IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE

CASE NO. 04/2008

In the matter between:

STANDARD BANK SWAZILAND LIMITED	**APPLICANT**

AND

MAKHATHU INVESTMENT t/a KILIMANJALO RESTAURANT	**1st RESPONDENT**
WELILE EMMANUEL MABUZA	**2nd RESPONDENT**
WELILE MKHATSWA	**3rd RESPONDENT**
SIBUSISO MKHLULI KUBHEKA	**4th RESPONDENT**
FIKILE THALITHATHA MTHEMBU	**5th RESPONDENT**

CORAM	**OTA J.**
FOR APPLICANT	**MR. K. MOTSA**
FOR 5th RESPONDENT	**ADVOCATE L. MAZIYA**

JUDGMENT

[1] The plaintiff herein instituted proceedings by way of simple summons against the defendants, jointly and severally the one paying the other to be absolved, in the following terms.

[2] CLAIM NO 1 - LOAN ACCOUNT

1. The payment of the sum of E400,059-7,1 being in respect of monies; lent and advanced by the plaintiff to the first defendant at the latter's special instance request and/or order which monies are now due owing as of 7th January 2008 and which the defendants fail, neglected and/or refuse to pay to the plaintiff.
2. Interest on the sum of E400,059-71 at the bank's rate of 5% above prime per annum a tempore morae to date of final payment.
3. Costs of suit on the scale as between attorney and own client including collectioncommission.
4. Further an/or alternative relief.

[3] CLAIM NO. 2 - CURRENT ACCOUNT

1. The payment of the sum of E129,939-35 being in respect of monies lent and advanced on overdraft by the plaintiff to the first defendant at the latter's special instance request and/or order which monies are now due owing as of 7th

January 2008 and which the defendants fail, neglect and/or refuse to pay to the plaintiff.

2. Interest on the sum of El29,939-35 at the bank's overdraft rate of 5% above prime per annum a tempore morae to date of final payment.
3. Costs of suit on the scale as between attorney and own client.

4. Further and/or alternative relief.,

[4] CLAIM NO. 3

1. The payment of the sum of E 58,609-02 being in respect of monies lent and advanced by the plaintiff to the first defendant at the latter's special instance request and/or order which monies are now due owing as of 7th January 2008 and which the defendants fail, neglect and/or refuse to pay to the plaintiff.

2. Costs of suit on the scale as between attorney and own client including collection commission.

3. Further and/or alternative relief.

Thereafter, the plaintiff delivered an Ammended Declaration to be found on pages 6 to 49 of the book of pleadings. The record demonstrates, that the 2nd and 3rd Defendants, respectively,

delivered a plea to the plaintiffs Ammended Declaration (see pages 94 to 112) of the record. For her part, the 5th Defendant raised a special plea to the plaintiffs Ammended Declaration, in the following terms, as appear on page 113 of the book of pleadings:-

[5] " *I.The summons discloses no cause of action in that it is not clear on these papers, whether the parties concluded a Loan or Lease Agreement.*

2. The summons is fatally defective in that there is nothing on these papers, to show that there ever was any written cancellation of the Agreement between the parties.

3. The Summons is fatally defective in that the amounts claimed are based on certificates of balance which are invalid since they are inconsistent with the provision of the Common Law."

[6] It is on record that after the 5th Defendant raised the foregoing special plea, that the plaintiff delivered a notice to discover documents to the defendants.

[7] It is in consequence of the Notice to Discover, that the 5th defendant commenced the instant application in terms of Rule 30 (1) of the Rules of this court, praying the court as follows :-

a. Setting aside plaintiffs Notice to Discover as an irregular proceeding or step in that

1. *The fifth Defendant raised a point in limine by way of a special plea and as such the point has not been decided by the court.*
2. *That such a step violates the provisions of Rule 35 in that pleadings are still not closed as the fifth Defendat has not filed any pleadings in the matter save for the special plea which is still to be argued.*

b. Granting fifth Defendant costs.

c. *Granting fifth Defendant further and/or alternative relief*

[8] It is the foregoing rule 30 application that presently vexes this Court. The parties herein filed their respective heads of argument. When this matter served before me for oral argument on Friday the 11th of February 2011, the plaintiff was represented by **Mr Motsa** and the 5th Defendant was represented by **Advocate Maziya.** I have carefully considered the totality of counsel's submissions for and against this application, as contained in the heads of argument filed, as well as oral argument tendered in Court. T have no wish to reproduce same in extenso. Suffice it to say that I will be making references to such of them as I deem expedient in the course of determining this application. Rule 30 (1) upon which this application is predicated provides thus:-

[9] "A party to a cause in which an irregular step or proceeding

has been taken by any other party may, within fourteen days after becoming aware of the irregularity, apply to Court to set aside the step or proceeding.

Provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application"

[10] It is glaringly obvious from the language of the foregoing legislation, that it affords a party, aggrieved by an improper procedural , step, taken by his opponent, an avenue to challenge such procedural step as irregular.

[11] In casu, it is contended by the 5th Defendant that the filing of the " *Discovery Notice*" by the plaintiff before the "*special plea*" had been heard and determined, constitutes the taking of an irregular step as envisaged by Rule 30. It was contended replicando by learned counsel for the plaintiff that the exception is bad and should be dismissed. I will come to these matters and the reasons advanced by the respective parties for their stance, anon.

[12] The question that looms large in this application is 'is the Discovery Notice an irregular step in the circumstances, of,this case?. To effectively determine this question, I must of necessity have recourse to the characteristics of the defence of special plea, for therein lie the answer to the question posed. It is

incumbent upon me to,undertake this task, since the cries of 'foul' by the 5th Respondent are elicited by the alleged irregular procedure that followed the special plea raised. It is therefore mandatory that we consider the characteristics of a special plea, to ascertain if there is any substantiality in the allegation of the 5th Defendant as regards the special plea raised.

There are three classes of defences that may be raised in answer to a declaration, namely

(a) defences or pleas properly so called

(b)exception and;

(c) special plea

[13] Now in the Text Civil Practice of the Supreme Court of South Africa, 4th edition, page 470 to 471, the learned editors **Herbstein and Van Winsen** described a special plea as follows:-

[14] " *A special plea is one that does not raise a defence on the merit of the case but, as it's name implies, sets up some special defence, which has as it,s object either to delay the proceedings (a dilatory plea) or to abate or quash the action altogether (a declinatory plea). Thus, if the defendant is sued on a contract, he*

may seek to delay the action by specifically pleading that the same cause is pending in another Court - a plea of lis pendens - or he may seek to quash the action by specifically pleading that the same cause has already been tried and decided upon by some other Court of Competent Jurisdiction -a plea of res judicata ".

[15] *The special pleas do not concern the merits of the action. They merely seek to interpose some defence not apparent on the face of the pleading up to the time when they are raised—.*

[16] *The essential difference between a special plea and an exception is that in the case of the latter the excipient is confined to the four corners of the declaration. The defence he raises in exception must appear from the declaration itself; he must accept as true the allegations contained in it and he may not introduce any fresh matter. Special pleas, on the other hand, do not appear ex facie the declaration. Special pleas have to be established by the introduction of fresh facts from outside the circumference of the declaration and those facts have to be established by evidence in the usual way. Thus as a general rule, the exception procedure is appropriate when the defect*

appears ex facie the pleading, whereas a special plea is appropriate when it is necessary to place facts before the court to show that there is a defect.------" ,

[17] Similarly, in Becks Theory and Principles of pleadings in Civil Actions page 152 and 153, the learned author declared in part as follows:-

" *The Common Characteristics of a special plea* **— is** *that they do not raise any defence upon the merits of the case at all; they seek only to evade the action either by declining the jurisdiction, by postponing the trial or by abating the declaration; they therefore allege merely some defect or irregularity — it will be remembered that the test of a valid exception is that the truth of the pleading excepted to is assumed and that no fresh matter of any sort is introduced. Pleas in bar, dilatory pleas and pleas in abatement differ from exceptions precisely in this, that they do always*
introduce fresh matter which must be proven by evidence. Once that evidence is established there emerges therefrom some reason why the action cannot be proceeded with "

[18] In casu, the allegation is that the Declaration discloses no cause of action. That there is a conflict between the simple summons and the Declaration as to the cause of action, a loan or lease agreement. In support of this allegation, **Advocate Maziya** whilst submitting before Court, called the Courts attention to paragraph 1 of action 3 of the declaration which he alleges

presupposes a loan, page 65 of the book which he alleges shows a lease agreement,, pages .52, to, ,57 which he alleges refers to some separate agreements which have not been annexed.

Advocate Maziya contended, that by reason of the foregoing, the 5th defendant is at pains in comprehending whether the cause of action is a loan or a lease. The 5th defendant is therefore not in a position to plead to same. The notice to produce if allowed, will foreclose the 5th defendant from pleading. In the circumstances, the special plea should be set down for hearing first.

[19] Mr Motsa on the, other hand contends that the cause of action is clearly decipherable from pages 24 to 41 of the declaration. Therefore, the nature of the special plea requires that the 5th Defendant be put in the box at the trial to enlighten the Court as to why her confusion on the cause of action. That in any case, since the 5th Defendant has raised a special plea, she is barred from pleading over on the merits, therefore, the notice to produce is a regular step at this stage.

[20] It is obvious to me from the totality of the foregoing, that the bone of contention is whether, a party who raises a special plea to a xlaimis~still entitled to plead over on the merits, after a disposal of the special plea.

[21] What then is the position of the law on this question? The question whether a defendant who raises a special plea is required to plead over on the merits of the claim at the same time, has been a subject of considerable judicial debate over the decade. The end result of this debate is the emergence of two schools of thought. The position of the first school of thought is embodied in the **Case of Sibeko and Another V Minister of Police and others 1985 (1) SA 151 (10) AT 157 H.** In that case, the court held that where the effect of the special plea will be to bar the plaintiff from proceeding on the merits, it is unnecessary to plead over and incur costs in relation to other issues, since the special plea may prove decisive. In these circumstances, if the special plea fails to achieve its objective, the court will then allow the defendant an opportunity of delivering a plea on the merits. The position in **Sibeko (supra)** was disapproved of in the later decision in **David Beckett Construction (Pty) Ltd V Bristow 1987 (3) SA 275 (W) at 280 C-F,** where it was held that in terms of the rules, pleading over is always necessary at the same time that a special plea is raised. In the words of the Court:-

[23] *" The intended effect of the Rules, as conveyed by the actual wording and scheme thereof, is that, irrespective of a preference to add the label "special plea" to portion of the plea, every defence must be raised as part and parcel of the plea required*

by Rule 22. A "special plea" will constitute either part of or whole of that plea. Except when a defendant is prepared to have his case stand or fall by the "special defence" which is pleaded, there is no action which "no plea over is necessary". It must also be remembered that a plaintiff has an entitlement to a plea complying with Rule 22 and an accompanying aspect such as to serve a notice of bar. Such rights are given by the Rules of Court which have the force of Law. A Court cannot alter the Law and accordingly cannot devise or follow a contrary practice. This consideration reinforces the message contained is Rule 22 and the resultant conclusion that' there can be no automatic or generally followed practice that the court will, after disposing of a special plea, "then allow the defendant a further opportunity to deliver a plea canvassing the merits". [24] The emergence of the foregoing Schools of thought has wrought the ill consequence, of lack of uniformity on this question by case law. This ill has also pervaded our courts, thereby giving rise to the unfortunate situation, where the same High Court is speaking from two different sides of it's mouth, over the same issue. It is thus obvious to me, that each case must be decided upon its own peculiar facts and circumstances.

[25] I have taken the liberty of perusing the totality of the papers that attend this application. I must say that I am very mindful of the fact that I am not seised of the "*special plea*". Therefore, I have had to approach this whole application with much trepidation, to avoid the danger of predetermining the special

plea. This not withstanding, I hold ,the; view that since the parties have put all the materials necessary to determine this question before me at this stage, it will amount to an attitude of over restraint for me to refuse to do so. Suffice it to say that it is obvious to me from the facts stated, that the 5th defendant's grumble is that the declaration has fallen short of disclosing a cause of action, due to the allegation that there is an apparent conflict between the simple summons and the Declaration, as well as other attendant document, as to whether the cause of action is a loan or a lease. Therefore, making it impossible for the 5th defendant to plead to same. It appears to me therefore, and as rightly contended by **Advocate Maziya,** that the special plea is such that if upheld, may have the effect of requiring the plaintiff to file fresh summons. Thereby, rendering a plea over at this stage irrelevant. It is thus my considered view in the circumstances, that the better approach and the interest of justice demands, that all other actions be stayed until after a determination of the "*special plea*".

[26] **Mr Motsa** contends that the 5th Defendant has failed to produce any authority that says that a special plea should be dealt with before trial. That may very well be the case. However, in reaching the conclusion that the special plea be dealt with first, I have taken into consideration the facts and circumstances of this case. To my mind, the special plea is just one of the avenues

of excepting to the declaration, as I have hereinbefore demonstrated. It has however been termed a special plea and is serving before court as such. Substantial justice demands that the Court deals with it in consideration of its peculiar facts and, circumstances, irrespective of nomenclature. To hold the notice to discover a regular step at this stage and order the 5th defendant's special plea to be heard at the trial, has the dangerous potentials of closing pleadings and thus an automatic bar to the 5th defendant from pleading over to the main case. I do not think that this approach will serve the cause of justice. If we never doanything.which$_t$ has not been done before, we shall never get anywhere. The law will stand still while the rest of the world goes by; and that will be bad for both. The spirit of justice does not reside in forms or formalities or in technicalities. Legal inflexibility may if strictly followed, only serve to render justice grotesque or even lead to outright injustice. The Court will therefore, not ensure, that mere form or fiction of law introduced for the sake of justice, should work a wrong contrary to the real truth and substance of the case before it. The universal trend is that courts are more interested in substance than mere form. Justice can only be done if the substance of the matter is considered.

[27] On these premises, I agree entirely with the 5th Defendant, that the Notice, to, Produce delivered at this stage is an irregular step. It is hereby set aside. I make no order as to Costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 18TH OF FEBRUARY 2011

OTA J.

JUDGE OF THE HIGH COURT