Judgment No. HB 23/07
Case No. 132/06
X-Ref HC 921/06; 483/03 & 921/06

DR IBO MANDAZA t/a
INDUNA DEVELOPMENT PROJECTS

Versus

MZILIKAZI INVESTMENTS (PVT) LTD

IN THE HIGH COURT OF ZIMBABWE
NDOU J
BULAWAYO 22 JUNE 2006 AND 8 FEBRUARY 2007

J Sibanda, for applicant
B Ndove, for the respondent

Opposed Application

NDOU J: The applicant is the defendant in the main action between the parties. *In casu,* the applicant seeks an order in the following terms:

"It is hereby ordered

(a) That case number 921/06 (X-Ref 483/03) be and is hereby removed from the roll of 22nd June 2006.
(b) That the applicant be and is hereby ordered to file his application for rescission of judgment in case number 921/06 within seven days of this order.
(c) That if applicant fails to file the said application within seven days the respondent be and is hereby granted leave to set the matter down for hearing on the uncontested roll.
(d) The respondent be ordered to pay the costs of this application."

The applicant's legal practitioner of record filed a founding affidavit in support of the application. Paragraph 3 of the founding affidavit captures the basis of the application in the following terms:

"3. On Tuesday the 20th June 2006, upon looking at the court roll for the motion court on 22nd June 2006 I noticed that enrolled as matter number 5 was the present matter. The matter was enrolled under "Default Judgments". On the 21st of June 2006 I quickly proceeded to the High Court to find out how the matter was enrolled under Default Judgments when the matter is opposed. There I learnt that on the 27th of April 2006 the respondent had lodged under case number 921/06 an application to compel the applicant to file his discovery affidavit. I was totally surprised because I had never been served as the applicant's legal practitioner with the application compelling the applicant to file his discovery affidavit … I indeed confirmed from the High Court file that no such service of the application was effected on us."

It is common cause that the application in HC 921/06 was not served on the applicant. One would have expected the parties to have settled this issue without resorting to these proceedings. But having obtained a judgment, the respondent was not prepared to compromise. It appears to me that my brother granted the default on the basis of the Notice to Discover served on the applicant's legal practitioners of record at 4.00 pm on 14 March 2006. Mr *Ndove*, for the respondent, indeed placed a lot of emphasis on the service of this document. I think this is a case where the respondent should have made a concession rather than cling to the default judgment and I will show why. The Notice to Discover relied upon is process as defined by Order 5 Rule 35 (1) of High Court Rules, 1971 in the following terms:

"(1) In this order-

"process" means any document which is required to be served on any person in terms of these rules."

All process must be filed with the Registrar and <u>thereafter</u>, a copy served on the other party in the manner set out in the various rules – *The Civil Practice Handbook*, by Mary Welsh at 8/4. This sequence was not followed by the respondent in respect of this Notice to Discover. What the respondent did, was to serve the Notice to Discover first, i.e. on 14 March 2006 and thereafter file it with the Registrar i.e on 15 March 2006. So at the time of the service, the Notice to Discover was not properly issued process. With such a glaring flaw in the issuing of the Notice to Discover it was unwise for the respondent to oppose this interlocutory application.

Further, the respondent argues that Order 24 Rule 165 (1) in terms of which he applied and obtained the order does not state that the chamber application should be served on the other party. This is correct, but this Rule should not be read in isolation. Order 32 deals with all chamber applications. In terms of Rule 242(1) all chamber applications must be served on all interested parties except in default application stated in the sub-rule. The facts of this matter

do not constitute such an exception. Even if they did, the founding affidavit would still have to set out these exceptions in terms of sub-rule (2)(a) which was not done in the founding affidavit in HC 921/06.

There are reasonable prospects of success on the application for rescission and a case has been for relief sought. Before I conclude I would like to deal with the point *in limine* raised by Mr *Ndove* on the applicant's legal practitioner deposing to the founding affidavit under a power of attorney. Generally, I agree with *Mr Ndove,* that a legal practitioner should not depose to a founding affidavit on behalf of a client. This court has previously stated why it is undesirable for legal practitioners to do so. But there is an exception to this general rule if the facts are within the knowledge of a legal practitioner (he may swear an affidavit on behalf of the client) – *Samkange & Anor* v *The Master & Anor* HH-63-93. Even in such exceptional cases, the route should be, in my view, be sparingly resorted to. The facts of this application are within the knowledge of the applicant's legal practitioner. He is in fact, in better position to highlight the applicant's case as the application is about procedural matters. In the circumstances the legal practitioner was justified in deposing to the affidavit.

Accordingly, I grant the application in terms of the above-mentioned draft.

Mazangaza & Tomana c/o Job Sibanda & Associates, applicant's legal practitioners
Marondedze, Nyathi, Majome & Partners, respondent's legal practitioners