CIV. CASE NO.373/93

In the matter between

CASH & CARRY SWAZILAND (PTY) LTD	**PLAINTIFF/RESPONDENT**
And	
INTERCON CONSTRUCTION (SWD (PTY) LTD	**DEFENDANT/APPLICANT**
Coram	S.B. MAPHALALA – J
For Plaintiff/Respondent	MR. N. HLOPHE
For Defendant/Applicant	MR. L. HOWE

JUDGMENT
(24/01/2001)

Maphalala J:

The applicant under a certificate of urgency made an application for an order in the following terms:

1. That this application be treated as one of urgency and that for the purposes thereof condonation is granted to the applicant for the non-compliance with time limits, service and forms of service in terms of the rules of this court;

2. Rescission of the default judgement granted against the defendant/applicant on the 5th July 1999, by this court under Case No. 373/93 on such terms as this court may determine;

3. Staying execution of the aforesaid judgement;

4. Costs, but only in the event of plaintiff/respondent opposing this application.

5. Further and/or alternative relief.

The application is supported by the affidavit of one Marcus David Gudgeon who is presently a Director of the company known as Smith & Glending Construction (Pty) Limited which was formerly Intercon Construction (Pty) Limited. In the latter at the material time he served as Contracts Administrator and Quantity Surveyor.

The application is opposed by the plaintiff/respondent. The plaintiff/respondent duly filed an opposing affidavit of one Meyer Diamond who is the Director of the said company.

The facts of the dispute are adequately outlined in the affidavit of Marcus David Gudgeon that on the 18th March 1993, the plaintiff/respondent instituted action by way of combined summons against the applicant. The applicant immediately entered an appearance to defend the action and in this regard instructed its then attorneys, Harold Currie & Company to prosecute its defence. The matter thereafter took its normal course as a defended action.

Plaintiff/respondent's cause of action as evinced in the particulars of claim is in summary founded on the following allegations; that plaintiff/respondent is registered owner of certain property to wit, remaining extent of Portion 70 (a Portion of Portion 51) of Farm No. 50, Ezulwini Valley in the Hhohho District. That applicant was in unlawful occupation of the aforesaid property during the period August 1992 and that applicant was advised of this position and persisted in its alleged occupation. By applicant's continued occupation it tacitly accepted an oral lease with the respondent of the said premises at a reasonable rental whose estimate was given by plaintiff/respondent to be E3, 000-00 per month. It was therefore alleged that applicant was contractually liable to plaintiff/respondent for a rental of E24, 000-00. In the alternative respondent claimed unjust enrichment on the part of the applicant on account of the alleged unlawful occupation to the extent of E24, 000-00 being an allegedly fair estimate by plaintiff/respondent of reasonable rental of like property. Alternatively respondent's claim was for damages in the sum of E24, 000-00 allegedly occasioned by applicant's use and occupation of the plaintiff/respondent's property which plaintiff/respondent alleges was unlawful.

The applicant's defence in summary form is as follows. Applicant whilst denying that it occupied or used plaintiff/respondent's property, pleaded that applicant has leased certain machinery to a certain third party being a company known as Odi Driveways (Pty) Limited represented by a certain Mike Odendaal. That pursuant to the said lease and on instruction from the said Odendaal, the machinery was deposited and placed in the property, which according to Odendaal's representatives, belonged to him. In this regard applicant contended it was either Odi Driveways (Pty) Limited or Mr. Odendaal who had been in occupation of the property. In the alternative applicant pleaded that if it was found on the facts that it was applicant which was in occupation of the said property, such occupation or detention was for the benefit of a third party being the said Odi Driveways (Pty) Limited.

The applicant submits that it has a ***bona fide*** defence either in the main or alternative pleas and particularly that where a person hold or occupies property belonging to another for the benefit of a principal. Such is a valid defence in law.

The applicant submitted that during 1991, the third party Odi Driveways (Pty) Limited represented by Mr. Odendaal entered into an Engineering contract with the Government of Swaziland in terms of which the third party undertook certain road construction works involving the rehabilitation of the old Mbabane/Manzini road. Owing to the extensive and fairly complex nature of the works and the fact that Odi Driveways (Pty) Limited lacked the technical and capacity to sustain the works, the parties entered into a SUB CONTRACT AGREEMENT with PROVISIONS OF CONTRACT incorporating GENERAL CONDITIONS OF SUB-CONTRACT 1978. In terms of the sub-contract, Odi Driveways (Pty) Limited was the main contractor and applicant the sub-contractor. The conditions of the

aforesaid contract which are material hereto were that applicant would supply certain equipment machinery and plant together with the personnel to man or operate such equipment. It was a specific and special condition of the aforesaid contract that Odi Driveways (Pty) Limited provide YARD OR BASE CAMP FACILITIES at Plot 70 of Farm 50 (a Portion of Farm 51) Ezulwini in "free of charge" terms. Pursuant to the agreement, the road works were commenced and applicant's leased and supplied the plant and equipment to Odi Driveways (Pty) Limited at certain rates.

The court's attention is drawn to the fact that during February 1993, plaintiff/respondent brought an application before this court for an interdict or ejectment order against the third party (Odi Driveways (Pty) Limited), one Elizabeth Busisiwe Odendaal and Michael Odendaal seeking to evict them from the property in question. An order was accordingly obtained by plaintiff/respondent's attorneys. The defendant/applicant submits that the plaintiff/respondent's interdict application against the third party constituted an admission of the fact that the said third party and not the defendant/applicant had taken occupation of the property. This is also consistent with defendant/applicant's defence in the pleadings. In the event defendant applicant's attorneys issued a third party notice in terms of Rule 31 of the court rules to join Odi Driveways (Pty) Limited in the proceedings. When the said third party failed to intervene without notice to the defendant/applicant, plaintiff/respondent moved an application for default judgement before this court against the third party on the 14th March 1997. Judgement was granted as prayed against the third party with costs.

The defendant/applicant is of the view that this was highly irregular for respondent to proceed against the applicant having already obtained judgement against the third party, as by then the matter was ***res indicata***.

During January 1997, applicant's present attorney, Cyril Maphanga took over the matter from Mr. Currie. Respondent's attorney, Mr. Phesheya Dlamini like wise took over the matter from Mrs. Currie. Owing to the fact that this was now a rather old matter involving archived documentation, the applicant in the process of giving further instructions came upon the sub-contract agreement referred to above and other vital documents which were previously not available. This information and documentation, which had not been discovered previously in terms of the rules necessitated that the parties, in a genuine attempt to narrow down the issues and reach an agreement of certain facts, have a further pre-trial conference. The opportunity had not arisen by the time respondent's attorney set down the matter for hearing on the 5th and 6th July 1999.

At paragraph 28 to 34 applicant describes the reasons why this further pre-conference was held culminating in the respondent obtaining default judgement against the applicant on the 5th July 1999, owing to the absence of the applicant and Mr. Maphanga. The applicant avers that the non-appearance of Mr. Maphanga was not due to wilful neglect or default on his part but was as a result of genuine error, which had occurred when he diarised the dates for hearing. The full circumstances in this regard are canvassed in Maphanga's accompanying affidavit.

Applicant further referred the court to another fact that respondent in setting judgement against the applicant, it has also sought and awarded interest at the rate of 9% calculated from the 19th March 1993. Applicant submit that this was irregular on the following grounds:

36.1 Nowhere in its combined summons had the plaintiff/respondent claimed any interest whatsoever in its cause of action.

36.2 Plaintiff/respondent has failed to set out such interest in its prayers.

Per contra the affidavit of one Meyer Diamond outlines the plaintiff/respondent's version. In opposition the plaintiff/respondent states that there was no misunderstanding on its part, which led to it obtaining the judgement after defendant/applicant and its attorneys failed to attend court on trial. The judgement obtained by the plaintiff/respondent is of a final nature in so far as evidence was led before the court, pursuant to which evidence the court gave judgment. Defendant/applicant has no defence and that this rescission application has been filed solely as a means to delay the execution of the judgement. Plaintiff/respondent knows nothing about the alleged arrangement between the defendant/applicant and Odi Driveways (Pty) Limited or even the said Mike Odendaal. Plaintiff/respondent and the occupation by the defendant/applicant of the property was for the benefit of any third party but was for the benefit of the defendant/applicant itself. Plaintiff/respondent denies defendant/applicant averments in paragraph 12 and 15. The plaintiff further submits that the defendant/applicant is only trying to use the ejectment of the said Mike Odendaal to its advantage and thereby deliberately mislead this court. The truth of the matter is that Odi Driveways (Pty) Limited and Mike Odendaal had been squatters in the plaintiff/respondent's property in as much as they were in unlawful occupation of it. They had to be evicted from it through a court order. The plaintiff denies that such eviction is proof that Odi Driveways (Pty) Limited had given the defendant/applicant the right to occupy its property. Even if it were to prove that the said third party had given defendant/applicant the right to occupy plaintiff/respondent's land, it would not avail defendant/applicant as a defence in as much as defendant/applicant had no cognisance right to do so in law.

All in all plaintiff/respondent holds the view that the defendant/applicant has no ***bona fide*** defence and has no reasonable and acceptable explanation for the default.

The matter then came for arguments. It was submitted on behalf of the defendant/applicant that defendant/applicant has contested the action substantially on the basis that it was a defector on behalf of another third party and issued a third party notice in terms of Rule 31 claiming indemnity for it. In the event, the third party failed to intervene and the plaintiff/respondent on the 14th March 1997, by a Rule 31 notice sought and was granted judgement against the third party for the relief claimed by the plaintiff with costs. The third party notice in terms of Rule 31 does not create a ***lis*** between the plaintiff and the defendant, the third party does not become a joint defendant vis-a-versa the plaintiff. For this proposition the court was referred to the cases of ***Shield Insurance Company Ltd vs Zervolirdatius 1967 (4) S.A. 785 (E) and Swart vs Scollish Union and National Jus and National Insurance Company Ltd 1971 (1) S.A. 384.***

It follows therefore that it is not competent for the court to give a judgement against the third party for the payment of a sum of money in respect of the amount claimed in the action (see ***Herbstein & Van Winsen (4thED) at page 184).*** The only exception to this rule is in instances where the plaintiff itself issues a third party notice under Rule 31 (1). It was submitted on behalf of the defendant that the judgement granted by the court against the third party on the 14th March 1997, was in error. Nonetheless the judgement obtained against the third party in the action notwithstanding that it was in error, was ***res indicata*** and as much

could only be set aside upon application to the court. (see ***Herbstein & Van Winsen (3rd ED) at page 469).***

It was submitted that it was not open for the plaintiff to seek a further judgement from defendant without setting aside the judgement against the third party. At best there has been such a procedural error in these proceedings as would warrant the setting aside or rescission of the judgement against the defendant. There is good cause, which has been demonstrated explaining defendant's failure to appear in court on the final date. Such default was not wilful but due to a certain mistake or misunderstanding on the defendant's attorney's part.

The applicant has provided the grounds for the relief he has sought at common law and thus the court cannot disregard it. It would be unjust for the court to refuse the applicant rescission. The court has inherent powers to grant the order under the common law. To this effect the court was referred to the case of ***De Wet and others vs Western Bank Limited 1977 (4) S.A. 1042 F – 1043 A).***

It was argued further that Rule 42 of the High Court Rules also applies in the case ***in casu.*** It is clear from the applicant that the respondent was not present at the hearing and the reason for him not being there has been explained to the court. The applicant through no fault of his own had a judgement granted against him. He however took immediate steps to remedy the default or defect. In such a case the court should exercise its discretion in his favour. To buttress this proposition the court was referred to the cases of ***Theron NO vs United Democratic Front and others 1984 (2) S.A. 532 at 536 F – H; Tshivhase Royal Council vs Tshivhase 1992 (4) S.A. 853 and Topol and others vs L.S. Group Management Services (Pty) Limited 1988 (1) S.A. at 650 G – J.*** The application in terms of Rule 42 must be within a reasonable time and thus it complies with the requirements of the Rule when applying for rescission of the judgement under Rule 42. It was further argued that the application in terms of Rule 42 must be within a reasonable time and thus it complies with the requirements of the Rule when applying for rescission of the judgement under Rule 42. (see ***First National Bank of Southern Africa Limited vs Van Rensburg N.O. and others*** in re: ***First National Bank of Southern Africa Limited vs Jargans and others 1994 (1) S.A. 667 at 680 D – G).***

The circumstances surrounding the reasons for the defendant and its attorney's absence are adequately canvassed in the founding affidavits. It would be just and fair that the default judgement be rescinded and the defendant be offered an opportunity to defend the action.

It was submitted that the defendant has a ***bona fide*** defence to the plaintiff's action in the following respects:

Defendant's contention is that it denies that it was in occupation of the said premises and if it is found it was, a defector on behalf of another third party namely Odi Driveways (Pty) Ltd.

The defendant further avers that the property in question was a site which was provided by a third party for the storage of certain road construction plant and equipment on behalf of and for the benefit of a third party.

A fact, which is not disputed by the plaintiff, is that during the time of the alleged occupation it sought and obtained an ejectment order against the third party premised on the said third party's occupation of the said premises. That this has always been uppermost in plaintiff's

mind is evident in its readiness to obtain a default judgement against the third party as it did on the 14th March 1977, albeit in error.

Mr. Hlophe for the plaintiff argued ***in contra***. The stance taken by the plaintiff is that defendant/applicant is not entitled to rescind the judgement in as much as it was final in nature. Defendant/applicant could only appeal against the judgment, which it has failed to do. For this proposition the court was referred to the work by ***Erasmus Superior Court Practice – page B1 – 309*** and the case of ***Tshivhase Royal Council vs Tshivhase 1992 (4) S.A. 853.***

Plaintiff/respondent submits that it was entitled to obtain judgement against the third party who has never bothered himself to defend the matter, alternatively, no prejudice has been suffered by the defendant/applicant, alternatively, defendant has itself stated the judgement was not competent which means that the subsequent judgement against the defendant/applicant was competent.

It was further argued on behalf of the plaintiff/respondent that the application brought by the other side has a serious flaw in that it has failed to allege a reasonable and acceptable explanation as well as a ***bona fide*** defence to the plaintiff/respondent's action.

In this respect the court was referred to the case of ***Lucky Dlamini vs Leonard Dlamini Civil Case No. 1644/97.***

It was further argued that the alleged contract between the defendant/applicant and the said third party cannot exonerate the defendant/applicant from its own liability to pay for occupation of the said premises.

These are the issues before court. It is common cause that the defendant/applicant had issued a third party notice calling upon the third party to join the proceedings. The third party never defended the proceedings, resulting in the plaintiff/respondent obtaining judgement against the third party. The matter was subsequently allocated a trial date and accordingly set down. On the day of trial neither the defendant/applicant nor its attorneys attended court resulting in the matter being proceeded with in defendant/applicant's absence. On the day in question the plaintiff/respondent's director, Mr. Diamond was called to give evidence, which he did. The court having heard him give evidence granted judgement in favour of the plaintiff/respondent. In law the third party notice in terms of Rule 31 does not create a ***lis*** between the plaintiff and the defendant, the third party does not become a joint defendant ***vis-a versa*** the plaintiff. It follows therefore, that it would not be proper for the plaintiff to obtain a judgement against the third party for the payment of a sum of money in respect of the amount claimed in the action. According to ***Herbstein and Van Winsen et al (4thED)*** at page ***184*** the only exception to this rule is in instances where the plaintiff itself issues a third party notice under Rule 31 (1). It is clear, therefore that judgement was granted in error. Mr. Hlophe in argument also agreed with this conclusion. It would appear to me that it was not open for the plaintiff to seek a further judgement from the defendant without setting aside the judgement against the third party. That as it may, the question still remains as to whether or not this court has the power to rescind the judgement granted in favour of the plaintiff against the defendant. The law is that as a general rule once a court has duly pronounced a final judgment or order, it has itself no authority, to correct, alter or supplement it. The reason is that it thereupon becomes ***fuctus officio***; its jurisdiction in the case having been fully and finally, exercised its authority over the subject matter has ceased. However, there are

exceptions to this general rule. A court may set aside its own final judgement in terms of the provisions of Rule 42 or in terms of the common law.

It would appear to me that there was a procedural error in the proceedings in favour of the plaintiff to warrant the setting aside or rescission of the judgement. Such a rescission is justified and this court can grant it in accordance with the common law.

Further, in my view the defendant has shown good cause, which is amply demonstrated in the papers explaining defendant's failure to appear in court on the final date. Such default in my view was not wilful but due to a certain mistake or misunderstanding on defendant's attorney's part, with the remit that the defendant was represented at court during the date set for trial. The defendant has provided the grounds for the relief being sought at common law and thus the court cannot disregard it. In coming to this conclusion I have sought refuge in the ***dicta*** in the case of ***De Wet and others vs Western Bank Limited (supra)***. Furthermore, it would appear Rule 42 (1) (a) is applicable in this case.

The defendant has a ***bona fide*** defence to the action.

On the question of interest, the law requires that such should be pleaded in the summons. I am not going to make any specific ruling on this issue in view of my finding that defendant is entitled to a rescission.

I thus grant an order in terms of prayer 2 of the notice of motion and costs to be costs in the main action.

S.B. MAPHALALA
JUDGE