IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE Civ. Case No. 3720/2009

In the matter between

COVENANT OF JESUS CHRIST MINISTRIES	Applicant
Vs	
VILAKATI KHUMALO DESIGN AND QUANTITY SURVEYOR (PTY) LTD	1st Respondent
STANDARD BANK SWAZIALND	2nd Respondent
THE DEPUTY SHERIFF MANZINI REGION	3rd Respondent

CORAM	Mamba J
FOR APPLICANT	Mr. M. Ndlovu
FOR 1st RESPONDENT	Mr. M. Mabuza

JUDGMENT

15th April, 2011

[1] This is an application, filed under a certificate of urgency whereby the applicant seeks inter alia, the following orders:

(a) Pending the determination of this application, a stay of the execution of the order of this court issued on 13th November, 2009 and the writ of execution issued by the Registrar three days thereafter;

(b) Rescinding and or setting-aside the default judgment granted by this court in favour of the 1st respondent on 13th November, 2009.

[2] The application was filed and served on the relevant parties on 28th May 2010 and was set-down for hearing on 31st May 2010. On that day a consent order was issued by this court inter alia, suspending and or staying the execution of the court orders referred to above.

[3] The origin or basis of this application is as follows:

3.1 By simple summons dated 20th October 2009 and served on the applicant's representative on the next day, the 1st respondent claimed a sum of E589.298.82 from the applicant. This, it was alleged, was for or in respect of professional architectural services rendered to the applicant by the 1st respondent in March 2009.

3.2 In terms of the summons aforesaid, the applicant was required and expected to file its notice of intention to defend within ten days of the service of the summons, if it had any such intention.

3.3. Upon receipt of the summons Bishop Enock Lwane Maseko, the founder of the applicant church, organized or arranged a meeting with the 1 respondent's representatives. The meeting was held in Matsapha on 31st October, 2009. Present in that meeting were representatives of the church (including the said

Bishop) and also Directors of the 1st Respondent. Mr M. Mabuza, an attorney acting for the 1st respondent also attended.

3.4 According to Bishop Maseko, he informed the meeting and in particular the 1st respondent's representatives that the applicant had not entered into any agreement or contract with the 1st respondent for the services alleged in the summons or for any other service. Instead, the applicant had awarded the tender for the architectural services to another company; Roots Civils (Pty) Ltd who in turn had contracted with the 1st respondent. The contract was therefore between these two entities and the church was not a party thereto and was therefore not liable to the 1st respondent for the services rendered. This position is stated by the Bishop as follows: "in the light of the above circumstances it was agreed by the parties that applicant is not liable to pay 1st respondent the amount claimed... . There was no privity of contract between applicant and 1st respondent." The Bishop further exhibited the relevant written contract between the parties and this was acknowledged and accepted by the 1st respondent.

3.4 Again, according to the Bishop, the meeting agreed and resolved that the 1st respondent's attorney will withdraw the proceedings instituted against the church and the 1s respondent would pursue its claim against Roots Civils (Pty) Ltd. Assured and or fortified by this agreement, the applicant who had wanted to defend the action, did not file its notice of intention to defend.

3.5 It is common cause that the 1st respondent did not withdraw the action but instead bv notice dated 6th November 2009, applied for default judgment which was granted on 12th November, 2009. Thereafter, writs and other relevant documents were issued by the Registrar's office in execution of the court order. These documents include a garnishee notice in respect of monies belonging to the applicant and held by the 2nd respondent at its Matsapha branch. The applicant only discovered these facts on 26th May 2010 when an inspection and search was conducted at the High Court Civil Registry by applicant's attorneys. The upshot of this discovery is this application for rescission in terms of rule 31 (3)(b) and 42 of the rules of court.

[4] It is the applicant's contention that it is not in willful default of filing its notice of intention to defend the action. Applicant avers that it was always its intention to defend the action and would have filed such notice timeously had it not been agreed between the parties that the action will be withdrawn by the 1st respondent. (I note here that when the parties met and deliberated on the matter on 31st October, 2009, the ten-day period within which the applicant had to file its notice of intention to defend had not expired). It is the applicant's position further that it has a <u>bona fide</u> defence to the action in that there is no contract between it and the 1st respondent. The contract was entered into by and between the 1st respondent and Roots Civils (Pty) Ltd. Indeed, annexure A (starting at page 20 through to page 48 of the Book of pleadings) is such contract. Lastly, the applicant makes the point that the 1st respondent is not in the roil of Companies registered

in terms of the Company laws of Swaziland and therefore has no locus standi to institute the action. Again I observe here that the 1st respondent alleges that it is a company duly registered in terms of the law. This is, however, denied by the Registrar of Companies who says he has no such company name in his data base.

[5] In opposing this application, the 1st respondent raised a few preliminary points relating to the issue of urgency, the requirements for an interim interdict and non-compliance with rule 31(3) of the rules of this court. When the matter eventually came before me for hearing on 18th November, 2010, these points were, properly in my judgment, not persisted in or pursued by Counsel for the 1st respondent. For one, the urgency lay in the writ and attachment of the applicant's property that had been effected. Secondly, an interim interdict was necessary and established on the papers. The applicant had established that its money at the bank had been attached and it was unable to access it, to its prejudice. The attachment was itself based or grounded on a stolen court order which to boot, was in favour of a non-existent entity. I say "stolen court order" because, according to the applicant, it was tricked by 1st respondent into not defending the action. On the non-compliance with rule 31 (3) (b) of the rules of court, the applicant got to know of the default judgment against it on 26th May, 2010 when a search was made at the Registrar's office. This application was filed and served two days thereafter and set down for the 31st day of that month. Thus, there was compliance with the relevant period of 21 days within which the application could be filed. The application was also served on all the parties- herein save for the 3rd respondent. The third

respondent has, in my judgment, only been cited as a party because he has executed some of the documents herein, but beyond that, he has no direct and substantial interest in the matter. There is no allegation from any quarter that he has gone beyond the powers granted to him by the court orders. His citation as a party is merely a formality and is surplusage.

[6] On the merits, the 1st respondent denies that the applicant has a bona fide defence to the action and is not in willful default of filing and serving its notice of intention to defend. First respondent alleges that in the meeting in Matsapha, there was no agreement or undertaking that the action will be withdrawn but rather that the action will be put in abeyance or "stayed whilst the applicant attempted to pay off the balance owing".

The 1st respondent also makes the point that applicant admitted liability for the debt and had, prior to the issuing of the summons directly made payments to 1st respondent totaling E160,000.00. Again, after the issue of the summons, the applicant paid a sum of E35,000.00 directly to the 1st respondent's attorneys, in liquidation of the debt. (See page 85 of the Book of Pleadings).

[7] The Bishop explains that in a meeting held in Matsapha between himself on the one hand and the directors and lawyer of the 1st respondent on the other, "Sabelo Vilakati requested that I give him E35, 000.00 ... since his motor vehicle had been attached by a-deputy

sheriff ... and he had to pay the above amount to have his motor vehicle released. ...I then decided to draw a cheque in favour of Mphumelelo Mabuza attorneys since I trusted him as an attorney". This was after Sabelo Vilakati had agreed to deduct this amount from the invoice that was to be forwarded to Roots Civils (Pty) Ltd.

[8] From the above facts it is clear to me that a meeting was held between the 1st respondent in the presence of its attorney and the representative of the applicant on 31st October, 2009 and certain resolutions or agreements were made in that meeting. These agreements related to the conduct and or prosecution of the action that had been filed by the 1st respondent against the applicant. Whatever the precise or exact terms of that agreement were, is for present purposes difficult to establish in this application and perhaps not even strictly necessary to do so. The underlying consensus though, is that the parties agreed either to withdraw the action or keep it in abeyance indefinitely. Assuming it was the latter as stated by the 1st respondent, there is no allegation or any indication whatsoever that when this indefinite period came to an end (became definite), the 1st respondent indicated to the applicant that it was now going ahead with the action in court. The other point, of course is the assertion by the applicant that the agreement was to withdraw the action. He may have misunderstood this, but there is no material before me to suggest or indicate that he did not honestly believe that that was the agreement reached. He acted on this belief, mistaken though it may have been, but honest nonetheless. Under such circumstances, the applicant's failure to file its notice of intention to defend the action is

understandable and excusable. It was not a willful disregard of the rules. That of course is not an end to the matter. The applicant must show that it has a bona fide defence to the action. I turn to this now, briefly.

[9] The 1st respondent's claim is one for services rendered based on contract. There is of course no such contract between the applicant and 1st respondent. The contract is between the 1st respondent and Roots Civils (Pty) Ltd. That the services were in respect of property belonging to the applicant cannot be a ground or reason strong enough for the court to foist such contract on the applicant. The matter would, in my judgment, be different if the 1 respondents' claim was based on the applicant's acknowledgement of debt. In that case the causa or cause of action would be the acknowledgement of debt and not the contract.

[10] I have referred above to the status and locus standi of the 1st respondent and in particular what the Registrar of Companies has said thereon. No document, exhibiting registration or incorporation of the 1st respondent has been filed herein. It is not strictly necessary for me to decide this point at this stage, but assuming (and without deciding the point) that the applicant is correct in that the 1st respondent does not in law exist, that is a nonentity and taking into account the size of the 1st respondent's claim, the applicant deserves a certain measure of protection by the law and the interdict and rescission herein affords it that protection. From the above facts, it is clear to me that the

applicant has demonstrated that it has a bona fide defence to the action.

[11] Lastly I would add this if on applying for default judgment the 1st respondent's attorneys had informed the presiding judge that the parties had agreed to hold the proceedings in abeyance for an indefinite period and that the 1st respondent had unilaterally decided to apply for default judgment without notice or recourse to the applicant, the judge would not have granted the default judgment. On this basis, the judgment is therefore one that was erroneously sought and granted as per the provisions of rule 42 of the rules of this court. I would thus rescind the judgment under that rule as well.

[12] The default judgment granted by this court on 12th November, 2009 is therefore rescinded and set aside and the costs of this application shall be the costs in the main action. The applicant is ordered to file its notice of intention to defend within ten days from date hereof.

MAMBA J

(Extempore judgment delivered on 18th November, 2010).