EXPOSALES (PRIVATE) LIMITED
versus
POLY PACKAGING (PRIVATE) LIMITED

HIGH COURT OF ZIMBABWE
MUTEMA J
HARARE, 6 February 2012

Opposed Application

F G Gijima, for the applicant
J Koto, for the respondent

MUTEMA J: The bare bones of the matter are these: The respondent issued summons against the applicant on 30 November, 2010 in case number HC 8728/10, claiming $6 369-35. The applicant entered appearance to defend via its erstwhile legal practitioners Messrs Bruce Mujeyi Manokore Attorneys. The applicant through its then legal practitioners was served with a notice to plead on 26 January, 2011. The applicant did not enter a plea and the respondent applied for default judgment on 2 March, 2011. The order was duly granted on 31 March, 2011 and issued on 28 April, 2011.

Subsequently the respondent took out a writ of execution against applicant's property and it was served upon the applicant on 31 May, 2011. On 2 June, 2011 the applicant instructed its erstwhile legal practitioners to apply for the rescission of the default judgment. The applicant's former legal practitioners, for reasons best known to themselves, did not do anything. When called upon to proffer their explanation for their unethical conduct by the applicant's present legal practitioners who needed the explanation to buttress this application for condonation for late application for rescission of the judgment, the erstwhile legal practitioners did not respond. This contributed to the prolonged delay in filing the application for rescission of the default judgment as well as the present application.

At the scheduled hearing of the matter two issues emerged against the respondent, viz that in terms of r 238 (2 b) of the High Court Rules 1971, the respondent was barred for filing heads of arguments outside the ten day period stipulated in subr (2 a) and that Mr *Koto* for the

respondent came to court not dressed in the required attire – prompting the court to invoke the age old custom of saying that "I don't see you and I don't hear you."

While r 238 (2 b) provides that following an automatic bar against a respondent, the court may either deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll, I am persuaded by MAKARAU J's (as she then was) reasoning in *Vera* v *Imperial Asset Management Co.* 2006 (1) ZLR 436 at 438 D–E. Therein the learned Judge reasoned thus:

> "It is my further view that, as the bar against a respondent in such circumstances is automatic and brings about a technical default, a review of the merits of either case at this stage of the proceedings, though provided for in the rules, will unnecessarily fetter the discretion of a future court that may be seized with an application to rescind the default judgment that the applicant is entitled to at this stage. In view of the above, I have used the discretion vested in me by r 4C in the interests of justice and instead of directing that the matter be set down on the unopposed roll for the granting of a default judgment, I will save the incurring of further costs and delays in the matter and grant a default judgment in favour of the applicant…"

As regards eschewing reviewing the merits of either case at this stage of the proceedings which the learned Judge alluded to *supra*, I am tempted to add, that not only would that unnecessarily fetter the discretion of a future court that may be seized with an application to rescind the default judgment that the applicant is entitled to at this stage, but also the application to rescind the default judgment in HC 8728/10 which the applicant intends to launch once condonation is granted.

Before I conclude, there is one issue I must advert to, viz Mr *Gijima*'s prayer that his client be awarded costs *de bonis propris* on the scale of attorney and client. The reason advanced for seeking to mulct Mr *Koto* with such costs is that some of the issues to be raised in the main application are points of law and as such it was encumbent upon Mr *Koto* to legally correctly advise his client following an attempt to persuade him to so do but he refused and proceeded to file voluminous unnecessary papers confusing the court in the process in an endeavour to simply snatch at a judgment. Well, I often decry the death of the age old practice of legal practitioners engaging each other in respect of such matters of adjectival law and accommodating each other by consenting to things like upliftment of a bar, condonation, rescission etc. where applicable thereby saving the court's time and client's money. Nowadays I am not privy to why that no longer happens especially in respect of young practitioners.

But is mulcting them with costs on the higher scale *de bonis propris* the solution? I think not. I have not been persuaded that this is a proper case for such course of action.

In the result, I grant a default judgment in favour of the applicant as follows:

IT IS ORDERED THAT:

1. The late noting of an application for rescission of judgment in case number HC 8728/10 be and is hereby condoned.
2. The applicant shall file its application for rescission within ten days of this order.
3. The respondent shall pay the costs of this application.

F.G. Gijima & Associates, applicant's legal practitioners
Koto & Company, respondent's legal practitioners