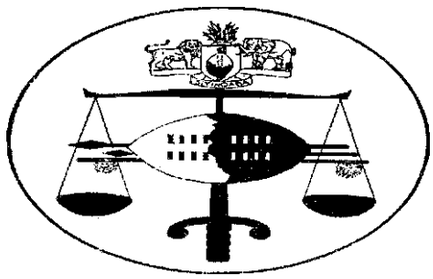

THE HIGH COURT OF SWAZILAND

HELD AT MBABANE	CIVIL CASE NO. 691/2004

In the matter between:

INTAMAKUPHILA TRANSPORT	APPLICANT
AND	
KHETSIWE FAKUDZE PK MSIBI AND ASSOCIATES SANDILE DLAMINI	1st RESPONDENT 2nd RESPONDENT 3rd RESPONDENT

IN RE

KHETSIWE FAKUDZE	PLAINTIFF
VERSUS	
INTAMAKUPHILA TRANSPORT AND 1st SIBUSISO MASANGO DEFENDANT	
2ND DEFENDANT	

COR AM:	ANNANDA LE J
FOR APPLICANT:	MR. M. MABILA OF MABILA ATTORNEYS
FOR FIRST AND SECOND RESPONDENTS:	MR. P.K. MSIBI OF PK MSIBI AND ASSOCIATES
THIRD RESPONDENT:	NO APPEARANCE

JUDGMENT

31st

MARCH

2009

[1] The Applicant seeks to have a judgment against it to be rescinded and relies on

all three available modes to do so - Rule 31(3) (b), Rule 42 (1) as well as the Common Law. This shotgun approach is accompanied by severe mudslinging in which the then Plaintiff's attorney who obtained the judgment is accused of all sorts of wrongdoing and culminates in a further prayer for relief to investigate the matter to determine fraudulent conduct by the attorney of record.

[2] The judgment central to the recession application was ordered on the 6th November 2008 in the absence of the then

Defendants or their attorneys and followed the hearing of argument and perusal of various papers in support thereof. The Defendants were ordered to pay the Plaintiff a sum of E 304 150 in respect of damages suffered by the Plaintiff and her dependents due to the demise of her husband, as well as costs of the action. The deceased was

a passenger in a bus owned by the First Defendant and driven by its employee, the Second Defendant. The bus was involved in a road traffic collision, with fatal consequences. The Plaintiff pleaded that negligent driving by the Second Defendant resulted in the collision, death and resultant damages.

[3] An affidavit by the Plaintiff in proof of damages concisely sets out the cause of action and the *quantum* of the claim, in addition to relevant supporting documents relevant to the claim. In addition, she referred to the history of the matter, specifically to the fact that the notice of intention to defend was not followed by filing of a plea to either the original or amended summons for a period of over two years. She enclosed various letters from her attorneys, addressed to the Defendants attorneys, and says that they "literally begged the Defendants to file their

plea by various phone calls and by correspondence", but to no avail. She adds that further particulars sought and given in October 2005 still did not result in the filing of a plea, and that she considered the matter as undefended. She also referred to fruitless settlement attempts over the previous three years and prayed for default judgment.

[4] All of this resulted in the aforementioned judgment that now sought to be rescinded. Unlike the usual norm where the Applicant would state under which head it comes to court, none such is mentioned in its notice of application to do so, whereas Mr. Mabila argues that all three modes apply, as is also stated in the affidavit of the Applicant's director, Bessie Khanyisile Nkosi.

[5] Her disdain of the Respondents attorney, Mr. PK Msibi in particular, is

immediately apparent from the Applicant's notice which prays for an order "(t)hat an investigation of the events leading to the grant of the said default judgment be conducted with a view of determining any fraudulent conduct on the part of the 1st and 2nd Respondents". She underscores this more pointedly in her affidavit when stating that *"inter alia,* a rescission of a default judgment" is sought and "investigation of the events leading to the grant of the said default judgment and where a fraud is discovered to have been perpetrated by any of the Respondents, in particular the 2nd Respondent, that costs be granted *de boni proprii* against such Respondent".

[6] Strong language indeed. The pre-occupation with the latter aspect seems to overshadow the rescission application which is sought *"inter alia".* It also results in the use of all weapons in the armoury by seeking to rely on

Rule 42 (1), Rule 31 (3) (b) and the common law to obtain rescission.

[7] At the hearing of the matter, Mr. Mabila filed ultra brief heads of argument. It consists of less than two pages and merely refers to the three heads under which rescission may be sought. He argues that under Rule 31 (3) (b), the application to set it aside must be made within 21 days after becoming aware of it and that good cause must be shown. Applied to the facts at hand, the time limit not being in issue nor the required E 200 security which was tendered , it is held out that the existence of a notice under Rule 30 obviated the applicability of a judgment entered by default as it clashed with the mandatory provisions of Rule 31 (5).

[8] The Rule 30 notice, as well as a notice of Bar, are two aspects in this matter which are referred to below but far now,

> it suffices to state that neither of these were uplifted, set aside or properly dealt with at the time when judgment was entered. Rule 31 (5) on which the Applicant emphatically relies to set aside the judgment deals with the procedural aspect of setting down judgment sought to be obtained by default. Rule 31 (3) (a) has it that "whenever a defendant is in default or delivery of notice of intention to defend or of a plea, the Plaintiff may set the action down as provided in Sub-Rule (5) for default judgment and the court may, ... after hearing such evidence as the court may direct, whether oral or documentary, grant judgment against the defendant

Before reverting to Rule 31 (5), it requires to be rioted that in the present matter, the Court which ordered the judgment had regard to not only submissions by Mr. Msibi but the order also reflects that regard was given to the papers filed of record. What this obviously includes is the affidavit filed by the

Plaintiff in which a host of details and evidence was contained. It was not only concerned with the quantifying of unliquidated damages but it also brought to the fore that despite the filing of a notice to convey the intention of the Defendant to defend the claim, and despite further interlocutory pleadings and amendment of the summons to accommodate misgivings raised against it, and furthermore that despite active efforts by her attorneys, initially and upon substitution, the defendant just did not file its plea. A notice of Bar did not help either. Settlement attempts failed.

The then Plaintiff did not also refer the court which entered judgment to the contentious Rule 30 notice in her damages affidavit. However, her attorney states in his own answering affidavit, under paragraph 8.5 (page 86 of the record) that:

> *"/ wish to state that the Rule 30 notice to the Deponent to the founding affidavit speaks of was*

abandoned by his own attorney and in any event its filling did not stop nor change the fact that the defendant in the main action was barred and no application for removal of bar was ever moved on behalf of the Applicant" (sic).

[11] He goes on to say in paragraph 10.9 (page 90) that:

"I submit that the Rule 30 notice Applicant relies upon does not stop the running of the period of filling of the plea and in any event by the time it was filed the Applicant had been barred three years before on the 26?h May 2004. The Rule 30 application was itself irregular without removal of Bar" (sic).

[12] Whether the legal conclusions are correct or not, fact remains that indeed the Defendant was barred from filing its plea well before judgment by default

was ordered and also, that the notice under Rule 30 dated the 26th April 2007 (page 64) was filed in-between being barred from filing a plea on the 28th May 2004 and again on the 14th February 2005 (pages 26 and 32 of the record), and the time when she applied for judgment.

[13] It is noted that following different complaints by the then Defendant regarding issues such as quantification of damages and non joinder of the Defendant's driver, a further combined summons came to be issued in its second amended form (page 50 of the record) on the 20th April 2005. Again, before and after this, the Defendants attorneys were regularly being "requested" to file its plea.

[14] On the 18th April 2007 the Plaintiff gave notice of substituting her attorneys, seemingly when Mr. Msibi moved over to another firm. On the same date, the

> Defendant was notified that judgment would be sought on the 20th April 2007. It was not then granted, as on the 26th April 2007, the Rule 30 notice was filed, which had it that " the claim" would be sought to be set aside in that two sets of amended combined summonses were served, which were at variance with each other.

In turn, the Plaintiff notified that on the 25th May 2007 it would move a contested motion to determine the Rule 30 application and also to seek default judgment. The court file shows that it was postponed to the following week, when it was removed from the roll. It seems that the dispute remained in limbo, since the Plaintiff again enrolled the matter for the 22nd August 2008, when it was again removed, then reinstated a week later and postponed to the 29th August 2008 for hearing of argument on the question of damages. Judgment was entered on the 6th November 2008, the same day on which argument was eventually heard.

By that time, Mr. Msibi practiced under his own name, still for the Plaintiff. He omitted to notify the defendant formally, but remained in contact with Mr. Mabila's firm in the time being, as evidenced by the affidavit of Mr. Msibi. He states (para 8.6 page 86) that:

> *"I admit that there was an oversight on our side as we omitted to file a notice of amendment when I changed offices from B S Dlamini and Associates however I was discussing the matter with the counsel for the Respondent (Defendant) and he has always been promising that to tell his client, the deponent to the founding affidavit, to offer a settlement on the main matter".*

[17] On this score, the issue is not so much as to which firm of

attorneys, or which particular attorney acted for the then Plaintiff, but whether the appointed Attorney was obliged to notify the defendant that judgment was to be applied for. A notice to this effect, under "Rule 31 (3) (A)" (sic) states that such an application would be made on the 22nd August 2008. The notice is inaccurate to the extent of stating the cause of action to be in respect of "monies the lent and advanced", but it correctly cites the case number, Plaintiff and both defendants.

It also certifies the summons to have been personally served on the Plaintiff as long ago as the 13th April 2004, that a notice to defend was filed two days thereafter and that the time for filing a plea expired on the 10th June 2004 and also that a Notice of Bar was filed on the 3rd August 2004. As previously recorded, notices of Bar were filed on the 28th May 2004 and the 14th February 2005 but it does not by necessity exclude a further notice as

referred to. The Rule 31 (3) (a) notice finally refers to an attached affidavit in proof of damages.

[18] The Applicant is justifiably begrudged in that it was not served with this latter notice which resulted in the judgment against it, subsequently obtained on the 6th November 2008.

[19] The Respondents unsuccessfully seek to take cover under the provisions of Rule 31 (5) to absolve them from notification thereof. This Sub-Rule reads:

> *"The proceedings referred to in sub-rules (3) and (4) shall be set down for hearing ... provided that notice of set down need not be given to any party in default of delivery of notice of intention to defend by such party."*

It is the last few words of this sub-rule with which the two parties have a major difference. The Applicant argues that because it did indeed enter an appearance to defend, or otherwise put, because it is not"... a party in default of delivery of notice of intention to defend", it was a mandatory obligation of the Plaintiff to give it notice of its application to seek default judgment.

The Respondent has it exactly the opposite. It argues that indeed there was no need, requirement or obligation on itself to give notice of its application for default judgment. This is so, Mr. Msibi says, because the Defendant was served with a notice of bar, calling upon it to file its plea within a stipulated period of time, which time had long ago lapsed without any plea having been filed. In addition, numerous documented reminders or requests were sent to the Defendant's attorneys thereafter, and still no plea was filed, hence it disposed of any perceived need to give notice of the Rule 31 (3) (a) application. Moreover, it was held out

to be, the Rule 30 notice did not suspend its notice of bar and in any event, the Defendant did not pursue its Rule 30 notice either.

[22] It is common cause that the notice of application for judgment by default in terms of Rule 31 (3) (a), which resulted in it soon thereafter being granted by the Court, is devoid of notifying the Defendant of this crucial step in the protracted litigation. The notice itself states that service of the summons was effected on the 13th April 2004 and that notice of intention to defend "expired" but at the same time, it also states that it was filed on the 15th April 2004.

[23] Though ambiguous, presumably due to the use of pro forma computer programming, it is nevertheless clear that it was a defended matter. The notice goes on to state that time to file a plea expired on 10th June 2004 and also that a notice of bar was filed on

> the 3rd August 2004. The notice does not also mention that a Rule 30 notice was not filed nor what it resulted in. The notice under Rule 31 (3) (a) states that the application was to be made on the 22nd August 2008, some four years after barring. It also included a damages affidavit, deposed to by the Plaintiff.

On face value, the notice to apply for default judgment seems in order. It refers to anteceding events which culminated in the Defendant being barred, four years previously, from filing its plea. It was also accompanied by a damages affidavit which provides (unilateral) evidence on the quantum of damages, as well as giving a brief history to motivate that many attempts were made to obtain a plea from the Defendant. The evidence on affidavit also alleges that a notice of intention to defend was merely filed to delay the claim, as per the original and amended summonses. She also says that:

"My attorneys have literally begged the Defendants to file their plea by various phone calls and by correspondence but still the Defendants failed to file the same. My attorneys were in fact overgenerous in that instead of taking advantage of the Rules of this Court in regard to obtaining default judgment, they wanted to hear what the defendants were to say in response to the averments in the summons."

She also referred to further particulars having been sought in September 2005 and furnished the following month "... *but still no plea was filed and clearly this matter is undefended".*

[25] What she omitted to state is that her own Attorney of record changed between firms without notifying the Defendant's attorneys of it. Mr. Msibi is taken to task for this by the Applicant but I fail so see what difference it would have made to the matter or in any prejudice

resulting from it. That no notice of the application for judgment by default that was given remains an unchanged fact and whether it did not emanate from firm A or firm B is immaterial.

[26] The further omission from her affidavit is any reference to the notice under Rule 30 which the Defendants served in April 2007. Therein, the Plaintiff's claim was sought to be set aside since two sets of amended combined summonses were served, alleged to be at variance with each other. This notice under Rule 30 had not been withdrawn, set aside or pronounced upon by the Court, leaving it undealt with and still in existence at the time when judgment was entered.

[27] It cannot be determined from the papers whether the Court which granted judgment by default was aware of this pending Rule 30 notice, nor whether it considered it in the absence of the

objecting litigant, nor has it been shown that it was decided whether the noted objection was valid or not.

[28] Mr. Mabila argued that over and above the failure to notify the Defendant that default judgment was to be applied for, the mere undetermined existence of its Rule 30 notice is sufficient to prevent the Plaintiff from obtaining judgment in the manner it did.

[29] Rule 30 deals with the manner in which irregular proceedings are dealt with. With certain provisos and limitations which are irrelevant for present purposes, it requires of the Court at the hearing of that application to decide whether the alleged irregular step or proceeding is indeed so and it may then set it aside in whole or in part, as well as granting leave to amend. Once the Court has made an order under this Rule, an affected party shall take no further step in the cause, save to

> apply for an extension of time within which to comply with such order. Sub-Rule 30 (5) has it that where a party fails to comply timeously with a notice given pursuant to the Rules, the party giving notice may notify the defaulting party that he intends to apply for an order that such notice be complied with or that the claim be struck out. If not done within seven days, application may be made to the Court to order so.

Previous complaints by Defendant twice resulted in the combined summons being amended. When the Plaintiff did not timeously deal with the cause of complaint embodied in the Rule 30 notice, i.e. by withdrawing the first amended combined summons, the onus was on the Defendant to take it to Court and obtain an appropriate order as provided for under Sub-Rules 30 (3) and 30 (5). Instead, it did nothing further.

As an aside issue, the content of the Rule 30 notice justifies some comment. It sought to

set aside the Plaintiffs claim in that the Plaintiff has presented the Defendant with two sets of amended combined summons which are at variance. A scrutiny of the two sets of amended combined summons clearly reveal the only difference to be that in the latter, the driver of the Defendants transport business was specifically cited as the Siecond Defendant. He was initially referred to by name and alleged to have been the bus driver who caused a motor vehicle accident which caused the claimed damages. All along, the claim against the initial sole Defendant and later the First Defendant has been based on its vicarious liability, being the owner of the bus driven by its named employee. Apart from citing the driver as a Second Defendant, the amended particulars of claim describes him by name, as was already done in the first amended summons, as being an adult Swazi male whose fuller and further particulars are unknown. As previously, he is yet again alleged to have acted within the course and scope of his employment with the (first) Defendant and all

negligence is attributed to him. The only difference remains that the named driver became a separate second Defenderdant in the second amended combined summons.

[32] The first amended summons came into being when the words: *"Wherefore Plaintiff claims"* were added above its prayers for relief. In both instances, the amendments came into existence because the Defendant raised the acknowledged shortcomings.

[33] From this, without pronouncing upon the issue, it is doubtful that in the event the Rule 30 application had been decided by a Court, that it could have resulted in a dismissal of the claim or to anything more than an order to strike out the first amended summons if it had not already been withdrawn by then. I am adverse to find that there could have been confusion as to what had to be pleaded to. Even if it was

otherwise, in the course of the numerous calls upon the Defendant's to file its plea, it is an aspect that most readily could have been resolved and sorted out by the attorneys of the litigants. Seemingly, they corresponded and had telephone conversations with each other on many occasions.

[34] Nevertheless, the technical fact remains that at the time when judgment by default was sought and obtained, the Rule 30 issue had not been resolved, pronounced upon, set aside or uplifted. The question then remains whether by itself, it suffices to have mandated notice to the Defendant of the judgment application, or that if the Court did not know about it and would have refused judgment if it did, that it should result in rescission, either under Rule 31 (3) (b) or Rule 42 (1).

[35] The Respondent's position is that when proper regard is given to the history

> and antecedents of the matter, the Defendant ought to be regarded as having abandoned the issue it regarded as necessitating it to be dealt with as an irregular step or proceeding under Rule 30 - the matter of having two sets of amended combined summonses and thus being unable to file its plea.

If indeed the Defendant was serious in its desire to plead to the claim against it but was actually unable to file it because it did not know which summons to deal with, as evidenced by its notice under the auspices of Rule 30 to actually pray for a dismissal of the claim, it had its remedies to get the query dealt with. It could have followed up on its notice and set it down for adjudication. If it did so, the Court would have either dismissed the claim, as it asked for, or a different order could have been made, one of various options, such as setting aside the first amended combined summons. It

remains most unlikely that the claim itself would have been dismissed.

However, the Defendant did nothing. It did not pursue its notice of an irregular proceeding at all. Instead, it simply left it at that. The correspondence filed of record subsequent to the notice establish that the Defendant was frequently being harassed to file its plea. It did not, according to the record, choose to take refuge behind its notice of an irregular proceeding.

[38] It requires that the ongoing events be contextualized in the sense of a time frame, to enable this Court to properly exercise its discretion as to whether the default judgment should be rescinded or not.

[39] The Plaintiff issued its second amended combined summons in April 2005. On the 30th June 2005, the Plaintiff's attorney of record called upon the Defendants attorney for the umpteenth

time to file its plea. In September 2005, the Defendant yet again asked for further particulars to enable it to plead. It was furnished within a fortnight. On the 27th October 2005 the Plaintiff was yet again castigated on the basis that its particulars of claim were vague and embarrassing. Various other correspondences which were filed display a pattern of taking issue with the claim on diverse grounds. It resulted in amendments of the combined summons and furnishing of particulars, and culminated in the notice under Rule 30, which it never brought to conclusive finality. This spanned a period of one and a quarter years, from the 26th April 2007 until at best the 22nd August 2008, the date mentioned in the notice of application for default judgment, which in turn was further extended to the 6th November 2008, when it was eventually granted.

[41] Meanwhile, the Defendant sat back complacently, content with its mediocre assertion that it did not know which summons to plead to, at the same time ignoring numerous reminders to file its plea.

[42] *In Bakoven Ltd v GJ Howes (Pty) Ltd 1992 (2) SA 466 (E),* Erasmus J held (with regard to Rule 42 (1) (a), that-

> *"Once the Applicant can point to an error in the proceedings, he is without further ado entitled to rescission. At is only when he cannot rely on "an error" that he has to fall back on Rule 31 (2) (b) (where he was in default of delivery of a notice of intention to defend or of a plea) or on the common law (in all other cases). In both latter instances he must show 'good cause'. This pattern emerges from the decided cases".*

[43] The present Applicant desperately seeks to point out an error which resulted in

the judgment against it. It relies upon its notice under Rule 30, which does not carry the day, as well as the failure by the Plaintiff to notify it of the application to seek judgment, which I revert to below. Before doing so, it is instructive to note what Moseneke J (as he then was) had to say about a similar issue in *Harris v ABSA Bank Ltd t/a Volskas 2006 (4) SA 527 (T).*

> *"The common law requires 'sufficient cause' to be shown before a default judgment may be set aside. Rule 31 (2) (b) of the Uniform Rules of Court requires 'good cause' to be established before the rescission of a default judgment may be granted. The phrases 'good cause' and 'sufficient cause' are synonymous and interchangeable. See Silber v Ozen Wholesalers (Pty) Ltd 1954 (2) SA 345 (A) at 352H -*

353A. The absence of 'wilful default' does not appear to be an express requirement under Rule 31 (2) (b) or under the common law. It is, however, clear law that an enquiry whether sufficient cause has been shown is inextricably linked to or dependant upon whether the applicant acted in wilful disregard of the Court rules, process and time limits. While default may not be an absolute or independent ground for refusal of a rescission application, a display of willful neglect or deliberate default in preventing judgment being entered would sorely co-exist with sufficient cause" (emphasis added).

The approach of Moseneke DCJ is pragmatic and persuasive, especially so in a matter like the present where all possible stops are

pulled out to seek rescission, which is not to be dealt with singularly but broadly inclusive. *In casu,* the First Respondent resists the application on an equal footing to the manner in which it was brought before Court. She deals with the technicalities, which in clinical isolation appears to go against her, but she also provides a broader perspective of the events during the protracted period of time that preceded her application for judgment.

It remains a fact that the summons was amended on two occasions in order to accommodate concerns against it but it never changed in material substance on the merits of the claim. From its initial form, the Defendant was at all times informed of the case it was to meet. It exercised its right to seek further particulars and received it. It exercised its right to complain about aspects such as an initial failure to include a preamble to its prayers for relief or the absence of the defendant's driver being separately cited as defendant. It resulted in removal of the complaints by amending the

combined summons and its attendant particulars of claim.

The approach by this Court to determine whether the judgment should be rescinded or not cannot be to deal with each head or issue separately and individually. Rather, it should be all encompassing and broadly inclusive of all appropriate considerations as a whole. I am supported in this approach by Moseneke J (as he then was) in his *dicta* in *Harris (supra).* I quote extensively, from page 803 onwards:-

> *"Before an applicant in a rescission of judgment application can be said to be in 'wilful default' he or she must bear knowledge of the action brought against him or her and of the steps required to avoid the default. Such an applicant must deliberately, being free to do so, fail or omit to take the step which would avoid the default and must appreciate the legal consequences of his or her actions. A*

decision freely taken to refrain from filing a notice to defend or a plea or from appearing, ordinarily will weigh heavily against an applicant required to establish sufficient cause. However, I do not agree that once willful default is shown the applicant is barred; that he or she is then never entitled to relief by way of rescission as he or she has acquiesced. The Court's discretion in deciding whether sufficient cause has been established must not be unduly restricted. In my view, the mental element of the default, whatever description it bears, should be one of the several elements which the Court must weigh in determining whether sufficient or good cause has been shown to exist. In the words of Jones J in De Witts Auto Body Repairs (Pty) Ltd v Fedgen Insurance Co Ltd 1994 (4) SA 705 (E) at 708G, '. . . the wilful or negligent or blameless nature of the defendant's default now becomes one of the various considerations which the

Courts will take into account in the exercise of their discretion to determine whether or not good cause is shown'.

Also see HDS Construction (Pty) Ltd v Wait 1979 (2) SA 298 (E) at 300G - 301E. A steady body of judicial authorities has held that a Court seized with an application for rescission of judgment should not, in determining whether good or sufficient cause has been proven, look at the adequacy or otherwise of the explanation of the default or failure in isolation. 'Instead, the explanation, be it good, bad, or indifferent, must be considered in the light of the nature of the defence, which is an important consideration, and in the light of all the facts and circumstances of *the case as a whole.' De Witts Auto Body Repairs (Ptyf Ltd v Fedgen Insurance Co Ltd. In amplifying the nature of the preferable approach in an application for rescission of judgment, I can do no better than quote Jones J with whose dicta I am in respectful agreement:*

"An application for rescission is never simply an enquiry whether or not to penalize a party for failure to follow the Rules and procedures laid down for civil proceeding in our Courts. The question is, rather, whether or not the explanation for the default and any accompanying conduct by the defaulter, be it wilful or negligent or otherwise, gives rise to the probable inference that there is no bona fide defence and hence that the application for rescission is not bona fide. The magistrate's discretion to rescind the judgments of his Court is therefore primarily designed to enable him to do justice between the parties. He should exercise that discretion by balancing the interests of the parties. . . . He should also do his best to advance the good administration of justice'. In the present context this involves weighing the need, on the one hand, to uphold the judgments of the Courts which are properly taken in accordance

with accepted procedures and, on the other hand, the need to prevent the possible injustice of a judgment being executed where it should never have been taken in the first place, particularly where it is taken in a party's absence without evidence and without his defence having been raised and heard." [47] It is when the whole composite body of the rescission application is considered that it takes on a different colour from that which is displayed under the individual heads under which it is brought. Otherwise put, the whole becomes more than the sum total of what it is made up of. For instance, the Applicant has been slack and lackadaisical in its filing of the plea. The excuses for not doing so are not altogether convincing in itself, but when cognizance is taken of the historical perspective, it

does add a little weight to the scales, more than when viewed in isolation.

[48] The Applicant did previously disclose to the Plaintiff that the MVA fund might have been a party in the action, that the driver and owner of the second vehicle involved in the fatal collision could also feature and that other aspects prevail which precluded it from filing a plea. Whether these issues are meritorious is quite another matter, possibly to be decided in due course but for now, it suffices to state that whatever laxity might vest with the then Defendant, it cannot also be so that it rested on its laurels in a wholly inexcusable manner.

[49] In addition, had the Plaintiff been as anxious to have the case taken on trial as she says she was, the notice of bar which has been left idle for so long does not reflect similar resolve. The same yardstick is equally applicable to the Applicant which also saw no need to bring its alleged inability to plead to the fore, as evidenced by leaving the

notice of irregular proceedings under Rule 30 in limbo for so long.

[50] In my view, the most significant aspect of this application which ultimately tips the scales is that the Defendant was not notified of the application for default judgment. Even if it was to be so that it could do nothing more to prevent judgment from been granted at that time, which I do not find to be so, at minimum it would have been entitled to appear and cross examine the Plaintiff's witness as to the quantum of damages etcetera. Over and above this right, it did in fact file a notice of its intention to defend the action, albeit four years prior.

[51] The Rules of Court excuses the Plaintiff from notification of its intention to apply for default judgment only in the event that the Defendant, forgone its right to be notified by not entering the arena. The Defendant did enter, by way of filing a notice of intention to defend,

though it did not also follow the other procedural steps, such as filing a plea. In my view, the notice of bar did not serve its intended purpose, initially could have been the position, as it has been overtaken by subsequent events, exacerbated by the passenger of time.

[52] It is when all of these elements are given joint and cumulative consideration that I come to the inevitable conclusion that the matter is not yet to be regarded as so final that it could only properly be assailed on appeal. Instead, the litigation should continue from the point where it was before judgment was entered. It is for the parties to adhere to the well established procedures under which it may be expedited and if need be, to go on trial.

[53] There is one further and unfortunate issue to deal with. In the rescission application, the Plaintiffs Attorney has been accused of atrocious and despicable conduct, but which is not

borne out and evidenced in the papers. In fact, the second Respondent stands accused of fraud and an enquiry into it is called for. It is an accusation of the most serious order.

[54] I do not propose to delve into the merits and demerits thereof in any detail but it has caused this Court to spend much more time and energy in consideration of this application than otherwise, in order to see if indeed Mr. Msibi fraudulently obtained the judgment in favour of the first Respondent. It did not find it to be so.

At worst, the judgment could be labelled to have been opportunistically obtained or possibly under a misapprehension of interpretation of the Rules. However, it is my considered view that is remains a far cry from fraud. By so saying, I remain alive to the various allegations to the contrary, such as failing to notify the Defendant's attorneys that

the Plaintiff's attorney of record, Mr. Msibi, has changed between firms and also the ostensibly inadvertent statement by the Plaintiff as to the employer of her deceased husband, over and above the omission to notify the opposition of an application for default judgment. Altogether, it still does not equate to a misplaced accusation of fraud, with all of its adverse connotations.

To conclude this episode, I quote Banda C J in *Samuel Mfanufikile Mabuza v Swaziland Royal Insurance Corporation* where the Supreme Court stated in Civil Appeal Case No. 19 of 2007 (unreported) at paragraph 10:

> "This is an extraordinary allegation to make against professional colleagues, especially so when it is made in their absence ... Fraud is a serious allegation to make and it should not lightly be made unless there is evidence to substantiate it."

The costs order made shall reflect the displeasure of the Court in this latter aspect, in which costs were sought to be ordered *de bonis propriis* against Mr. Msibi. In any event, it would not be proper to burden the then Plaintiff with the costs of this rescission application on the basis which it comes to be ordered in favour of the Applicant. It is at the end of the action when the successful litigant may find itself with a favourable costs order.

In the event, it is ordered that the application for rescission of the default judgment herein, dated the 6th November 2008, be granted. The matter is to take its normal course in accordance with the Rules, as from the date when the application for judgment under Rule 31 (3) (a) was filed.

J. P. ANNANDALE JUDGE OF THE HIGH COURT

The relief sought against the second Respondent is dismissed. Costs of this application are ordered to be costs in the cause.