IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CIVIL CASE NO.-4468/08

In the matter between:

SWAZILAND INDUSTRIAL DEVELOPMENT COMPANY LIMITED **Plaintiff**

AND

PROCESS AUTOMATED TRAFFIC MANAGEMENT (PTY) LTD **1st Defendant**

MUSA MAGONGO **2nd Defendant**

Date of hearing: 5 March, 2009
Date of judgment: 24 April, 2009

Mr. Attorney K. Motsa for the Plaintiff
Mr. Attorney M.E. Simelane for the Defendants

JUDGMENT

MASUKU J.

[1] This is an application for summary judgment, which has however, raised a deeply fundamental question *viz:* whether a defendant against whom a summary judgment has been moved

may place reliance in a bid to defeat the same, on the instrumentality of a plea but without filing, as required by the Rules of this Court, an affidavit resisting summary judgment. That is the major but not the only question that requires the Court's determination.

[2] It would no doubt conduce to clarity for one, at this juncture, to briefly lay down the historical facts that give rise to the issue under consideration. The Plaintiff is a public company which has been duly incorporated in terms of this country's company laws, having its business offices at Dhlanubeka Building, Mbabane. The 1st Defendant is also a company, duly incorporated in terms of the company laws of this Kingdom, with its business premises situate at Matsapha Industrial Sites, Matsapha. The 2nd Defendant is a Swazi male adult, cited in his capacity as a surety and co-principal debtor with the 1st Defendant.

[3] The above-named parties entered into an agreement of lease and in respect of which the Plaintiff leased to the 1st Defendant

1 x Terex Model 860SX Backhoe loader whose price was E520 000.00. An agreement of lease was duly signed by the 1st Defendant, duly represented by its Director, the 2nd Defendant on 18 May, 2006 and by the Plaintiff, duly represented by Dr. E.T. Gina, on 12 June 2006. In terms of the said agreement, the 1st

Defendant was required and agreed to *inter alia:*

>Pay a monthly installment of El 5 599.77, commencing at the end of June, 2006 and thereafter on the 30 of each month, until May, 2009;

>Take possession of the loader and to take reasonable care of it.

>Pay interest at price plus 2% per month.

>Pay costs at an Attorney and own client scale, including, collection commission if the Plaintiff did institute legal proceedings against the 1st Defendant.

[4] It is the Plaintiffs contention that the 1st Defendant failed to honour its obligations in terms of the agreement, including the terms set out above. In order to secure its interests, the Plaintiff moved an urgent application on an *ex parte* basis and in which it prayed for and was granted the following relief by this Court:-

1 A Rule *Nisi* is hereby issued returnable on 15 April 2009 calling upon the Defendant to show cause why and order in the terms set out hereunder should not be made final;

1.1 That the Defendant be ordered to handover the plant equipment mentioned in paragraph 1.2 herein to the Deputy Sheriff for the District of Manzini or any other authorized person on service of this order.

1.2 The Sheriff or her lawful deputy for the District of Manzini or any authorized person should be authorized and empowered to seize and attach from the Defendant or whosoever is in

possession of the under mentioned plant equipment and wherever it may be found;

Description : TEREX MODEL 860SX

Chassis No : SMFH645C05GGM6099

Engine No : RG38099V227638M

Model : 2006

1.3 The plant equipment set in above should not be kept in the Plaintiffs custody pending the confirmation of the Rule *Nisi;*

1.4 The Plaintiff be ordered to institute an action for arrear rentals within 21 (twenty-one) days of confirmation of the Rule *Nisi*'

1.5 The Plaintiff be and is hereby entitled to dispose of the plant equipment either by public auction or by private treaty;

1.6 Costs of the application on the attorney and own client scale should not be granted against the Defendant;

1.7 The Plaintiff be ordered to institute proceedings for damages suffered within 3 (three) months from the date of sale of the plant equipment as envisaged in paragraph 1.5;

Alternatively

2 Directing that paragraph 1.1 - 1.3 of the Rule Nisi operate with immediate and interim effect pending the return date of this application.

3. The Plaintiff be entitled to anticipate the above order within 24 hours of service by the Deputy Sheriff.

[5] Having obtained the aforesaid order, basically for the preservation of the leased article in the interregnum, the Plaintiff instituted the present proceedings in which it claims as a result of the 1st Defendant's breach of the agreement payment of an amount duly certified to be E543, 893.24, interest thereon at the rate of 9% per annum and costs on the punitive scale. I

interpolate to observe that the Plaintiff has not claimed the *mora* interest it appears to be entitled to in terms of the agreement *inter partes.*

[6] Because of the importance of the question that was raised in paragraph 1 above, I am compelled to chronicle the various steps taken by the various parties after service of the summons on the Defendant's attorneys of record. Upon being served with the simple summons on both Defendants on 27 November

(2) the Defendants, through their present attorneys of record, filed a notice to defend dated 28 November, 2008. The Plaintiff responded by filing a declaration dated 26 January,

(3) which was received by the Defendants on 27 January, 2009.

[7] On 3 February, 2009, at 11.29 am, the Defendants served a plea, which embodied a special plea. It is unnecessary, for present purposes, to have recourse to matters therein raised. On the same date i.e. 3 February 2009, at 3.00 pm, the Plaintiff served on the Defendants' attorneys an application for the grant of summary judgment in the terms set out in the simple summons. The Defendants did not and have not responded to the application for summary judgment. This is, as indicated above, one of the matters the propriety of which will be brought under a spot light.

[8] The first issue that I must mention at this nascent stage of the judgment is that it is common cause that at the time when the Plaintiff served its application for summary judgment on the

Defendants, it was then aware of the fact of the delivery of the plea and its contents. Mr. Motsa accepted this, which appears reasonable in any event, considering the time when the plea and special plea were served and the time when the application for summary judgment was served on the Defendants.

[9] The issue that requires immediate determination is whether it was proper for the Plaintiff to proceed, in the face of the special plea and plea filed by the Defendants, to file an application for summary judgment. This is particularly so in view of the fact that the Defendants had filed their plea and special plea and timeously, if I may add at the time the summary judgment application was moved.

[10] The starting point, in determining that issue are the provisions of Rule 32 (1) (2), as read with (3) (c) and which read as follows:-

(1) Where in an action to which this rule applies and a combined summons has been served on a defendant or a declaration has been delivered to high and that defendant had delivered notice of intention to defend, the plaintiff may, on the ground that the defendant has no defence to a claim included in the summons, or to a particular part of such a claim, apply to the Court for summary judgment against the defendant.

(2) This rule applies to such claims in the summons as is only:-

(a) On a liquid document,

(b) For a liquidated amount in money;

(4) For delivery of specified movable property, or

(5) Ejectment.

(3) The notice of application, a copy of the affidavit in support and any annexures thereto shall be delivered to the defendant not less than ten court days before the date of the hearing."

[11] I interpose to mention that a close reading the Rule in question, particularly 3 (c) thereof, shows indubitably that there is no fixed time period within which the application for summary judgment should be moved once the defendant has delivered the notice to defend to the particulars of claim or the declaration in circumstances where the action was commenced via a simple summons.

[12] The question that arises is whether because of the stark absence of a limitation period, if I may refer to it as such, a Plaintiff may deliver the application to a Defendant who has at

that time filed a plea, so long as the notice of the application together with the stipulated accompaniments are delivered at

least ten days before the hearing of the summary judgment

application. I should add that there is no debate regarding the fact that the instant claim falls within the rubric of Rule 32 (2)(b) as it is a claim for a liquidated amount in money.

[13] In support of the contention that there is nothing untoward with filing an application for summary judgment even after the filing of a plea, Mr. Motsa helpfully referred, amongst other cases to *Vesta Estate Agency v Schlom* 1991 (1) S.A. 593 (C.P.D.) 595. Due to the appositeness of the comments therein by Tebbutt J. (as he then was), I shall quote *in extenso* therefrom, at C - H where the learned Judge said:-

> "An application for summary judgment is an extraordinary remedy. It enables a Plaintiff to obtain judgment against a Defendant without a trial where the Defendant has no defence to the Plaintiffs' claim. By means of this procedure a defence of no substance can be disposed of without putting the Plaintiff to the expense of a trial. I can see no reason why this procedure should still not be open to a Plaintiff even after the Defendant has filed his plea. There is nothing in the wording of Rule 32 to preclude it. It is true that the words used in the Rule refer to the notice of intention to defend and do not refer to a plea but, on the other hand, they do not exclude an application for summary judgment after plea. If it were not so, nothing would be easier for a defendant with a spurious or no defence to a Plaintiffs claim to file some sort of plea at the same time as he gives notice of intention to defend in order to defeat the Plaintiffs right to obtain summary

> judgment. Indeed, the nature of the plea and the time and circumstances of its filing may afford good ground for an application for summary judgment under the Rule. The Rule requires a Defendant who is faced with an application for summary judgment either to provide security for any judgment, including costs that may be given or deliver an affidavit which must set out the material facts to satisfy the Court that he has a *bona fide* defence to the action and disclose fully the nature and grounds of such defence. A Defendant with no or a spurious defence, if the point *in limine* is sound, may avoid this by filing a plea at the same time as or shortly after, he gives notice of intention to defend. I do not think that can be correct. In *Khan v South African Oil & Fat Industries Ltd* 1923 N.P.D 99, a Full Bench of the Natal Provincial Division, dealing with Order XIV, which was similar to Rule 32, held that summary judgment could be applied for and obtained even after a plea had been filed. In England, where there was a similar rule, an application for summary judgment was made one month after delivery of the plea (see *McLardy v Slateum* (1890) 24 QBD 504 (CA) and see also Jones and Buckle, The Civil Practice of the Magistrates Court in South Africa. 7th Ed. Vol. 2 at 97). I therefore find that the delivery of a plea is no bar to a subsequent application for summary judgment. The point *in limine* accordingly dismissed."

[14] Before I can comment on the above excerpt, it is important to point out that the provisions of our Rule 32 (1) differ from Order 34 of Botswana, and Rule 32 (1) of the Uniform Rule of the Republic of South Africa, the latter of which also deals with summary judgment. In Botswana, Rule 2 (1) thereof provides that the application for summary judgment shall be delivered within 14 days of the entry of an appearance to defend. See *P.G. Glass (Pty) Ltd V Skepcon (Pty) Ltd* [2005] 2 B.L.R. 66

(H.C.)

at 68. In South Africa, on the other hand, the application must be moved within 15 days of the delivery of an intention to defend. As stated above, in terms of our Rules, there is no fixed period within, which the applicant for summary judgment should deliver the said application.

[15] Reverting to the above quotation, I should mention that I fully align myself with the reasons provided by the learned Judge in the above case, together with his conclusion. I say so fully cognisant, as stated in the immediately preceding paragraph, that our Rule 32 does not fix a deadline by which the application has to be brought in contradistinction with the Botswana and South African Rules of Court. I equally concur that it would not do any harm for a Plaintiff who realizes that his opponent, from the plea filed, does not have a *bona fide* defence, to then move for an application accordingly. This would avert the expense, delay and the vexation associated with trials when it is otherwise obvious from the plea that the purported defence is bogus and certainly unsustainable at law. I also associate myself with the comment about the unjust result that could be heralded to a Plaintiff by a Defendant with a spurious or bogus defence, who by the simple stratagem of filing the plea *pari*

passu with the notice to defend or soon thereafter in order to defeat what is otherwise a good claim and in respect of which a trial would be a waste of resources and time, successfully hamstrings a Plaintiffs efforts to enjoy the fruits of his judgment at an early stage.

[16] Having said the above, it would appear to me, agreeing as I do with the conclusion of Tebbutt J. in the *Vesta Agency* case *{supra)* that notwithstanding the filing of a plea, a defendant who is subsequent thereto served with an application for summary judgment, ought either to furnish security or to file an affidavit resisting summary judgment. The latter must be done within the period that will have been stipulated in the notice, if it is compliant with Rule 32 (1). In *David Chester v Central Bank of Swaziland* Civil Appeal No.50/03, Zietsman J.A. had this to say at page 3 of the cyclostyled judgment regarding the necessity to file an affidavit resting summary judgment in such cases:-

> "As can be seen from the above the defendant in his affidavit simply refers to his plea. He does not state under oath that the allegations contained in his plea are true and correct. He has therefore not complied with the Rule which requires him to fully set out his defence in his affidavit and to swear positively that the factual allegations supporting that defence are true and correct." See also *Central Bank of Swaziland v David*

Musa Chester Civil Case No. 114/03 (H.C.) per Maphalala J. at page 3.

Ordinarily, it should not be a defence for a Defendant to decline filing an affidavit resting summary judgment when called upon, by claiming that he had already delivered a plea. The plea, it must be accepted, would have been filed in oblivion to the fact that a summary judgment would in due course be moved. But once aware of the existence of the summary judgment, which is a step further than the plea, and constituting as it does, a separate procedure with its own requirements and responsibilities, the Defendant ought to deal head-on with the allegations therein contained on the basis of the duty thrust upon him by Rule 32 (5) (a) of the Rules.

[17] If the Defendant acts otherwise, the Court may be persuaded to

deal with the summary judgment application on the basis that

it is unopposed. There would, having said that, be nothing to

preclude the Court in unusual but appropriate cases, from having regard to the contents of the plea, in considering whether the Defendant has a defence or has raised a triable

issue that *prima facia* carries a prospect of success at the trial. See *Zanele Zwane v Lewis Stores (Pty) Ltd t/ a Best Electric* Civil Appeal No.22/07. I accordingly hold that the Defendant was bound in the instant case to file an affidavit resisting summary judgment and the Defendants in the instant case could not properly rely on the forlorn hope that the plea they had filed would suffice in their bid to successfully oppose the grant of the summary judgment.

[18] I should mention that Mr. Simelane helpfully referred to a memorandum dated 24 October, 2000 in which Sapire C.J. (as he then was) proposed certain amendments to Rules 30 and 32. In respect of the latter, the then Chief Justice noted correctly that it is possible under the current Rules for the summary judgment to be filed even after a plea, following the English procedure. He was of the view that aligning our Rule 32 to the South African Rules by stipulating the period by which the application for summary judgment would be filed i.e. 15 days, would be appropriate.

[19] It must be mentioned that these were useful recommendations which however remain uneffected. As we speak, there is no question or debate - Rule 32 of this Court's Rules remains in the state I quoted above. The

production of the said memorandum does nothing in my view to advance the Defendants' case save to show that there may be need to review our Rules of Court generally, including the Rules referred to by the then learned Chief Justice, in particular as his recommendations never saw the light of day.

[20] I now turn to deal with an important case in this regard, which from Mr. Simelane's argument, lends support for the proposition that the filing of a plea in response to an application for summary judgment may suffice. This is the case of *Zanele Zwane v Lewis Stores (op cit).* Due to the conclusion reached by the Supreme Court in that case, I find myself compelled to set out the facts as found in the judgment in necessary detail.

[21] Ms. Zwane, the Appellant, was sued by Lewis Stores for payment of E3,687.39 in respect of goods sold and delivered at her special instance and request. She filed a notice to defend and Lewis Stores neglected to file a declaration for a period in the excess of eight months, contrary to Rule 20 (1) of the Rules of Court. Lewis Stores eventually filed a declaration which was followed shortly by an application for summary judgment. In response, Zwane filed a plea in which she set out her defence. The High Court

proceeded to grant summary judgment against her the plea notwithstanding. She noted an appeal against the High Court's judgment.

[22] The Supreme Court upheld the appeal and refused the summary judgment and further granted Zwane leave to defend. In particular, the Supreme Court found that at the time that the application for summary judgment was moved, the *dies* stipulated in Rule 32 (3) (c) i.e. ten days had not lapsed. This, the Supreme Court found was enough basis to refuse the summary judgment. That Court did not stop there. There is an excerpt of the judgment which Mr. Simelane harped upon as being authority for the proposition that in summary judgment applications a defendant may file a plea and not an affidavit as required by Rule 32 (5) (a).

[23] The relevant portion is to be found in page 9 - 1 0 [paras 13-14] of cyclostyled judgment where the Supreme Court held:-

> "But then Mr. Magagula for the Respondent had another string to his bow. He then sought to persuade this Court that summary judgment was properly granted because the appellant had failed to file an affidavit in terms of Rule 32 (5) (a). This Rule is quoted in paragraph [9] above. I have deliberately underlined the words "or otherwise" to indicate my view that the Court is not confined to a defendant's affidavit in determining whether or not summary judgment should be dismissed. In the exercise of its judicial discretion, the court takes into

> account all the relevant factors bearing on the case. It should here be emphasized that, because of its inroads into the ordinary right of a defendant to a trial, sub-rule 5 (a) requires to be interpreted strictly and restrictively. Viewed in this way, it follows that the words "or otherwise" in sub-rule 5 fa) must be interpreted to include a plea in the circumstances of this case." [Emphasis added]

[24] I interpose at this juncture and observe with great respect that the Supreme Court held that because of the inroads to a defendant's right to a trial created by the summary judgment procedure, it is necessary to interpret Rule 32 (5)(a), including the words "or otherwise" occurring therein strictly and restrictively. It would appear to me, on a proper analysis of the judgment though that the Supreme Court, again with the greatest respect, may have done the opposite. It seems to me that the Supreme Court interpreted the words "or otherwise" liberally and not restrictively as it apparently had set out to do. That liberal interpretation resulted in the plea being regarded as sufficient in a certain cases. If the Supreme Court had actually interpreted those words restrictively, the result would have been to narrow down than to bestow the largesse it did.

[25] At paragraph 14, the Supreme Court proceeded to state reasons why it was necessary to extend the reach of the words "or otherwise" in the following language:-

> "One should not lose sight of the fact that the appellant was unrepresented. As can be seen from paragraph [5] above, her plea is written in the first person. It may well be that she intended her plea to serve as an affidavit. It was clearly her response to the respondent's application for summary judgment. I consider that, to a layman, there

> is a fine line between an affidavit and a plea per se. It is, however, the duty of the court to do justice in the circumstances of each case. Considered in the light of this factor, I am satisfied that this is a fit case where substance must take precedence over form in the interests of justice."

[26] Can it be correctly stated, particularly on the entire matrix of the facts before the Supreme Court that that case is authority for the proposition that a party who has been duly served with an application for summary judgment can file a plea instead of an affidavit as required by Rule 32 (5) (a)? I think not. The sentiments expressed by Zietsman J.A. in the *David Chester* case *[supra]* and quoted in paragraph 16 above are highly apposite and instructive.

[27] Furthermore, there are some important and crucial features of the *Lewis* case that must be properly placed in perspective and which in my view, led the Supreme Court to come to the judgment it did. The first aspect, which obviously weighed heavily on the Court was that Zwane was unlettered in law. Secondly, she was not represented in those proceedings. In contradistinction, the Defendants in the instant case are represented by an attorney admitted to practice in the Courts of this country. This is an important distinction.

[28] Thirdly, and most importantly, in her avowed status of being unlettered in law, Zwane, in her own way filed Court papers

in direct response to the application for summary judgment moved against her. The papers admittedly did not meet the form required but they provided issues which the Supreme Court found raised a triable issue warranting that summary judgment be refused. In the instant case, however, the Defendants, after filing a plea, were served with an application for summary judgment, legally represented as they were, did not file an affidavit resisting summary judgment. They just did not bother to file the requisite affidavit, considering the conclusion reached that an application for summary judgment may be moved even after a plea has been filed in terms of our law.

[29] It should also not sink into the abyss of oblivion that the Supreme Court was categoric that the approach adopted in that case was based on the peculiar circumstances of that case and which I have described above. It is therefore patently obvious that it is in exceptional circumstances that the Court can adopt the approach the Supreme Court did and have regard to a plea in deciding the propriety of the granting summary judgment when the defendant actually fell foul of the provisions of Rule 32 (5) (c) by not filing an affidavit resisting summary judgment in particular.

[30] If the interpretation of the Supreme Court judgment contended for by the Defendants was accorded to every case, it would result, in my view in the negation if not the total abolishment of the commercially useful tool of summary judgment. I say so because according to stainless procedure, once a summary judgment application has been moved, a plea may ordinarily be filed once the Court has determined that the defendant has a *bona fide* defence to the claim. It is therefore inherently wrong for a defendant to file a plea instead of an affidavit and equally wrong for a party which has filed a plea not to file an affidavit resisting summary judgment if the application for summary judgment is filed after the plea has been delivered.

[31] I had occasion to deal with an almost identical situation in the case of *David Ashworth Crabtree and Another v Robert Ashworth*

Crabtree Case No.2350/02. In that case, the plaintiffs moved a summary judgment against the defendant who when called upon to file and comply with Rule 32 (5) (a) instead filed a plea, a counter claim and affidavit which did not advance a valid and *bona fide* defence to the plaintiffs' claim but merely made reference to the plea. The plaintiffs thereafter sought to have the plea set aside as an irregular step and for the Court to proceed to

grant summary judgment as prayed, considering that there was no affidavit filed nor security furnished by the Defendant.

[32] Recognizing that the defendant in that case was unlettered in law and was unrepresented, I duly set aside the plea as an irregular step but granted the defendant leave to file an affidavit within a specified period. The Court also mulcted the Defendant with an adverse order for costs of the application. What was uppermost in the Court's mind, considering the fact that the defendant was unrepresented and unlettered in law was the stringent and extra-ordinary nature of the summary judgment procedure. At page 4 of the judgment, I stated the following:-

> "it is also my firm view that the Court, in deciding on the validity and *bona fides* of the defence cannot and must not have recourse to any pleadings irregularly filed. The Court must confine itself to the affidavit and any annexures thereto. *In casu,* it is improper and irregular to have any recourse to the Defendant's plea and I entirely agree with Mr. Howe on this score. To do so would defeat the entire purpose of summary judgment and would result in the Defendant usurping the powers of the Court because his filing of a plea is, indicative of the fact that he is entitled to leave to defend the claim. This power rests with the Court alone. Litigants cannot arrogate themselves this power. Such a course cannot and should not be allowed."

At a general level, I reiterate these remarks in respect of the run of the mill case.

[33] Mr. Motsa has urged the Court, if it finds that the plea

sufficed in the instant case, to have regard to the plea filed. It was his contention that the issues raised by the Defendant therein unquestionably raise neither a defence nor a triable issue. As such, he prayed that the Court should proceed to grant summary judgment in the manner prayed for in the application.

[34] Having regard to the entire conspectus of the legal issues involved, considered *in tandem* with the entire circumstances and events in this matter, I decline that invitation. I do so primarily for the reason that the circumstances in which the Court will have regard to the plea in the absence of an affidavit are rather strikingly unusual. I have dealt with them at length, particularly when I considered the Supreme Court judgment of *Zwane v Lewis Stores [supra).* It is patently obvious that the circumstances which faced Zwane in that case are starkly absent in this case as the Defendants are represented by attorneys of their choice, who on account of their knowledge of the law, ought to have done the correct thing in meeting the strictures of Rule 32 (5) (a).

[35] It must be understood and emphasized that the expansive interpretation accorded to the words "or otherwise" by the Supreme Court, is not readily available and accorded to every erring defendant, particularly one who is represented

by a legal practitioner in the proceedings in issue. It is my view that extra-ordinary and stringent as the summary procedure is, its requirements must be adhered to by every defendant and it is only in unusual and compelling cases like Zwane's case *(supra),* as the Supreme Court found it to be that an appropriate degree of relaxation may be called for to meet the justice of the case.

[36] There is need, in my view to strictly enforce the summary judgment Rule than to relax it, unless circumstances call for it in the Court's exercise of its discretion. To do otherwise would in my view lead to uncertainty and to a drop in the standards, if not outright and deliberate failure or refusal to follow the requirements of the Rule in question by some defendants resting on the forlorn hope that when times are hard the Court will, considering that summary judgment is stringent, adopt a less formalistic approach. This impression should not be allowed hatch and ferment into becoming the rule than the exception.

[37] There are two contentions raised by Mr. Simelane with which I propose to deal at this stage. In the first instance, he argued that what was or should have been before the Court for

^rgument was not the summary judgment as was the case, but the special plea which was raised by his client the 1st

Defendant. In essence, he strongly argued, if I may paraphrase, that the legal maxim "*prior in tempore est prior in jure*" i.e. first in time is first in law, should apply. Because the special plea was delivered first and was followed, by the application for summary judgment, a few hours later, he contended, the special plea ought to have been determined ahead of the application for summary judgment.

[38] This argument can be disposed of very easily. The fact of the matter is that although the special plea was delivered first, it is an ineluctable fact that the summary judgment is the one that was set down for hearing ahead of the special plea. I say so because the summary judgment application, on delivery, contained in it a date for the hearing of the same. It is accordingly my view that the critical stage to consider which matter ought to be heard first is not determined by the date and time of delivery of the pleading concerned but by which of the matters was set down for hearing earlier than the other. On this score, it is clear that whereas the summary judgment was delivered later than the special plea, it was, however, set down earlier. If truth be told, the special plea has not been set down even as I read this judgment. The argument by the Defendants in this regard has no merit and ought to fail in the premises.

[39] The next line of attack adopted by the Defendants was that the affidavit filed in support of summary judgment does not in its body, make reference to or acknowledge that the deponent thereto did at the time of deposing thereto, have regard to the contents of the plea. Had that been the case, so the argument ran, the affidavit signed by the deponent would have explicitly stated so. The failure to acknowledge the plea in the affidavit, the Court was urged to find, was fatal to the application for summary judgment.

[40] When one has regard to the contents of the affidavit deposed to by Dr. E.T. Gina, it is abundantly clear that no specific reference is therein made to the plea and special plea. The affidavit makes reference only to the notice of intention to defend having been filed as a dilatory tactic. The question is whether that omission alone is fatal and should lead the Court to dismiss the application for summary judgment for that reason alone.

[41] It is not contended by the Defendants that Dr. Gina did not see the plea and the special plea before deposing to the affidavit in question. There is no evidence that he did not see the same. I am of the considered view that although it

would have been proper for the affidavit in support of summary judgment to have made reference to the plea, in acknowledgment first of the receipt thereof and further signifying the position that the Defendant still had no *bona fide* defence, having regard to the plea, the omission to do so, is however, not fatal.

[42] I say so because although the formal aspects of summary judgment are there to be followed, the ultimate question to be decided does not vanish once reference to the plea has not been made. The question still remains for the Court to consider and it is this in the circumstances: does the plea filed by the

Defendant's raise a triable issue or a *bona fide* defence which *prima facie* carries a prospect of success so as to render the granting of summary judgment inappropriate. I do not find merit in this argument as it does nothing in the way of making the Court view summary judgment in a less critical manner and to the Defendant's prejudice. The Court must, even in the absence of reference to the plea, still be on the *qui vive* and ensure that no injustice is perpetrated against the Defendant, considering the stringent and summary nature of the procedure. I dismiss this argument as well.

[43] In view of the analysis of the cases that I have had to undertake, I find it proper to enumerate my conclusions regarding the matter under consideration. My conclusions, based on the cases I have consulted may be summarized as folio ws:-

(1) Where a defendant has filed a plea consequent to a notice of intention to defend, there is nothing that precludes the plaintiff, having seen the plea, from moving an application for summary judgment;

(6) in those cases where a plea has been filed, a defendant may not rely on that plea and contend that it complies with the otherwise mandatory requirements of Rule 32 (5) (a). The defendant will still have to furnish security or file an affidavit or where the Court finds it appropriate, order the defendant to come to Court to produce a document or to be examined on oath as provided in Rule 32 (5) (d).

(7) it is only in unusual and compelling situations that the Court may have regard to the plea filed when the Defendant has not complied with Rule 32 (5) (a). This will be done sparingly and only if the interests of justice in that particular case so require.

[44] Speaking for myself in relation to (3) above though, I would respectfully advocate for and prefer a situation where the Court, having considered the plea in coming to a view whether a defence is disclosed, still calls upon the defendant to file an affidavit as required by the Rules on such terms as the Court considers just, rather than the approach where the status of the plea will be elevated to that of an affidavit and recognize that plea as the sole basis for granting the erring defendant leave to defend the proceedings, thus virtually rendering inconsequential the requirement of the affidavit.

[45] An affidavit resisting summary judgment, it must be recalled, provides evidence and its weight arises from the fact of its having been sworn to. In contradistinction however, a plea merely sets out allegations which must be established by evidence. To substitute a plea for an affidavit would therefore elevate the status of the plea to that of an affidavit as I have stated above.

[46] Having regard to the sequence of events in the current matter, I find that the Defendants are "offside" if I were to resort to football parlance. They did not file an affidavit in which they could swear to their defence in a manner that could satisfy the

Court that they have a *bona fide* defence to the Plaintiffs claim. I do not, however find it proper, for reasons given earlier, to decide the matter on the basis of the plea. It is my view that this is not a proper case to do so. I can also not properly grant summary judgment in the present circumstances only for the reason that no affidavit has been filed as there is a looming possibility that an injustice may thereby be perpetrated on the Defendants.

[47] I am of the considered opinion that the fairest manner in which to deal with this matter and which takes into account both stringent nature of the remedy sought and the injustice that may be occasioned to the Defendant but at the same time reinforces the need by Defendants to follow the requirements of the relevant Rule to the letter, is, in exercise of the Court's discretion, to grant the Defendant leave to file an affidavit resisting summary judgment within a time I shall specify hereunder.

[48] On the issue of costs, it is my considered view that the Defendants failed to comply with their obligations as required by Rule 32 (5) (a). That failure has necessitated that I issue a moratorium, so to speak, in order to allow the Defendants, in the interests of justice, to file an affidavit resisting summary judgment well after the time stipulated in the Rules. To that

extent, I am of the view the Defendants should bear the costs, which on the basis of the lease agreement *inter partes,* are hereby ordered to be on the attorney and client scale.

[49] I finally wish to commend Counsel on both sides for the sedulous work they undertook in producing erudite heads of argument on the balance of the issues raised in the Defendants' plea. Regrettably, I am unable to draw from their research, hoping though that their work shall not eternally be laid to waste and be in vain. The Court may, in the future, depending on the course this matter takes, once again have recourse to the heads presently filed and hopefully to good effect.

[50] In the premises, I issue the following Order:

50.1 The 1st and 2nd Defendants be and are hereby ordered to file an affidavit resisting summary judgment within seven (7) days from the date of this judgment, in line with Rule 32 (5) (c) of the Rules of this Court.

50.2 The 1st and 2nd Defendants be and are hereby ordered to bear the costs of the hearing on the scale between attorney and client, jointly and severally, the one paying the other to be absolved.

50.3 The matter shall, after compliance with 50.1 above, proceed in terms of the Rules governing summary judgment applications.

DELIVERD IN OPEN COURT IN MBABANE ON THIS THE 24th DAY OF APRIL, 2009.

T.S.MASUKU
JUDGE

Messrs. Robinson Bertram for the Plaintiff
Messrs. Mbuso E. Simelane & Associates for the Defendants