

PHINEAS CHIOTA
and
WALLACE LABORITIES (PVT) LTD
and
BESSIE CHIOTA
versus
DAVID MABUWA

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 27 October 2020

Opposed Application

A Masango, for the 1st – 3rd applicants
Respondent in person

ZHOU J: This is an application in terms of r 449 of the High Court Rules 1971 for the setting aside of the judgment granted in Case No. 5305/19. The judgment was granted in the absence of the applicants who are the defendants in that case. The applicants submit that the judgment was erroneously sought and granted on 6 February 2020.

The material facts are as follows. The respondent issued summons against the applicants claiming payment of a sum of \$16 343.67 together with interest thereon. In the summons and declaration, the respondent asked that there be no order as to costs. The applicants having entered appearance to defend filed an application for further particulars on 3 July 2019. On 1 August the respondent filed and served upon the applicants a notice of intention to bar. On 8 August the applicants filed a special plea in which they raised a number of grounds. The hearing of the special plea was postponed on at least two occasions. On 28 January 2020 the respondent purported to effect a bar on the applicants notwithstanding the fact that a special plea had been filed in response to the notice of intention to bar. Relying on the bar, the respondent filed an application for default judgment on 4 February 2020.

Default judgment was granted on 6 February 2020. This is the judgment which the applicants seek to have set aside.

In terms of Order 49 r 449 (1) (a) this court may *mero motu* or upon application by any party affected *inter alia*, rescind a judgment or order that was erroneously sought or erroneously granted in the absence of a party affected by such order or judgment. In *casu* the applicants, as the defendant in the main action, are clearly affected by the judgment. The judgment was granted against them.

On whether it was erroneously sought or erroneously granted the applicants have pointed to two grounds. The first ground is that the judgment was granted on the basis that the applicants were barred for non-filing a plea. The record shows that a special plea had, in fact, been filed. The respondent was aware of this fact as the special plea was set down for argument before the default judgment was even sought. The error which occurred was that the applicants ought not to have been barred because they filed the special plea before the bar was effected. Secondly, when the respondent approached the court for default judgment he stated (Record 26) that the time for filing a plea by the applicants expired before they filed a plea. This was factually incorrect. There is the further aspect that the order granted contained two matters which were not in the summons. The first aspect is in respect of set off; the second aspect was of costs against the second and third applicants. These matters were not in the summons. No amendment of the summons was granted in respect of them. The seeking of this relief was also erroneous as was its granting.

Having regard to the circumstances in which the judgment was sought and granted, this court is of the view that it was erroneously sought and erroneously granted.

The applicants, through their legal practitioner, have properly abandoned para 2 of the draft order. They however, persist with the claim of costs on the attorney-client scale. This scale of costs is punitive and is reserved for special cases, such as reprehensible conduct on the part of the affected party. In the present case the respondent may have been mistaken that he could seek default judgment where a special plea had been served upon him. Such a misapprehension especially by a self-actor does not amount to a special reason justifying the special order of costs. For these reasons, costs must be on the ordinary scale.

In the result, IT IS ORDERED THAT

1. The default judgment granted against the applicants on 6 February 2020 in Case No. HC 5305/19 be and is hereby set aside.
2. Respondent shall pay the costs.

Muronda Malinga, 1st – 3rd applicants' legal practitioners