IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE CASE NO. 958/18

In the matter between:

GIGATECH (PROPRIETARY) LIMITED PLAINTFIFF

And

KAREEM ASHRAFF & ANOTHER DEFENDENT

Neutral Citation: *Gigatech (Proprietary) Limited v Kareem Ashraff & another (958/18) SZHC14 (2020) [12th February 2020]*

Coram: MAPHANGA J

Date Heard : 20/09/19

Date Delivered: 12/02/2020

Summary : *Civil Law – Summary Judgment; whether rules for the production of documents in terms of rule 35 apply in the summary judgment, whether application for leave to supplement affidavits permit.*

Background facts

[1] The Plaintiff, a firm specialising in the supply and installation of high-tech scanning equipment and metal detectors, has applied for summary judgment under rule 32 of the Rules of The High Court, for a claim of E719,000.00 against the defendants jointly and severally, the one paying the other to be absolved. The defendants oppose the application and have filed their papers contesting the claim. The 1st Defendant is a businessman of note and a director of the 2nd Defendant, a trading company carrying on business in Mbabane.

[2] The defendants have through the voice of Mr Ashraf, delivered an affidavit resisting summary judgment deposed to by the 1st Defendant both in his nominal capacity and also in representative position acting for and on behalf of the 2nd Respondent company. In it the

plaintiff's claim is refuted as lacking merit. He has also raised a preliminary point of law on the basis of which the cause of action is challenged in its totality as expiable in law. I propose to deal with the point of law separately in the context of the summary judgment application and the implications thereof to the success or otherwise of the application.

[3] On the merits it is the defendant's case that the cheques relied on and the alleged procurement of funds through those instruments were in Mr Ashraf's version received in good faith under circumstances that are totally different from what the plaintiff has alleged. According to Mr Ashraf the said cheques were delivered to him as security and mode of securing payment for a loan facility he had extended to the Plaintiff at the instance of its directors- the said Fitbea and Ntiwane, in order to assist them capitalise and provide vital finance for the plaintiff's fledgling enterprise.

[4] He describes how after having been introduced by a mutual friend he was approached by the two soliciting him to consider investment in the business by acquisition of equity in the company. He turned down the offer as he says he was not interested in the proposition. Nonetheless he agreed to finance the venture by extending a loan of funds from time to time on the basis that he would realise his returns from a share of the profits of the business. Mr Ashraf would extend the finance to the plaintiff as and when they required funding to facilitate delivery on their orders from time to time and attaches as evidence of these transactions, various cheques indicating divers payments to the plaintiff's directors in the period between 2008 to 2009. In addition he alleges that in terms of this scheme he would also finance the plaintiff's orders of equipment and supplies from overseas sources by paying those suppliers directly on behalf of Gigatech. An example of one such transaction produced by Mr Ashraf was an invoice and corresponding instructions to the bank of the 2nd Defendant which according to Mr Ashraf was procured by him under his signature to settle the invoice in the figure of USD 4160.00. He attaches the invoice and instruction to the bank as Annexures KA 2.1 and KA 2.2 respectively.

[5] Further Mr Ashraf deposes that through the 2nd Defendant he would supply certain goods to Gigatech as well as extend personal cash loans to the directors for certain expenses including payment of utilities such as water and electricity accounts. Again he has attached certain annexures being alleged copies of delivery notes in respect of goods supplied, petty cash vouches and evidence of receipt of loans in the form of

acknowledgment thereof given by the directors. These appear as Annexes KA3-4 and 5 in the series of attachment to Mr Ashraf's affidavit.

[6] Of significance to the proceedings is Mr Ashraf's statement in paragraph 5.11 of his affidavit resisting summary judgement where in rejecting the Plaintiff's version of the circumstances pertaining to the tender and receipt of the cheques he says:

> ***"As security for the loans, the arrangement was that the Plaintiff would give me blank cheques duly signed by its directors. On receipt of payment from whatever source, we would agree on the extent to which any outstanding debt would be paid. It is false that the Plaintiff handed to me two (2) cheques to settle a debt of E80, 000.00 (eighty thousand Emalangeni). It is noteworthy that his first cheque of E 276,000.00 (two hundred and seventy six thousand Emalangeni) was paid in November, 2008. The second cheque for E 523 000 (five hundred and twenty three Emalangeni) was in March, 2009. It is highly unlikely that the Plaintiff and its directors would sit back and allow a cheque of E 267 000.00 (two hundred and seventy six thousand Emalangeni) to be paid and do nothing thereafter to recover the over payment and then also allow a cheque of over half a million which was not due to go through. Less still is it likely that they would then wait for almost ten (10) years and do nothing about it."***

[7] According to Mr Ashraf the financial and business dealings between him and Messrs Fitbea and Ntiwane were extensive. They included the provision by Ashraf through his corporate interests, of other support to the plaintiff's directors including the lease of residential facilities in the form of a house in the Matsapha industrial complex. He also states further that in the course of the business dealings and transactions the blank cheques received from the directors of Gigatech was not confined to the two cheques that are part of the subject matter of this action but he retained another cheque which was not banked which he has also attached as Annexure KA6. This cheque is supposedly introduced as evidence of Mr Ashraf's assertions that there is more to the context to do with delivery of the two cheques that were drawn in favour of 2nd Defendant than the plaintiff is prepared to reveal.

[8] In his affidavit Mr Ashraf was keen to allude to a background of litigation between himself and the plaintiff involving some of the business dealings and cites as an example an

application for ejectment of the directors of the plaintiff from the leased residential premises in Matsapha in respect of which he attaches a transcript of the evidential record of the ejectment proceedings. He has attached a transcript of oral evidence in the ejectment proceedings as KA 7. From the headings it shows the litigants as Mr Kareem Ashraf and one Mona Ashraf as the Plaintiff's against the Plaintiff under case No. 2199/2010.

[9] As regards the transcript it is not clear to me *ex facie* the document itself and without any contextual bearings as to whether this was an action and if so what the subject matter thereof was. When the summary judgment was heard Mr Mamba did make reference to certain passages in the transcript and in his submissions sought to impress the import of the relevant portions of the transcript as giving credence to Mr Ashraf's factual assertions regarding the history and context of the dealings between himself and the plaintiff's directors. Mr Mamba urged us to consider that some of the evidence critical to these proceedings and the transactions that are the subject matter herein are not novel to these proceedings. That the evidence had been canvassed in previous litigation albeit involving a different *causa* and claim by Mr Ashraf.

[10] Of particular interest to me herein are the portions to which my attention was drawn by Mr Mamba as highly pertinent to this application as appears at pages 58, 60, 61, 62 and 65 to which I shall refer herein. From the preceding pages of the transcript it appears that the witness whose evidence is recorded as PW1 in those proceedings indicates reference to the testimony of Mr Ashraf. In the extract the proceedings are at a point where he was being cross-examined as the Plaintiff's witness by the Mr Dlamini (the plaintiff's attorney presently). At page 58 and further Mr Mamba highlighted aspects where specific reference to the cheques under review here was made by Mr Dlamini in his cross-examination of Mr Ashraf. The narrative reads:

"DC: Page 36. It will only be 3 cheques My Lord.

JUDGE: Not a problem, carry on.

DC: Yes, yes. So what do you see there again?

PW1: I can see My Lord, E276 000.

JUDGE: Was the money paid to Union Supplies?

PW1: <u>To Union Supplies</u>.

JUDGE: And the cheque is dated?

PWI: <u>June 11, 2008.</u>

D.C: Yes.

JUDGE: And it is an amount of?

PW1: <u>E276 000 My Lord</u>

……..”

Further at the same page 58:

> ***“DC: And the final one at page 37? Maybe before I get there was that paid to your company Union Suppliers E276 000?***
>
> ***PW1<u>: All 3 cheques were paid My Lord.</u>***[1]
>
> ***JUDGE: So what was paid for the purposes of the record…(?)***
> ***PW1: Yes, <u>E523 000 9th March 2009.</u>***
>
> ***Judge: Yes.***
>
> ***PW1: <u>From Gigatech to Union Suppliers.”</u>***

[11] Then at page 60 Mr Mamba sought to also highlight what he submitted was some acknowledgement during the proceedings in question by no less than the Plaintiff’s

[1] The question and the following appear in the next page 59 of the Book of Pleadings.

attorney as evidenced by his line of question put to Mr Ashraf during the cross-examination:

> DC: Now do you still maintain Mr Ashraf that my clients were living form hand to mouth notwithstanding the payment of almost E 1000 000.00 to your company in a relatively short period of time"
>
> JUDGE: You say basically, let's just take this thing into context, you are asking him is it true that what you say, are you still maintaining that they were not making money, is it. This living from hand to mouth does not give us a clear……"

[12] Another reference to the cheques in the said transcript occurs at page 62. The notable aspects read as follows:

> "PW1: Yes, My Lord, if you allow me. From the beginning we are talking about 3 cheques which….
>
> JUDGE: I am going to be in writing.
>
> PW1: ……are here and I have one blank cheque for you to see. They would take loans from me My Lord and the agreement was when the money would come they would pay me my principal amount and they used to sign a blank cheque, these are all blank cheques signed by them, the 4th one I have got it, it is still blank"

[13] Now I understand that the reference to cheques in the oral evidence attributed to Mr Ashraf appearing in the transcript is to the instruments on which the plaintiff's claim is partly based annexed to the Particulars of Claim as G1 and G2. There was no question about that assumption being correct during Messrs Mamba and Dlamini's submissions before me. Of equal impact further at Page 62 of the transcript is what PW1 says when questioned further about the financial standing of the plaintiff and the transactions involving the cheques:

"JUDGE: Yes, you were saying that the agreement was that?

PW1: All these cheques that have been shown here, the 3 of them plus the one in front of you blank one was signed by these 2 directors blank, because paying the supplier and the tender was in their name so when they used to get money I used to fill in the money and take."

Finally again at Page 65 the transcript reads:

"PW1: The one cheque was 9, 10 months before the other cheques are given the same time if you cheque the number of the cheques, so it is not as if they would come, they used to give me blank cheques signed by them because I was the financier.

JUDGE: You were their financier?

PW1: Yes, My Lord, they did not have, they said I should help them."

[14] A course of dealings involving loan transactions and a pattern entailing a modus operandi for giving Ashraf succour in the form of the rather peculiar system of depositing blank cheques from which he could from time to time procure payments from the plaintiff's bank accounts via these instruments….speaks to an underlying agreement or contract.

[15] The transcript and its content has not been disputed or challenged by the plaintiff.

From this one may infer that according to Mr Ashraf he was convinced of the lucrative prospects of the business. All said he states that in was on that basis that by arrangement he accepted the two blank instruments on the basis that as and when the company was placed in sufficient funds, by arrangement he would

Notice in terms of Rule 35(20)

[16] On the 15th August 2018 after delivery by the defendants of their affidavit resisting summary judgement, Plaintiff issued and delivered Notice in terms of Rule 35 (20) calling on the defendants to produce certain specified documents particularised as follows:

1. Annexure "KA2.2 (Union Supplies (Pty) Ltd letter to the Nedbank Manager) on which the handwritten material on the bottom right was originally written.
2. The original cheque stubs in respect of the cheque payments in annexures "KA1.1"-"KA1.9"'

[17] In response to the said notice and on the 20th of August 2018 the defendant's gave notice to the plaintiff of their intention to make an application for an order setting aside the Rule 35(20) notice as an irregular and improper step on the grounds that the notice for production of documents does not form part of the process of summary judgment and therefore is an impermissible procedure under Rule 32.

[18] Hot on the heels of the defendant's Rule 30 Notice the plaintiff filed a Notice of Motion in terms of which it intimated an intention of moving an application for leave for the Plaintiff to be permitted to file a reply to the defendants' affidavit resisting summary judgment. As the contemplated content sought to be admitted in the proposed replying affidavit was already canvassed in the founding affidavit in support of the application for leave, an ancillary prayer was sought allowing that content to stand were the Court incline towards granting the sought leave and if opposed for the defendant to be ordered to pay the costs of the application. Affidavits of the applicant's directors, as in the main application for summary judgment were again annexed in support of the interlocutory application for leave.

[19] The matter was set down for hearing of the Rule 30 application on the 21st September 2018 by Mr Mamba for the defendants. When the parties' attorneys initially appeared before me on 21st in the persons of Mr Mamba and Ms Matsebula, I directed that the matter of the defendants Rule 30 application be dealt with first and that the question of the Application for leave to file and answering affidavit be dealt with in tandem with the Summary judgment application. The matter was postponed to the 4th October 2018.

[20] Upon mention of the matter on the 4th I dismissed the defendant's Rule 30 application for setting aside of plaintiff's Rule 35(20) on grounds of irregularity. I also indicated that I was inclined to allow the plaintiff's replying affidavit. Mr Mamba indicated that whilst he considered the practice of placing the material or evidence for which leave was proposed in the very application for leave to be proper and the appropriate procedural approach, he was objecting to the admission and consideration of the introduction of any new issues by way of replying affidavit that should have been placed by the plaintiff in the affidavit for summary judgment in the first place. It was also forcefully argued by Mr Mamba that the plaintiff's case stands to fall on the strength of averments in the original affidavit and that it was not permissible for the plaintiff to augment its case beyond the material required in terms of Rule 32(3) (a).

Leave to file Replying affidavit

[21] In terms of Rule 32 (5) (a) the court reserves a discretion to grant leave to the plaintiff to file a replying affidavit under certain circumstances. It provides as follows:

> ***"(5) (a) A defendant may show cause against an application under sub-rule (1) by affidavit or otherwise to the satisfaction of the court and, with the leave of the court, the plaintiff may deliver an affidavit in reply."***

At this time I briefly set out my reasons for the interlocutory rulings.

Whether Rule 35(20) Notice is irregular in Summary Judgment Proceedings
Rule 35 (Discovery and Production of Documents).

The crisp issue arising from the Rule 30 application for the striking out as irregular plaintiff's Rule 35 (20) notice delivered on the defendants to produce a certain document referred to in the affidavit opposing summary judgment, is plainly whether the Rule 35 notice and process is precluded in summary judgment applications.

A robust contention by the defendants is that it has no place in summary judgment proceedings but should be confined to general actions or applications after close of pleadings.
Rule 35 reads as follows:

"35(20) Any part to any proceeding may at any time before the hearing therefore deliver a notice as near as may be in accordance with Form 16 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or transcription thereof".

I was not referred to any judicial authority on this question but an opinion that comes to mind comes in a South African decision of the High Court of that country in ***Business Partners Ltd v Trustees Rinan Botes Family Trust and Ano*.[2013](5)SA514(WCC)** in a judgment of Schippers J. However, I do consider the learned judges remarks to be obiter and not so decisive on the present enquiry because in that case the court was dealing with a somewhat different question from the issue at hand. In that Business Partners case the defendant to a summary judgment motion delivered a Rule 35(12) notice but without filing their affidavit to oppose summary judgment. The discovery and summary judgment rules that were under consideration in that case are similar in form and purpose to our own Rules (35(1) and Rule 32 dealing with discovery and summary judgment respectively. The court held that an application for summary judgment could not be deferred by the delivery of a notice in terms of Rule 35(12) and (14) and also that to hold otherwise would ignore both the extraordinary remedial nature of summary judgment procedure and its purpose.

However, I dare hasten to point out that the learned judge in that case does in the same breath qualify his statement at paragraph 11 of his judgment as follows:-

"(I)t is of course open to the defendants to invoke Rule 35(12) and (14)"

Placing these words in proper context Schippers JA then goes on to say at paragraph 11:

"(11) However if they (the defendants) had difficulty in dealing with the pleadings because they require documents in order to determine what the plaintiff's case was, this should have been stated in affidavits opposing summary judgment as justification for their inability to deliver an affidavit disclosing the nature and grounds of their defence and the material facts upon which it was based. But what the defendants cannot do is to circumvent the provision of Rule 32(3) (b) by delivery of the notice in order to obtain documents which might support and bona fide defence or to defer summary judgment proceedings……"

Analysing the learned judges ratio in the Business Partners case, **Bozalek J**, in ***Absa Bank Ltd and Ano. v Expectra 423 (Pty) Ltd*** **20495/2015** comes to the conclusion that the upshot of Justice Schipper's dictum above is in effect that a defendant may for what it is worth, issue a notice in terms of Rule 35(12) and (14) but these cannot defer or delay an application for summary judgment on the basis that no reply to the notice has been given.

In light of Mr. Mamba's submission in support of the defendant's Rule 30 application at hand, the crux of the matter raised by his interlocutory point is whether he is correct in this submission that Rule 35(1) is incompatible with the purpose and nature of summary judgment proceedings and that therefore it has no place in that procedure. This indeed was the opinion of the court in the Absa Bank case referred to above in taking the view that it could never have been the intention of the drafters of the rule that the rules as to the discovery of documents should apply in summary judgment proceedings for it so it would create an absurdity of stultifying the purpose of Rule 32 to provide a speedy and drastic procedure for determination of liquid claims.

I think this interpretation and contention on the rules may be correct in regard to rules as pertains to discovery generally but to rely on the argument in regard to notice to produce documents would seem to misconstrue the rather permissive wording of Rule 35 (20) in so far as that rule implicitly enables production of documents in application proceedings by its reference to 'documents or tape recordings to which reference has been made in pleadings or affidavits' in the wording of the sub-rule.

Commenting on this rule, the academic commentators Erasmus 'Superior Court Practice submits that:

> ***"the entitlement to see a document or tape recording arises as soon as reference is made thereto in a pleading or affidavit and a party cannot ordinarily be told to draft and file his or her own pleadings or affidavits before he or she will be given an opportunity to inspect and copy or transcribe a document referred to in his or her adversary's pleadings or affidavits"***[2]

Now I accept that as I equally take due notice that the quoted passage from Erasmus and the cited cases do not necessarily led authority to the proposition that Rule 25 proceedings are permissible and competent in summary judgment motions because these authorities deal with

[2] *DE Van Loggerenberg Erasmus Superior Court Practice 2nd Ed.Vol.2 (2015) D1-478. See also Protea Assurance Co. Ltd and Ano.v Waverly Agencies CC and Others 1994 (3) SA 247 (C); Unilever PLC and Ano.v. Polagric (Pty)Ltd 2001(2)SA329(C).*

discovery and production of documents generally. However I find no logical basis either for the proposition the Rule 35 process and procedures are not permissible in summary judgment proceedings as to permit a Rule 30 objection.

On the other hand it has been suggested that the right of a party in litigation to call for an inspection of documents is wide in scope and application (meaning that it should be flexibly applied) that the right to production and can even be exercised, inter alia, in application proceedings before replying affidavits are files. (See Herbstein and van Winsen 5th Ed.JUTA at 789. Indeed the authors also point out that the South African rule considered above has been interpreted to include documents referred to, as in this case, an answering affidavit opposing a summary judgment application (See Herbstein and Van Winsen supra at page 788; also ***Gehle v McLoughlin*** **[1986] (4) SA 543 (W).**

In the Gehle case the court held that the wording of a rule for production and inspection in Rule 35(12) was not so limited as to exclude application in summary judgment. The wording of that rule does not differ materially from the wording of our Rule35 (20). It reads as follows:

"Rule 35(12)

'Any party to any proceedings may at any time before the hearing thereof deliver a notice as near as may be in accordance with Form 15 in the First Schedule to any other party in whose pleadings or affidavits reference is made to any document or tape recording to produce such document or tape recording for his inspection and to permit him to make a copy or the transcription thereof. Any party failing to comply with such notice shall not, save with the leave of the court, use such document or tape recording in such proceedings provided that any other party may use such document or tape recording'.

In that case the respondent had unsuccessfully submitted that the application of the rule was restricted or limited to documents referred to in pleadings in the context of an action.

In Limine

[22] At this point I conveniently propose to deal with the points taken in limine in intimating an exception against the applicant's course of action. These points are set out in the defendants opposing affidavit which in essence is an attack on the plaintiffs claim as articulated in his particulars of claim on the basis that it is bad in law. I understood the point as elaborated on by Mr Mamba in his oral arguments to be more fully that the pleading is flawed on account of certain specific contradictions and inconsistencies of the pleading as to render the claim susceptible to exception. I further understood Mr Mamba's

arguments in this regard to zero into the effect of the pleading in relation to the requirements of summary judgment to be that the inconsistencies in the cause of action also render the claim one in respect of which summary judgment cannot be granted.

[23] As to what the effect complained of were Mr Mamba's preliminary points to carry, he as suggested that it renders the pleading expiable. It is conceivable all said that what the defendant may be occasioned on account of inconsistent or contradictory statements as to the cause of action is an embarrassment on account of vagueness.

[24] The issue or defect complained of arises in relation to the following elements in the particulars of claim. At paragraphs 5-9 the plaintiff interposes the existence of a contract and bases the claim on an alleged breach of contract in the following terms:

> "5. On or about August 2008 and at or near Mbabane in the Hhohho District, the Plaintiff which was represented by its directors, King Ntiwane and George Fetbia and the 1st defendant who represented himself entered into a Verbal Agreement of loan in terms of which the 1st Defendant would loan and advance to Plaintiff the sum of E80,000.00
>
> 6. The material terms of the Verbal Loan Agreement between the parties were *inter alia* that:
>
> 6.1 The Defendant will loan the Plaintiff the sum of E80,000.00;
>
> 6.2 The Plaintiff will repay the amount loaned in two instalments.
>
> 7. On or about August 2008 and as a means to enable the said Defendant to recover periodical instalment payments towards the loan advanced by the 1st Defendant to the Plaintiff in the sum of E80,000.00, the Plaintiff furnished the 1st Defendant with two of its signed cheques which had no figure or amount inscribed.

8. In the aforesaid verbal agreement, the Plaintiff was represented by its two Directors, King Ntiwane and George Fetbia whilst the 1st Defendant represented himself.

9. *In breach of the aforesaid agreement, the 1st Defendant withdrew E719,000.00 more from the Plaintiff's bank account than the agreed sum of E80,000.00. The said withdrawals sere undertaken as follows:*

9.1 E276, 000.00 by means of the first cheque which the 1st Defendant made payable to the 2nd Defendant on 12 November 2008;

9.2 E523,000.00 by means of the second cheque which the 1st Defendant made payable to the 2nd Defendant on 9 March 2009."

(Sic., emphasis added)

Unjust Enrichment

[25] Further in the said particulars of claim the plaintiff alleges unjust enrichment as a distinct and separate cause against the 2nd Defendant when in paragraph 10 of the particulars of claim he states:

> ***"10. The 2nd Defendant was unjustly enriched at the expense of the Plaintiff in the sum of E 719 000.00 as there was no legal obligation for the Plaintiff to pay the 2nd Defendant either the sum of E719 000.00 or any sum at all".***

[26] Mr Mamba argued that this statement appears to allege a separate and distinct cause of action aimed specifically and exclusively against the 2nd Defendant. Mr Mamba further submitted that whilst alleging unjust enrichment the statement seems also to conflate the claims of unjust enrichment and *conditio indebiti* as a cause of action and that this constitutes further cause for embarrassment in the pleading. I agree.

[27] As regards the essence or nature of a claim or conditio indebiti and distinction to that of unjust enrichment, that clarity is in my view well provided in the following exposition of

the subject by **E M Grosskopt JA** in **B & H Engineering v First National Bank of SA Ltd 1995 (2) SA 279 (A).** The matter concerned whether a claim for the recovery of funds fraudulently paid out in a cheque is recoverable as a condition indebiti. The learned judge held as follows at p. 284 G – I:

> ***"The Bank's claim is based on unjustified enrichment. In Natal Bank Ltd v G Roorda 1903 TH 298 the Court suggested, in a similar case, that the appropriate common law remedy was the condictio indebiti (at 303). This was disapproved in Govender v Standard Bank of South Africa Ltd 1984 (4) SA 392 (C) at 398D E and 400CD for the following reasons. A condictio indebiti lies to recover a payment made in the mistaken belief that there is a debt owing. However, a bank paying a cheque knows that it owes no debt to the payee. Its mistake lies, not in a belief that it owes money to the payee, but in a belief that it has a mandate from the drawer to make payment. In these circumstances the appropriate remedy is not the condictio indebiti but the condictio sine causa. This analysis of the two conditions was followed in the Court a quo (at 44GH). It also accords with views expressed by academic writers (see the articles quoted by the Court a quo, ubi sup) and was accepted as well founded (correctly, in my view) by both parties before us."***

[28] From this I am satisfied on the principles that a claim based on a mistaken belief that an obligation exists between the payee and the drawer where none does and one based purely on an alleged overpayment by the drawer and the payee are indeed different. In the instant case the difference is even more confounded in that the defendants are different parties and the claim for unjust enrichment allegedly lies only against the 2nd Defendant. However this is not the end of the problem. There is more.

[29] More perplexing are the further allegations as appears in paragraphs 11 and 12 of the Plaintiff's particulars of claim which on a plain reading seem to allege a claim based on a delict. It states:

> ***"It was within the contemplation of the Defendants to whom plaintiff was well known that he Plaintiff would have productively employed the funds standing to the Plaintiff's credit in the bank account in the sum of E719,000.00.***

The Plaintiff therefore claims from the defendants, jointly and severally, 9% interest on the unlawfully withdrawn sum of E719, 000 as representing damages flowing naturally from the deprivation resulting from the 1st defendant's unlawful withdrawal of the sums in excess of the permitted E80,000.00"

[30] Finally and by inference the Plaintiff also appears to suggest another cause in the form of a *conditio ex causa furtiva* as a form fraud or that the sums claimed were taken through payments of cheques that had been fraudulently procured. That is in the penultimate paragraph of the particulars of claim where Plaintiff makes the following statement:

"15. In making the unlawful withdrawal of the Plaintiff's funds, the 1st Defendant who is the principal of the 2nd Defendant actuated by greed and malice, manipulated banking procedures to the prejudice of the Plaintiff as the holder of the bank account in question"

[31] Mr Mamba pointed out that at the very least summary judgment was not competent on the plaintiff's claim on account of these inconsistencies and particularly that the plaintiff's suit against the defendants jointly and severally, the one paying and the other absolved is irregular on account of the disparate causa as set out as for that reason joint and several liability cannot arise especially where the parties are being sued severally under separate causes.

[32] As another inconsistency and flaw the defendants have also cited ex facie the plaintiffs statements of claim the plaintiff's claim for restitution of overpaid on cheques allegedly tendered in repayment of a loan whilst at the same time allege that the claim is based on a breach of contract.

[33] I think the inconsistencies and contradictions in the particulars of claim are self-evident regard being had to the above cited aspects and are of such a nature as to render the pleading defective and explicable. The question that arises is whether this alone would be good grounds for refusing summary judgment. The defendants contend that it does.

[34] In *Arend & Another v Astra Furnishers (Pty) Ltd 1974 (1) SA 298 (C)* at 314 a court in South Africa held that the explicability of a claim is a matter that may properly considered in the context of weighing a plaintiff's compliance with the rules as pertains to summary judgment procedure. I would say that I agree with this proposition as equally applicable in regard to our own rules despite the difference in the precise wording and requirements between the rules in South Africa as the jurisdiction of the above decision and ours. I think the principle equally applies in this jurisdiction.

[35] The position seems quite clear and established in regard to defects that go into the heart of the cause of action as to render it bad in law yet not so much where the defect only renders the pleadings vague and embarrassing. It has been suggested that exceptions on the latter grounds may be upheld only if the defect gives rise to serious prejudice to the defendants if the defective pleadings are not expunged on account of an embarrassment in dealing with and pleading to the particulars occasioned to the defendants. See *Onyx Distributors CC v Jenta Couriers*[3].

[36] In *Levitan v Newhaven Holiday Enterprises CC* 1991 (2) SA (C) AT 298 A-D Conradie J, as he then was had this to say as regards the nature of prejudicial deficiency in a pleading:

> ***"It has been stated, clearly and often, that an exception that a pleading is vague or embarrassing ought not to be allowed unless the excipient would be seriously prejudiced if the offending allegations were not expunged***
>
> ***In this Division the practice was stated by Benjamin J in Colonial Industries Ltd v Provincial Insurance Co Ltd 1920 CPD 627 at 630 when he said that***
>
> > ***'……save in the instance where an exception is taken for the purpose of raising a substantive question of law which may have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed'.***
>
> ***This approach was approved in Kahn v Stuart and Others 1942 CPD 386***

[3] Case No. 25277/09

at 391 which was in turn followed in Lobo Properties (Pty) Ltd v Express Lift Co (SA) (Pty) Ltd 1961 (1) SA 704 (C) at 711F-H.

An excipient must satisfy the Court that he will be substantially embarrassed, i.e., prejudiced, if the offending pleading is allowed to stand (See Herbstein and Van Winsen Civil Practice of the Superior Courts in South Africa 3rd ed at 339; Joubert (ed) Law of South Africa vol 3 para 199.)"

[37] It appears to me that by reason of the different and more charitable requirements as to the nature of the issues a defendant may raise to successfully resist summary judgment, the above proposition would not be applicable in our case. I think that a complaint that the plaintiff's cause of action is either equivocal, inconsistent or contradictory in his particulars would, in terms of our rules avail a defendant on the reasoning that such inconsistencies would primarily detract from the liquidity or the Plaintiff's claim or the reliability of the affidavit supporting summary judgment in so far as it is tendered to verify such a claim. Most particularly, if the inconsistencies or contradictions give rise to a question, or issues in the form of either triable issues or at the very least any reason for which there ought to be a trial.

[38] I think the following terse statement of the standard by His Lordship Zietzman JA in *David Chester and Central Bank of Swaziland, Civil Appeal No. 50/2003* expresses the point if crisp terms:

"The above cases also refer to the fact that the procedure of summary judgment constitutes an extraordinary and stringent remedy as it permits a final judgment to be given against a defendant without a trial. <u>The court should therefore not grant summary judgment if there is a reasonable possibility that the plaintiff's application is defective</u> or that the defendant has a good defence".

[39] But I also think that even taking these apparent defects in the context also of the merits on the issues raised by the defendant's in their opposing affidavits, I think the reasons why a trial would be the most appropriate way of resolving the issues calls for careful consideration

On the merits

[40] On the facts before me I think there can be no better evidence of the need or some reason for trial than the Plaintiff's own recent interlocutory application and r35 notice delivered to the defendants and the implicit object of these processes which is to interrogate or elicit further detailed issues arising from the parties' respective papers. That is how I view the abandoned r35 process and the applicants opposed application for leave to file replying affidavits. All are devices of engaging on specific factual averments in the defendant's opposing affidavit. I must say the degree of detail in the plaintiff's extensive riposte to the defendant's affidavit resisting summary judgement as seen from the attached 'replying affidavit' is at the very least indicative of the depth of the material factual disputes. It compounds the matter.

[41] I do not think the exercise before the court is one of simply assessing the respective merits and probative value of the divergent versions of the facts on the parties respective affidavits coupled with the issues arising from the parties papers, advance the purport of the summary judgment procedure; nor do I consider it feasible to deal with the matter by way of the plaintiffs apparent attempt at severing and isolating parts of the its claim that Mr Dlamini suggests in his submissions for grant of summary judgment to a part of its claim. In my view it is not a viable approach given the nature of the claims as stated by the plaintiff and the defendants' challenge to those claims.

Cambial or underlying causes

[42] Renunciation of cambial obligation and authority relying rather on an underlying contractual obligation. Instruments delivered *solvendi credendi donandi causa- ie contract on the instrument conditional on and concluded with the intention of executing an underlying obligation between the giver or signatory to the instrument and the receiver or payee. The contract or obligation (cambial) on the instrument being delivered for this purpose being merely an auxillary agreement because it executes or reinforces the original or underlying obligation.*

[43] *Despite the advent of electronic modes or systems of payment it seems to me as long as, such as in the instant case it is expedient to grant comfort to another party in the form of the*

old modes such as cheques and like instruments, we inevitably can draw some guidance from the authorities writing on the legalities and the subject of such instruments still in use today. ***Malan F R*** *et al on 'Bills of Exchange, Cheques and Promissory Notes in South African Law'*[4]*, commenting on the distinction between a cause founded on cambial liability or obligation and that based on an underlying cause explains the concept as follows:*

> ***"……The contract on the instrument delivered for this purpose is an auxillary agreement, because it executes or reinforces the original or underlying obligation. The underlying obligation is the 'causa' of the contract on the instrument.***
>
> ***The causa is not the mechanical part of the contract on a bill; an underlying obligation constitutes the causa only if and to the extent that the parties intend to make the contract on a bill dependent on it. Although the contract on a bill is expressed unconditionally, and directed solely at the payment of a certain unqualified sum of money, the parties do not usually intend their relationship to be governed by the terms of the instrument. By delivering an instrument for a debt the parties intend merely to execute or reinforce the underlying obligation, not to supplement it. For this reason the obligation between the two immediate parties on a bill is called a formally abstract or a dependent obligation"***

[44] It is now trite that summary judgment is a robust and drastic process designed to aid a litigant who has a good, liquid or liquidated claim to attain judgment without the pain and expense of a full trial process.[5] The matter at hand does not lend itself to a partial grant on summary judgment on a part of the plaintiff's claim either; a course or option open to the Court as envisaged by ***r 32(4) (a).*** It is not a matter of an arithmetic computation of isolated and divisible elements of a claim nor is the plaintiff's relief made up of several

[4] 4th Edition, LexisNexis Butterworths (DURBAN).

[5] [7] See *Swaziland Development and Financial Corporation v Vermaak Stephanus civil case no. 4021/2007*. See *also Zanele Zwane v Lewis Store (Pty) Ltd t/a Best Electric Civil Appeal 22/2001, Swaziland Industrial Development Ltd v Process Automatic Traffic Management (Pty) Ltd Civil Case No. 4468/08, Sinkhwa Semaswati Ltd t/a Mister Bread and Confectionary V PSB Enterprises (Pty) Ltd Case No. 3830/09, Nkonyane Victoria v Thakila Investment (Pty) Ltd, Musa Magongo v First National Bank (Swaziland) Appeal Case No. 31/1999, Mater Dolorosa High School v RJM Stationery (Pty) Ltd Appeal Case No. 3/2005.*

claims as discernible from the plaintiff's declaration. Instead what I think the plaintiff seeks to set out is an indivisible claim for payment or restitution of a certain sum of money founded as it is on the several causes that are articulated in its particulars of claim.

[45] During the hearing Mr Dlamini strongly submitted in part that the defendant's affidavit had failed to set out a clear or bona fide defence. I find it necessary to comment on what is the established correct construction of the rule as to summary judgments in our jurisdiction; if to dispel a lingering misconception that is perhaps a legacy from the past. We seem to have modelled our revised rule on summary judgment on an English rule; a position eruditely identified and traced recently by his **Lordship Mamba J** in the case of **Swaziland Tyre Services**[6] and several other cases where he explains and outlines the historical vintage and import of the rule as amended. Referring to his earlier dictum in the case of Sinkhwa Semaswati[7] this is what his Lordship reiterated:

> *"[3] In terms of Rule 32 (5) (a) of the Rules of this Court a defendant who wishes to oppose an application for summary judgment "... may show cause against an application under sub rule 1 by affidavit or otherwise to the satisfaction of the court and, with the leave of the court the plaintiff may deliver an affidavit in reply." In the present case the defendant has filed an affidavit. In showing cause rules 32 (4)(a) requires the defendant to satisfy the court "...that there is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of that claim or part thereof." I observe here that before these rules were amended by Legal Notice Number 38 of 1990, rule 32 (3)(b) required the defendant's affidavit or evidence to "disclose fully the nature and grounds of the defence and the material facts relied upon therefor." This is the old rule that was quoted by counsel for the plaintiff in his heads of argument and is similarly worded, I am advised, to rule 32(3)(b) of the Uniform Rules of Court of South Africa. Thus, under the former or old rule, a defendant was specifically required to show or "disclose fully the nature and grounds of his defence and the material facts relied upon therefor", whereas under the present rule, he is required to satisfy the court that "there is*

[6] *Swaziland Tyre Services (Pty) Ltd v Sharp Freight (Swaziland) (Pty) Ltd (381/2012) [2014] SZHC 74 (01 April 2014)*

[7] Sinkhwa Semaswati t/a Mister Bread Bakery and Confectionery v PSB Enterprises (PTY) LTD Civil Case no 3839/09

an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial on the whole claim or part thereof. The Defendant must show that there is a triable issue or question or that for some other reason there ought to be a trial. This rule is modeled on English Order Number 14/3 of the Rules of the Supreme Court.

A close examination or reading of the case law on both the old and present rule, shows that the scope and or ambit and meaning of the application of the two rules appear not to be exactly the same. Under the present rule, the primary obligation for the defendant is to satisfy the court that there is a triable issue or question, or that for some other reason there ought to be a trial. This, I think, is wider than merely satisfying the court that the defendant has a bona fide defence to the action as provided in the former rule. See VARIETY INVESTMENTS (PTY) LTD v MOTSA, 1982-1986 SLR 77 at 80-81 and ***BANK OF CREDIT AND COMMERCE INTERNATIONAL (SWAZILAND) LTD v SWAZILAND CONSOLIDATED INVESTMENT CORPORATION LTD AND ANOTHER, 1982-1986 SLR 406*** *at page* ***406H-407E*** *which all refer to a defendant satisfying the court that he has a bona fide defence to the action and fully disclosing its nature and the material facts relied upon therefor. I would also add that where there is a dispute of fact a court would be entitled to refuse an application for summary judgment. Under the present rule, the defendant is not confined or restricted to satisfying the court that he has a bona fide defence to the action or to complain of procedural irregularities."*

[46] I would respectfully add that the above is the correct position that our courts have followed in several other cases as referred to in his remarks. From His Lordship's instructive exposition of the law and application of the rule it is settled that there has been a shift in the requirements of the case that the defendant must make in order to successfully repel the grant of summary judgment and attain leave to defend. He is no longer necessarily required to state or disclose a defence in his papers. All he need show is the existence of a triable issue in the broad sense of a question or illuminating any reason for which there ought to be a trial as pertains the plaintiff's claim in its entirety or a part thereof. That is the 'cause' that Rule 32 (5) (a) of the Rules of Court refers to that the defendant needs to show when it states:

"(5) (a) A defendant may show cause against an application under sub-rule (1) by affidavit or otherwise to the satisfaction of the court and, with the leave of the court, the plaintiff may deliver an affidavit in reply."

[47] I am mindful of the apparent dissonance between the reference in Rule 32(3) (a) in so far as the plaintiff is required to affirm under affidavit that that there is 'no defence' to his claim or a part thereof in an application for summary judgment and the aforementioned standard that an affidavit resisting summary judgment must meet in terms of Rule 32(4). But I also think that can be explained in that all I consider Rule 32 (3) (a) to mean by no defence is that the plaintiff has to verify that his claim is, either on the whole or in part, unassailable. It does not detract nor is it inconsistent with the provision further in the rule in raising a triable issue, question or reason to establish the need to be granted due leave to defend. It would seem the clear position is that the threshold or bar for the defendant was deliberately set lower than in the previous iteration of the rule as indicated.

[48] Coming to the facts of this case it would seem to me, quite apart from the detailed material disputes emerging from the affidavits in respect to the basis for the plaintiff's claim and the general or fundamental dispute as to the genuineness of that claim going to the heart of the litigation between the parties, the only appropriate means of ventilating the issues and dealing with the evidential questions which it appears to me cannot readily be resolved by affidavit but by allowing the action to proceed to fuller pleadings, discovery and trial.

[49] For a start there seems to be a genuine issue as to the true nature, context and circumstances of the transaction or transactions involving the tender, negotiation and presentation of the instruments as between the parties let alone the legality of the alleged subsequent procurement of funds form the plaintiff's bank accounts. That issue is germane and fundamental to the claims made by the Plaintiff.

[50] Secondly the points raised by the defendants *in limine* as to the integrity, hence the alleged excipiability of the Plaintiff's cause of action is another reason for which summary judgment cannot avail the Plaintiff presently.

[51] Finally the scope and range of the matters in dispute that emerge in relation to the Plaintiff's claims and the contentions raised by the defendants only go to confirm that these are precisely the sort of issues, questions or reasons for which a trial is necessary as contemplated by the rule to enable a proper framing and definition of the issues by way of pleadings and the fullness proper discovery and presentation of evidence in the course of the suit.

[52] It is for these reasons that I determine that the application by the plaintiff for summary

judgment cannot succeed and that the defendants are hereby granted leave to defend the action in the normal course in terms of the rules.

Costs

[53] It is to the vexed question of costs that I now turn. At the close of the parties submissions on summary judgment Mr Mamba urged the court to consider an award of costs against the Plaintiff's and in so doing prayed that if inclined to grant an adverse order such award be pitched at a scale as between attorney and own client. A part of the submissions motivating a punitive award was simply that this was a turn that plaintiff's earned for just desserts in that the Plaintiff had likewise sought an order of costs on a similar scale in its summary judgment prayers.

[54] The rule lays down the basis for an award of costs against a plaintiff if only in certain limited circumstances. It is self-explanatory in stating thus:

> (7) If the plaintiff makes an application under sub-rule (1) where the case is not within this rule or if it appears to the court that the plaintiff knew that the defendant relied on a contention which would entitle him to unconditional leave to defend, then, without prejudice to any other powers, the court may dismiss the application with costs and may require the plaintiff to pay the costs forthwith.

[55] Further and as to the appropriate scale, it seems to be settled on good authority also that it is only on exceptional circumstances that the court make an adverse costs order on an attorney and client scale even where the plaintiff was aware of the defences that could be raised by the defendant to the claim upon launching the application.

[56] In this matter I am satisfied that the dealings and litigation history as between the parties arising out of that relationship, and the fairly complex and long-drawn financial relationship involving the grant of the carte blanche cheque instruments are such that it can scarcely be said that the Plaintiff did not know that the defendant were likely to raise the defence and vigorously challenge the claim as they have done.

[57] The court was presented with a transcript of a hearing of oral evidence concerning the very circumstances and backdrop facts pertaining to the handing over of the cheques which are the subject matter in this action in an action by the defendants against the self-same plaintiff under Case Number 2199/10. In that transcript the 1st Defendant who happens to be the managing director of the 2nd Defendant essentially conveys similar allegations of

fact on which the challenge to the Plaintiff's claims presently is founded. I think the testimony and the ensuing cross-examination on record indicates that the Plaintiff, who incidentally was represented by his present attorneys, will have had foreknowledge of the likely defence the defendant would raise. It cannot be said the plaintiff was entirely surprised. Indeed the transcript and the content thereof has not been disputed in regard to its relevance in the proceedings presently.

[58] In the circumstances I am satisfied that the plaintiff has sought summary judgment in circumstances where the claim does not fit the terms of the sub-rule or at the very least it knew that the defendant would rely on the contentions advanced in this application but proceeded regardless. I think it an appropriate case to make an order that it pays the costs of this application forthwith on an ordinary scale. I am not persuaded however, that exceptional circumstances exist for a higher pain of costs on a punitive scale other than an award on standard basis.

MAPHANGA J

Appearances:

Mr. S. Dlamini for Plaintiff
Mr. L.R. Mamba for Defendent