OLIMAS ENGINEERING (PRIVATE) LTD

T/A F AND R TRAVEL TOURS AND CAR SALES

versus

OLD MUTUAL ASSET MANAGERS ZIMBABWE

HIGH COURT OF ZIMBABWE

CHIWESHE JP

HARARE, 08 February 2011

In person Mr L. Takawira as Chairman

Mrs *Matsika* for the respondent

CHIWESHE JP: I dismissed this opposed application at the close of submissions on 8 February 2011 and indicated that my reasons for doing so would follow. I state them hereunder.

 The background facts to this matter are aptly summed by the respondent in its heads of argument. The parties entered into a contract in terms of which the respondent purchased and fully paid for two vehicles. The applicant failed to deliver the motor vehicles as agreed which prompted the respondent to issue summons. The summons were served on 28 August 2007 at the address given by the applicant. The applicant, through its legal practitioners, Messrs Chikumbirike and Associates, entered appearance to defend the action. A plea was then filed wherein the applicant admitted the existence of the contract. The matter was subsequently set down for trial before my sister MAKARAU J (as she then was). The applicant’s legal practitioners applied to amend the applicant’s plea. The court then adjourned to enable the parties to file their heads of argument on that application. When the court re-assembled, the applicant’s legal practitioners advised the court that they were withdrawing the appearance to defend because it had been filed in error as they had not been instructed by the defendant to enter same. The withdrawal was done in open court in the presence of the applicant’s directors and representatives, including the deponent to the founding affidavit in the present case. Judgment in default was applied for and granted as prayed. The applicant now seeks an order rescinding that judgment.

 The application to rescind the default judgment cannot succeed. An application to rescind judgment can only succeed if the court is persuaded that there is good and sufficient cause to so rescind the judgment.

It is trite that an application to rescind a judgment will likely succeed if the applicant shows that he was not in wilful default and that he has a *bona fide* defence to the action. In the instant case the applicant initially filed an appearance to defend and filed a plea. All its efforts in that regard were reduced to nil when it instructed its legal practitioners to withdraw the appearance to defend and, by implication, all its pleadings. The withdrawal was deliberate and done in open court in the presence of the applicant’s directors and representatives. This was well after the *dies induciae* would have expired. The directors did not object to this open withdrawal despite their presence in court.

 Clearly the only conclusion one can come to is that the applicant was in wilful default. On that hurdle alone this application cannot succeed. In any event, on the papers, the applicant does not seem to have any defence having entered into a contract of supply, received the full purchase price and yet failed to deliver. The applicant has no *bona fide* defence to the respondent’s claim.

 It was for these reasons that I dismissed the application with costs.

*Wintertons*, respondent’s legal practitioners