REPORTABLE

CASE NO.: SA 49/2008

IN THE SUPREME COURT OF NAMIBIA

In the matter between:

PETER A. DE VILLIERS **APPELLANT**

And

AXIZ NAMIBIA (PTY) LTD **RESPONDENT**

Coram: Shivute CJ, Strydom AJA e*t* Mtambanengwe AJA

Heard on: 01/03/2010

Delivered on: 09/06/2011

APPEAL JUDGMENT

SHIVUTE CJ:

[1] This is an appeal from the judgment and order of the High Court dismissing an application for the rescission of a default judgment made by the appellant, as applicant, in the Court *a quo* on the basis that the default judgment was erroneously sought or granted in his absence. The appellant and one Laurenza van der Merwe were members of a close corporation known as Executive Computer Systems CC (the close corporation) that was finally liquidated by the order of the High Court dated 30 October 2006. The respondent, as plaintiff,

instituted action against Ms van der Merwe and the appellant, as first and second defendants respectively, seeking *inter alia* to hold the defendants personally liable to the respondent for the alleged indebtedness of the close corporation (in liquidation) in terms of s 64(1) of the Close Corporation Act, 1988 (Act No. 26 of 1988) as well as payment of the amount of N$466 054,75.

[2] Mr Corbett argued the appeal on behalf of the appellant. The appeal is unopposed and so we have not had the benefit of hearing argument on behalf of the respondent.

[3] It is apparent from the record that after the summons had been served on the appellant, the appellant had signed a power of attorney appointing a firm of legal practitioners as his legal representatives and a notice of intention to defend as well as a plea were subsequently filed on his behalf by his legal practitioners on 23 June 2008. The notice of set down dated 19 June 2008 informed the parties that the matter had been set down for trial on a continuous roll from 30 September 2008 to 3 October 2008.

[4] On 30 September 2008, neither the appellant nor Ms Van der Merwe nor their legal representatives were present in Court and so the learned Judge seized with the matter handed down a default judgment in terms whereof the appellant and Ms Van der Merwe were found to be liable for the debts of the close corporation (in liquidation) in terms of s 64(1) of the Close Corporation Act, 1988 (the Act) and were furthermore ordered to pay the amount of N$466 054,75 to the respondent as well as the costs of suit. Only the appellant had sought rescission

of the judgment and Ms Van der Merwe played no part in the proceedings in the Court below or in this Court.

[5] The uncontested evidence presented in the application for rescission of judgment is that since the filing of the plea, the appellant had neither been notified of progress in the matter nor had he been informed of the date of set down. The evidence is furthermore that the appellant had consequently remained oblivious to the date of the commencement of the trial and only became aware of the judgment after 8 October 2008 when he was served with a writ of execution. Upon being served with the writ, the appellant promptly instructed his legal practitioners of record to obtain the documentation relating to the matter from the Court file. The information gleaned from the Court file established that on 8 July 2008, the appellant's erstwhile legal practitioner filed a notice of withdrawal, giving notice in respect of the then defendants as follows:

> "A copy of this Notice has been directed to the First Defendant to the last known address on the date indicated hereunder as per the attached registered slip.
>
> Second Defendant acknowledge (*sic*) receipt of a copy of this notice as per acknowledgement of receipt on page 3 hereof." (Emphasis supplied).

The part where the appellant was supposed to have signed in acknowledgement of receipt of the notice was in fact not signed and the appellant says that he did not receive a copy of the notice of withdrawal at all and was accordingly unaware of his erstwhile legal practitioner's withdrawal. Thus, contrary to what was stated in the notice of withdrawal, the appellant never acknowledged receipt of the notice

of withdrawal in any form since the appellant seemingly never received a copy of the same.

[6] On 31 October 2008, the appellant filed an application on notice of motion, supported by an affidavit, seeking to set aside the default judgment. The application, which was unopposed, was heard and refused on 28 November 2008. Reasons for judgment were given on 16 July 2009 subsequent to the lodging of the appeal in this Court on 21 November 2008 and after the appeal record had been filed. The judgment of the Court *a quo* is reported under *De Villiers v Axiz Namibia (Pty) Ltd* 2009 (1) NR 40 (HC). In the light of the late furnishing of the reasons for judgment, the appellant was constrained to lodge an application for condonation in this Court for the late filing of a supplementary record embodying the reasons for judgment. Having considered the reasons furnished in the application for condonation, we considered that sufficient cause therefor had been shown and the application was accordingly granted.

[7] The record of proceedings giving rise to the present appeal shows that when the matter was called, the learned Judge directed counsel to address him on the merits. Counsel then briefly addressed the Court on the merits and concluded with the submission that in light of what counsel contended was a vague and embarrassing summons, there was an arguable case which would entitle the appellant at the very least to attempt to persuade the trial Court why the claim should not succeed. Having heard brief argument from counsel, the Court *a quo* dismissed the application forthwith and as earlier mentioned, gave reasons at a later stage.

[8] In his reasons for judgment, the learned Judge found that there was no indication or reference “whatsoever” on the papers that the application for rescission was brought in terms of Rule 44(1)(a) of the Rules of the High Court. On the contrary, the Court *a quo* found that the appellant had expressly stated in his founding affidavit that he would rely on the Court’s common law powers to rescind the judgment. I will endeavour to present further findings of the Court *a quo* hereunder when considering the question whether or not that Court was correct in its holding that the application for rescission of judgment had been brought under common law only and not also in terms of Rule 44(1)(a) of the Rules of the High Court and it is to this aspect of the appeal that I propose to turn next.

[9] The wording of our Rule 44(1)(a) is identical to the wording of Rule 42(1)(a) of the South African Uniform Rules of Court and as such the commentary and South African case law on their Rule 42(1)(a) are of high persuasive authority. It is a well-known principle that a judgment taken in the absence of one of the parties in the High Court may be set aside in three ways, namely in terms of Rule 31(2)(b) or Rule 44(1)(a) of the Rules of the High Court or at common law. (*Cf*. *De Wet and Others v Western Bank Ltd* 1979 (2) SA 1031 (A) at 1037; *Bakoven Ltd v G J Howes (Pty) Ltd* 1992 (2) SA 466 (E) at 468H.) Rule 31(2)(b) is obviously of no application to the facts of this case since it applies to a situation where the applicant was in default of delivery of a notice of intention to defend or of a plea. (See Rule 31(1)(a) of the Rules of the High Court.) Counsel submitted and I

agree that Rule 44(1)(a) is of application to the facts of this appeal. In so far as it is relevant to the facts in issue, Rule 44(1)(a) provides as follows:

> "(1) The court may, in addition to any other powers it may have *mero motu* or upon the application of any party affected, rescind or vary –
>
> (a) an order or judgment erroneously sought or erroneously granted in the absence of any party affected thereby;
> (b) …
> (c) …"

[10] The difference between the application brought under the common law and the one brought pursuant to Rule 44(1)(a) (the Rule) is that in the case of the former, an applicant is required to establish "good cause" or "sufficient cause" for the rescission of the judgment granted in his or her absence in the sense of an explanation for his default and *bona fide* defence while in the latter case "good cause" need not be shown. (See, for example, *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996 (4) SA 411(CPD) at 417I; Herbstein and Van Winsen's *The Civil Practice of the High Courts of South Africa* 5th Edition Vol. 1, by Cilliers, Loots and Nel on page 938.)

[11] The Court *a quo* dismissed the application for the rescission of judgment on the basis that the application had not been brought in terms of the Rule; that it had been brought under the common law; that appellant was therefore required to establish "good cause", and that he had failed to do so. Crucially, it observed in para [18] of the judgment as follows:

> "In this application there is no indication or reference whatsoever neither in the notice of motion and its (*sic*) founding affidavit and annexures thereto nor in argument presented by the defendant's counsel in Court and also not in the applicant's/second defendant's notice of appeal to the Supreme Court that the application for rescission is brought in terms of Rule 44(1)(a)." (Emphasis added).

The High Court went on to record that on the contrary, the appellant had expressly stated in his founding affidavit that his application had been brought under common law and held in para [25] of the judgment that while it was prepared to accept "albeit with some reservations" the explanation offered for the default, the application for rescission of judgment "must be treated as one brought under the common law and that the appellant was therefore required to show 'sufficient cause'".

[12] Having considered the appellant's plea, founding affidavit and the annexures to the application at length, the learned Judge reasoned that neither the plea nor the founding affidavit nor the annexures had established a *bona fide* defence to the respondent's claim. The Court below found furthermore that the founding affidavit had not adequately dealt with the allegations of recklessness or gross negligence in the running of the close corporation and concluded that the appellant should be held liable for the debts of the close corporation in terms of s 64(1) of the Act.

[13] For the reasons that follow, I am of the firm view that the finding by the Court *a quo* that the application for rescission of default judgment in this case had not been brought under the Rule at all is a clear misdirection. A close examination

of the record shows that although the appellant had not cited the Rule by name, he had employed its language and appeared to have been guided by its spirit in the formulation of his application for rescission of judgment. A consideration of some of the salient allegations and contentions in the founding affidavit makes this abundantly clear. In this respect, the appellant stated in paragraph 4.9 of his affidavit as follows:

> "4.9 On 24 October 2008 my lawyers phoned the lawyer of the Respondent, Mr. Agenbach, who informed my lawyer that default judgment was granted by the High Court of Namibia due to absence of myself and my legal representative. My lawyer also informed Mr. Agenbach that I have instructed him immediately to bring an application for rescission of the judgment granted against me (*sic*)." (Emphasis is mine)

[14] In paragraph 8 he said:

> "8. In all the aforementioned circumstances, I respectfully submit that the failure to have appeared in Court was not as a result of willful neglect and/or default on my part…" (Emphasis as in the original)

[15] In paragraph 9 of the affidavit the appellant informed the Court and contended as follows:

> "9. I am furthermore advised and respectfully submit that:
>
> 9.1.1 inasmuch as I will rely hereafter on the term that the default judgment was erroneous sought and/or erroneous granted in my absence on 30 September 2008, it is not necessary for me to deal fully with the merits of my defence as was already done by my previous lawyers under pressure…; but

9.1.2 inasmuch as I will rely on the Court's common law powers to rescind the judgment granted by the High Court, I state that I in any event have a defence." (Emphasis added)

[16] In paragraph 10 it is stated:

"10.1 I shall now deal with the reason why I submit that the Respondent sought and the High Court granted the default judgment erroneously... and

10.4 I accordingly submit that the default judgment was erroneously sought and granted and for that reason alone the judgment should be set aside." (Emphasis is mine)

[17] This last contention was followed by a heading "*Ad* application in terms of the common law/merits" in which the appellant essentially denied, in two paragraphs, that he had entered into a transaction with the respondent in a reckless, negligent or fraudulent manner as alleged in the particulars of claim.

[18] During the proceedings of the application for the rescission of the judgment, counsel for the appellant in the Court *a quo (*not the same counsel who argued the appeal) made it quite clear at the outset what the grounds for the application for rescission were and it is apparent from the record that he had initially advanced the ground based on the Rule and in doing so, did not deal with the merits at all. It was only after he had been pressed by the learned Judge to address the Court *a quo* on the merits that he had to switch to the common law ground and then dealt with the merits in his oral submissions. It is apparent from the record that when the case was called, the appellant's counsel in the Court *a quo* submitted that the

papers were in order and prayed for relief in terms of the relevant prayers in the notice of motion. The learned Judge then reasoned that although he was persuaded that there had been an acceptable explanation for the default, he remained unconvinced that the appellant had had *a bona fide* defence or that there were prospects of success on the merits. The Judge then invited counsel to address the Court on the merits. Counsel asked the matter to stand down so that he could address the Court at the end of the roll. On resumption, counsel commenced his address by stating as follows:

> "My Lord, I can only refer this Court to page 9 paragraph 9.1.1, which reads as follows, 'In as much as I will rely hereafter on the term that default judgment was erroneously sought and/or erroneously granted in my absence on 30 September 2008, it is not necessary for me to deal fully with the merits of my defence as was already done by my previous lawyer under pressure.'" (Emphasis supplied)

Counsel next referred the Court *a quo* to a passage on page 697 of the 4th edition of Herbstein and Van Winsen's *The Civil Practice of the Supreme Court of South Africa* (as the book was then titled) where the principle that I have previously mentioned, *viz*. that an applicant who seeks to set aside a judgment in terms of the Rule is not required to establish good cause, was stated and concluded his brief address by submitting:

> "It is submitted that a case was made out why such default Judgment was granted in his absence which is not the Applicant's fault…"

[19] I am of the opinion that although the appellant's affidavit read as a whole was evidently not a model for elegant draftsmanship, there can be no doubt that by referring to and paraphrasing the contents or requirements of the Rule as exemplified by the highlighted phrases in the paragraphs of his affidavit quoted above, the appellant evidently relied upon the Rule in addition to the common law ground for rescission of judgment without necessarily invoking the Rule by name. Although it is not stated in so many words, it seems to me, upon the reading of the founding affidavit as a whole, that the merits were dealt with therein only to the extent that it was required to show good cause in terms of the common law ground relied on in the alternative. As was pointed out by Jafta J in *Mutebwa v Mutebwa* 2001 (2) SA 193 (Tk HC) at para [12], the fact that an application for rescission is brought in terms of one Rule does not mean that it cannot be entertained pursuant to another Rule or under common law provided, of course, that the requirements of each of the procedures are met. (See also *Bakoven Ltd v G J Howes (Pty) Ltd* (*supra*) at 468I; *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk GD) at 510C.) It follows that the Court *a quo* erred in holding that the application for rescission was brought only in terms of the common law. In finding that the affidavit did not spell out a case for rescission on the ground based on the Rule, the Court below impermissibly appears to have laid emphasis on the form rather than the substance of the appellant's affidavit.

[20] It is abundantly clear that in the submissions he made, counsel for the appellant in the Court *a quo* had also employed the language of the Rule. Since he alternatively relied on the common law ground, he was required to deal with the merits and it was in that context, so it appears to me, that the merits were also

dealt with. It is also plain that by citing the passage in the earlier edition of Herbstein and Van Winsen where the equivalent of the Rules was mentioned, as already noted, counsel also explicitly cited the Rule and pertinently relied on it in his submissions. It must follow then that the Court *a quo* also erred in its finding that there was no indication or reference "whatsoever" in argument presented by appellant's counsel that the application for rescission was brought in terms of the Rule.

[21] The next question for consideration and decision is whether the appellant had shown that the judgment was erroneously sought or granted in his absence as required by the Rule. An order or judgment that was erroneously sought or granted in the absence of any party affected by it should without further enquiry be rescinded or varied. (See the South African cases of *De Sousa v Kerr* 1978 (3) SA 635(W) at 638A-B; *Topol and Others v L S Group Management Services (Pty) Ltd* 1988 (1) SA 639(W) at 650D-J). There does not appear to be consensus among the decisions of the South African High Courts on the question whether or not in the consideration of an application in terms of their equivalent of the Rule, a Court is entitled to consider facts that are not on the record of the proceedings of the Court that has granted the order sought to be rescinded. As far as I was able to ascertain, the majority of the reported judicial pronouncements on the subject in that jurisdiction establish that relief under the Rule may be granted *inter alia* where at the time of the issue of the order or judgment complained of, there existed a fact of which the Judge was unaware, which would have precluded the granting of the judgment or order and which would have induced the Judge, if he or she had been aware of it, not to grant the judgment. (See *Nyingwa v Moolman NO* (*supra*);

Weare v ABSA Bank Ltd 1997 (2) SA 212 (D & CL) at 217B; *Stander & Another v ABSA Bank* 1997 (4) SA 873 (E).) In *Bakeoven Ltd v Howes (supra*) on the other hand, Erasmus J held at 471F, that in deciding whether a judgment was "erroneously granted", a Court is, like a Court of appeal, confined to the record of proceedings. The learned Judge went on to observe at 472H that unless an applicant for rescission could prove an error or irregularity appearing on the record of proceedings, the requirements of the Rule cannot be said to have been satisfied and rescission cannot therefore be granted. Erasmus J reaffirmed this position in *Tom v Minister of Safety and Security* [1998] 1 All SA 629 (E). In *Stander and Another v ABSA Bank* (*supra*), Nepgen J declined to follow Erasmus J's holding in this regard and pertinently observed at 882E-G as follows in reference to the phrase "in the absence of any party affected thereby" in the Rule:

> "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 the Rule is not restricted to cases of an order or judgment erroneously granted, but also to an order or judgment erroneously sought. It is difficult to conceive of circumstances where a Court would be able to conclude that an order or judgment was erroneously sought if no additional facts, indicating that this is so, were placed before the Court." (Emphasis supplied)

The *Stander v ABSA Bank* approach was followed in cases such as *President of the RSA v Eisenberg and Associates* 2005 (1) SA 246(C); *Smith v Van Heerden* [2002] 4 All SA 461(C) at 467 F-H. In *Mutebwa v Mutebwa* (*supra*), while agreeing with Erasmus J's *dictum* in *Bakeoven* (*supra*) that the error should appear on the record, Jafta J observed that such a requirement applied only in cases where the Court acts *mero motu* or on the basis of an oral application made from the Bar for rescission or variation of the order. For in those circumstances, so the learned Judge reasoned, the Court would have had before it the record of the proceedings only. The learned Judge continued to remark as follows in para [20]:

> "The same interpretation cannot, in my respectful view, apply to cases where the Court is called upon to act on the basis of a written application by a party whose rights are affected by an order granted in its absence. In the latter instance the Court would have before it not only the record of the proceedings but also facts set out in the affidavits filed of record. Such facts cannot simply be ignored and it is not irregular to adopt such a procedure in seeking rescission. In fact, it might be necessary to do so in cases such as the present, where no error could be picked up ex facie the record itself… It is not a requirement of the Rule that the error appear on the record before rescission can be granted."

[22] I respectfully endorse what was stated by both Nepgen J in *Stander and Another v ABSA Bank* and by Jafta J in *Mutebwa v Mutebwa* in the *dicta* quoted above. I consider that the approaches on the point under discussion adopted in those cases and others that followed them, are with respect, sound and should be followed by this Court. In the consideration of the application for rescission, a court would therefore be entitled to have regard not only to the record of the proceedings of the court that had granted the impugned judgment or order, but

also to those facts set out in the affidavit relating to the application for rescission. In the present appeal, it is not in dispute that judgment was granted by default in the absence of the appellant and Ms Van der Merwe. Counsel contended that the order of the Court *a quo* of 30 September 2008 was "erroneously granted" in the absence of the appellant since the appellant was neither informed of the trial date nor was he informed of the withdrawal of his former legal practitioners as contemplated in Rule 16(4) of the Rules of the High Court, which provides in full as follows:

> "(a) Where counsel acting in any proceedings for a party ceases so to act, he or she shall forthwith deliver notice thereof to such party, the Registrar and all other parties: Provided that notice to the party for whom he acted may be given by registered post.
>
> (b) After such notice, unless the party formerly represented within 10 days after the notice, himself or herself notifies all other parties of a new address for service as contemplated in sub rule (2), it shall not be necessary to serve any documents upon such party unless the Court otherwise orders: Provided that any of the other parties may before receipt of the notice of his new address for service of documents, serve any documents upon the party who was formerly represented.
>
> (c) The notice to the Registrar shall state the names and addresses of the parties notified and the date on which and the manner in which the notice was sent to them.
>
> (d) The notice to the party formerly represented shall inform the said party of the provisions of paragraph (b)."

[23] Counsel submitted further that it is clear from the notice of withdrawal that unlike in the case of Ms Van der Merwe in respect of whom the chosen mode of

service was by registered post, in respect of the appellant the chosen mode of service of the notice of withdrawal was by way of an acknowledgement of receipt of the notice, which is missing from the record. I think that counsel is right. That there was no proof that the appellant had been notified of his erstwhile legal practitioner's withdrawal would have been apparent from the record. This would have alerted the respondent and indeed the Court seized with the matter on the trial date that there had not been proof that the withdrawal of the legal practitioner had been brought to the attention of the appellant.

[24] The appellant's misfortunes were entirely due to his erstwhile legal practitioner's neglect to inform the client of the trial date and of his withdrawal from the case without giving notice to the appellant as required by Rule 16(4)(a) of the Rules of the High Court. It is, of course, trite law that a litigant is under an obligation to keep in touch with his or her legal practitioner and cannot simply leave matters in the hands of the lawyer without enquiring on progress. It is also a well-known principle of our law that there is a limit beyond which a litigant cannot escape the consequences of his or her legal practitioner's remissness. However, as was pointed out by Van Reenen J, in *Promedia Drukkers & Uitgewers (Edms) Bpk v Kaimowitz and Others* 1996(4) SA 411 at 420A-B, it would appear that those cases that have laid down this principle were decided in the context of clients, who with the knowledge that action was required, sat passively by without directing a reminder or enquiries to their legal practitioner entrusted with their matters. See, for example, the two cases cited by Van Reenen J, of *Saloojee and Another NNO v Ministry of Community Development* 1965 (2) SA 135 (A) at 141C-H; *Moraliswani v Mamili* 1989 (4) SA 1 (A) at 10B-D. In this matter, there is no

evidence or allegation that the appellant is the author of his misfortune in the sense that he kept quiet and had not enquired about progress from his legal practitioner. His lawyer withdrew as legal practitioner of record leaving the appellant in the lurch and without informing him of the trial date and his subsequent withdrawal. In the circumstances, the appellant has established that the judgment was erroneously granted in his absence in that had the Court that granted the default judgment been aware that the appellant had not been informed of the trial date by his legal practitioners, it might not have granted the default judgment.

[25] In any event, by finding that the appellant was personally liable for the debts of the close corporation (in liquidation), in terms of s 64(1) of the Act, the Court below essentially exercised a discretion. Section 64(1) of the Act provides as follows:

> "If it at any time appears that any business of a corporation was or is being carried on recklessly, with gross negligence or with intent to defraud any person or for any fraudulent purpose, a Court may on the application of the Master, or any creditor, member or liquidator of the corporation, declare that any person who was knowingly a party to the carrying on of the business in any such manner, shall be personally liable for all or any of such debts or other liabilities of the corporation as the Court may direct, and the Court may give such further orders as it considers proper for the purpose of giving effect to the declaration and enforcing that liability".

[26] It seems to me that the exercise of discretion in terms of s 64(1) of the Act, involves an element of making a value judgment based on the appellant's

attitude or state of the mind necessary to establish recklessness or gross negligence or in the case of fraud, the intent to defraud.

[27] As the Court *a quo* also acknowledged, the South African Supreme Court of Appeal pointed out in *Philotex (Pty) Ltd and Others v Snyman and Others* 1998 (2) SA 138 (SCA) at 142H, (a judgment concerning the interpretation of s 424(1) of the South African Companies Act, 1973 (Act 61 of 1973) which is worded not too dissimilar to s 64(1) of the Act), the finding that a person carried on a business recklessly should not be made lightly. That Court furthermore observed at 144B:

> 'In the application of the recklessness test to the evidence before it a Court should have regard, *inter alia,* to the scope of operations of the company, the role, functions and powers of the directors, the amount of the debts, the extent of the company's financial difficulties and the prospects, if any, of recovery."

[28] Paraphrasing in the above *dictum* "company" for "close corporation" and "director" for "member" how are those factors and the appellant's culpability in the running of the Close Corporation to be ascertained in the circumstances where no oral evidence was led at the trial to support the claim based on s 64(1) of the Act? I am unable to see that the factors mentioned in the *dictum* in *Philotex (Pty) Ltd v Snyman and Others* above could be ascertained simply by reading "the summons and other documents filed of record" as the order issued by the Court that had granted the default judgment indicates.

[29] In the light of the findings that the application for rescission had been brought pursuant to the provisions of the Rule and that the appellant had established that the judgment was granted erroneously in his absence, it is not necessary to consider the points of argument so ably presented by counsel for the appellant based on the relief sought in terms of the common law. I would accordingly allow the appeal.

[30] I must finally consider the issue of costs. Counsel for the appellant in his heads of argument urged us to order the respondent to pay the costs of the appeal. It is noted, however, that no costs were sought against the respondent in the High Court unless it had opposed. As already noted, the respondent did neither oppose the proceedings in the High Court nor did it oppose the appeal. In those circumstances, the respondent should not be mulcted in costs. The following order is accordingly made:

1. The appeal is allowed.

2. The application for condonation for the late filing of the record embodying reasons for judgment is granted.

3. The order of the Court *a quo* dated 21 November 2008 refusing the application for rescission of judgment is set aside and the following order is substituted therefor:

> "(a) The application for rescission of judgment is granted.

(b) The default judgment granted by the Honourable Mr Justice Muller under Case Number (P) I 11/2007 on 30 September 2008 is rescinded and set aside.

(c) Any process issued by the respondent on the strength of the said default judgment is set aside".

4. No order as to costs is made

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SHIVUTE CJ

I concur

_____
STRYDOM AJA

I also concur

_____
MTAMBANENGWE AJA

COUNSEL ON BEHALF OF THE APPELLANT:	Mr Corbett
Instructed by:	Chris Brandt Attorneys
COUNSEL ON BEHALF OF THE RESPONDENT:	No appearance