CASE 1

AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED
versus
A.A MIDGLEY PROPERTY COMPANY (PVT) LIMITED

CASE 2

A.A MIDGELY PROPERTY COMPANY (PRIVATE) LIMITED
versus
AFRICAN BANKING CORPORATION OF ZIMBABWE LIMITED

HIGH COURT OF ZIMBABWE
MUSITHU J
HARARE, 15 February 2024, 28 August 2024

Opposed Applications - Dismissal of matter for Want of Prosecution and Application for Rescission of Default Judgement

Mr C T Mutsvandiani, for the applicant in case 1 and the respondent in case 2
Mr B Mudhawu, for the respondent in case 1 and the applicant in case 2

MUSITHU J: This is a composite judgment that deals with two matters that were consolidated and argued at the same time. Case 1 which is HC 1103/22 is a chamber application for dismissal of a matter for want of prosecution. The matter that the applicant wants dismissed is an application for rescission of default judgement granted by this court per CHITAPI J on 21 September 2022. The matter that had been placed before me was the chamber application for the dismissal of the application for rescission of the default judgment. Following a case management meeting with the parties' counsel, the court agreed with the parties' counsel that for convenience, and in order to avoid conflicting decisions and determining their dispute in a piecemeal fashion, the two matters had to be heard at the same time. The relief sought in Case 1 is set out in the draft order accompanying the application as follows:

"IT IS ORDERED THAT:

1. The application succeeds with costs.
2. Respondent's court application for rescission of judgement under case number HC 7299/22 be and is hereby dismissed for want of prosecution.
3. Respondent shall pay the costs of this application on a high scale."

Case 2, which is HC 7299/22 is an application for rescission of a default judgement in terms of rule 29 (1) of the High Court Rules, 2021. The applicant seeks an order couched in the following terms:

"**IT IS HEREBY ORDERD THAT:**

1. The application for rescission be and is hereby granted.
2. The order granted in default dated 21st September 2022 in Case No HC 4274/22 be and is hereby rescinded.
3. The Registrar be and is hereby ordered to set down Case No HC 4274/22Q on the opposed roll.
4. The respondent shall pay costs on a legal practitioner-client scale."

Background to Case 1 and the Applicant's Case

The applicant is a banking institution, duly registered in terms of the laws of Zimbabwe and the respondent is a company duly registered as such in terms of the laws of Zimbabwe. Sometime in June 2022 the applicant issued a court application for a *rei vindicatio* against the respondent under case number HC 4274/22 and the application was opposed by the respondent. The applicant avers that the respondent failed to file its heads of argument timeously and was thus barred. Sometime in September 2022 the court per CHITAPI J granted a default judgement in favour of the applicant. Aggrieved by the default judgment, the respondent applied for the rescission of the judgement under case number HC 7299/22 on or about 28 October 2022. Pursuant to the application for rescission of judgement, the applicant filed its notice of opposition on or about 11 November 2022.

According to the applicant, the respondent did not file its answering affidavit or set the matter down in terms of the court rules. The applicant contends that the respondent's tardiness was a calculated move to delay the inevitable. Further according to the applicant, after it had obtained the order for the *rei vindicatio* the respondent had filed an application for rescission and an urgent chamber application for stay of execution pending the determination of its application for rescission and judgement was reserved. The applicant could not therefore proceed with

execution of the order. The applicant avers that the *status quo* favoured the respondent who continued to occupy and use the applicant's property. It was clear that the respondent was not motivated by any desire to prosecute its application for rescission and its actions clearly evinced a desire not to prosecute the application for rescission of the default judgment.

The applicant also avers that the respondent had refused to pay its taxed costs after realizing the advantages of letting the matter lie dormant. The applicant urged the court to dismiss the matter for want of prosecution as it was clear that the respondent had no interest in having the matter resolved expeditiously.

Further according to the applicant, the respondent's application had no merits on the basis that the respondent was guilty of material non-disclosures and misrepresentation of facts. The respondent did not disclose to the court that it was barred for failing to file heads of argument under case HC 4274/22 and to date it had not filed same. The applicant also averred that the heads of argument that the respondent purported to have filed were not stamped and that the respondent had sneaked the unstamped copy into the court record, it was for that reason that a default judgement was granted in favour of the applicant.

The applicant was surprised when the respondent applied for rescission of judgement and attached a copy of the heads of argument purportedly bearing the applicant's legal practitioner's office stamp and that of the registrar. The applicant's legal practitioners advised the respondent's legal practitioners that the stamp was not theirs. The applicant further averred that sometime in October 2022 its legal practitioners wrote to the registrar making enquiries on the authenticity of the stamp and the registrar, responded advising that there were no stamped heads of argument filed of record. The applicant contends that the respondent created fake stamps for both the applicant's legal practitioners and the registrar's office, and was seeking rescission of judgement based on fraudulent documents.

The applicant further averred it would continue to suffer prejudice if there was no finality to the litigation as it was continuously hiring out similar property for its other offices, whilst the respondent continued to derive benefit from its property without paying anything. The applicant therefore continued to suffer financial loss. The applicant contended that the respondent had no

prospects of success in the main matter, and it had to be dismissed with an order of costs on the punitive scale.

Respondent's Case

The respondent dismissed the application for dismissal as unwarranted arguing that the applicant had made multiple applications before this court which made it impossible to have the application for rescission set down for hearing. The court had already determined in an earlier matter between the parties that the respondent had a valid claim sustainable at law, and the matter should proceed to arguments. The respondent further averred that it had always wanted to have the matter heard on the merits and it filed its heads of argument, but applicant raised allegations which the court found to be unmeritorious.

Further according to the respondent, it could not have the matter set down when there were pending cases which had direct bearing on the matter. It also contended that the issue of taxed costs was addressed in the respondent's opposing papers and that the costs were in the main cause. The respondent further submitted that the matter would have been disposed of by now had the applicant not raised allegations of fraud in the filing of heads of argument, which the respondent was disputing. The respondent also contended that the applicant was duly served with a stamped copy of the heads of argument which its legal practitioners alleged were fraudulently issued. The applicant desperately tried to have the heads nullified but the court found otherwise. It also averred that its prospects of success in the pending application for rescission of judgment were high.

The respondent also averred that there was gross misrepresentation by the applicant. The property sought to be removed from the leased premises comprised of fitted fixtures which were fitted to the walls and could not be removed without weakening the building. It also averred that the court was grossly misled by the applicant as there were issues which could not be resolved on the papers without hearing *viva voce* evidence.

The respondent further averred that in terms of the lease of agreement between the parties, the applicant was not entitled to compensation for repairs or alterations. The respondent also averred that the stay of execution suspended execution of judgement and subsequently the

taxed costs were also suspended. The respondent prayed for dismissal of the applicant's case with costs on the punitive scale.

CASE 2

Case 2 is an application for rescission of judgement in terms of rule 29 of the High Court Rules, 2021 on the basis that the judgement was erroneously sought and granted. The applicant herein is the respondent in Case 1 and the respondent herein is the applicant in Case 1. The two parties signed a lease agreement sometime in July 2020 for a property described as Calvados building, Ground Floor, 61 Mugabe Way, Kwekwe. The lease agreement was to subsist until 31 December 2022. Clause 4.2 of the lease agreement provided that either party could terminate the lease on three calendar months' notice. The respondent issued a notice of termination of the lease agreement in May 2021.

On termination of the lease agreement the respondent sought the removal of certain alterations that had been made by the applicant on the leased premises. A dispute arose wherein both parties claimed ownership over the alterations. The respondent instituted the *rei vindicatio* proceedings under HC 4274/24 and the applicant filed a counter application for a *declaratur* under case number HC 4616/22. The respondent herein filed its answering affidavit and heads of argument in HC 4274/22, and served them on the applicant on 11 August 2022, when the court was on vacation. Since the court was on vacation, the applicant filed and served its heads of argument on the first day of the third term, on 5 September 2022. The heads were served on the respondent, and receipt was acknowledged.

The applicant claims that for some strange reason, the respondent proceeded to set matter down on the unopposed roll, even though the matter was duly unopposed. A default judgment was granted by this court on 21 September 2022. The applicant claims that the default judgment only came to light when it was served with a notice of set down for taxation on 14 October 2022. Attempts to resolve the matter amicably to avoid further costs were futile.

The applicant averred that the judgement was granted in error as heads of argument were filed on time, and at any rate, the respondent herein ought to have set the matter down on the

opposed roll. At any rate the period within which heads ought to have been filed had not lapsed, since the court was on vacation when the applicant was served with the respondents' heads of argument. By filing and serving heads of argument on the first day of the term, the applicant had complied with the rules of court.

The applicant also contends that the respondent erroneously sought default judgment when there was no legal basis to do so and had CHITAPI J been aware that heads of argument had been filed timeously, the default judgment would not have been granted. The applicant further averred that at any rate, a matter cannot be referred to the unopposed roll for failure to file heads of argument when there is a notice of opposition filed of record. By referring a matter to the unopposed roll, an applicant would have denied the respondent an opportunity to apply for the upliftment of the bar for it to purge its non-compliance with the rules of court.

The applicant submitted that the rescission of the default judgment would rectify the anomaly and allow the applicant to be heard in HC 4274/22. The default order created an anomalous situation where the respondent short-circuited the applicant's counter application under HC 4616/22 which also pertains to the same property. Both matters must therefore be heard at the same time to allow the court to fully interrogate the issues and hand down a composite judgment. If the situation were permitted to remain as it is, there was a possibility of two conflicting judgments wherein the order of 21 September 2022, would create ownership rights for the respondent, while another order of the court entitle the applicant to claim ownership over the same property.

The Respondent's Case in Case 2

The respondent's notice of opposition raised two preliminary points. The first was that the proceedings ought to be stayed pending payment of the outstanding taxed costs. The respondent's costs in HC 4274/22 were taxed on 10 November 2022, and these had not been paid by the applicant. It would be unjustified for the applicant to continue piling proceedings on the respondent without making good the wasted taxed costs. The present proceedings therefore had to be stayed pending the payment of such costs, and any prejudice suffered by the applicant was self-inflicted.

The second preliminary point was that the applicant was guilty of material non-disclosures and misrepresentation of facts. The applicant did not disclose that it had been barred for failing to file heads of argument in the main matter under HC 4274/22. When the respondent's counsel appeared before CHITAPI J on 21 September 2022, the learned judge confirmed that there were no stamped heads of argument filed of record by the applicant herein. The registrar's records also showed that there were no stamped heads of argument from the applicant. The applicant had somehow sneaked an unstamped copy of its heads of argument into the record.

When the applicant applied for rescission of the default judgment, it attached a copy of its heads of argument bearing a stamp from the respondent's legal practitioners, and that of the registrar. The registrar had, pursuant to a written enquiry from the respondent's legal practitioners on the authenticity of the stamp from his office. The registrar confirmed that there were no heads of argument in the system. It followed that the applicant created fake stamps from the respondent's legal practitioner's office and from the registrar's offices.

The respondents submitted that the application ought to fail on account of the account of the applicant's misrepresentations and criminal conduct. An order of costs on the punitive scale was also warranted.

As regards the merits of the application, the averments raised in motivating the application for dismissal of the application for rescission equally apply to the merits of the respondent's contentions in opposition to the application for rescission.

Submissions on Case 1 and Case 2

Mr *Mutsvandiani* for the applicant in Case 1 and the respondent in Case 2 averred that the respondent ought to have set the application for rescission of judgment by 10 February 2023 but had not done so. It was only in November 2023, that a proposal was made for that matter to be heard at the same time with the application for dismissal for want of prosecution. The respondent therefore had no intention to litigate the matter. Counsel further averred that following receipt of the application for rescission of default judgement they wrote a letter to the registrar wherein they queried the authenticity of the stamp on the heads of argument filed by the respondent. Mr *Mutsvandiani* further averred that when they appeared before CHITAPI J, the judge noted that

there were no heads filed of record and granted default judgement in the applicant's favour. It was after the filing of the application for rescission of the default judgement that the applicant discovered that there were heads of argument that had allegedly been stamped. Counsel further submitted that there were no prospects of success in the application for rescission of the default judgment because heads of argument were never filed and issued.

Further according to Mr *Mutsvandiani*, even if the first day for filing heads was 5 September 2022, the *dies induciae* would still lapse on 19 September 2022. Counsel averred that the matter was heard after the *dies* to file heads. Further according to Mr *Mutsvandiani* the default judgement was granted 21 September 2022. The matter was therefore heard after the expiry of the *dies induciae* to file heads of argument.

Per contra, Mr *Mudhawu* averred that the delay was not inordinate as the application for dismissal of matter was made four days after *dies* within which they ought to have filed answering affidavit or set the matter down. Counsel referred the court to the case of *Guardforce Investments (Pvt) Ltd* v *Ndlovu and Ors* SC 24/16, wherein the position of the law with regards to applications dismissal for want of prosecution was articulated. The issues for determination were whether there was a reasonable explanation for the delay and whether it was more likely than not that rescission would be dismissed. Counsel averred that judgement was erroneously sought and granted as it was the matter was referred to the unopposed roll on the basis that the respondent was barred for failure to file heads. Counsel also submitted that r 59 was clear that a respondent should file heads within ten (10) days and the proviso to the rule did not include the days on which the court was on vacation. Counsel further contended that the respondent was not barred as it was the applicant's heads of argument were filed when the court was on vacation.

As regards the authenticity of those stamps that were dismissed as fraudulent by the applicant, Mr *Mudhawu* submitted that one could not tell by merely looking at the stamps whether there was any material difference. He further argued that the applicant ought to have produced prototypes of stamps from the registrar's office and from the applicant's legal practitioners so that comparisons could be properly made. The applicant's legal practitioners had not denied that they had an employee by the name S Makoni whose name appeared on their stamp acknowledging receipt of the heads of argument. There was also no supporting affidavit

from the said S Makoni denying having received the heads of argument. The registrar had also not denied the authenticity of the stamp that was endorsed on the heads.

Mr *Mudhawu* also submitted that the application in HC 4274/22 should not have been referred to the unopposed roll. That matter was opposed, and the court could not have ignored a properly issued notice of opposition. The court did not relate to the notice of opposition that was before it when it granted the default judgment. The court ought to have struck out the notice of opposition from the record before treating the matter as an unopposed matter.

Analysis Case 1

The first part of the analysis will deal with the chamber application for the dismissal of the application for the rescission of the default judgment. The fate of the application for the rescission of the default judgment is dependent on the outcome of the chamber application which seeks to dismiss it. If the court determines that there is merit in the application for dismissal, then it becomes needless to interrogate the merits or demerits of the application for rescission.

On 21 September 2023, CHITAPI J granted the default judgment following the respondent's alleged failure to file heads of argument in HC 4274/22. The court proceeded to deal with the matter as unopposed. The respondent herein contends that the heads of argument were filed timeously after the opening of the new term on 5 September 2022. The applicant contends that at the time that CHITAPI J granted judgment in its favour, there were no issued heads of argument filed of record. The applicant claims that it discovered that there were heads of argument that were allegedly issued and bearing the applicant's office stamp when the respondent applied for rescission of default judgment in HC 7299/22. The registrar, in a letter dated 8 November 2022, confirmed that from a perusal of the record and the electronic case system, the respondent's heads of argument had not been stamped. The applicant claimed that the stamp impression on the heads of argument from its office was not authentic.

Prior to the granting of the default judgment, the applicant's legal practitioners had, on 9 August 2022, written to the registrar as follows:

> "**AFRICAN BANKING CORPORATION OF ZIMBABWE VS A. A MIDGLEY PROPERTY COMPANY (PVT) LIMITED CASE NO. HC 4274/22**
> **……..**

> We advise that on or about the 11th of August 2022, we issued and filed Heads of argument in this matter. In terms of rule 59(21) of the High Court rules, 2021, the respondent ought to have filed Heads of argument on or about the 25th of August 2022 but neglected to do so. We further advise that in terms of rule 59(22) of the High Court rules, 2021 [*Chapter 7:09*], the respondent was duly barred from filing any process.
>
> Pursuant to the above facts, we set down this matter on the unopposed role. The matter will be heard on the 14th of September 2022.
>
> We advise that upon perusal of the court record, we discovered that there is a copy of respondent's Heads of argument which have neither been stamped by your office or ours…"

I have deliberately reproduced part of this letter to illustrate two points. The first is that the applicant's heads of argument were filed when the court was on vacation. The midyear vacation commenced on 30 July 2022 ending on 5 September 2022. In terms of r 59(21) of the rules the respondent's legal practitioners were required to file the respondent's heads of argument not more than ten days after the filing of the applicant's heads of argument. Proviso (i) to r 59(21) states that no period during which the court is on vacation shall be counted as part of the ten-day period. The applicant's legal practitioners were therefore wrong in claiming that the respondent was duly barred for failing to file heads of argument by 25 August 2022.

The second point is that before the default judgment was granted, the applicant's legal practitioners had perused the record and discovered that there was a copy of the respondent's heads of argument that had not been stamped by the registrar. In addition to that, the respondent's notice of opposition was filed of record. The applicant's legal practitioners proceeded to obtain default judgment, nevertheless.

Mr *Mudhawu* for the respondent submitted that the respondent was not barred for failing to file heads of argument because the applicant's heads were filed during vacation period. Counsel further submitted that the respondent's heads of argument were filed on 5 September 2022, after the opening of the new term. He also submitted that in any case, the applicant should not have proceeded to set the matter on the unopposed motion roll in the face of valid notice of opposition that was filed of record. The Supreme Court dealt with that issue in *Lesley Faye Marsh Pvt Ltd t/a Premier Diamonds & Ors* v *African Banking Corporation of Zimbabwe (Pvt) Ltd & Ano*[1], and made the following pertinent observations:

[1] SC 4/19

"A clear reading of the rules and of the decision in *GMB* v *Muchero* (*supra*) makes it clear that the effect of the bar arising from the late filing of heads of argument and a bar arising from any other default in terms of the rules are different.

It presents itself quite clearly to me that where the respondent is barred for failing to file his or her heads of argument on time, the application cannot be treated as un-opposed. The provisions of r 238 (2) (b), which I have cited in full above, are clear on that point. The provisions of the rule direct the court hearing such an application where heads have been filed out of time, to either hear the matter on the merits or to refer it to the unopposed roll. The rule does not deem the application unopposed.

The Rule appears to me to be sound and based on the fact that once a notice of opposition and opposing papers have been validly filed, the late filing of heads of argument cannot automatically have the effect of negating or nullifying such filing. The rule re-asserts the common-sense position that the pleadings, having been validly filed, remain extant until struck off the record by a competent court order. A referral of the matter to the unopposed roll is one such competent court order that will have the effect of nullifying or striking off the record, the otherwise validly filed pleadings. A specific order striking off the notice of opposition and opposing affidavits is yet another competent order that can be made in the circumstances."

The above sentiments though expressed in the context of the old High Court rules, 1971, apply with equal force to the proceedings before me. Rule 238 (2b) of the old High Court rules was worded as follows:

> "(2b) Where heads of argument that are required to be filed in terms of subrule (2) are not filed within the period specified in subrule (2a), the respondent concerned shall be barred and the court or judge may deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll."

Rule 59 (22) of the High Court rules, 2021, provides that:

> "(22) Where heads of argument that are required to be filed are not filed within the period specified in subrule (21), the respondent concerned shall be barred and the court or judge may deal with the matter as unopposed or direct that it be set down for hearing on the unopposed roll."

There is a slight variation in the wording of the two provisions. The old rules provided if the respondent did not file heads of argument within the period specified in r 238(2a), then such respondent was barred, and the court could deal with the matter on the merits or direct that it be set down for hearing on the unopposed roll. The new r 59(22), appears to have taken away the court's powers deal with the matter on the merits by simply stating that the court or judge may deal with the matter as unopposed or direct that it be set down for hearing on the unopposed roll. The wording of that provision needs to be revisited.

Be that as it may, and in my respectful view, the wording of that provision does not negate the *ratio decidendi* in the *Lesley Faye Marsh* matter above. The same principle still applies because the mere fact that the respondent has not filed heads of argument or has filed them out of time, does not nullify the notice of opposition and the opposing affidavits that were filed timeously. The opposing papers remain part of the record. It is the heads of argument that are not part of the record. Rule 39(5)(b) of the High Court Rules, 2021, permit a party that has been barred to make a chamber application for the removal of the bar or an oral application at the hearing of the matter for the removal of the bar. It follows that if the matter is set down on the opposed roll, the respondent who has been barred can still make an oral application before the court for the removal of the bar. Further, in my view, where the opposing papers have been filed timeously, but the respondent has been barred for late filing or non filing of heads, the applicant cannot choose to set the matter down on the unopposed roll. Such matter must be set down on the opposed roll. It is the court or the judge that must direct that it be dealt with as unopposed but after striking out the opposing papers. I say so because the court or a judge still must contend with the possibility of an oral application for the removal of the bar in terms of r 39(5)(b) of the rules. An applicant that decides to set the matter down on the unopposed roll in the face of opposing papers thus denies the court and the respondent an opportunity to deal with the bar in terms of r 39(5)(b).

I agree with the submissions by the respondent's counsel that it was improper for the applicant to set the matter down on the unopposed roll. What makes the conduct of the applicant's legal practitioners even more untenable is that according to their letter of 9 August 2022, they perused the record prior to the granting of the default judgment and discovered that

there were unstamped heads of argument filed by the respondent's legal practitioners. There were therefore aware that the respondent's counsel intended to argue the matter. They were obviously aware as well of the r 39(5)(b). Whether those heads argument were issued or not issued does not really matter in my view. The applicant's legal practitioners owed the court and the respondent a professional duty to set the matter on the opposed roll so that the respondent could be heard. Proceeding to set the matter on the unopposed roll under those circumstances was tantamount to snatching judgment. The court was clearly misled into granting default judgment without being fully appraised of the circumstances of the matter before it.

This court is reposed with discretion to dismiss a matter for want of prosecution. The approach to be followed was set out in *Guardforce Investments (Private) Limited* v *Ndlovu & 2 Ors*[2] as follows:

> "The discretion to dismiss a matter for want of prosecution is a judicial discretion, to be exercised taking the following factors into consideration –
> (a) the length of the delay and the explanation thereof;
> (b) the prospects of success on the merits;
> (c) the balance of convenience and the possible prejudice to the applicant caused by the other party's failure to prosecute its case on time."

The extent of the delay in setting the matter down or filing heads of argument following the filing and service of the notice of opposition was not too inordinate. According to the applicant, the notice of opposition was filed and served on 11 November 2022. The respondent submits that the extent of its delay ought to be reckoned from by 12 December 2022, going forward. It could not set the matter down between 12 December 2022 and 9 January 2023 because courts were on vacation.

As regards the prospects of success on the merits of the application that the applicant wants dismissed, the respondent submitted that the default judgment was improperly granted because heads of argument were already filed in the matter before CHITAPI J. The applicant ought to have the heads of argument expunged from the record before applying for default judgment. The main dispute between the parties concerns certain alterations that were made to the leased premises. The applicant approached the court for a *rei vindicatio* under HC 4274/22.

[2] SC 24/16 at pages 6-7

The respondent filed its own application for a *declaratur* under HC 4612/22. The court's view is that the two matters ought to be heard and determined at the same time.

For the foregoing reasons, the court determines that there is no merit in the application for dismissal of the application for rescission of the default judgment under HC 7299/22 and it ought to be dismissed with costs.

Analysis Case 2

The respondent (applicant in Case 1) had, in its opposing affidavit raised two preliminary points. The first was that proceedings ought to be stayed until the applicant herein (respondent in Case 1), paid the respondent's outstanding taxed costs. The first preliminary point was abandoned in the respondent's heads of argument.

The second preliminary point was that the application must fail on account of the applicant's failure to disclose material facts as well as its misrepresentation of facts. The respondent's point was that the applicant did not disclose that it had not filed heads of argument in the main matter. Reference was also made to the views expressed by MANYANGADZE J in *A A Midgely Property Company (Pvt) Ltd* v *Africa Bank Corporation of Zimbabwe & Ano*[3], a matter in which the applicant herein sought a stay of execution pending the determination of the application for rescission of the default judgment. In that matter the issue of the unstamped heads of argument was also raised.

The respondent herein raised as a preliminary point, the fact that the applicant was non-suited because of the non-disclosure of material facts in its application. The respondent alleged that the applicant had filed fake heads of argument following the granting of the default judgment by CHITAPI J. The court, per MANYANGADZE J found that the allegations made against the applicant in the matter before him were of a serious nature, which went to the heart of the application for the rescission of the default judgment. The learned judge determined that he could not interrogate the issue of whether the applicant had filed fake heads of argument, as doing so would be tantamount to interfering with the merits of the application for rescission

[3] HC 7516/22

which was not before him. The court accordingly dismissed the preliminary point. The court did not make a finding that the applicant had indeed filed fake heads of argument.

The applicant dismissed the preliminary point as devoid of merit. There was no misrepresentation or material non-disclosure of facts in the present application. The applicant argued that it had no need to state that it had been barred at the time when the matter under HC 4274/22 was referred to the unopposed roll pursuant to r 59(22).

The preliminary point is tied to the merits of the application for rescission of the default judgment. The respondent alleged that the applicant's heads of argument were fake because the applicant had used fake stamps pretending, they were from the offices of the respondent's legal practitioners and the registrar's office. The respondent also averred that at the time that CHITAPI J granted the default judgment, there were unissued heads of argument filed on behalf of the applicant herein.

The averment that the applicant filed fake heads of argument to in the main matter under HC 4274/22 to support its application for rescission of judgment is without merit. No evidence was placed before the court to demonstrate that the stamp from the law firm of the respondent's legal practitioners did not emanate from that law firm. The law firm did not disown S Makoni whose name was inscribed on that stamp as the person who received the heads of argument. The registrar did not deny that the stamp impression on the heads of argument was not from his office. He merely confirmed that there were no issued heads of argument.

In my analysis of Case 1, I determined that the way the applicants obtained default judgment was irregular. That application ought not to have been placed on the unopposed roll as it was an opposed matter. Further, the respondent's heads of argument were filed during vacation period, and there is no way that the applicant would have been barred for failing to file heads of argument within the vacation period. Prior to the granting of the default judgment, the respondent's legal practitioners had perused the record and discovered unissued heads of argument that were filed by the applicant. The reasons I set out in Case 1 for determining that the respondent snatched judgment apply to the present matter.

The court determines that there is merit in the present application. The default judgment was erroneously granted in the face of a notice of opposition and heads of argument that were not expunged from the record.

COSTS

The conduct of the applicant and its legal practitioners in Case 1 and the respondent in Case 2 deserves censure. The applicant's legal practitioners should not have set the matter in HC 4274/22 on the unopposed roll in the face of the notice of opposition and heads of argument that were in the record. The matter would not have come this far had the matter been properly referred to the opposed roll. For that reason, an adverse order of costs is warranted.

Resultantly, it is ordered that:

In respect of case 1

1. The chamber application for the dismissal of the application for rescission of default judgment in HC 7299/22 is dismissed.
2. The applicant shall bear the respondent's costs of suit.

In respect of case 2

1. The application for rescission is hereby granted.
2. The order granted in default on 21 September 2022 in Case No HC 4274/22 be and is hereby rescinded.
3. The registrar is hereby ordered to set down Case No HC 4274/22 on the opposed roll.
4. The respondent shall bear the applicant's costs of suit.

MUSITHU J: .....

Messrs Shava Law Chambers, Legal practitioners for applicant in case 1 and for respondent in case 2
Makonese, Chambati & Mataka Attorneys at Law, Legal practitioners for respondent in case 1 and for applicant in case 2