Judgment No. HB 54/06
Case No. HC 1942/05
X Ref HC 1665/05;
1105/05; 1106/05;
3637/04; 4047/04 &
173/03

KEYA MUNYUKA

Versus

PATRICK MALISWA MAVINGIRE

And

DEPUTY SHERIFF

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 19 OCTOBER 2005 AND 1 JUNE 2006

R Moyo-Majwabu, for the applicant
1st respondent in person

NDOU J: On 19 October 2005 I granted an order by default in favour of the applicant in the following terms:

"It is ordered that:

1. In terms of Rule 449, the court order granted on 9 September 2005, in matter HC 1665/05 be and is hereby set aside.
2. Applicant be and is hereby interdicted from instituting new court proceedings in respect of No. 32, 7th Avenue, Woodville, Bulawayo, pending the determination of matters currently pending before the court.
3. Second respondent be and is hereby directed to re-instate applicant into peaceful and undisturbed occupation of No. 32, 7th Avenue, Woodville, Bulawayo and to release all the attached property pending the outcome of the matters currently before this court between the parties."

When the first respondent became aware of the above order, he, instead applying for its rescission, opted to file a notice of

appeal. I will not go into the merits of the procedure adopted. As a result of the noting of the appeal I have been requested to give full reasons for the granting of the

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above order. These are the following. This matter has a chequered history characterised by a multiplicity of applications arising from the same facts. The salient facts are that on 8 September 2005, the first respondent filed a chamber application in matter HC 1665/05. In return, the applicant filed his opposing papers to said application. On the same day the first respondent filed heads of argument, a pre-mature step on his part as the applicant still had opportunity to file his opposing papers. The applicant, however, did file his opposing papers and subsequently filed his heads of argument. The first respondent was granted judgment in HC 1665/05 and he proceeded to issue a writ on 17 October 2005. When the applicant became aware of the order (and the writ) he then instituted these proceedings in terms of the provisions of Rule 449(1) of the High Court of Zimbabwe Rules, 1971. Rule 449(1) provides:

> "1) 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-
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> a) that was erroneously sought or erroneously granted in the absence of any party affected thereby; or
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> b) in which there is an ambiguity or a patent error or omission, but only to the extent of such ambiguity, error or omission; or
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> c) that was granted as a result of a mistake common

to partners.

2. The court or a judge shall not make any order correcting, rescinding or varying a judgment or order unless satisfied that all parties whose interest may be affected have had notice of the order proposed."

Looking at the cross-reference files I am satisfied that the order was erroneously sought and obtained. I say so because HC 1103/05 and HC 1106/05 are opposed applications pending before this court. The parties

have both filed heads of argument. In other words, these two applications have provisional orders that are in effect pending their confirmation or discharge.

On 23 August 2005 the applicant filed an application to have matters in HC 1103/05; HC 1106/05; HC 3637/04; HC 4047/04; HC 173/03 and all the others referred to above consolidated so that they are all heard at the same time. It was therefore undesirable to set any of those matters down for hearing until the application for their consolidation had been determined. The application for consolidation is still pending. Further, it was wrong for the first respondent to have relied on Order 32 Rule 236(3) and (4) when the parties had filed heads of argument and are awaiting allocation of a date of hearing by a Judge who will preside over the matter. From the foregoing I opined that the judgment in question was sought and obtained by error and as such a case has been made in terms of

Rule 449(1).

The only issue is whether there is good service or notice as required by sub-rule (2). It is common cause that the application was served at the respondent's place of business on E Makoni. It is also common cause that the first respondent became aware of the hearing before it took place. The hearing was set down for 1430 hours on 19 October 2005. This is evinced by a minute he faxed to both the Deputy Registrar of this court and the applicant's legal practitioners. Both copies were faxed on the date of hearing and after 1430 hours i.e. 1437 and 1441 respectively. Unfortunately, in both, whether by design or by accident, the fax does not

show from where it was faxed. It was submitted by Mr *Moyo-Majwabu* that they believe that the respondent was in Bulawayo and pretending to be in Kwekwe hence the concealment of the fax's origin. They were aware that he was in Bulawayo in the morning. The first respondent does not dispute this in his fax. He, however, states that he left Bulawayo for Kwekwe in the morning. He said he got stranded in Kwekwe on account of transport problems occasioned by the fuel shortage. If that is the case, he should have faxed a copy showing it emanates from Kwekwe, once the applicant had challenged him to do so. In the circumstances. I am satisfied that he was properly notified in terms of section 449(2). It is for these reason that I granted the above-mentioned order.

James, Moyo-Majwabu & Nyoni, applicant's legal practitioners