

DR WALTER MANGEZI
versus
DR TONDERAI IRVINE TIPERE KASU

HIGH COURT OF ZIMBABWE
MUREMBA J
HARARE; 14 & 27 March 2024

Application for rescission of default judgment

L Uriri with T Zhuwarara, for the applicant
Ms. N Ngadya with T G Mboko for the respondent

MUREMBA J: This is an application for rescission of a default judgment and the background of the matter is as follows. On the 22nd of February 2022, the respondent instituted summons against the applicant, claiming damages for defamation of character. The summons was served on the applicant on the 23rd of February 2022. The applicant entered appearance to defend on the 25th of February 2022. The respondent filed a notice of intention to bar the applicant on the 1st of April 2022. In response the applicant proceeded to file a Special Plea and an Exception on the 5th of April 2022 instead of filing a plea. The Special Plea and the Exception were set down for hearing on the 29th of June 2022. The Special Plea and Exception were struck off the roll for having been filed out of time.

The respondent then proceeded to effect the bar on the applicant on the 13th of July 2022. The applicant proceeded to file a plea on the 9th of September 2022, despite having been barred on the 13th of July 2022. It is the respondent's contention that the purported plea was an irregular process as it was filed out of time. On the 6th of November 2023, the respondent proceeded to set the matter down on unopposed roll for the 15th of November 2023 and a default judgement was granted. After obtaining the default judgment, the respondent proceeded to have a writ of execution issued on the 28th of November 2023 and on the 5th of December 2023, the Sherriff proceeded to attach the movable property of the applicant. The applicant proceeded to

file the present application for rescission of default judgment on the 6th of December 2023.

At the hearing of this matter there was a bar that was operating against the respondent for having filed his opposing affidavit without a notice of opposition. The respondent's counsel, *Ms Ngadya* submitted that having realised the omission, she had subsequently filed the notice of opposition. By consent of the parties' counsels, the bar was uplifted and the notice of opposition was deemed to have been properly filed.

In responding to the application for rescission, the respondent raised the following two points *in limine*.

1. *The application is fatally defective as the applicant has not made an application for upliftment of bar and condonation for the late filing of his plea*

It was submitted that there is a valid bar that was effected on the applicant on the 13th of July 2022, and that the applicant had not made an application for the upliftment of that bar. It was further submitted that the applicant had also not made an application for condonation for the late filing of his plea. *Mr Mboko* argued that the applicant cannot make an application for rescission of default judgement without first making the attendant applications for upliftment of bar and also for condonation for the late filing of his plea. In arguing this point he referred to the cases of *Zimslate Quartzite (Pvt) Ltd. & Others v CABS SC 34-17* and *Adam Takawira v Tony Panel Beater & Spray Painters (Pvt) Ltd HH 268-18*. *Mr Mboko* submitted that in the *Zimslate* case it was held that where there has been a breach of the rules, the first port of call by the defaulting party is to apply for condonation. He further submitted that it was held that the defaulting party cannot make an application for rescission without first applying for the upliftment of the bar. *Mr Mboko* argued that on this basis an application for rescission is not there for the taking. He ended by submitting that the present application is defective and cannot be granted in its current form as there has been no application for upliftment of bar and condonation for the late filing of the plea. It was his submission that the applicant was supposed to make his case for upliftment of bar in the founding affidavit. Citing the cases of *Fuyana v Moyo SC 54/06* and *Nashe Family Trust v Charles Chiwara & Anor HH 476-18*, he submitted that it is trite that an application stands or falls on its founding affidavit. He moved that the application be dismissed with costs.

In response to the point *in limine* *Mr Zhuwarara* went on to cite Rule 27(1) of the High Court Rules, 2021 and submitted that the rule does not make it a requirement that a party

seeking rescission of a default judgment should first obtain an upliftment of the bar. He further submitted that the *Zimslate* case that Mr *Mboko* referred to is not applicable to the present application as it was dealing with the Supreme Court rules and an application for reinstatement of an appeal. Mr *Zhuwarara* was correct in his submission. The *Zimslate* case is totally unrelated to the present case. The court was not dealing with an application for rescission of default judgment made in terms of the rules of this court. Instead, it was dealing with an application for reinstatement of an appeal that had lapsed in terms of the rules of the Supreme Court.

The case of *Adam Takawira v Tony Panel Beater & Spray Painters (Pvt) Ltd* HH 268-18 that Mr *Mboko* also referred to is totally irrelevant as well. This court was dealing with an application for rescission of a default judgment in terms of Rule 449 of the High Court Rules of 1971. The respondent had filed and delivered a notice of intention to bar requiring the applicant to file his plea. The applicant had instead gone on to request for further particulars. The respondent did not concede the applicant's position and indicated to the applicant that it was proceeding to apply for a default judgment. The applicant took no action when the respondent effected a bar on it and later went on to apply for a default judgment and obtained it. The applicant then applied for rescission of the default judgment. In the application for rescission of the default judgment, FOROMA J held that the applicant should have taken measures to prevent a default judgment being entered against it in view of the respondent having barred it. He further said that the applicant by not applying for an upliftment of the bar in the circumstances led to the conclusion that it was in wilful default. He went on to dismiss the application for rescission of judgment saying that it was clear that neither the application for default judgment nor its grant by the judge was erroneous.

It is clear that the two cases that Mr *Mboko* referred to are of no relevance to the present case. They do not speak to Mr *Mboko*'s submission. Nowhere in these judgments did the Supreme Court or this court say that a party who intends to apply for rescission of default judgment must first apply to uplift a bar operating against them and neither did the two courts say that the applicant must first apply for condonation for the late filing of a plea. Why Mr *Mboko* decided that the two cases are applicable to the present matter is beyond comprehension. Legal practitioners have a duty to present relevant and persuasive arguments based on the correct law and relevant facts. Citing irrelevant cases can be detrimental to their credibility and the integrity of the legal process. Legal practitioners who engage in such practices need some words of wisdom.

1. **Relevant cases:** Relevance is key. Citing cases that are not directly applicable to the issue at hand can confuse the court and waste everyone's time. Legal practitioners must focus on the relevant precedents and legal principles.
2. **Quality over quantity:** Quantity of citations does not necessarily equate to quality. It is better to cite a few well-reasoned and directly relevant cases than to inundate the court with irrelevant ones.
3. **Honesty and integrity:** Legal practitioners are officers of the court. Presenting misleading or irrelevant authorities undermines the trust placed in them. They should always strive for honesty and integrity in their arguments.
4. **Craft persuasive arguments:** Legal practitioners should craft persuasive arguments that logically support their position. They must explain why the cited cases are relevant and how they apply to the facts before the court.
5. **Know your case law:** legal practitioners should know their case law thoroughly. They must understand the nuances (subtleties – small and specific details) and distinctions between cases. They must cite them accurately and explain their relevance clearly.

There is no merit in the first point *in limine* raised by the respondent. It is therefore dismissed.

2. *Affidavit not properly deposed*

It was submitted that the applicant's founding affidavit was not properly deposed because the law states that one can only depose to an affidavit in relation to facts that they have first-hand information of as was stated in the case of *Jean Hiltunen v Osmo Juhani Hiltunen* HH99/08. It was submitted that in *casu* the deponent of the founding affidavit, Fidelis Manyuchi, has no full knowledge of the facts. Paragraph 11-13 makes it clear that Andrew Nyanhete who was once a legal practitioner at Scanlen and Holderness is the one that has first-hand knowledge of facts as he is the one who was handling the matter before he left for Canada. It was submitted that the deponent Fidelis Manyuchi deposed to second hand information. Further, it was submitted that it is totally undesirable for a legal practitioner to either attest to an affidavit or sign an urgent certificate for and on behalf of a client who is being represented at his or her law firm as such legal practitioner clearly has an interest in the

matter at hand. For these averments reference was made to the case of *Chafanza v Edgars Stores Ltd & Anor* 2005 (1) ZLR 301 (H). The submission was that there is no affidavit before the court and as such this application ought to be dismissed with costs.

In response it was submitted on behalf of the applicant that the present application is of a procedural nature. The law allows legal practitioners to depose to affidavits in matters of a procedural matter. It is the legal practitioner who possesses first-hand knowledge of the facts pertaining to the grant of the default judgment. In that regard he is allowed to depose to the affidavit. Reference was made to the case of *Dr Ibbo Mandaza t/a Induna Development Projects v Mzilikazi Investments (Pvt) Ltd* HB23/07. It was further submitted that in the circumstances of the present case the applicant went on to depose to a supporting affidavit confirming the facts that are in his personal knowledge.

In the *Chafanza* case that the respondent's counsel referred to, the issue was whether or not it is proper for a legal practitioner from the same law firm as that of applicant to certify certificates of urgency in urgent chamber applications. CHEDA J said that it is totally undesirable for a legal practitioner to either attest to an affidavit or sign a certificate of urgency for and on behalf of a client who is being represented at his firm as such lawyer clearly has an interest in the matter. Again, the respondent's counsel cited an irrelevant case. The case was dealing with the issue of attestation of affidavits and the signing of certificates of urgency in urgent chamber applications. When a legal practitioner attests to an affidavit, it means he or she will be acting as a commissioner of oaths. In other words, he or she will be administering an oath or affirmation. The present matter has nothing to do with attestation of an affidavit or the signing of a certificate of urgency.

In *Dr Ibbo Mandaza t/a Induna Development Projects v Mzilikazi Investments (Pvt) Ltd* which the applicant's counsel cited, NDOU J held that generally, a legal practitioner should not depose to a founding affidavit on behalf of a client. But there is an exception to this general rule if the facts are within the knowledge of a legal practitioner. He however said that even in such exceptional cases, the route should be sparingly resorted to. He said that in that case the facts of the application were within the knowledge of the applicant's legal practitioner. He said that in fact, the legal practitioner was in a better position to highlight the applicant's case as the application was about procedural matters. In the circumstances, the legal practitioner was said to be justified in deposing to the affidavit. In *casu* the application is about a procedural matter and as such even if the deponent to the applicant's founding affidavit Fidelis Manyuchi was not the initial legal practitioner who handled the matter, he

gathered the facts thereof when he took over the matter. He looked at the paper trail of the matter and gathered the facts. Any legal practitioner would have done that. Besides, the applicant himself went on to depose to a supporting affidavit confirming the facts that are in his personal knowledge. There is therefore no merit in the argument that the applicant's founding affidavit was not properly deposed to. I thus dismiss the point *in limine*.

The merits

In terms of s 27 (2) of the High Court Rules, 2021, in an application for rescission of a default judgment, the applicant ought to satisfy the court that there is good and sufficient cause for it to set aside the default judgment. In *casu* counsels were correctly agreed that the usual factors that guide the court in determining that there is good and sufficient cause to set aside a default judgment are as follows.

- a. The reasonableness of the applicant's explanation for the default;
- b. The *bona fides* of the application to rescind the judgment; and
- c. The *bona fides* of the defence on the merits of the case which carries some prospect of success.

See: *Deweras Farm (Pvt) Ltd & Ors vs. Zimbabwe Banking Corp Ltd* 1988(1) ZLR 368 (SC); *Mdokwani v Shonhiwa* 1992 (1) ZLR 269 (S); *G D Haulage (Pvt) Ltd v Mumurugwi Bus Services (Pvt) Ltd* 1979 RLR 447(A); *Stockil vs. Griffiths* 1992 (1) ZLR 172 (SC), and *Songore v Olivine Industries (Pvt) Ltd* 1988 (2) ZLR 210(S).

These case authorities make it clear that these factors must be considered in conjunction with one another and cumulatively. In the case of *Trustees (For the Time Being) Of Tongogara Community Share Ownership Trust Versus Matrix Realty (Private) Limited* HH 247-18 which *Mr Zhuwarara* referred to, reference was made to the case of *Dupreez v Hughes NO* 1957 R & N 706 (SR) at 709 A-D wherein it was held that too much emphasis must not be placed on one factor, all must be regarded in conjunction with one another. An unsatisfactory explanation for default may be strengthened by a very strong defence on the merits and a completely satisfactory explanation for defaulting may cause the court not to scrutinise too closely the defence on the merits. In that case (*Trustees (For the Time Being) Of Tongogara Community Share Ownership Trust v Matrix Realty (Private) Limited*) reference was also made to the headnote in *Deweras Farm (Pvt) Ltd & Ors v Zimbabwe Banking Corp Ltd* 1998 (1) ZLR 368 (SC) which provides that:

“The High Court Rules requires only “good and sufficient cause” as the basis of rescission of judgment. This gives the court a wide discretion and it is not possible to provide an exhaustive definition of what constitutes sufficient cause to justify the grant of indulgency. Even where there has been wilful default there may still sometimes be good and sufficient cause for granting rescission. The good and sufficient cause, for instance, might arise from the motive behind the default.”

So, what constitutes good and sufficient cause in terms of s 27 (1) of the High Court rules is not limited to the usual three factors mentioned elsewhere above. Any other factors that satisfy the court as constituting good and sufficient cause should cause it to set aside the default judgment.

I now turn to deal with the factors that usually constitute good and sufficient cause.

a) The reasonableness of the applicant's explanation for the default

It was averred that the applicant's alleged default was not as a result of intentional negligence or wilful disregard, but it is the respondent who misled this court by falsely asserting that the applicant had been barred, subsequent to issuing a notice of intention to bar, which notice was duly responded to through the filing of an exception and a special plea. It was contended on behalf of the applicant that after the special plea and the exception were struck off the roll on 29 June 2022, for whatever reason, the respondent ought to have issued a fresh notice of intention to bar the applicant before effecting a bar for failure to file a plea to the summons as it did on the 13th of July 2022. *Mr Zhuwarara* argued that the moment the applicant filed a special plea and an exception after having been served with the notice of intention to bar by the respondent on the 1st of April 2022, that notice of intention to bar fell off because it was responded to. It was *Mr Zhuwarara's* further argument that it was wrong for the respondent to go ahead and effect a bar against the applicant on the basis of a notice of intention to bar of the 1st of April 2022, that had been complied with, albeit wrongly. It was submitted that since the applicant had not been issued with a fresh notice of intention to bar, he went on to file his plea on 9 September 2022. He was not aware of the bar that had since been effected against him. Despite the applicant having filed a plea, the respondent went on to set down the matter on the unopposed roll and obtained a default judgment on the 15th of November 2023. *Mr Zhuwarara* submitted that in the circumstances, the applicant was not in wilful default as the bar was invalidly effected against the applicant.

The respondent is of the contrary view. It was submitted that in the present application, the applicant did not proffer a reasonable explanation for his default. The applicant was duly served with a notice of intention to bar on the 1st of April 2022. Instead of

filing a plea, the applicant went on to file a special plea and an exception on the 5th of April 2022. The special plea and exception were irregular processes as they were filed out of time. Mr *Mboko* submitted that rule 12(4) and rule 37 (3) of the High Court rules provide that after the defendant has entered appearance to defend, he shall within a further ten days deliver a plea, a special plea, an exception or an application to strike out. The applicant in *casu* filed his special plea and exception out of time and these were correctly struck off the roll. He argued that this meant that the notice of intention to bar which the applicant was served with on the 1st of April 2022, was still extant and therefore the applicant ought to have filed his plea by the 6th of April 2022, which he did not do. The applicant was therefore duly barred on the 13th of July 2022. Mr *Mboko* further submitted that the applicant prepared his plea on the 9th of August 2022, only to file it a month later on the 9th of September 2022. This was five months from the date the applicant was supposed to have filed his plea. The applicant deliberately neglected to file his plea and was correctly barred. Mr *Mboko* submitted that the applicant was therefore in wilful default.

The bone of contention between the parties is whether or not the notice of intention to bar that was issued by the respondent on the 1st of April 2022, ceased to be operational by virtue of the special plea and exception that the applicant filed on the 5th of April 2022, regardless of whether or not it was procedurally correct for the applicant to file a special plea and an exception in response to the notice of intention to bar. It is not disputed between the parties that the special plea and the exception were struck off the roll by MANYANGADZE J because they had been filed out of time. The question now is: after the special plea and the exception were struck off on 29 June 2022, for having been filed out of time, was the respondent supposed to issue the applicant with another notice of intention to bar before effecting a bar against him or he was simply supposed to go ahead and effect the bar as he did?

In order to answer this question, the starting point is to look at rule 37(3) of the High Court Rules, 2021 which outlines the defendant's rights and responsibilities after entering appearance to defend. It reads;

“Where the defendant has delivered notice of appearance to defend, he or she may, subject to rule 39, within ten days after filing such appearance, deliver a plea with or without a claim in reconvention, or an exception with or without application to strike out or special plea”

The rule means that when a defendant has submitted a notice of appearance to defend in a legal action, they have the option to take certain actions within ten days after filing that

appearance. These actions include delivering a **plea** (which is a response to the plaintiff's claim) either with or without a **claim in reconviction** (a counterclaim against the plaintiff). Alternatively, they can submit an **exception** (a legal objection) either with or without an **application to strike out** (requesting the removal of certain parts of the plaintiff's case) or a **special plea** (a specific defence). The phrase "subject to rule 39" in rule 37(3) means that the defendant's actions in terms of rule 37(3) are governed by or contingent upon or dependent on or subordinate to or affected by rule 39. Rule 39 (1) reads,

"A party shall be entitled to give five days' notice of intention to bar to any other party to the action who has failed to file his or her plea or request for further particulars within the time prescribed in these rules and shall do so by delivering a notice in Form No. 8 at the address for service of the party in default." (my underlining)

This rule pertains to situations where the defendant has failed to file their plea or request for further particulars within the specified time set by the rules. Upon this failure, the defendant is given five days' notice of intention to bar by the plaintiff. What is pertinent is that the rule does not specifically mention exceptions, applications to strike out or special pleas. Their omission means that rule 39(1) does not provide a mechanism for enforcing compliance regarding these specific legal actions. The rule focuses solely on the failure to file a plea or request for further particulars within the prescribed time. In practical terms, this means that if the defendant fails to file an exception, application to strike out, or special plea within the specified time frame of ten days of entering appearance to defend as provided for in rule 37 (3), the plaintiff cannot utilize rule 39(1) to give notice of intention to bar specifically related to these actions. The rule is only used to enforce compliance with the filing of a plea. I am strengthened in my position by Form No. 8 which is the form in which the notice of intention to bar is given. Below is the form.

Form No. 8
Notice of intention to bar
Rule 39(2)

Case No.

IN THE HIGH COURT OF ZIMBABWE

In the matter between:, Plaintiff

and

....., Defendant

TAKE notice that the plaintiff/**defendant** is hereby required to file his declaration/**plea**/request for further particulars within five days excluding Saturdays, Sundays and public holidays, and in default it is the defendant's/plaintiff's intention to file a copy of this notice with the Registrar as a bar. (my underlining)

Form No. 8 makes it clear that the notice of intention to bar requires the defendant to file his plea to the merits of the case and not a special plea, application to strike out or an exception. Therefore, once a notice of intention to bar has been issued, the defendant is supposed to strictly comply with its requirements. It therefore follows that if the defendant decides to go on a frolic of his or her own and files something else other than a plea, and the time prescribed in the notice expires, they cannot expect to be issued with another notice of intention to bar. I find support from the case of *Adam Takawira v Tony Panel Beater & Spray Painters (Pvt) Ltd, supra* which states that when a notice of intention to bar is issued, the defendant must only file a plea. In that case the applicant who was specifically required by the notice of intention to bar to file a plea but went on to request for further particulars and the 5-day period expired, became liable to the penalty of being barred. The court held that the applicant having realised that the respondent was not conceding his position that he could request for further particulars instead of filing a plea, ought to have taken measures to prevent a default judgment being granted against him. When the applicant requested for further particulars, the respondent went on to effect a bar and obtained a default judgment. The applicant then applied for rescission of the default judgment. FOROMA J held that by not applying for upliftment of the bar in the circumstances, the applicant made the court conclude that he was in wilful default. The judge dismissed the application for rescission of the default judgment. The point that comes out of that case is that when a defendant is served with a notice of intention to bar, he or she should only plead to the merits of the plaintiff's claim.

In *casu* the applicant ought to have pleaded to the merits when he was served with a notice of intention to bar on 1 April 2022. Instead of filing a plea he went on a frolic of his own and filed a special plea and an exception. Therefore, when the respondent effected a bar against him on the 13th of July 2022, he was correct. The bar was properly effected. It was not necessary for the respondent to issue another notice of intention to bar. Once a notice of intention to bar has been properly issued, it should be properly responded to and complied with. There is therefore no provision for the plaintiff to issue another notice of intention to bar. A defendant cannot go on a frolic of his own in response to a notice of intention to bar and then expect the plaintiff to issue another notice of intention to bar. Therefore, when the applicant filed his plea on the 9th of September 2022, that plea was an irregular pleading since he had already been barred. The respondent was correct in proceeding to apply for a default judgment.

However, now that the applicant wants the default judgment rescinded, the question is: has the applicant given a reasonable explanation for his default which resulted in the default judgment being granted? A reasonable explanation refers to a logical and justifiable account for failing to do that which a party was required to do. It is an explanation that aligns with common sense and rationality. It is an explanation that is not unreasonable. What is deemed reasonable depends on the specific context and facts of each case. The party's explanation should justify why they did not take appropriate action or respond to the legal proceedings. If the party's default was wilful (intentional or due to gross negligence), rescission may not be granted. Wilful default refers to a situation where a party, with full knowledge of the legal proceedings and the risks associated with not participating, deliberately chooses not to appear or take action. Essentially, it occurs when a party intentionally fails to comply with legal obligations, such as responding to court process or participating in a case. In the case of *Zimbabwe Banking Corporation v Masendeke* 1995 (1) ZLR 400 MCNALLY JA explains what constitutes wilful default as follows:

“Wilful default occurs when a party with the full knowledge of service or set down of the matter and of the risks attendant upon default, freely takes a decision to refrain from appearing.”

In *Mdokwani v Shoniwa* 1992 (1) ZLR 269 (SC) at 273E-G, Ebrahim JA (as he then was) said;

“Against the background of these events, it seems to me to be unduly harsh to hold that there was an element of deliberateness on the part of the appellant. There is nothing in his conduct to suggest that he, “with the full knowledge of the set down and of the risks attendant on his default”, freely took the decision to refrain from appearing. In fact, his conduct indicates the contrary view. He appears to have been in constant contact with his legal practitioner, who in turn had communicated with the respondent's legal practitioner. In my view, there is nothing on the papers to show any degree of wilfulness on his part.”

In *Hutchison & Anor vs. Logan* 2001 (2) ZLR 1 (H), it was said;

“...a wilful default occurs when a party, with the full knowledge of the service or set-down of the matter, and of the risk's attendant upon default, freely takes a decision to refrain from appearing. The wilfulness of a default is seldom clearcut. There is almost always an element of negligence, and the question arises whether it was such gross negligence as to amount to wilfulness. The expression relates to that extreme of circumstances where the applicant knowingly and deliberately refrained from opposing the relief sought. However, even in a case of wilful default, if a satisfactory explanation can be given for the acquiescence in the judgment, and other circumstances, including the merits of the defence, justify such a conclusion, good and sufficient cause may be established.”

Taking guidance from the above authorities, I come to the conclusion that the applicant in the present matter has given a reasonable explanation for his default. The

explanation given shows that the applicant was of a mistaken legal view. He was of the view that the notice of intention to bar that the respondent issued against him on 1 April 2022, was no longer operational by virtue of him having responded to it by filing a special plea and an exception.

However, all that is required in an application for rescission of a default judgment is for the defaulting party to give a reasonable explanation for their default. If they defaulted because they were of a wrong legal view, that explanation is reasonable and rescission may be granted. In the circumstances of the present matter it was not unreasonable for the applicant to believe that since he had responded to the notice of intention to bar by filing a special plea and an exception, that notice of intention had ceased to be operational. The explanation although not correct at law, aligns with common sense. The applicant's default was not wilful because he went on to file his plea to the merits in September 2022, before the respondent had applied for default judgment in November 2023. When the applicant filed his plea, a bar had been effected against him without notice. So, the applicant was not aware that there was now a bar operating against him when he filed his plea. The filing of the plea unaware of the bar is proof that he intended to defend the matter. This is despite the delay in filing the plea. The history of the matter shows that when the applicant was issued with the summons, he entered appearance to defend. When he was issued with a notice of intention to bar, he filed an exception and a special plea, albeit wrongly. Unaware that the respondent had barred him, he then went on to file a plea to the merits of the respondent's claim. These actions are consistent with the actions of a party who intended to defend the matter against him. It cannot be said that the applicant intentionally abstained from defending the case against him. I am satisfied that the applicant managed to proffer a reasonable explanation for his default.

Before I move on to deal with the next factor on good and sufficient cause, I need to comment on an observation that I made. It is worrisome that the respondent went ahead and applied for a default judgment on 15 November 2023, when he was fully aware that the applicant had filed his plea on September 2022, more than a year before. The respondent obviously knew that by filing the plea, the applicant was not aware of the bar that was now operating against him yet he did nothing to alert the applicant of the existence of the bar and that he had filed an irregular process in light of the bar. This is a typical case where the respondent ought to have utilised rule 43 (1) of the High Court Rules, 2021, in order to have the irregular plea set aside before proceeding to apply for default judgment. The rule reads;

“A party to a cause in which an irregular step has been taken by the other party may apply to court to set it aside.”

This provision refers to a situation where a party believes that the opposing party has taken an improper or irregular action during the legal proceedings. This could be a mistake, a violation of procedural rules, or any other action that deviates from the expected legal process. When such an irregular step occurs, the affected party has the right to apply to the court and request that the irregular action be nullified or set aside. Essentially, the party will be asking the court to disregard the improper action and restore the legal proceedings to a fair and proper state. The court will then evaluate the circumstances and decide whether the irregular action should be invalidated. This rule ensures that parties have the opportunity to challenge irregularities and maintain a fair and just legal process. However, the rule is not peremptory or mandatory. Instead, it provides a right or option for the affected party to seek court intervention when they believe that the opposing party has taken an improper or irregular action. The affected party can choose whether or not to exercise this right based on the specific circumstances of the case. In my view, the decision for a party to utilize this rule should be informed by several factors which include the following factors:

1. The nature of the irregular step: The affected party should consider the seriousness and impact of the irregular action taken by the other party. If it significantly affects the case or their rights, seeking to set it aside may be warranted.
2. Prejudice: The affected party should assess whether the irregular step has caused them or will cause them any prejudice. If it has unfairly disadvantaged them or will unfairly disadvantage them, seeking correction becomes more crucial.
3. Reasonableness: The party should evaluate whether their explanation for the irregularity is reasonable. If they have a valid justification, seeking to set aside the irregular step is more justifiable.

In the case of default judgments this court and the Supreme Court have said times without number, legal practitioners should not snatch at judgments. In *Zimbank vs. Masendeke* 1995 (2) ZLR 400 (S) at page 401-3 in an appeal against refusal of an application for rescission of a default judgment by this court, MCNALLY JA at page 403 said:

“Speaking for myself, I would say that a lawyer in Mr Moyo's position must have at least suspected, when no appearance was entered by Zimbank, that something had gone wrong. A telephone call to Zimbank's legal department would, as we can now see by hind-sight, have

saved a lot of trouble and expense. He did not do that. He obtained default judgment. But he must have at least half expected that what did in fact happen, would happen. In future cases, we may have to consider awarding costs personally against legal practitioners who not only "snatch at their judgments" but then stubbornly and unreasonably cling to them."

In *casu* if the respondent had utilised rule 43(1), he would have notified the applicant of his irregular plea and the need to remove it in terms of rule 43(2)(b) which provides that the applicant should by written notice afford the other party the opportunity of removing the cause of complaint within ten days. If the applicant had refused to remove his irregular plea after being notified, the respondent would have then gone on to file an application to set aside the irregular plea in terms of rule 43(2)(b). It is at the hearing of that application that the parties would have argued on the propriety or otherwise of the applicant's plea. That is when the parties would have argued on the issue of whether or not the applicant had been correctly barred and whether it was necessary for the respondent to issue a second notice of intention to bar. The outcome of that application would have informed the respondent on whether or not it was necessary for him to go ahead and apply for default judgment. Rule 43(1) promotes fairness in legal proceedings. It prevents one party from gaining an unfair advantage due to procedural errors made by the other party. It allows the affected party to seek correction and ensures that both sides have an equal opportunity to present their case. While adhering to court rules is essential, the rule recognizes that mistakes can happen. Allowing parties to address irregularities helps strike a balance between justice and efficiency. The court can correct errors without unduly delaying the proceedings. In summary, this rule serves to maintain procedural integrity, protect parties' rights, and ensures a just and efficient legal process. Litigants are encouraged to employ this rule.

b) The bona fides of the defence on the merits of the case which carries some prospect of success

This simply means that the applicant's defence must have a reasonable chance of prevailing or achieving a favourable outcome. The defence should be valid and not futile or purely speculative. It should be sincere, substantive and have a reasonable chance of success. In *casu* the applicant disputes that he defamed the respondent. I am in agreement with the applicant that this defence has some prospect of success. A cursory glance of the plaintiff's declaration brings to question the respondent's cause of action. I will reproduce the declaration below.

1. The plaintiff is Dr. Tonderai Irvine Tipere Kasu, a male adult whose address for service is care of Mapendere and Partners Legal Practitioners, 11th Floor Causeway Building Corner 4th and Central Avenue, Harare.
2. Defendant is Dr Walter Mangezi, a male adult whose address for service is 18 Cleveland Avenue, Harare.
3. The plaintiff's claim is for injuria, injury to his dignity and reputation.
4. The defendant is a member of the Medical and Dental Practitioners' Council of Zimbabwe's Health Committee which sat and deliberated the plaintiff's case. The defendant was also the plaintiff's ex-wife's psychiatrist.
5. The defendant, despite the fact that he was the psychiatrist for the plaintiff's ex-wife, he sat on the panel and deliberated a matter against the plaintiff when the plaintiff's wife was a complainant. He sat in that capacity from the 22nd of February 2019, 7th of June 2019, 13th of September 2019, and many other meetings the plaintiff might not be aware of.
6. The defendant at all relevant times failed to disclose to the Health Committee of the Medical and Dental Practitioners Council of Zimbabwe that he had a conflict of interest since the complainant in the matter was his patient. The defendant should have recused himself from the proceedings, but wilfully and deliberately chose not to do so. At every meeting there was an explicitly stated requirement for members of the committee to disclose any conflicts of interest; and the defendant never declared his conflict of interest. The actions of the defendant were unprofessional misconduct which prejudiced the plaintiff.
7. The defendant's actions were harmful, wrongful, and intentional. The plaintiff suffered harm, in the form of a violation of his personal and professional interests (his corpus, dignitas and fama).
8. The actions were a violation of his constitutionally guaranteed right to administrative justice and the right to dignity.
9. The plaintiff suffered damages due to defendant's wrongful acts in the sum of US\$100 000.00 or to alternatively the equivalent RTGS according to the Reserve Bank of Zimbabwe official exchange rate at the date of payment, being damages for personal injuria, injury to his dignity and reputation.
10. **WHEREFORE** plaintiff prays for judgment against the defendant as follows:
 - a. Payment of US\$100 000.00 or to alternatively the equivalent RTGS according to the Reserve Bank of Zimbabwe official exchange rate at the date of payment, being damages for personal injuria, injury to his dignity and reputation.
 - b. Interest at the prescribed rate of interest from the date of issue of the summons.
 - c. Cost of suit on a legal practitioner client scale."

Having set down the matter on the unopposed roll, the respondent who was not legally represented obtained the following default judgment.

“It is ordered that:

1. Defendant to pay to plaintiff US\$100 000.00 being damages for personal injuria, injury to the plaintiff’s dignity and damage to the plaintiff’s reputation.
2. Defendant to pay to plaintiff interest at the prescribed rate of interest from the date of issue of the summons.
3. Costs of suit on a legal practitioner client scale.”

From the declaration it is not clear how the failure by the applicant to declare that he was conflicted, injured the respondent’s dignity and reputation. On this basis the applicant’s defence that he did not defame the respondent carries some prospect of success. It is also not clear how the respondent obtained costs on a legal practitioner scale when he was not legally represented. This issue also carries some prospect of success.

The applicant’s counsel submitted that assuming that there was indeed defamation of the respondent, this happened during the discharge of the applicant’s functions in terms of the Health Professions Act [*Chapter 27:19*] and as such the applicant is protected by the said Act. Section 115 (1), and (2) thereof provides that:

“(1) Except as is provided in this Act, no legal proceedings, whether civil or criminal, shall lie against a council, executive committee or disciplinary committee or any member or officer thereof in respect of any act or duty performed in accordance with this Part.

(2) A council shall not be responsible for any loss of earnings by a person as a result of action taken under this Part, whether by its disciplinary committee or executive committee or by the council and whether or not the finding or penalty is subsequently varied or cancelled.”

The provision shows that there is an immunity shield to the council, the executive and the disciplinary committees and their members against litigation for acts performed within the bounds of the Health Professions Act. In addition, the council shall not bear the burden of financial consequence if it takes any action based on the rules outlined in this Part (whether it is done by their disciplinary committee, executive committee, or the council itself). The council will not be held accountable for any financial losses someone might experience as a result. Even if the decision is later changed or cancelled, the council will not be responsible for any earnings lost during that process.

However, it was submitted on behalf of the respondent that s 115 of the Health Professions Act is not applicable to this matter because s 115 applies to disciplinary proceedings that are conducted by the disciplinary committee whereas the respondent’s proceedings were under the health committee. The Health Committee was assessing the

respondent's capacity to practice medicine on medical grounds. The applicant was part of that committee and not the disciplinary committee which inquires into improper, disgraceful or grossly incompetent conduct allegations of registered persons in the medical profession. It was submitted by the respondent's counsel that the Act does not prohibit any commencement of legal proceedings where the council or executive member is acting in accordance with any other part of the Act which does not deal with discipline. I am in agreement with Mr Mboko that s 115 of the Health Professions Act is not applicable as it is clearly stated in the respondent's declaration that the applicant was sitting in the health committee and not the disciplinary committee. Section 115's heading reads, "**Council, executive committee and disciplinary committee not to be liable.**" As such it appears that the applicant's defence that is predicated upon s 115 of the Health Professions Act does not carry some prospect of success.

It was further submitted on behalf of the applicant that even if it is assumed that the applicant did indeed defame the respondent, the quantum of damages awarded to the respondent deviates from the customary awards granted in analogous cases within this jurisdiction, thereby casting doubt upon the appropriateness of the awarded sum. In essence, the applicant is challenging the fairness of the damages awarded to the respondent, even if it is assumed that the defamation occurred. The respondent did not respond to this issue. There being no challenge to this issue, I am inclined to admit that this is a *bona fide* defence that carries some prospect of success. The award of USD100 000.00 is very substantial, signifying or reflecting the severity of the harm or injury that was caused to the respondent yet in the respondent's affidavit justifying the quantum, the respondent made no reference to any similar cases within this legal jurisdiction or any other jurisdiction and neither did the respondent elucidate on what justified such a huge award. The affidavit was just a regurgitation of the declaration and nothing more. So, in my considered view, the defence about deviation from customary awards carries some prospect of success.

In the overall, the applicant managed to show that his defences to the respondent's claim carry some prospect of success.

c) The bona fides of the application to rescind the judgment

The phrase "the *bona fides* of the application to rescind the judgment" refers to the genuineness or good faith behind the request to reverse a default judgment. It is a phrase that questions whether the application to rescind the judgment is made honestly and with

valid reasons. Essentially, it examines whether there are legitimate grounds for challenging the default judgment. For an applicant to convince the court that there is genuineness in his or her application, he or she must exhibit consistent behaviour throughout the legal process. Any inconsistencies or contradictions may raise doubts about their intentions. Providing a detailed and transparent account of the circumstances leading to the default judgment is essential. Clear communication helps establish credibility. The applicant also needs to present relevant evidence that supports the application. This could include documents, correspondence, and affidavits.

In *casu* it was submitted on behalf of the applicant that the present application is put forth with utmost sincerity and good faith. The applicant possesses a genuine and earnest intention to vigorously defend the main claim. The applicant consistently maintained his unwavering intention to defend the claim under case number HH 1120/22, and now fervently implores to be afforded the opportunity to exercise this right. This earnest plea for the application for rescission is rooted in the applicant's genuine and *bona fide* desire to present his case and assert his lawful defence before this court. In response it was submitted on behalf of the respondent that the application for rescission is *mala fide*. The applicant is clearly on a fishing expedition and this is evidenced by the second application for rescission of default judgment that he filed on the 5th of January 2024 under Case No. 59/24. He is running all over the place hoping that one of the applications will miraculously be granted. Furthermore, the applicant has not made the attendant application for upliftment of bar and condonation for the late filing of his plea. The applicant is a sluggard litigant whose litigation history shows that he pays no respect to court rules and procedure. It is due to his inability to follow proper court procedures that he finds himself in this situation. The applicant cannot have his cake and eat it too. This application ought to be dismissed with costs on an attorney client scale.

The language used by the respondent's counsel in the last part of his submission is forceful and colourful, emphasizing the applicant's perceived shortcomings. In a more neutral language and to put it concisely, the respondent's counsel simply meant that the applicant has a history of non-compliance with court rules and procedures. Due to this, he now faces the consequences of his actions. A sluggard litigant refers to a party who displays laziness, negligence, or a lack of diligence in pursuing legal matters. This is a party who fails to comply with court rules, deadlines, or procedures and such behaviour can negatively impact on their case.

I find it difficult to comment on the second application for rescission that the applicant made because nothing much was said about it. I do not know under what circumstances it was filed. However, I do agree with the respondent's counsel that the applicant was sluggish in the way he handled the main matter after he entered appearance to defend. He did not file his plea or some other answer to the respondent's claim within the timeline prescribed in rule 37(3). When he was served with the notice of intention to bar, he filed an exception and a special plea instead of filing a plea as directed in the notice of intention to bar. When his special plea and exception were struck off the roll for having been filed out of time on 29 June 2022, he took no action to file his plea until the 9th of September 2022. By that time, unbeknown to him, the respondent had since effected a bar against him on the 13th of July 2022. There is nothing that stopped the applicant from filing his plea after his special plea and exception had been dismissed on the 29th of August 2022 and before the respondent had effected a bar against him on the 13th of July 2022. At that time the bar had not yet been effected against him. He had no reason to wait for the respondent to file another notice of intention to bar, even if he was of the mistaken legal view that the respondent needed to issue a fresh notice of intention to bar before effecting a bar against him. The applicant clearly displayed a lack of diligence in defending the matter against him. However, since he then went on to file his plea before the default judgment was granted and when he was not aware that the respondent had since effected a bar against him, it cannot be said that he was grossly negligent in his lack of diligence. The fact that the applicant entered appearance to defend, filed a special plea and an exception when he was served with an intention to bar, albeit wrongly and that he went on to file a plea unaware that he had been barred is evidence that he possesses a genuine intention to defend the respondent's claim against him. The applicant's counsel correctly submitted that the applicant consistently maintained his unwavering intention to defend the claim. Elsewhere above, I have made a finding that the applicant gave a reasonable explanation for his default. This coupled with the fact that I have also made a finding that the applicant has tendered a defence on the merits of the case which carries some prospect of success, leads me to the conclusion that the present application to rescind the default judgment is *bona fide*.

Disposition

In view of the foregoing, the applicant managed to establish good and sufficient cause for the application for rescission to be granted.

In the result, it is ordered that:

1. The default judgment granted in HC 1120/22 on the 15th of November 2023, be and is hereby set aside.
2. The plea filed by the applicant on the 9th of September 2022, is deemed to have been properly filed.
3. Costs shall be in the cause.

Scanlen & Holderness, applicant's legal practitioners
Mboko T.G Legal Practitioners, respondent's legal practitioners