IN THE HIGH COURT

OF SWAZILAND

JUDGMENT

Case No. 915/2015

In the matter between

KUKHANYA (PTY) LTD **Plaintiff**

And

RONNIE HLOPHE **Defendant**

Neutral citation: *Kukhanya (Pty) Ltd v Ronnie Hlophe* (915/2015) [2017] SZHC 143 (13 July 2017)

Coram: **MAMBA J**

Heard: **07 July 2017**

Delivered: **13 July 2017**

[1] *Practice and Procedure – Judgments and Orders – application for summary judgment – time for filling such application per rule 32 (1) of the rules. No fixed time for doing so. Plaintiff is, as a general rule, not precluded from applying for such after filing of plea by the defendant.*

[2] *Practice and Procedure – Judgments and orders – application for summary as per Rule 32 (1) of the rules of court. Application after delivery of plea, further particulars to plea, replication and disclosure affidavit by Plaintiff and request for such disclosure to be made by the Defendant. Application filed rather late and constituting an irregular step or proceeding within the meaning of Rule 30 of the rules of court.*

[1] By summons issued by the Registrar of this court on 19 June 2015, the Plaintiff sought an order for the payment of the sum of E220, 000-00, alternatively for cancellation of an agreement of sale of a motor vehicle between the parties and the return of the relevant motor vehicle by the Defendant to the Plaintiff. Following service of the summons on the Defendant, he filed and served his notice of intention to defend the action. This was done on 26 November 2015.

[2] By notice dated 25 November 2015, the Plaintiff applied for summary judgment. This application was set-down for the 11th day of December 2015. The application was opposed by the defendant who filed a detailed or comprehensive affidavit setting out his defence to the action. This caused the Plaintiff to abandon or withdraw the application for summary judgment.

[3] By a notice of bar dated 12 May 2016, the Plaintiff demanded that the Defendant should file his plea within three days of receipt of that notice, failing which he would be ipso facto barred from so doing and judgment by default would accordingly be applied for. The said notice of bar was filed after the Plaintiff had compiled with a request for further and better particulars by the Defendant.

[4] The defendant filed and served his plea on 24 May 2016 and on the same day, the Plaintiff sought further particulars from the Defendant pertaining his plea. The Plaintiff stated that it needed or required these further particulars in order to file its replication. These further particulars were supplied or furnished to the Plaintiff's attorneys on 10 June 2016. There is no indication in the file whether the promised replication was filed or not. Nothing turns on this, however, in this judgment.

[5] Thereafter, the Plaintiff filed and served its discovery affidavit. This was on 17 October 2016. The Plaintiff simultaneously with its own disclosure affidavit, demanded that the Defendant files his within a period of 21 days from date of service of that notice. However, before this could be done, the Plaintiff again filed an application for summary judgment. This application is dated 24 January 2017 and was set-down for the 17th day of February 2017. In response to this, the Defendant filed a Rule 30 notice, arguing that this application for summary judgment was an irregular step in the proceedings. This judgment is on that notice i.e. Rule 30 notice.

[6] The Plaintiff argues that its second application for summary judgment is in order and there is nothing irregular about it. In support of this argument Counsel for the Plaintiff submitted that:

'--- the rules of this Honourable Court do not fix any time period within which the application for summary judgment should be moved nor do the rules close to the door to a Plaintiff moving a summary judgment application after a plea has been filed.'

Reliance for this proposition, which seems trite, was placed on the judgment of this court by Masuku J in *Swaziland Industrial Development Company Limited v Process Automated Traffic Management (PTY) LTD & Another, Case 4468/2008*, delivered on 24 April 2001, where the Learned Judge stated:

'[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 cognizant, as stated in the immediately preceding paragraph, that our Rule 32 does not fix 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 *bona fide* defence, to then move for an application accordingly. This would avert the expense, delay and 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 Plaintiff's effort to enjoy the fruits of his judgment at an early stage.'

See also the judgment by Mabuza J in *Comprehensive Car Hire (PTY) LTD v Bongani Mamba (62/09) [2012] SZHC 247 (19 October 2012)* where the Learned Judge quoted with approval the judgment by Tebbutt J in *Vesta Estate Agency v Schlom 1991 (1) SA 593 at 595 C-H.* There the court stated as follows:

> '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 as well 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 plaintiff's claim to file some sort of plea at the same time as he gives notice of an intention to defend in order to defeat the plaintiff's right to obtain summary judgment. Indeed, the nature of the plea and the time and circumstances of this 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 to deliver an affidavit which must set out the material facts to satisfy the Court 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 could, if the point *in limine* is sound, avoid this by filing a plea at the same time as, or shortly after, he gives a notice of intention to defend. I do not think that can be correct. In *Khan v South African Oil and Fat Industries LTD 1923 NDP 99,* a Full Bench of Natal Provincial Division, dealing with the 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 *Mc Lardy v Slateum (1890) 24 QBD 504 (CA)* and See also Jones & Buckle *The Civil Practice of the Magistrate's Courts 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.'

[7] I, with due respect, entirely agree with the above exposition of the law in this regard. However, the present case is markedly different or distinguishable from the cases discussed above. In the instant case, the pleadings are almost closed. The Plaintiff has after filing of the notice of intention to defend, taken several steps toward the completion of the pleadings. These include the first application for summary judgment, and the withdraw thereof, the request for further and better particulars to enable the Plaintiff to file its replication, the filing of the disclosure affidavit and the notice for the Defendant to do the same, i.e. to file his discovery affidavit. All these steps were taken by the Plaintiff. To compound matters, these steps were taken after the filing of the plea.

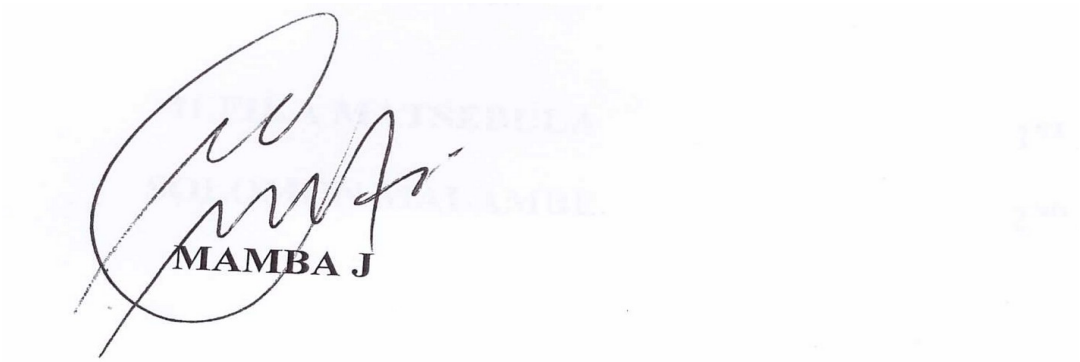
[8] If, upon filing of the plea, the Plaintiff is of the view that the plea does not disclose a defence to the action or part thereof, then, the prudent and logical thing to do is for the Plaintiff to say so and apply to set aside the plea and also apply for judgment in the main action. The mere fact that the applicable rule does not bar a Plaintiff from applying for summary judgment after the filing of a plea is certainly no licence to do so at any

time before judgment. That cannot be the intention of the framers of the rule in question. It is neither the meaning nor purport of the rule. The rule was intended to serve, and quickly come to the aid of a litigant who has an indefensible claim against him. The Plaintiff cannot exercise this remedy or procedure at any time or stage in the proceedings. He must do so at the earliest available opportunity. That opportunity is when he realizes that his case is unassailable and that the Defendant is merely dilatory or procrastinating. This may be either immediately before the plea or immediately after such plea. Indeed Justice Tebbutt in the quoted excerpt above refers to the time and circumstances of the filing of the plea by the Defendant.

[9] It must always be borne in mind that the rules of court do not constitute substantiative law. They are there for the smooth and efficient and predictable running of the court and the adjudication of cases. Where there is licence to do something or take a procedural step, just because the step is not time-barred in terms of the rules, it does not follow that it may be taken at any time or at any stage of the proceedings. If this were the case, the smooth adjudication of litigation would be compromised. Predictably would suffer the same fate. This cannot be countenanced by the court.

[10] In the present matter, the application was moved rather too late and after many steps had been taken by the Plaintiff, towards the conclusion or close of the pleadings. By then, the Plaintiff had lost his right to move the application. For these reasons, the application for summary judgment was an irregular step within the meaning or provisions of rule 30 of the Rules of the court. The Rule 30 notice succeeds with costs in favour of the Defendant.

[11] For the avoidance of doubt, this judgment does not purport to overrule any of the judgments cited above. Instead it reaffirms and qualifies them or the general rule therein stated. To use a tired yet useful phrase; each case will always be decided or determined on its particular or peculiar facts and circumstances.



FOR THE PLAINTIFF : MR. F. TENGBEH

FOR THE DEFENDANT: MR. M. NKAMBULE

(*Ex tempore* judgment was handed down immediately after submissions on 7 June 2017).