

DOVES FUNERAL ASSURANCE (PVT) LTD
versus
ALBERT MUKOZHO
and
ARBITRATOR ALPHA GURUPIRA N.O

HIGH COURT OF ZIMBABWE
ZHOU J
HARARE, 10 October 2019 & 23 October 2019

Opposed Application

M Moyo, for the applicant
S.T Mutema, for the respondents

ZHOU J: This is an application in terms of r 449 (1) for the setting aside of a judgment granted in the absence of the applicant. The applicant's case is that the judgment which was granted in HC 1794/19 on 29 May 2019 was erroneously sought or erroneously granted in its absence. The application is opposed by the first respondent.

The material facts from which the application arises are as follows. The applicant and the first respondent were involved in a labour dispute which was referred for arbitration before the second respondent. The second respondent rendered an award in which she found in favour of the first respondent. The parties having failed to agree on *quantum* of the monetary loss due to the first respondent, the second respondent quantified the loss and rendered a "quantification award" which was not accompanied by reasons. Aggrieved by that, the applicant approached this court under case No. HC 1794/19 seeking the setting aside of the award pertaining to *quantum*. The first respondent filed papers in which he conceded that the award which was not accompanied by reasons could not stand and must be set aside. Simultaneously, the first respondent filed a counter application in which he cited the applicant as the first respondent and the arbitrator as the second respondent. The arbitrator was not cited in the main application. In the counter application the first respondent asked for an order that the arbitrator must re-

quantify the award and render reasons for the quantification. On the clearly mistaken assumption that his concessions in the main application excused the applicant from attending the hearing, the first respondent proceeded to set down the counter application on the unopposed roll. He obtained an order which reflects both the primary relief sought in the main application and the relief which he was seeking in the counter application. The order granted is as follows:

“IT IS ORDERED THAT:

1. The arbitral award issued by the second respondent in favour of the counter-applicant dated 19 December 2018 be and is hereby set aside.
2. The second respondent be and is hereby ordered to re-quantify an award she handed down on 27 October 2017 and issue a reasoned quantified award within 5 days of this order in compliance with Article 34 of the Arbitration Act [*Chapter 7:15*] as read with s 13, 14 of the Labour Act [*Chapter 28:01*].
3. There shall be no order as to costs.”

The applicant which was also the applicant in Case No. HC 1794/19 instituted the instant application seeking the setting aside of the order which was granted in HC 1794/19. The errors which the applicant complains of are:

- (a) That it was inappropriate for the first respondent to set down the matter on the unopposed roll when it was not an unopposed matter; and
- (b) The hearing of the counter-application separately from the main application violated r 229 A (2) as read with subrule (4) because there was no court order authorising that separate hearing;
- (c) That no relief could be obtained against the second respondent in the counter-application because she was not cited in the main application; and
- (d) That the order which was granted differs in some respects from the draft order which was filed with the counter-application.

This last ground does not in any way constitute an error. There is no requirement at law that the order granted by the court must be identical in terms to the draft relief sought. A draft order is what the term means, just a draft. The court is at large to grant relief if it is satisfied that the relief is based on and is supported by the papers before it.

The fundamental error made in this matter was to set it down on the unopposed roll and proceed to obtain what is essentially a default judgment in the counter-application only. Part of relief granted is also the relief which was being sought in the main application. There can be no doubt that the first respondent irregularly set down the manner. What has exercised the mind of the court is the question of the materiality of the error. This is so given the fact that the effect of the order given was to grant the relief which was being sought in the main application as well as that which was being sought in the counter-application. What complicates the matter is that the order reflects only the parties to the counter-application which would effectively mean that the main application remains uncompleted in circumstances where the relief sought therein has already been granted. This is an irregularity which taken together with the other issues raised above would constitute an error. There are procedural errors which would be difficult to justify by reference to the end result for.

I do not accept that the issues raised in these matters are res judicata. This is an application for the setting aside of a judgment given in default of the applicant. This issue has not been previously dealt with by any competent court.

On the question of costs, this is an appropriate case for costs to be in the cause. The reason for this is that the first respondent contested this matter primarily on the basis that the rescission of judgment does not really serve a substantive purpose since the relief which the applicant was seeking in the main matter was granted. The effect of the success of this application would be to reinstate the impugned quantification award which makes the success of the applicant in this matter academic in that it will still have to press on with the application for the setting aside of the same award.

In the result, IT IS ORDERED THAT:

1. The judgment granted in Case No. HC 1794/19 on 29 May 2019 be and is hereby set aside.
2. Costs are to be in the cause in HC 1794/19.

Dube-Banda, Nzarayapenga & Partners, applicant's legal practitioners
Stansilous & Associates, 1st respondent's legal practitioners