CONCILIATION. MEDIATION AND ARBITRATION COMMISSION (CMAC)

HELD AT MANZINI STK 025/09

In the matter between :-

ZURIGO INVESTMENTS (PTY) LTD APPLICANT

And

VUSI MABUZA RESPONDENT

RULING:

APPLICATION FOR RESCISSION OF AN EX-PARTE ARBITRATION AWARD

1. This ruling pertains an application for rescission of an arbitration award issued by myself on the 20th October, 2009 pursuant to an arbitration hearing that proceeded ex-parte, i.e. in the absence of the present Applicant.

2. The ex-parte arbitration hearing was held at the Commission's (CMAC's) offices situate at 1st Floor, Government Complex, Siteki in the Lubombo region on the 8th September, 2009.

3 BRIEF BACKGROUND

3. A brief background to the matter as captured from the Record stands as follows:

3.1 On or about the 11th February, 2009 the present Respondent launched a report of a labour dispute with the Conciliation, Mediation and Arbitration Commission (otherwise known as CMAC) hereinafter referred to as the Commission, in terms of Section 76 of The Industrial Relations Act,2000 (as amended) hereinafter referred to as The Act.

3.2 The nature of the dispute was that of unfair dismissal and unlawful deductions by the present Applicant (as employer) from the Respondent's monthly salary. The Respondent alleged in the Report of Dispute Form that his dismissal was both substantively and procedurally unfair and went on to claim Notice Pay, Additional Notice Pay, Severance Pay, Outstanding Leave Pay, Back pay for unlawful deductions from salary for a period of six (6) months, as well as Maximum Compensation for unfair dismissal, all totaling up to E44 530-09. For full details of the issues in dispute between the parties

as contained in CMAC Form 1 (being a Report of Dispute Form) see page 1 of the record.
3.3 The aforesaid dispute was conciliated upon by Commissioner Banele Ngcamphaiala in terms of Section 80 and 81 of The Act, and on the parties' failure to reach an amicable settlement of the matter, the Commissioner issued a Certificate of Unresolved Dispute as per Section 81 (5)(a) of The Act.

See: Page 12 of the Record.

3.4 After the issuance of the Certificate of Unresolved Dispute, the parties consented to the Commission resolving the dispute through the process of arbitration, per Section 85(2) of The Act, by duly filling up and signing the Request for Arbitration Form (i.e. CMAC Form 8).

See: Page 10 of the Record.

3.5 Consequent to the request for arbitration by the parties, the Commission appointed me as arbitrator over the matter, following which, arbitration proceedings were dully commenced and

conducted resulting towards the issuance of the award sought to be rescinded by the present Applicant. In lieu of the granting of the award in

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Respondent's favour, full evidence was led by the Respondent in proof of the allegations of unfair dismissal and unlawful deductions from his salary by the Applicant. As already mentioned hereinabove, during the hearing date, being the 8th September,2009 the Applicant was not present, having defaulted to attend notwithstanding hand-delivery service of the invitation notice dated 11th August,2009 as served on the Applicant on the 13th August.2009 by the Commission's messenger.

See: Pages 35 and 37 of the Record, for the invitation notice plus hand-delivery proof of service.

3.6 This is the abridged summary of this matter's background.

4 AD MERITS OF THE APPLICATION

4. The Applicant's rescission application is brought in terms of Section 17 (6) of The Act as seen from paragraph 4 of the Applicant's Founding Affidavit, though the exact sub-paragraph of the sub-section has not been specified as the sub-section provides for three (3) different instances under which an arbitrator may vary or rescind an award. It shall, however, appear from the reading of Applicant's Founding Affidavit and oral submissions that the application is brought in terms of Section 17 (6) (a) of The Act which reads as follows:

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"17 (6) An arbitrator who has made an award may vary or rescind the award if-

(a) it was erroneously sought or erroneously made in the absence of any party affected by the award."

5. The Respondent has not filed an Answering Affidavit in opposition to the application. The Executive Director of the Commission, when faced with a similar scenario on a rescission application in the matter between Sifiso Khumalo vs. Inyatsi Construction Ltd - CMAC Case No. NHO 158/08 had this to say, and may I add, rightfully so:

"The Respondent has not filed any papers to oppose the application notwithstanding that the application was properly served on it. Nevertheless the fact that the Respondent has not filed any papers in opposition does not gnaw on my statutory responsibility to consider the application on the basis of what the record provides. The fact that the Applicant has filed an affidavit in support of his application does not make his case a watertight case so as to merit the granting of the rescission of the default judgment. For it may happen that there may be other facts in the record and other considerations which when viewed cumulatively would militate against the rescission of the default judgment. At the ej\d of

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the day, the overriding consideration is that I have to achieve justice and fairness inter-partes on one hand and on the other the administration of justice." (paragraph 14, pages 6-7).

6. As opposed to applications for rescissions in respect of rejections and/or default judgments granted in terms of Section 81 (7) (a) or (b) of The Act, there is no provision in The Act as to the criteria to be followed in rescission applications instituted in terms of Section 17 (6) of The Act. Sub-section (9) of Section 81 of The Act provides for the dies for moving an application for the rescission of a rejection of a dispute and/or default judgment granted pursuant to section 81 (7) (a) or (b) of The Act as well as the appropriate fora. Sub-section (10) of Section 81 provides the criterion and/or yardstick for adjudicating and deciding rescission applications- that being "good cause**".** There is no

similar provision for rescission applications launched in terms of Section 17 (6) of The Act.

7. Regarding procedure, however, a provision has been made in the Commission's Rules indicating the manner for adjudicating rescission applications filed in terms of Section 17 (6) of The Act. And that procedure is in pan materia to that followed in rescission applications brought in terms of Section 81 (9) and (10) of The Act. The Commission, in terms of the Rules has a discretion, either to decide

the rescission application without inviting the parties to appear before it and/or it may invite the parties to appear before it to make oral presentations in support of their cause of whether or not to grant the rescission.

See: Rule 35 as read with Rule 34 of Legal Notice No.22 of 2008.

8. The present application is being decided after the parties had been duly invited to appear before the Commission and made oral submissions. The hearing was held on the 17th March, 2010 at CMAC, Manzini, SNAT Building.

9. It is worthnoting that any rescission application either brought in terms of Section 81 (9) and (10) and/or in terms of Section 17 (6) of The Act logically follows an adjudication over a dispute conducted in the absence of one of the affected parties. Consequently, if a party that seeks to rescind a judgment that has been made in his/her absence in terms of Section 81 (10) should show and/or demonstrate "good cause" why the rescission should be granted, the same standard should as well apply to a party that seeks to rescind an award in terms of Section 17 (6) (a). Any departure from the standard yardstick provided in Section 81 (10) of The Act when adjudicating aver rescission applications brought in terms of Section 17 (6) would not

find any legal support and would therefore amount to a material misdirection. Good cause or sufficient cause is the criterion for rescission applications under the Industrial Relations Act, 2000 (as amended) in the absence of any provision to the contrary. In any event, an award made in the absence of an affected party is still default judgment and both have the same legal weight.

10. The notion of good cause or sufficient cause was clarified in the decided case of Harries vs. ABSA Ltd t/a Volkskas 2006 (4) SA (at 529) as follows.

"Whether or not "sufficient cause"[or "good cause"] has been shown to exist depends upon whether:

(a) The Applicant has presented a reasonable and acceptable explanation for his or her default
(b) The Applicant has shown the existence of a bona fide defence, that is, one that has some prospect or probability of success.

"The test whether "sufficient cause" [or "good cause"] has been shown by the party seeking relief is dual in nature, it is conjunctive and not disjunctive. An acceptable explanation of default must co-exist with the evidence of reasonable prospects of success on the merits. It is not sufficient if only one of the two requirements is met. For

obvious reasons, a party not showing no prospects of success on the merits will fail in an application for rescission of a default judgment against him, no matter how reasonable and convincing the explanation for his default And ordered judicial process would be negated if on the other hand, a party who could offer no explanation of his default than his disdain for the Rules was nevertheless permitted to have a judgment against him rescinded on the ground that he had reasonable prospects of success on the merits."

11. The Commission has adopted and used this criterion as expounded by decided cases in a number of rescission applications.

See: Africa Cash and Carry vs. Makhosazana October - CMAC Case No. 224/09;

Creative Car Sound and Another vs. Auto Mobile Radio Dealers Association (Pty) Ltd - CMAC Case No. SIM 001/08;

Simeon Mlangeni t/a Thembalemalangeni Transport vs. Samson Zitha - CMAC Case No. SWMZ 212/08.

REASONABLE EXPLANATION FOR THE DEFAULT

12. The Applicant's explanation for the default appears from its Founding Affidavit to be two-fold. Firstly, Applicant alleges that it was not served with the invitation notice. On the other hand, it is Applicant's contention that it never, on the first place, consented to arbitration.

See: Paragraphs 8.1 and 8.2 respectively of the Founding Affidavit.

13. It needs be mentioned without any further ado that proof of the allegation of dental of consent to arbitration would render any further scrutiny of the main grounds for rescission obsolete as same would be decisive of this application. Under our law a determination of a labour dispute of right through the process of arbitration is not compulsory perse, not unless the referral of a matter to arbitration has been ordered by the Judge President of the Industrial Court.

See: Section 85 (2) of the Act.

14. Ordinarily, a determination of disputes of right through arbitration should be by voluntary consent of both affected parties, and in the absence of such mutual consent, any arbitration award would be null and void as the referral of that matter to arbitration would be nothing but a nullity.

As a result, the Commission has designed a standard form, known as CMAC Form 8, to be filled and duly signed by both parties if they have consented to a determination of an Unresolved Dispute through the process of arbitration under the auspices of the Commission. The aforesaid Form amounts to a prima facie proof of consent to arbitration and therefore, in the absence of same, an averment of denial of consent by either of the parties would most likely succeed.

15. In casu, however, a perusal of the Record adduces evidence contrary to Applicant's denial of consent to arbitration. Page 10 of the record contains CMAC Form 8, dully filled and signed by both parties consenting to arbitration. Moreover the record contains further proof of instances where the Applicant had attended other dates that had been set for the arbitration process, albeit eventually aborted. For example, page 31 contains CMAC Form 21, being an agreement to postpone an arbitration, duly signed by both parties. No argument was made by Applicant that those signatures were forged.

16. Applicant's contention that it did not consent to a determination of the matter through arbitration must therefore fail.

17. Coming to the issue of denial of receipt of the invitation notice, mention needs be made hastily that CMAC's invitations are now served by the

Commission. The fears indicated by the Applicant in paragraph 8.1 of its Founding affidavit are therefore allayed quickly. In the matter between Sipho Mastna t\a Rambo Transport vs. Zachartah Ngwenya - CMAC Case No. SWMZ 304/08, the Executive Director of the Commission made the following observation regarding service of CMAC's invitation processes:

"It is now an established CMAC practice that invitation of parties for conciliation [and arbitration] are served by the messengers of the Commission. This serves as a safeguard against a party that would unscrupulously, out of spite, lie that he served the invitation on the other party and take a default judgment against the party that is not in attendance..."

18. The proof of service as duly signed by the Applicant at page 37 of the Record, being CMAC Form 20, is prima facie evidence that service of the invitation was indeed made by the Commission's messenger, since if it was by the Respondent, he would have been required to prepare and file an Affidavit of service.

19. The invitation was served on one Mpumie Maziya, who at the material time, was employed as Secretary to the Applicant's company. The fact of Mpumie Maziya's employment as Secretary has not been, denied by

the Applicant in its papers and in fact, it was even unequivocally admitted by the Applicant during the hearing of the matter. It was therefore possible for the Applicant to get Mpumie Maziya deposing to an affidavit denying receipt of the invitation notice and/or signing any CMAC Form 20 in confirmation of receipt.

20. What makes matters worse is that Applicant alleges on paragraph 7 of its Founding Affidavit that it did not receive the invitation notice "despite the fact that an invitation letter was sent by registered mail". The basis of such an allegation is, at best, unknown, but at worse, it negatives any inference that the Applicant was not in willful default. The invitation notice had not been served on the Applicant through registered mail. Paragraph 4.3 of the award clearly specifies how the invitation was served on the Applicant, that it was hand-delivered by the Commission's messenger upon the Applicant's Secretary, by the name of Mpumie Maziya, who indicated receival thereof by signing CMAC Form 20, being CMAC's proof of hand delivery service. From the whole award there is no mention that the invitation was ever served by posting.

21. This unfounded allegation by the Applicant does not augur well insofar as demonstrating bona fides is concerned, it negatives the

genuineness of the application and renders the application rather vexatious and embarrassing.

In Creative Car Sound and Another vs. Auto Mobile Radio Dealers (Pty) Ltd, 2007 (4) SA (at 555) the court cited with approval the decided case of Collyn vs. Tiger Food Industries Ltd t/a Meadow Feed Mills (Cape) 2003 (6) SA I (SCA) where the following legal precept was made:
"With that as the underlying approach, the Courts generally expect an Applicant to show good cause- (a) by giving a reasonable explanation of his default; by showing that his application is made bona fide: and by showing that he has a bona fide defence to the Plaintiffs claim which prima facie has some prospects of success." (My emphasis).

22. It has been stated over and over again by the Commission's Executive Director that what is of major concern is whether or not the service was in accordance with CMAC's Rules, so that if this question is not answered in the affirmative, the purported service is utterly defective.

In Simeon Mlangeni t/a Thembalemalangeni Transport vs. Samson Zitha - CMAC Case No.SWMZ 212/08, the Director observed as follows:

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"...therefore service otherwise than in accordance with CMAC's Rules is utterly defective and renders the granting of a default judgment un-procedural and illegal, (at page 3).

See: also Sipho Masina t\a Rambo Transport vs. Zachariah Ngwenya - CMAC Case No. SWMZ 304/08 (paragraph 7 at page 2 thereof).

23. In the case of Sifiso Dlamini vs. L.C. Von Wissel (Pty) Ltd- CMAC Case No. SIM 001/08 the Executive Director made the following analysis regarding service of CMAC's processes, with particular reference to hand delivery service:

"Rule 9 (1) (d) (i) of CMAC Rules provides that service of CMAC process on a party to proceedings is considered proper if it is effected by hand delivery and the party being served completes and signs the relevant sections of Form 20 in acknowledgment of receipt of the invitation." (at page 6).

24. It is therefore only caution regarding compliance with the Rules that the Commission is legally bound to concern itself with. Anything beyond that, the Commission cannot be faltered and/or held its functioning or

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determination of disputes rendered indefinitive purely due to internal operations of companies and other corporate bodies. It is even worse in a case where the alleged negligent employee who neglected to notify her bosses does not confirm through a supporting Affidavit that she either ignored to hand over the invitation notice or, alternatively, that she did not ever had an encounter on the alleged date with any of the Commission's messengers as contained in CMAC Form 20 and/or that the signature thereon is not hers.

25. In the circumstances of this case, I am disinclined to find that the Applicant has been successful in establishing a reasonable explanation for the default.

BONA FIDE DEFENCE

26.The effect of the last paragraph of the quotation from Harries's case (supra) is that even if a negative finding has been made on the question of whether the Applicant has established a reasonable explanation for its default the Commission still has to consider whether the Applicant has a bona fide defence to the Respondent's case with good prospects of success as the two requirements are inextricably linked.

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27. Consequently, the second leg of the enquiry involves a determination of the question of whether the Applicant has set out allegations of fact which demonstrate a bona fide case which prima facie carries some prospects of success.

28. In an attempt to satisfy this requirement, the Applicant has alleged in paragraph 4 of its Founding Affidavit as follows:

"I state also for the record that I have a bona fide defence to the matter that requires ventilation at trial. The Respondent was found guilty of theft which misconduct warrants dismissal. The Respondent asked that the criminal charges be stayed pending settlement between the parties."

29. It was only during the hearing of the rescission application that the Applicant made an effort to elaborate on the allegations of theft. It was only then that the Applicant stated that Respondent had allegedly stolen some money from the Applicant, the exact figure of which was not mentioned. These were monies, so goes Applicant's argument that were paid by the company's customers to the Respondent, which the Respondent did not disclose to his employer.

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30. A certain letter allegedly made by one Makhosazana Fakudze was handed from the bar (i.e. by Applicant's representative during the course of the hearing) and it sought to prove that an amount of E500.00 was paid to the Applicant through the Respondent but the latter did not disclose it,

31. When sought to explain the weight to be given by the Commission to this kind of a loose document, Mr. Simelane, on behalf of the Applicant confidently responded by saying that that question is solely left to the discretion of the Commission.

32. On the face of it, the aforesaid document is just a simple letter as opposed to being an Affidavit. Secondly, the letter purports to have been prepared by and/or for Makhosazana Fakudze but has been signed by one N. Matjaka. For this obvious anomaly, the Applicant's representative attempted, albeit unconvincingly, by giving a rather flimsy explanation to the effect that this is how the sai Makhosazana Fakudze signs all documents, according to his instructions.

33. Obviously this amounts to clutching at straws and under no circumstances can it be accepted. How is the Commission supposed to know Makhosazana Fakudze's signatures unless she has signed under oath before a Commissioner of Oaths? Just mere initials for

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Makhosazana on the signature space would have done better harm than a signature of a completely different individual, the said N. Matjaka.

34. Furthermore, the aforesaid letter is dated 31st February, 2009 and yet the Respondent was dismissed on the 30th January, 2009, i.e. a whole month later and/or after the events giving rise to the main dispute in this matter. The Respondent has given evidence under oath in proof of his cause to the effect that his dismissal was both substantively and procedurally unfair. Substantively unfair in the sense that the allegation of failure to transmit certain monies paid to him by Applicant's customers was unfounded, baseless and unproven. Now any documentary proof of the theft allegations could not come after the dismissal. It is trite that evidence precedes judgment and not vice versa. Clearly by the time of Respondent's dismissal this piece of documentary evidence, shoddy as it is, was not there at all and thus could not have been the basis of the Respondent's dismissal.

35.The foregoing quotation from Applicant's Founding Affidavit (i.e. paragraph 11 thereof) coupled with the aforesaid letter of the 31st February, 2009 are the only means through which the Applicant has tried to satisfy the requirement of bona fide defence on the merits. No attempt at all has been made to answer to the point of unlawful

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deductions of the sum of E900.00 from the Respondent's salary for a period of six (6) months as well as the alleged procedural unfairness of the dismissal. Respondent's evidence regarding those issues, therefore, remains intact and uncontroverted.

36. In the decided case of Creative Car Sound and Another vs. Auto Mobile Dealers Association (Pty) Ltd (supra) the court reasoned as thus:

"...In essence the Applicants are required to demonstrate reasonable prospects of success on the merits. This in my view means that the grounds of the defence must be set forth with sufficient particularity and detail to enable the court to conclude that there is a bona fide case and that the

application is not being brought purely for the purposes of delay." (at 555).(My emphasis.)

37. Responding to the foregoing enunciation, the Commission's Executive Director in Africa Cash and Carry vs Makhosazana October (supra) commented as follows:

"In as much as the above principle was expounded in a different factual context to this application, the above principle

of law have equal relevance and application to a rescission application under the Industrial Relations Act"

" Bare and unsubstantiated allegations as regards the Applicants case would not be sufficient in discharging this onus." (Page 6).

See: Also Sifiso Khumalo vs. Inyatsi Construction - CMAC Case No. NHO 154/08 (page 8)

38. Accordingly, this being a claim for unfair dismissal coupled with unlawful deductions from an employee's salary, the requirement that the Applicant has to establish a bona fide defence, properly conceived in the context of labour laws, requires the Applicant to satisfy the Commission that the requirements set in Section 42 (2) of the Employment Act, 1980 were observed before the employee's services were terminated.

Section 42 (2) of the Employment Act, 1980 provides as follows: "(2) The services of an employee shall not be considered as having been fairly terminated unless the employer proves-

a. That the reason for the termination was one permitted by Section 36; and
b. That, taking into account all the circumstances of the case, it was reasonable to terminate the services of the employee."

39. The burden of proof in terms of Section 42 of the Employment Act is borne by the Applicant to establish on a balance of probabilities that the requirements of Section 42 of the Employment Act were satisfied before the termination of the Respondent's services was effected.

40. Bare and unsubstantiated allegations as regards the Applicant's bona fide defence would not be sufficient in discharging the onus that is thrust on the Applicant in an application for rescission of a default judgment/award.

41. After enumerating as aforegoing the meaning and/or duty that is upon an Applicant in a rescission application, the Executive Director of the Commission in Sifiso Dlamini vs L.C**.** Von Wissel (Pty) Ltd-CMAC Case No. SIM 001/08 (at page 10) went on to state as follows:
"Although the Respondent has not filed its papers in opposition to the application, he however has given evidence under oath setting out the basis of his claim for unfair dismissal. Therefore, the Applicant bears the onus of establishing a bona fide defence by, inter-alia, substantivety responding to all those allegations that have been made by the Respondent at paragraph 3 of the default judgment and set out other allegations, if need be, that ground its defence."

42 In Sikhumbuzo E. Mkoko vs. V.I.P. Protection Services - CMAC Case No. SWMZ 371/08, the following extract was made:

"Since the Applicant is burdened with the onus of proving that the Respondent's services were fairly terminated, the Applicant is required to set out comprehensively in its Founding Affidavit allegations of fact that establish a prima facie case which carries same prospects of success at trial, i.e. allegations of fact that establish on a balance of probabilities that the services of the Respondent were terminated in accordance with Section 42 of the Employment Act In this instance where the Respondent has not filed any papers, the Applicant is required to discharge this onus by admitting or denying, confessing and avoiding the allegations of facts that have been stated under oath as contained in the default judgment" (Page 6).

43. Dismissing Applicant's alleged defence on the merits, the Executive Director of the Commission in the aforesaid case of Sikhumbuzo E. Mkoko vs. V.I.P. Protection Services - CMAC Case No. SWMZ 371/08 (supra) concluded as follows:

"Basically, the reason the Respondent's services were terminated as alleged by the Applicant was because he colluded with an employee of its client in stealing corrugated iron sheets and this incident it is alleged was witnessed by its client However, the Founding Affidavit falls short of telling us who is this client who witnessed the incident Neither does the Applicant attach a confirmatory affidavit of the said client who witnessed the incident of theft. Accordingly, this piece of evidence is unreliable and is excluded by the exclusionary rule of the law of evidence as being inadmissible hearsay evidence. On this score as well, I find that the Applicant has failed to establish on a balance of probabilities a prime facie case of a fair termination of the Respondents services which carries some prospects of success." (Page 7).

44. In closing his submissions, Mr. Simelane on behalf of the Applicant, referred the Commission to the decided case of Jika Ndlangamandla vs. Zeiss Investments (Pty) Ltd t/a Zeiss Bearings and Another, Civil Case No. 3289/08 (High Court) (unreported), in particular in support of the plea that the Commission should condone the failure by Applicant to file affidavits, one by Mpumie Maziya (the company's Secretary) in proof of the denial of service of the notice of invitation to arbitration hearing, the other by Makhosazana Fakudze in proof of the unaccounted monies allegedly paid by her to the Respondent.

45. The persuasiveness of the aforementioned judgment, so goes the argument, comes from the fact that in the aforesaid judgment the High Court (per Justice Masuku T.) condoned the use of an inapplicable Rule by the Applicant when seeking to access the wells of justice, opining that to dismiss the application would be adopting too formalistic an approach.

46. With all due respect to Applicant's representative, this judgment cannot be used to cure a lacuna insofar as evidence is concerned and is therefore clearly distinguishable. In casu there are glaring gaps in Applicant's case and these gaps are damning insofar as they go to the heart of Applicant's application- being to satisfy the Commission as to the reason for the default in attending the arbitration hearing on the 8th September, 2009 as well as demonstrating the existence of a bona fide defence which carries some prospects of success on the merits of the matter.

47. No attempt at all was made by Applicant's representative, a legal one for that matter, on appreciating these serious discrepancies during the hearing of the application, to seek leave to file supplementary Affidavits. This obviously should not be construed to mean that leave would automatically have been granted as same would still be tested against the rule of thumb applicable in all application proceedings to the effect that an Applicant stands or falls by his Founding papers and the facts therein alleged.

48. Having reasoned as foregoing, I am again disinclined to make a finding that the Applicant has satisfied the second requirement of good cause. The explanation proffered for the default of appearance must when it is weighed against the Applicant's defence tip the scale in favor of granting the rescission application. In casu, both the explanation for the default as well as the alleged bona fide defence having failed, there would not be any basis for the granting of the rescission.

49. In the foregoing regard, the rescission application is dismissed. The Applicant is ordered to comply with the arbitration award within fourteen (14) days from the date of service of this ruling. This is my ruling.

DATED AT MANZINI ON THIS 30th....DAY OF APRIL, 2010

Velaphi Dlamini

(CMAC COMMISSIONER)