

NATIONAL BLANKETS LIMITED

APPLICANT

Versus

ZIMBABWE TEXTILE WORKERS UNION

RESPONDENT

IN THE HIGH COURT OF ZIMBABWE
MATHONSI J
BULAWAYO 10 FEBRUARY 2011 & 10 FEBRUARY 2011

N. Mlala for plaintiff

JUDGMENT

MATHONSI J: In this matter I granted an order in favour of the plaintiff and against the Defendant on the 25th November 2010 in motion court. This followed a default judgment application made in terms of Rule 58 of the High Court of Zimbabwe Rules, 1971.

The plaintiff instituted proceedings against the defendant out of this court on the 13th October 2010. The summons in that matter was served upon the defendant on the 22nd October 2010 and as no appearance to defend was entered at the expiration of the *dies inducae*, the plaintiff set the matter down unopposed on 25 November 2010 resulting in default judgment being granted aforesaid.

Unbeknown to me at that time, and neither of the parties brought this to my attention, on 20 October 2010 my brother NDOU J, had issued a provisional order in Case No HC 2171/10 the interim relief of which, was to place the defendant under provisional judicial management. That order also stayed "all actions and proceedings and the execution of all writs, summons and other processes against the company " (clause 4 of the interim relief granted.)

I would not want to believe that the plaintiff knew of the existence of that provisional order when it sought judgment against the defendant because if it did, it was obligated to bring that fact to the courts attention on 25 November 2010. On the other hand, the defendant did not notify the court of the existence of that order either. Whichever way, the order of 25 November 2010 should not have been made and I would like to believe that it came about as a result of a mistake common to both the court and the plaintiff.

When this was brought to my attention, I notified the plaintiff's legal practitioners and gave them the opportunity to address me on the issue. I have not received any submissions from them.

Rule 449(1)(a) and (c) allows the court to rescind a judgment or order made under such circumstances. It provides:

" The court or a judge may, in addition to any other power it or he may have *mero motu* or upon the application of any party affected, correct ,rescind or vary any judgment or order -

(a) that was erroneously sought or erroneously granted in the absence of any party affected thereby;

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(b) - -

(c) That was granted as a result of a mistake common to the parties.”

Not only was the order erroneously sought and erroneously granted, it was also granted as a result of a mistake as the provisional order of 20 October 2010 was not brought to our attention. I therefore intend to set that order aside in terms of Rule 449.

Accordingly I make the following order:

1. That the default judgment granted on 25 November 2010 be and is hereby rescinded.
2. That there be no order as to costs.

Cheda and Partners, Applicant's Legal Practitioners

Messrs Khumalo & Company Attorneys, Respondent's Legal Practitioners