IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE CASE NO. 905/2009

In the matter between:

SAVANNAH N. MAZIYA SANDANEZWE APPLICANT

AND

GD 1 CONCEPTS AND PROJECT MANAGEMENT (PROPERTIES) LIMITED RESPONDENT

JUDGMENT

OTA J.

The antecedents of this case, is that the Respondent herein as plaintiff, sued out Combined Summons against the applicant herein as defendant, in a suit styled **Case No. 905/2009,** claiming inter alia the following reliefs:

1. Payment of the sum of E845,746-53,
    1. Interest on the aforesaid sum at 9% per annum *a tempore morae*
2. Costs of suit
3. Further and/or alternative relief

The claim as disclosed by the particulars of claim, was founded upon a building contract entered by the parties, wherein, the Respondent was to execute, carry out and complete the construction of the Applicants residential house on Portion 215, Farm 188, Pine Valley, Mbabane, District of Hhohho. The Applicant was to pay the Respondent a total of E2, 995, 813-68, for the entire work. The amount was to be paid by installments, in respect of which the Respondent was required to prepare and give the Applicant interim payment certificates, spelling out the amounts due at each interval. The Applicant was required to pay the Respondent the issued or received value of the certificate within 7 days of such receipt. Upon each payment by the Applicant a 10% retention fee was to be deducted, which amount was to be refundable upon completion of the project or upon a termination of the contract owing to a breach. That until such time that all amounts owing are paid in full, the Respondent was entitled to exercise a *lien* and keep possession of the property. That if the Applicant defaults in payment within 7 days upon receipt of certificate, the Respondent would be entitled to cancel the agreement, and claim all outstanding amounts including damages in the removal of it's tools, machinery and plant on site. That it was agreed that the Applicant would pay the

Respondent for sketch plans and design. That the Applicant failed to pay the full amount on certificates No 3 and No 4, as well as other amounts totaling the sum of E845, 764-53 claimed, as detailed on pages 6 and 7 of the book of pleadings. The record demonstrates that the foregoing Combined Summons was served by affixing a copy at the main entrance of the Applicants chosen *domiciliiim,* being Portion 215 of Farm 188, Pine Valley in the District of Hhohho. The said service was effected on the 9th of March 2009. (See page 24 of the book) The applicant failed to deliver a notice of intention to defend, within the time statutorily prescribed for delivery of same, whereupon, the Respondent commenced an application for Default Judgment. It is on record, that Default Judgment was granted in favour of the Respondent on the 26th of March 2009. Following the said Default Judgment, the Respondent sought to execute against the movable and immovable property of the Applicant, whereupon, it took out Writs of Execution against same.

It is against a backdrop of the foregoing facts, and in dissatisfaction thereof, that the Applicant commenced this application for rescission of the Default Judgment, pursuant to **Rule 31** of the **Rules of this court,** in the following terms.

1. Rescinding the Default Judgment order granted against the Defendant in favour of the Plaintiff on the 26th March 2009.

2. That the Warrant of Execution issued by the above Honorable Court in favour of the Plaintiff against the Defendant be stayed pending the outcome of prayer I.
3. Costs of this application only in the event of it being opposed.
4. Further and / or alternative relief.

Now, from the papers filed, it is beyond dispute that the Applicant commenced this application pursuant to **Rule 31 (3) (b)** of the **Rules of this Court,** which provides as follows:-

> "A Defendant may within twenty-one days after he has knowledge of such judgment apply to court upon notice to the Plaintiff to set aside such judgment and the court may, upon good cause shown, and upon the Defendant furnishing to the Plaintiff security for the payment of the costs of the Default Judgment, and of such application, to a maximum of E200-00, set aside the Default Judgment on such terms as to it seems meet".

Let me interpolate at this juncture to consider the preliminary issues raised by the Respondent in relation to the security for costs and the dies of this application pursuant to the foregoing **Rule of Court.** It is

Respondent's contention, that the Applicant cannot seek to invoke the protection of **Rule 31 (3) (b),** because the Applicant has failed to tender the E200-00 costs prescribed by the Rule, and that secondly, the application by the most conservative computation, was commenced 30-35 days after the Applicant became aware of the Default Judgment, clearly in contravention of the 21 days period expressly prescribed by **Rule 31 (3) (b).** Let me say straightaway here, that Respondents contention in relation to the issue of security for costs is clearly misconceived. I say this because it is apparent ex facie the Applicants Founding Affidavit, that she tendered security for costs. This is demonstrated in paragraph 96 of the Founding Affidavit, to be found on page 68 of the book, wherein the Applicant averred thus:

" 96. I hereby tender security for costs in the sum not exceeding E200-00 as security for costs herein in terms of **Rule 31** " I agree entirely with **Mr Mdladla** for the applicant, that by the foregoing averment, the Applicant has fulfilled the requirement of security for costs pursuant to **Rule 31 (3) (b).** Respondents contention on this wise is therefore unmaintainable in the circumstances. On the question of the dies of the application, I agree in toto with the Respondent, that the dies of

the application had extinguished before same commenced. I say this because, even if I were to accept Applicants version, as depicted in paragraph 6 of her Founding Affidavit, that she only became aware of the Default Judgment on the 8th of April, 2009, during the meeting with the respondent's Managing Director, Ian Williams, the application would still be outside the 21 days period statutorily prescribed for same. The question that arises at this juncture is, should the court throw this application into the waste bin, like a piece of unwanted meal by reason of this fact, as is urged by the Respondent? I do not think so. I say this because the universal trend is towards substantial justice. Courts across jurisdictions have long departed from the era when justice was readily sacrificed on the altar of technicalities. The rationale behind this trend is that justice can only be done if the substance of a matter is considered. Reliance on technicalities tends to render justice grotesque and has the dangerous potentials of occasioning a miscarriage of justice. I have expressed this self same view in several of my decisions. The most recent being the case of **Phumzile Myeza and others V The Director of Public Prosecutions and another Case No 728/2009, Judgment of the 28th of February 2011 (unreported).** In that case, whilst departing

from the judicially settled requirement, that for a litigant to be entitled to a declaration that his fundamental right to a fair and speedy hearing within a reasonable time, pursuant to **Section 21 (1) of the Constitution of The Kingdom of Swaziland Act, 2005,** has been violated, the litigant must demonstrate that he had asserted his right prior to institution of litigation, I had this to say:-

> "I must say that I am contounded by the very proposition, that this factor is a precondition to the enforcement of the fundamental right of fair hearing enshrined in the constitution. I am of the firm conviction, that this factor resides more in the realm of forms and formalities, rather than substance, and therefore, should not count greatly in the determination of this matter. I say this irrespective of the reasons advanced by case law in honour of it... I hold the view, that to rely on forms and formalities to hamstrung the very constitutional right which **Section 21 (1)** strives to protect, is in itself unconstitutional.

The universal trend is that courts are interested in substance rather than mere form. This is because the spirit of justice does not reside in forms and formalities, nor in technicalities, nor is the triumph of the administration of justice to be found in successfully picking ones was between the pitfalls of technicalities. Justice can only be done, if the substance of the matter is considered. Reliance on technicalities leads to injustice. The court will therefore, not ensure that mere form or fiction of law introduced for the sake of justice should work a wrong, contrary to

the real truth or substance of the case before it". I am delighted to note that I am not alone in the foregoing proposition. The Supreme Court of Swaziland, the Apex court in the land, made a similar pronouncement in the celebrated

case of **Shell Oil Swaziland Ltd V Motor World (Pty) Ltd t/a Sir Motors Case No 23/2006 (unreported) at page 23.** The very illuminating dictum of Tebutt JA, on this question at paragraph 39, to my mind is worthy of restatement. His Lordship declared as follows:-

> 39 The Learned Judge *a quo* with respect, also appears to have overlooked the current trend in matters of this sort, which is now well recognized and firmly established, *viz* not to allow technical objections to less than perfect procedural aspects to interfere in the expeditious and if possible, in expensive decisions of cases on their real merits (see e.g. the *dicta* to that effect by **Schreimen JA** in **TRANS-AFRICAN INSURANCE CO LTD VS MALULEKA 1956 f2) SA 273 (A) AT 278G. FEDERATED TIMBERS LTD V BOTHA 1978 (3) SA 645 (A) AT 645 C-F NELSON MANDELA METROPOLITAN MUNICIPALITY AND OTHERS V GREYVENOUW CC AND OTHERS 2004 (2) SA 81 (SE).** In the latter case the court held that (at 95F-96A paragraph 40)

' The court should eschew technical defects and turn its back on inflexible formalism in order to secure the expeditious decisions of matters on their real merits, so avoiding the incurrence of unnecessary delays and costs'. 40 The

above consideration should also be applied in our courts in this Kingdom. This court has observed a tendency among some judges to uphold technical points *in limine* in order it seems I would dare to add, to avoid having to grapple with the real merits of a matter. It is an approach which this court feels should be strongly discouraged" More to the foregoing, are the words of wisdom by **Van de Heever JA,** in the case of **Andile Nkosi V The Attorney General, Appeal Case No 51/99 at page 7,** where his Lordship declared thus:-

> "Rules governing procedure, such as rules of court, are not made to enable lawyers representing the parties to a dispute without advancing the resolution of the dispute in any way. They are guidelines aimed at obliging the litigants to define the issues to be determined, within a reasonable time, and enabling the courts, as a consequence, to organize their administration as quickly, effectively and fairly as possible".

It is by reason of the totality of the foregoing, that I must refuse **Mr M Mabuza's** entreaties to discard this whole application on these technical grounds, but will proceed to consider the merits.

In coming to this conclusion, I am also mindful.of the fact that even if I were to countenance the technical grounds urged, I am still obliged, as is rightly contended by **Mr Mdladla,** to consider this application pursuant to **Rule 42 (1) (a)** of the rules of this court, as well as the

Common Law, in the interest of substantial justice. The foregoing said and done, let us now consider the substance of this matter.

Now, an applicant seeking the courts indulgence for rescission of judgment pursuant to **Rule 31 (3) (b)** of our **Rules,** must show good cause, as demonstrated by that legislation.

The fundamental parameters that an applicant must demonstrate in showing good cause have been judicially settled. In his work entitled **"Superior Court Practice" Juta 1995, at Bl 201-202, Erasmus,** states them to be as follows :-

1. The applicant must give a reasonable explanation of his default, if it appears that his default was unlawful or that it was due to gross negligence, the court should not come to his assistance.

2. His application must be bona fide and not made with the intention of merely delaying the Plaintiff s claim.

3. The Applicant must show that he has a *bona fide* defence to the Plaintiff s claim. It is sufficient if he makes, out a *prima facie* defence in the sense of setting out averments which if established at the trial, would entitle him to the relief asked for. He need not deal fully with the merits of the case and produce evidence that the probabilities are actually in his favour.

The foregoing parameters were given judicial approval by **Jones AJA in Colyn V Tiger Food Industries Ltd t/a Meadow Feed Mills (cape) 2003 (6) SA 1 (SCA), at paragraph (11) page 9,** where his Lordship stated as folio ws:-

"...the courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default (b) by showing that his application is made bona fide and (c) by showing that he has a *bona fide* defence to the plaintiff s claim which prima facie has some prospect of success..."

It is worthy of note that a re-statement of the foregoing parameters in courts of this Kingdom has rendered them sacrosanct See **Johannes Manguluza Tsabedze V Swaziland Development and Savings Bank and 2 others Case No. 257/2009, The African Echo Pty Limited t/a The Times of Swaziland and Another V Thulani Mau Mau Dlamini Case No 3526/2000, Sarah Masina V Thabsile Lukhele and Another Case No 2019/2008.**

Let us now proceed to examine these parameters *ad seriatim vis a vis* the facts stated, to discover if this application has merits

1. Reasonable explanation for default

What the court has to determine here is whether the allegations of fact in the applicant's founding affidavit, demonstrate that the applicant was not in willful default in attending court.

The Learned Author Erasmus, in the text, **The Superior Court Practice Juta 1995 at Bl-202,** states the following as the elements that must be established in proving willful default

> "Before a person can be said to be in willful default, the following elements must be shown
>
> a) Knowledge that the action is being brought against him.
>
> b) a deliberate refraining from entering appearance, though free to do so; and
>
> c) A certain mental attitude towards the consequences of the default".

The foregoing principles were given judicial backing in the case of **Harris V ABSA Bank Ltd t/a Volkskas, 2006 (4) SA 527 (1) paragraph 8, page 530,** in the following words,

per Moseneke, J

"Before an Applicant in a rescission of judgment application can be said to be in "willful 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" The facts upon which the applicant contends that she is not

in willful default are as elucidated in paragraphs 18 to 23 of the founding affidavit, as appear on pages 41 and 42 of the book of pleadings, as follows:-

> "18. Clause 1.1.1 of the building contract stipulates that the address chosen by me as my *domicilium citandi et executandi,* is Portion 215 of Farm Dalriach, Swaziland .which address is not the address at which the Respondents Summons was served according to the sheriffs return of service.

19. Thus, the Respondent's summons was never served on me, it was served on an incorrect address, which I never chose as any *domicillium citandi et executandi* and which is unknown to me, and the Respondent's summons was never brought to my attention. For this reason alone, I submit that the Default Judgment granted against me ought to be rescinded.

20 Even if the Respondent's summons had been served at the correct address on 9th March 2009, I would not have known about the summons.

21 As at 9th March 2009, the Respondent was still present at the address I chose as my *domicillium citandi et executandi,* being the site where the Respondent was supposed to construct a dwelling in terms of the building contract, and I was not present on the site at the time. In this regard, I point out that I live and work in South Africa, at the addresses referred to in paragraph 1 above, and on 9th March, 2009, I was in South Africa and not in Swaziland (in particular not at the site).

22 In the circumstances, I did not receive the Respondent's summons and was not aware (until 8th April 2009 by which time Default Judgment had already been granted against me) that the Respondent had instituted action against me.

23. Had the Respondent's summons come to my attention, I would have defended the Respondent's action (as I have already stated) in view of the fact that I have a valid and *bona fide* defence to the Respondent's action".

In answer to the foregoing allegations of fact, the Respondent contended *replicando,* as follows in paragraphs 13.1 to 13.3 of the answering affidavit, to be found on pages 199 to 200 of the book of pleadings:-

13.1 The Applicant has, as her explanation for default to file a notice to defend alleged, disingenuously so, that the summons, as appears ex facie the sheriffs return of service, were served at Portion 215 of Farm 188, Pine Valley, which is an incorrect *domicillium citandi et executandi,* as appears *ex facie* the construction contract.

13.2 Notwithstanding that the summons were served at Portion 215 of Farm Pine Valley, it is incontroverted, that the aforementioned address is the construction site, where at Portion 215 of Farm 188, Dalriach, is situate, and the same address where

the summons were served by the Deputy Sheriff. By the Applicants own admission at paragraph 21 and 31.2 of the founding affidavit, it is apparent that the summons were served at the correct address being the construction site. It is further clear 215 of Farm 188, Dalriach is the same location as the address cited in the Deputy Sheriffs proof of service. I further refer the above Honourable Court to clause 1.13 of the construction contract which is annexed to the Applicants affidavit and is marked "FA2". The aforesaid clause clearly indicates that the construction site is situated at the address upon which the Deputy Sheriff served the summons. It is therefore, clear that the two addresses referred to herein are used interchangeably in the construction contract.

13.3. I submit that, notwithstanding that the Applicant was not present at the construction site whereupon the summons were served, service upon the aforementioned *domicillium* constituted good and proper since, despite the fact that the Applicant is known to be resident abroad and despite her having chosen the aforesaid *domicillium* voluntary and well aware that she was resident in South Africa. From the foregoing it is clear that the Applicant does not have reasonable and acceptable explanation for her default".

Having carefully considered the totality of the papers serving before me, I have no doubt at all, that the address on the sheriff return of service, which is Portion 215 of Farm 188, Pine Valley, is the same as the chosen *domicillium* of the applicant, which is Portion 215 of Farm

188 Dalriach. It is obvious by a close reading of the papers that these addresses were used interchangeably in the building contract to refer to the construction site. This fact is clearly demonstrated by annexure 'FA 2' the contract between the parties.

Paragraph 1.1.1 of FA 2 on page 72 of the book, demonstrates the domicillium as Portion 215 of Farm 188, Dalriach, Swaziland. Paragraph 1.1.3 of FA2 at page 73 of the book demonstrates the construction site as Portion 215 of the Farm 188, Pine Valley. It is common cause in this application, that the construction site is the Applicants *domicillium* which puts it beyond disputation, as I have already said, that the two addresses were used interchangeably to denote the same construction site. It is therefore incontrovertible as contended by the Respondent, that the service which was effected at the construction site was effected at the applicants chosen *domicillium* and I so hold.

The question that must be asked at this juncture is, whether the mere fact that the service was effected at the applicants *domicillium* is sufficient to establish willful default as is urged by the Respondent?

I think not. I say this because it is common cause that at the time of the service at the *domicillium* which is the construction site, the said

construction site was in the possession of the Respondent. It is common cause that the applicant who is ordinarily resident in the Republic of South Africa, was neither in Swaziland nor at the construction site at the time of the service. The paramount consideration in establishing willful default, as I have hereinbefore demonstrated, is not the fact of service *strictu sensu,* but the fact that the applicant had knowledge of the action brought against her and deliberately failed or omitted, to take the requisite steps to avoid the default. There is no evidence before me demonstrating that the summons which was effected by affixing same at the main entrance of the construction site which was then in the Possession of the Respondent, was ever brought to the notice of the applicant, who by the respondents own showing, as I have hereinbefore demonstrated, was ordinarily resident in South Africa at the time of service and was not in Swaziland at that material point in time. I find a need to stress here that this material fact is not disputed throughout the tenure of this application. There is also no evidence to show that the applicant having knowledge of the said processes failed or omitted to take the requisite steps to avoid the default.

It is my considered view in the light of the totality of the foregoing, that the allegation of fact of the applicant when juxtaposed with the laid down principles that must guide the court on these issues, vindicate the applicants cries that she is not in willful default and I so hold.

2) Bona fides of Applicant's application It was argued by **Mr Mabuza,** that the application is not bona fide and is aimed solely at frustrating and delaying the Plaintiff from enjoying the benefit of its judgment. He called in aid minutes of a meeting between the parties held in Sandton, which appears on pages 230 to 234 of the book, contending, that the application only seeks to frustrate and abuse the process of the court, via the applicant flexing her financial muscle and her position of influence. He drew the courts attention to portions of the minutes where the applicant states that she is not to be "messed with" and allegedly threatens to make life "difficult" for the Respondent in the event that they do not bow to her demands.

He also further drew the courts attention to where the applicant says that she can afford to bankroll the project but the Respondent cannot. He also argued that this application which is argued *2½* years after the

applicant got to know of the Default Judgment shows lack of bona fides.

Mr Mabuza finally submitted that there can be no doubt as far as the lack of bona fides is concerned. It was argued *replicando* **by Mr Mdladla,** that there are letters on the file, to show that the applicant has been chasing this matter to be heard. That the applicant cannot delay the hearing of this matter because she has a draw down facility.

Now, I hold the view, that it cannot be disputed on the facts stated, that the applicant brought this application in an honest attempt to set aside a judgment obtained in default against her. The amount awarded against the applicant in the Default Judgment is quite substantial as I have hereinbefore demonstrated. It is also obvious that the amount awarded was not based on an unanswerable case, as it were. It is therefore obvious to me that the application instant is a genuine attempt to set aside the default judgment in order to have the opportunity to defend the action. I will disregard the allegations of **Mr Mabuza,** in relation to the activities of the applicant at the meeting between the parties, as misconceived. This is because I hold the view, that what transpired at the said meeting cannot now be

advanced as demonstrating lack of bona fides on the part of the applicant.

On these premises, I find that this application is *bona fide.* 3) Bona fide Defence

Now, **Erasmus** *[supra)* at page BI- 203-4 states the requirements for establishing a bona fide defence as follows:-

" The requirement that the applicant for rescission must show the existence of a substantial defence does not mean that he must show a probability of success, it suffices if he shows a *prima facie* case, or the existence of an issue which is fit for trial. The applicant need not deal fully with the merits of the case, but the grounds of defence, must be set forth with sufficient detail to enable the court to conclude that the application is not made merely for the purpose of harassing the respondent..." Furthermore, in **Johannes Manguluza Tsabedze V**

Swaziland Development and Savings Bank and 2 others (supra)

Masuku J declared thus " The test to be met in this regard, it would appear to me, is akin to that required of a defendant faced with the calamitous possibility of an application for summary judgment being granted against him. The test was concluded in

the following terms by **Brink J,** in **Grant V Plumbers (Pty) Ltd 1949 (2) SA 470 (0) at 478** " ...i.e. he has made sufficient allegations in his petition which if established at the trial would entitle him to succeed in his defence".

It is obvious to me from a close reading of the papers that the defence the Applicant seeks to set up is two edged. One side deals with the claim by the Respondent for the sum of E25, 000-00 in respect of design fees, and the second side deals with the rest of the claim. I find it convenient at this juncture to first consider the defence in relation to the design fee of E25, 000-00. The grounds upon which Respondent premised its claim on this issue, are clearly decipherable from paragraph 13.6 of Respondent's affidavit to be found at page 201 of the book,

wherein Respondent contends as follows:-

> " The Applicant is indebted to the Respondent in the sum of E25,000-00, for plans and designs it amended pursuant to and upon being advised by the Applicant that she had only been advanced a loan in the sum of E3,000,000-00 instead of the E4,021,941-00, which had previously been agreed upon for the building project. The plans had already been drawn pursuant to the initial quotation of E4.021, 941-00 for the whole project; however, upon being advised by the Applicant of a lesser amount for the

project, it was then necessary to amend same to fit within the E3, 000,000-00 figure. Clause 6 of the construction agreement provides as follows:-

"Should any variation be of such a nature that it is necessary to amend, re-draught or re-print, any plan...the employer shall be liable for all costs resulting from this" By her own admission at paragraph 28.5, the plans were accordingly amended. Upon amendment of the plans, I duly furnished the applicant with an invoice of E25,000-00, which to date has not been paid despite demand, no defence has been raised by the Applicant for non-payment of the aforementioned amount. I annex hereto an electronic mail message email requesting payment including the invoice marked "GD14" and "GDI5" respectively". Now the defence that the Applicant seeks to set up in response to the claim *ante* is best summarized as follows:-

That prior to the conclusion of the building contract, the Applicant and the respondent had orally agreed that the Respondent would be paid E80, 438-82 to produce plans, which were produced by the Respondent and paid for by the Applicant. That amended plans were subsequently prepared by the Respondent and that in regard to the initial and revised plans and bills of quantities it was never agreed that the Respondent would be paid any further amounts in regard thereto,

over and above the agreed fee of E80, 438-82. In particular, it was never discussed or agreed that the Respondent would be paid a fee for amending the initial plan and bill of quantities.

That for the Respondent to be entitled to the alleged payment, it must demonstrate pursuant to clause 6 of the building contract, that such variation was assessed between the parties and agreed in writing.

That since the Respondent does not allege in its particulars of claim that the value of the revised plan was assessed between the Respondent and the Applicant, or was agreed to in writing, or at all between the Respondent and the Applicant, which is in any event denied by the Applicant, the Respondent is not entitled to payment at all in respect

of the revised plans. See paragraphs 28, 28.2 - 28.2, 29, 30, 81, 82 and 91 of the Founding Affidavit. Now, since both parties urge Clause 6 of the contract between them, it is therefore expedient for me to have recourse to that Clause of the contract, to see if same aides

the defence which the Applicant seeks to set up. The contract between the parties is exhibited to the Applicants founding affidavit as

Annexure FA2 Clause 6, thereof, which is headed VARIATIONS, and

which appears on page 77 of the book of pleadings, is couched in the following language,

> "The employer may from time to time order variations or modifications of designs; quality or quantity of works as shown on drawings provided that no variations shall vitiate this agreement, provided further that any variation in terms of this Clause shall be given in writing. The contractor shall have a triplicate site instruction book on site at all times, solely for this purpose. Should any variation be of such nature that is necessary to amend, re-draught or reprint any plan or submit such a plan to the local Authority, the employee shall be liable for all costs resulting from this.
>
> The value of any variation shall be assessed between the Contractor and Employer and agreed in writing, and shall be paid to the contractor together with the next payment due to him in terms of this contract, if such work is done to the Employer's Satisfaction".

The language of the foregoing clause puts it beyond dispute, that any variations to the plan or design of the building was to be in writing and the assessment of such variations was to be agreed by the parties in writing. This naturally raises the question as to what must befall the cost of the variation of design claimed herein by the Respondent, which it is common cause was not in writing? To my mind, this question raises an issue which is fit for trial. On these premises, I hold

that the Applicant's averrals demonstrate a *bona fide* defence to the claim on this wise.

On the second tier, the Respondent's claim is that the applicant failed to pay the complete amount on the third and forth certificates of payment, within the time limits stipulated in the contract between the parties for said payment.

Consequently, on or about the 23rd October 2008, the Respondent instructed its attorneys to cancel the agreement. The applicant in setting up this defence calls in aid an alleged oral amendment of the building contract, which purportedly took place between the parties on the 30th of September 2008 and 6th of October 2008, respectively. The Applicant alleges that this oral amendment became necessary because Standard Bank, which is the financer of the construction was dissatisfied with the activities of the Respondent. It is the Applicant's contention, that by the oral agreement of the 30th of September 2008, that the Respondent and one Amos Ngwenya (Ngwenya) of Ngwenya Wonfor & Associates W&A, would perform audit of the materials on site. The Respondent would submit completed and approved plans to Ngwenya to enable him to finalize

the audit. That an independent engineer or architect would be required to be appointed to sign the certificates of payment as required by Standard Bank. That at the meeting of 6th October 2008, it was agreed, that the Respondent's Managing Director, Williams, would liase with Standard Bank and Ngwenya, to get an understanding of how to complete the plans. Once the plans were complete, a project manager would sign off claims to be submitted to Standard Bank (i.e. approve payment certificates) instead of the applicant. The Project Manager would meet with the Respondent weekly to reconcile and check current and past claims, viz 1st, 2nd, 3rd and 4th payment certificates, including bills of quantities. That inconsequence of the oral amendment to the building contract, the Respondent would only become entitled to payment in respect of the balance of the 3rd & 4th payment certificates, once the Respondent had submitted completed and approved plans to Ngwenya, and the Respondent and Ngwenya had performed an audit of the materials on site, a project manager was appointed, and the project manager had met with the Respondent and had reconciled, checked and approved of the 3rd & 4th payment certificates. Furthermore, the Respondent would only become entitled to payment in respect of further payment certificates, if checked and

approved of, by the appointed project manager. Applicant further alleges, that the Respondent failed to liase with Ngwenya to perform an audit of the materials on site until after it purportedly cancelled the contract on the 20th of October, 2008. The Respondent failed to submit completed and approved plans to Ngwenya. The Respondent's Managing Director, Williams, did not attend a meeting with the applicant to discuss and agree to the appointment of a Project Manager. Consequently, no Project Manager was appointed. Therefore, neither of the claims, the 3rd & 4th certificates or any subsequent ones were checked and approved of by an appointed Project Manager. Rather, on the 20th of October 2008, Respondent purported to cancel the building contract via a faxed letter to its attorneys. Applicant contends that the purported cancellation of the building contract is invalid. That such cancellation is tantamount to a repudiation of the sale agreement by the Respondent, thus entitling the applicant to cancel the sale agreement, which it did.

That since the Respondent failed to honour the terms of the oral amendment to the building contract, it is not entitled to payment of the balance on the 3rd and 4th building certificates. That the value of the work done by the Respondent is E843, 156-66. That since the

Respondent has been paid a total of E784, 224-00, it is only entitled to be paid a further amount of E 58,932-66, which amount the Applicant has offered to the Respondent, but was rejected by the Respondent. In furtherance of the contention that there was a subsequent oral amendment to the building contract, **Mr Mdladla** urged several correspondence between the parties, to be found at different pages of the book of pleadings. I will endeavor to reproduce some portions of these correspondence for ease of clarity in this judgment.

Now on pages 230 to 234 of the book appears the minutes of a meeting held in Sandton on Monday 6th October 2008, between **Sandanezwe Enterprises Trust [Applicant) and Ian Williams of GD 1 (Respondent).** The resolution arrived at the meeting appears on page 234 of the book in the following terms :-

'The following was resolved:

1. *GD 1 would contact the Bank to get an understanding of what was incomplete on the plans.*

GD 1 understood that a Project Management Clerk of Works and QS would sign off claims, meet with GD 1 weekly or fourth nightly, reconcile and check future claims against the bill of quantities.

3. *The client will sign the claims as advised by the Bank and is the norm.*

4. *GD 1 would treat the client in a professional manner and TW would give attention to the project if and when it is needed as he has a site Manager and Foreman for that purpose and the client will treat GD I with the same professionalism.*
5. *GD 1 would respect the Bank's procedures for payment which included as what they expected, signing of claims by their clerks of Works or Project Manager, as to the client request and approval, visit and approval by QS of site and claims.*
6. *GD 1 would give weekly updates to the client and submit a schedule of work.*
7. *GD 1 would claim payment from client...*"

Then there are also the host of correspondence between counsel as demonstrated in pages 161 to 173 of the book, on the question of the audit by the said **Mr Ngwenya.** In the light of the totality of the foregoing, I am firmly convinced that the conspectus of the averrals in the Applicants affidavit, raise an issue which is fit for trial.

That is the question of the purported oral amendment of the building contract and its bearing on the amounts allegedly owed the Respondent in this transaction. In coming to this conclusion, I am mindful of the fact, as I have hereinbefore demonstrated, that it is not for the applicant to show the probability of success, it suffices if she

demonstrates a prima facie case, or the existence of an issue which is fit for trial. I am satisfied from the facts presented, that the Applicant has scaled this hurdle. I therefore hold, that she is entitled to the rescission sought both pursuant to **Rule 31 (3) (b),** as well as the Common Law. This is because the prerequisite of a recession under the Common Law, that is, "reasonable explanation" and "*bona fide* defence", have been met by the applicant, as I have hereinbefore demonstrated, whilst considering this application pursuant to **Rule 31 (3) (b).** See **Bhekiwe Vumile Dlamini N.O** (in her capacity as **Trustee for the S.M. Trust) V Standard Bank Swaziland Limited and Others Case No 1125/2009 (unreported) Herbstein *et al* Civil Practice of the Supreme Court of South Africa (4th edition) page 69.**

Having come to the foregoing conclusion, the matter ought to end here naturally. However, I find myself unable to resist **Mr Mdladla's** vociferous entreaties to also weigh this application against the Provisions of **Rule 42 (1) (a)** of the **Rules of this Court.** I chose to succumb to his entreaties and embark on this journey, no matter how academic it might be perceived.

Now **Rule 42 (1) (a)** of the rules of this court provides.

> **" The court may in addition to other powers it may have, *meri motu* or upon the application of any party affected, rescind or vary (a) an order or judgment erroneously granted in the absence of any party affected thereby".**

In the case of **President of the Republic of South Africa V Ersenberg and Associated 2005 (1) SA 247 at 264 H. J. Erasmus J,** reproduced the words of **Nepgen, J** in **Stander and Another V ABSA Bank 1997 (4) SA 873 (E) at 882 E-F,** on this subject matter, as follows:-

" It seems to me that the very reference to " the absence of any party affected" is an indication that what was intended was that such party, who was not present when the order or judgment was granted, and who was therefore not in a position to place facts before the court which would have or could have persuaded it not to grant such order or judgment, is afforded the opportunity to approach the court in order to have such order or judgment rescinded, or varied, on the basis of facts, of which the court would initially have been unaware, which would justify this being done..." Furthermore, in **Nyingwa V Moolman N.O 1993 (2) SA 508 (TK GD) White J,** considered this question and declared thus:

" It therefore seems that a judgment has been erroneously granted, if there existed at the time of its issue a fact of which the judge was unaware, which would have precluded the granting of the judgment and which would have induced the judge if he had been aware of it, not to grant the judgment". Then there is the case of ***Bakoven V G.J. Howes (Ptu) Ltd 1992 (2) SA 466 at 471 EG,*** *wherein* ***Erasmus J,*** *expounded the scope of applicability of* ***Rule 42 (1) (a)*** *of the* ***Rules of the Court of South Africa,*** *whose wordings are in pari materia with our own* ***Rule 42 (1) (a),*** *and declared as follows:-*

"Rule 42 ***(1) (a),*** *it seems to me, is a procedural step designed to correct expeditiously an obviously wrong judgment or order. An order or judgment is 'erroneously granted" when the court commits an error in the sense of a 'mistake in a matter of law appearing on the proceedings of a court of record" (The Shorter Oxford Dictionary). It follows that a court deciding whether a judgment was erroneously granted is like a court of appeal, confined to the record of proceedings. In contradistinction to relief in terms of* ***Rule 31 (2) (b)*** *or under the Common Law, the applicant need not show 'good cause' in the sense of an explanation for his default and a bona fide defence... Once the applicant can point to an error in the proceedings, he is without further ado entitled to a recession".*

It appears to me from the totality of the foregoing, that the operative criteria is that if the court commits an error in the record, in the sense of a mistake, which if it had been aware of, would have induced it not to grant the judgment, then the court in that instance would be entitled to rescind the judgment in question.

It is worthy of note that the foregoing principles have gained judicial approval in this jurisdiction. Some of the cases in which these principles have been employed, include, but are not limited to the following. **Johannes Manguluza Tsabedze V Swaziland Development and Saving Bank and Others (supra) Tasneems Investments (Pty) Ltd V Choice Investments (Pty) Ltd Civil Case No 2871/2009, The Attorney General V Austin Bonginkosi Nhlabatsi and Others Case No 91/2010 (unreported) Bhekiwe Vumile Dlamini NO (in her capacity as Trustee for the S.M Trust) V Standard Bank Swaziland Limited and Others (supra).**

Now, let me consider the allegations of fact contained in the Applicants affidavit, to ascertain if same are juxtaposed with the foregoing principles, they vindicate **Mr Mdladla's** vociferous entreaties in this application. It is obvious from the facts stated, that

the Applicant urges in aid of this issue, two alleged errors, which she contends are *ex facie* the record namely:

1] The agreement has an arbitration clause which was not brought to the attention of the court, therefore the court proceeded in error in granting the Default Judgment.

2) Paragraphs 12.2, 12.3, 12.5, 12.6 and 12.7 of the Respondent's Particular of Claim, are for unliquidated amounts, therefore oral or documentary evidence ought to have been tendered before the court proceeded to judgment.

Let me now examine these alleged errors to see if there is any substantiality or efficacy in the Applicant's contention on this wise,

1) Arbitration clause

It is a trite principle of law, one of universal and Hallowed application, respected and reverred across jurisdictions, that, for arbitration proceedings to arise, there must have been an agreement providing for such proceedings when necessary. Such an agreement may be expressed in a document signed by the parties, or in an exchange of letter's, telex, telegrams or other means of communication, which

provide a record of the arbitration agreement, or in an exchange of points of claim or of a defence, in which the existence of the arbitration agreement is alleged by one party and not denied by another.

In *casu,* the building contract between the parties contains an arbitration clause, which is contained in paragraph 14 thereof, to be found on pages 83 to 84 of the book of pleadings, in the following terms :-

> "*14. Any dispute or difference between the contractor and the employer arising out of and during the duration of the contract or upon termination or cancellation thereof shall be referred to arbitration. The arbitrator shall be appointed at the request of either party by the President for the time being of the Institute of architects. The Arbitrator shall be held in terms of the arbitration Act The arbitraton is expressly authorized to determine the format and procedure of the arbitration and in so doing, and more particularly with regards to pleadings, discovery of the documents and other matters of that kind, the arbitrator shall in sole discretion determine the dispute of difference as expeditiously and as cheaply as possible and will resort to as little formality as is reasonably practicable*"

I agree entirely with **Mr. Mdladla** that the use of the peremptory "shall" makes the question of arbitration mandatory in this transaction. Besides, it is trite learning, that, except where a contrary intention is expressed in the agreement, an arbitration agreement is irrevocable except by agreement of the parties or by leave of the court or a Judge.

The Learned Authors **Herbstein** *et al,* in their work **The Civil Practice of the Supreme Court of South Africa, pages, 261 to 262,** put the foregoing position of the law, in the following parlance.

> *"A person who has agreed to submit to arbitration any differences he might have with another person cannot, except in special circumstances, have those differences settled by a court of law. In an English case more than a century ago a court held:-*
>
> *'If the parties choose to determine for themselves that they will have domestic forum instead of the ordinary court, under the Act of Parliament (In south Africa)* ***The Arbitration Act 1965)*** *and since that Act was passed, a prima facie duty is cast upon the courts to act upon such an agreement'*
>
> *When a contract contains a term that disputes arising out of the contract should be referred to arbitration, neither party is entitled to the assistance of*

the court, unless the matter has first been submitted to arbitration or unless the right to insist upon arbitration has been waived"

See **Davies v South British Insurance Co. (1885) 35C 416** approved in **Glanfield v ASP Development Syndicate Ltd 1911 AD 374.**

I see no contrary intention expressed by the parties in the building contract serving before court and none is urged in this application. In the circumstances, whilst agreeing with **Mr. Mabuza** that the mere fact of the arbitration clause does not oust the jurisdiction of the court, I am however firmly convinced, that the arbitration clause should have been urged upon the court, and leave should have be sought and granted by the court, before the case was proceeded with, even on default basis, regard being has to the fact that the case ought to have been referred to arbitration in the first instance.

I am guided on this matter by the pronouncement of the court in **Parekh v Shah Jehan Cinemas fPtv) Ltd and Others 1980 *(1)* SA 301 D at 305 E-H,** where Didcott J, declared thus,

"*An arbitration agreement does not deprive the court of its ordinary jurisdiction over the disputes which it encompasses. All it does is to oblige the parties to refer such disputes in the first instance to arbitration, and to make it a prerequisite to an approach to the court for a final judgment that this should have happened*"

It appears to me therefore, from the totality of the foregoing, that **Mr. Mdladla's** contention has much to commend itself for, that this is an error which if the court had been aware of, would have induced it not to grant the said Default Judgment.

2. Oral Evidence or Affidavit Proof of Damages On this issue I agree entirely with **Mr. Mdladla,** that the claim expressed in paragraphs 12.2 to 12.7 of the Respondents claim, is for unliquidated amounts. By **Rule 3(3)(a)** of the rules of this court, the Respondent was required to tender an affidavit in proof of this amount or tender oral evidence. There is no evidence before me to show that the Respondent either tendered oral evidence or filed an affidavit in proof of these amounts before the court proceeded to the Default Judgment in relation of

same. This is a mistake on a matter of law apparent on the proceedings of the court which entitles the Applicant to the rescission sought.

In the final analysis, I hold that the Applicants application has merits. On these premises, I make the following orders;

1) The Default Judgment order granted against the Applicant on the 26th of March 2009, do and is hereby set aside.

2) Applicant shall bear the costs of this application.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 25th DAY OF MARCH.2011

OTA J.
JUDGE OF THE HIGH COURT