

IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 42/99

In the matter between

FAST LANE SECURITY (PTY) LTD

PLAINTIFF

And WILSON BAYLY HOMES OVCON

DEFENDANT

Coram

S.B. MAPHALALA – J

For Plaintiff

MR. MAGAGULA

For Defendant

MR. SIMELANE

JUDGEMENT

(25/06/99)

Maphalala J:

Before court is an application for leave to reply to defendant's affidavit resisting summary judgment in terms of Rule 32 (5).

The plaintiff issued a combined summons and the defendant filed a notice to defend the proceedings against it, whereupon plaintiff applied for summary judgement. The defendant filed its affidavit resisting summary judgement, and when the matter appeared before court on the 5th February 1999, the plaintiff then applied for leave to file a replying affidavit which application was opposed by the defendant. The court reserved judgement. Due to the lapse of time and the fact that the court was not recording the submissions made by counsel then which were brief the court requested counsel to file Heads of Arguments to assist the court to come to a decision. After a long while the parties filed their Heads of Arguments dated the 8th April 1999 and 9th April 1999 respectively. I must comment that these dates are not entirely correct in that the court came to a decision of the filing of the Heads well after these date. That as it may the matter is to be decided on its merits. Rule 32 allows the plaintiff seeking summary judgment to file; albeit with the leave of the court, replying affidavit once an affidavit resisting summary judgment has been filed. With regards the filing of the replying affidavit, the court has a discretion to grant leave to file such affidavit. Such discretion must be exercised judiciously.

I agree with Mr. Simelane for the defendant that the criteria to be used by the court in deciding whether or not to admit a replying affidavit in summary judgment proceedings is that of fairness to both litigants (see Milne No. vs Fabric House (Pty) Ltd 1957 (3) S.A. 63 at 65. I further, align myself with Mr. Simelane's trenchant

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submissions that it would not be fair to the defendant if leave to file the replying affidavit were to be granted. Plaintiff has not placed before court, the affidavit that it seeks to file, for the court to assess the facts fully. Summary judgement proceedings, being proceedings whereby the defendant may not file any further affidavit once the replying affidavit has been filed, it is essential that he is well appraised of all the facts to which he may have to answer. Since that has not been done, it would be unfair to the defendant for the court to grant leave to file a replying affidavit without the defendant having been appraised of the facts contained therein.

Mr. Simelane is also correct in his submission that the plaintiff has not alluded to the court nor has it been suggested that the defendant's affidavit resisting summary judgment has raised a new matter, that could not have been anticipated or dealt with in either the particulars of claim and/or the affidavit in support of summary judgement. The plaintiff has not given to court any reasons nor explanation as to why he could not include in his particulars of claim, all that he now seeks to say as permitted by the provisions of Rule 32 (3) (a), and (b). The plaintiff has neither suggested nor alluded to any special circumstances warranting that it be granted leave to file the replying affidavit and has therefore not

made out a case for the exercise of the court's discretion in its favour. Plaintiff's Heads of Argument are a mere plea to the court to grant the leave in the interest of justice no substantive reasons are canvassed to support such a plea.

In the circumstances, in the exercises of my discretion and on the basis of the above reason I refuse leave to file a replying affidavit as prayed for.

Plaintiff to pay costs.

S. B. MAPHALALA

JUDGE