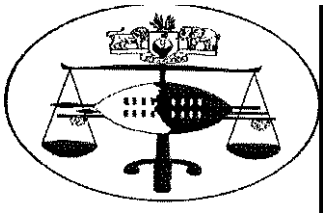

IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 42 / 20**

In the matter between:

TQM INVESTMENTS (PTY) LTD Appellant

And

SAMKELISO ABEL DLAMINI Respondent

Neutral Citation: TQM Investments (Pty) Ltd vs Samkeliso Abel Dlamini (42/2020)[202JJSZSC ...35.(...0Sth December, 2021).

Coram: M.J. Dlamini JA, R.J. Cloete JA and M.J. Manzini AJA.

Heard: 13 October 2021.

Delivered: 08 December 2021.

Summary: *Summary judgment - Application for - Rule 32 (1) and (4) - Liquidated counter-claim - Acknowledgment of debt - Opposing affidavit, requirements - Triable issue or question present-Appeal allowed - Matter referred to trial. The 1990 amendment to Rule 32 did not affect any significant change on summary judgment procedure.*

JUDGMENT

M.J. Dlamini JA

General introduction

[1] In this appeal, the appellant has filed two grounds of appeal as follows:

> "1. The court *a quo* erred both in fact and in law in granting the Respondent's application for summary judgment whilst there were triable issues and the matter should have been referred to trial.
>
> "2. The court *a quo* erred both in fact and in law in granting the Respondent's application for summary judgment in the face of a liquidated counter-claim by the appellant which is in excess of the amount claimed by the Respondent"

These two grounds of appeal may safely be collapsed into one ground as follows:

> "The court *a quo* erred (in fact and in law) in granting the Respondent's application for summary judgment whilst there was a triable issue in the form of the liquidated counter-claim by the Appellant (in excess of the claim in convention)".

[3] In February 2020, the Respondent, by combined summons, sued the Appellant for an amount of (a) ES0,000-00 (Fifty thousand Emalangeni) being return of an investment contribution or share in the business of the Appellant which had collapsed; and (b) E75,000-00 (Seventy-five thousand Emalangeni) being "unpaid monthly shares ofE2,500- 00 (Two Thousand Five Hundred Emalangeni) from November 2016 to May 2019 when

[Respondent] [reneged] and cancelled the (business) agreement" with the Appellant. This latter amount however was not pursued in the court *a quo* and in this Court. The judgment *a quo* does not mention it. The learned Judge *a quo* granted summary judgment for the first amount as per the application.

[4] The Appellant who had filed an intention to defend the action admitted receipt of the amount of E50 000-00 but denied that it was returnable in terms of the failed investment agreement. Even though Respondent alleged that he had for some time been paid the monthly profits of E2500-00 the support for the claim is hard to sustain. In the bank statement marked "SAD2", I could not find support of the Respondent's claim of payment of monthly profits, and none was properly identified. Whether paid or not, this is not critical to the outcome of the main claim. The Respondent applied for summary judgment for the amount ofE50 000-00. In paragraphs 3 and 8 of his affidavit in support of the application, the Respondent stated: *"It is my humble opinion that the Defendants have no* ***bona fide*** *defence to the claim outlined therein and they filed the notice of intention to defend and subsequent plea merely for purposes of delaying the matter",* and concluding that the counter-claim was "unfounded".

[5] As part of its defence to the action and the application, the Appellant filed a counter claim in the amount ofE42 020-00 based on an annexed document marked 'A', being an 'acknowledgment of debt'. The said annexure 'A' is divided into two main parts. The first part is headed "LOAN APPLICATION"and has four paragraphs and is signed by the Respondent as 'Applicant'. The second part is headed 'ACKNOWLEDGEMENT OF DEBT' and has ten paragraphs and is signed by the Respondent as 'Borrower' and by (presumably) a representative of the Appellant as 'Lender'. Both parts were signed the on the same day.

The proceedings in conrt *a quo*

[6] In a brief summary prefacing the judgment, the learned Judge *a quo* wrote: *"The plaintiff has filed a summary judgment application on a liquidated claim. The defendants*

admit liability but raise a counter-claim defence". The issue became whether by the counter-claim the application for summary judgment could be successfully resisted. That is, was the applicant entitled to summary judgment in face of the counter-claim? The learned Judge *a quo* accepted that the counter-claim could set-off the summary judgment claim, but the set off failed because the counter-claim did not show as a *bona fide* defence in light of the 'ambiguous' annexure A, that is, whether it was for a loan advanced or stock received on credit. The Appellant argued that the court *a quo* erred in its holding that the counter-claim did not provide a triable issue as required by the Rule 32(4). In other words there really was nothing wrong or ambiguous about Annexure A.

[7] As it turned out during argument, the nature of Annexure 'A' was contested, it being argued that it was neither a loan application nor an acknowledgement of debt strictly so called since the said amount of E42,020-00 was in fact not 'lent and advanced' by the Appellant as purported. In the counter-claim to its plea, the Appellant explained why the said amount was not in fact 'lent and advanced' as such while insisting that Annexure A was a legitimate and good 'acknowledgment of debt'. The Appellant explained:

> *"3. The acknowledgment emanated from an oral agreement wherein the [Respondent] was given stock on credit by the [Appellant] amounting to the said sum of £42,020.00 (Forty two thousand ....). The [Respondent] has failed to pay the amount stated on the agreed date of the 30th October 2018. The amount is now due and payable".*

[8] In its affidavit resisting summary judgment, the Appellant stated, *inter alia,* as follows: *"4. 1 deny that I do not have a* ***bona fide*** *defence to the Plaintiff's claim and that my Notice of Intention to Defend and plea have been filed solely for purposes of delay. . . .*

5. ... In particular, it is denied that the Defendants do not have a valid and ***bona fide*** *defence, and it is denied that the 1'1 Defendant and the Plaintiff entered into any alteration of their oral agreement. ...* 7. *I further submit that the initial investment amount paid by the [Respondent] is not due to him purely because the [Respondent] and myself, that is*

inclusive of the 1st Defendant, agreed that the investment amount would be used to offset the £42,020-00 (.....) which had an interest rate of 0.83% per month and administration fees of 9.17% and now totals £51,453-00 (.....) which is a debt owed to the [Appellant] by the [Respondent}". Annexure 'A' is attached.

[9] Respondent did not dispute the loan application or acknowledgment of debt. All that the Respondent said in paragraph 8 of his affidavit was the *"Defendants are not disputing that I paid the sum of E50,000.00 (. ..) ... save to dispute the terms of the investments agreement and further make an unfounded counter-claim .."* The Respondent did not deny having received goods on credit from the Appellant. If the goods were indeed received the counter-claim cannot be 'unfounded' unless Respondent presents other or different terms and conditions for the payment of the goods received. Respondent has not done so save for the bald allegation that the counter-claim was 'unfounded'. There was no replying affidavit by the Respondent. Appellant disputed the claim on account of Annex 'A', being an 'Acknowledgment of Debt' signed by both parties, and as such speaking for itself. Appellant also explained that the debt arose from goods or stock sold and delivered to the Respondent. That explanation was not really necessary having regard to the nature of an acknowledgment of debt duly signed by the parties thereto and not challenged.

[1O] The challenge as to the nature of Annexure A was not critical or seriously pursued because as between the parties Respondent applied for a certain loan amount and did acknowledge to be indebted to the Appellant in an amount equal to the loan he purportedly applied for. The Respondent did not deny the loan application or the acknowledgment of debt. The Appellant stated that the said debt was due and owing. Why should it be important how the debt came into existence? If that was important for the purposes of the summary judgment application then an explanation had been given, that is, that the Respondent received goods on credit from the Appellant to the value of the amount stated as a loan and a debt. That information is enough, in my opinion, to satisfy the Court as to the existence of an issue that is triable.

[11] In my opinion, the court *a quo* erred in proceeding on the basis of a normal set-off. Thus the learned Judge observed *"it was said that an unliquidated claim can set-off a liquidated claim"*, and proceeded: *"A set-off operates where both debts i.e. for plaintiff and defendant are for a liquidated sum. Both debts must be due at the same time ... What is vital though is that there (sic) must be based on liquidated claims ..."* (see para (5] of the judgment). It would then appear that the dual character of Annexure A resulted in the determination by the Judge *a quo* that the said Annexure A was not a liquid document and therefore the counter-claim was in turn unliquidated and did not pass for the desired set off. Hence the grant of the summary judgment. Nowhere does the judgment refer to Rule 32 which deals with 'summary judgment' and how it is ordinarily resisted. The Appellant says the court *a quo* erred in granting summary judgment in the face ofa liquidated counter claim. I am disposed to agree with the Appellant in this regard. Herbstein and van Winsen write: *"In* ***WM Menz en Seuns (Edms) Bpk*** *v* ***Katzake***[1] *the court accepted that a liquid document was one in which the debtor acknowledges in writing over his signature, ... his indebtedness in a fixed and certain sum. Where such document is sued upon it must be annexed to the supporting affidavit"*.[2] That is precisely what the Appellant had done. If the amount ofESl,453.00 was for any reason doubtful, there could be no such doubt on the amount ofE42,020.00 expressly stated in Annexure A.

Summary judgment

(12] Regarding summary judgment, it is always worth recalling that: *"The procedure provided by the rules has always been regarded as one with a limited objective, viz. to enable a plaintiff with a clear case to obtain the swift enforcement of his claim against a defendant who has no real defence to that claim. The courts have in innumerable decisions stressed the fact that the remedy provided by this rule is an 'extraordinary' one which is*

[1] 1969 (3) SA 306 (T)
[2] The Civil Practice of the Superior Courts in South Africa, 3" ed. at 303

'very stringent' in that it closes the door to the defendant and that it will only be accorded to a plaintiff who has, in effect, an unanswerable case ".[3]

[13] The provision for summary judgment is in terms of Rule 32 of the High Court Rules promulgated in 1969 and amended from time to time. In casu, we are concerned with the Rule as amended in 1990. Sub-rule 32(1) states that where the plaintiff is of the view that the defendant who has entered notice to defend a claim included in combined summons has no defence to that claim or a particular part of that claim, the plaintiff may apply for summary judgment against that defendant. Sub-rule 32(4) (a) states that a defendant who seeks to thwart an order under sub-rule 32(1) must satisfy the court that there is an issue or question which ought to be tried or that the claim ought for some other reason to be sent for trial. The sub-rule expressly reads:

> *"(4) (a) Unless on the hearing of an application under sub-rule[]) either the court dismisses the application or the defendant satisfies the court with respect to the claim, or part of the claim, to which the application relates 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, the court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed".*

[14] Traditionally, it would seem: *"The affidavit filed by defendant must set out his defence fully. This requirement has been interpreted as meaning in siif.ficient detail to enable the court to decide whether, if the facts stated therein are true, it would constitute a defence to the claim. It is unnecessary for the defendant to give a complete and exhaustive account of all the facts on which he relies".*[4] If defendant sets up a counter-claim, then *"sufficient detail of the claim must be given so as to enable the court to decide whether it is wellj'ounded. The counter-claim may be one which is unliquidated and it need not*

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[3] Herbstein and Van Winsen, The Civil Practice of the Superior Courts in South Africa, 3" ed p302.
[4] See Herbstein and van Winsen, 3" ed. At 306; Breitenbach v. Fiat SA 1976 (2) SA 226 (T)

necessarily arise out of the same set of facts as the claim in convention but it must be of a nature which would afford a defence to the claim".[5] Seemingly, the court *a quo* overlooked this consideration. Herbstein and van Winsen also warn that the summary proceeding should not be "converted into a miniature trial" - even as it remains an abridged trial.

Rule 32 (3) recalled

[16] It may be apposite to set out the former Rule 32 (3) and consider some cases associated with its application. Incidentally these cases are mainly South African even though the Rule also applied in eSwatini until 1990 when the current Rule 32 was enacted. These cases were (and, somehow, still are) also applicable in eSwatini. For our purposes, we are not concerned with the whole of the said Rule 32. That Rule 32(3) read:

> "Upon the hearing of an application for summary judgment, the defendant may -
>
> (a) give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which shall be given; or,
>
> (b) *satisfy the court by affidavit (. . .) or with leave of the court, by oral evidence of himself or any other person who can swear positively to the fact, that he has a* ***bona fide*** *defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor".* (My emphasis).

[17] As to a general understanding of that sub-rule, Colman J. in **Breitenbach** (supra) at 227G-228A states that *"the sub-rule was not intended to demand the impossible"* and that:

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[5] **Herbstein and van Winsen, 3rd ed, at 306**

"One of the things required of a defendant by Rule 32 (3) (b) is *that he must set out in his affidavit facts which, if proved at the trial, will constitute an answer to the*

plaintiff's claim. If he does not do that, he can hardly satisfy the Court that he has a defence. The sub-rule, however, requires that the Court be satisfied that there is *a **bona fide** defence, and the qualification gives rise to some difficulty. On the face of it, **bonafides** is a separate element relating to the state of the defendant's mind. A man may believe in perfect good faith that he has a defence, ... yet the law may be against him, ... He is **bona fide,** but he has no defence. .. .*

"If, therefore, the averments in a defendant's affidavit disclose a defence, the question whether the defence is ***bona fide** or not, in the ordinary sense of that expression, will depend upon his belief as to the truth or falsity of his factual statements, and as to their legal consequences. It is difficult to see how the defendant can be expected to 'satisfy the Court'(....) not only that what he alleges is an answer to the plaintiff's claim, but also that his allegations are believed by him to be true. There* is *no magic whereby the veracity of an honest deponent can be made to shine out of his affidavit".*

[18] Corbett JA,[6] as he then was, reflected a need that Rule 32(3) should be applied in moderation. The tendency had been to say that the Rule should not be given its literal meaning when it requires the defendant to *satisfy the Court* of the *bonafides* of his defence. It was thought that to construe the Rule otherwise would be demanding too much from the defendant. Instead, *"It will suffice, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing",* said Colman J[7] of sub-rule 32 (3) (b), in connection with the *"requirement that in the defendant's affidavit the nature and grounds of his defence, and the material facts relied upon therefor, are to be disclosed 'fully'".*

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[6] see **Maharaj v Barclays National Bank 1976 (1) SA 418 (AD)**

[7] See **Breitenbach v Fiat SA** (Edms) Bpk 226 (T) at 228B

Case law revisited

[19] Case law postulates that the *"purpose of the procedure"* of the summary judgment is a *"procedure aimed at the defendant, who, although he has no* bona fide *defence to the action brought against him, gives notice of intention to defend solely in order to delay the grant of judgment in favour of the plaintiff".* It is then proposed that *"the relevant Rule should, therefore, not be interpreted with such liberality to defendants that that purpose is defeated".* The summary procedure would seem to view the defendant with some distrust. The court must therefore *"guard against iryustice done to the defendant, who is called upon at a short notice, and without the benefit of further particulars, discovery or cross*

examination, to satisfy the court in terms of sub-rule (3) (b) ", it being considered that ***"if*** *the requirements of that sub-rule are too stringently applied, a defendant who has a defence to the action brought against him may be denied, uryustly, an opportunity of establishing that defence by the ordinary procedure of a civil suit".*

[20] In 1984, in **Variety Investments,**[8] Aaron JA commented as follows on this topic based on the old sub-rule 32 (3):

> *"This is then a convenient stage to consider how far a defendant need go when he takes the course of opposing an application for summary judgment by filing an opposing affidavit. Rule of Court 32 (3) requires him to 'satisfy the Court ...that he has a bona fide defence to the action'. Furthermore, such affidavit....'shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor'.*
>
> *"There has been much discussion in the reported cases in South Africa as to how far a defendant need go before he can be said to have 'satisfied' the court, and as to what is meant by the requirement that the affidavit should 'fully' disclose of the nature and grounds of the defence. In* ***Maharaj v Barclays National Bank Ltd*** *1976 (1) SA 418 (A), Corbett JA said, at 426A - E. 'Where the defence is based*

[8] **Variety Investments (Pty)** Ltd **v Moisa** 1982 -1986 SLR 77 (CA) at 79 - 80

upon facts, in the sense that material facts alleged by the plaintiff in his summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is *a balance of probabilities in favour of the one party or* the other. All that the Court enquires into is: (a) whether the defendant has fully *disclosed the nature and grounds of his defence and the material facts upon which it* is *founded, and (b) whether on the facts so disclosed the defendant appears to ave, as to either the whole or part of the claim, a defence which* is *both bona fide* and *good in law. If satisfied on these matters the Court must refuse summary judgment, either wholly or in part, as the case may be. The word 'fully' as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence. (See generally . . . **Shepstone** v **Shepstone,** 1974 (2) SA 462 (N)). At the same time the defendant* is *not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standards of pleading. (See....)".* (My underlining).

[21] The learned Justice of Appeal, Aaron JA, further referred to what he described as an 'instructive passage' in **Gilinsky and Another**[9]:

"The courts - quite rightly - never tire of pointing out the drastic consequences of a summary judgment order and that the natural corollary to this is *that such order will only be given if the Court can be persuaded on the evidence before it that plaintiff has what has sometimes been referred to as an unanswerable case..... It is*

[9] Gilinsky and Another v Superb Launderers and Dry Cleaners (Pty) Ltd 1978 (3) SA 807 (C) at 811C - G

important to note that a decision as to whether a plaintiff's case is *unanswerable or not must be founded on information before the Court dealing with the application. This iriformation is derived from the plaintiff's statement of the case, the defendant's affidavit or oral evidence and any documents that might properly be before the Court. It would be inappropriate to allow speculation and conjecture as to the nature and ground of the defence to constitute a substitute/or real information as*

to these matters. On the other hand, even if a court concludes that such information as is disclosed by defendant in his affidavit is not a sufficient compliance with the provisions of the Rule of Court 32(3), it may nevertheless consider that it is sufficient to raise a doubt as to whether plaintiff's case can be characterised as ***unanswerable.*** *In that case the Court would in the exercise of its discretion refuse summary judgment".*

[22]The learned Justice of Appeal added, for a good measure (at p 81A): *"Although it has frequently been said that a defendant need not, in his opposing affidavit, formulate a defence with the precision which would be required in a plea, it is also true that he must not be too terse".*

[23]In Construction Supplies and service[10], a decision from Botswana, it was held as follows:

"(I) interms of Order 22, r. 3 (b) of the Rules of the High Court relating to summary judgment, a defendant was obliged in an opposing affidavit to disclose 'fully' the nature and ground and material facts relied upon therein for his defence. A defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, but he must at least disclose his defence and the material facts upon which it was based with sufficient particularity and completeness to enable the court to decide whether the affidavit disclosed a bona fide defence. The statement of material facts should be sufficiently full to persuade the court that what

[10] Construction Supplies and Service (Pty) Ltd v Greenwood [1987] BLR 479 (HC)

the defendant had alleged, if proved at the trial, would constitute a defence to the plaintiff's claim". (Lawrence Ag. J)

[24] In 1986, in **Bank of Credit and Commerce International,**[11] Dunn AJ, as he then was, delivered the judgment based on the Rule 32 (3) and stated as follows:

"The defendants have by filing the opposing affidavit, elected to meet the application for summary judgment in terms of Rule 32 (3) (b)..The defendants are in the circumstances required to satisfy the court that they have a bona fide *defence to the action and further, to disclose fully the nature and grounds of the defence and the material facts relied upon therefor".*

[25] The learned Acting Judge also made the following observation:

"An instructive collection of cases as to how far a defendant need go before he can be said to have 'satisfied' the court, and as to what is meant by the requirement that the affidavit should 'fully' disclose the nature and grounds of the defence in a summary judgment application under Rule 32 (3) (b) is contained in the judgment of Aaron JA in ***Variety Investments (Pty) Ltd v. Motsa*** *1982 - 86 SLR* 77. *Reference is there made to the cases of* ***Maharaj v. Barclays National Bank . . . and Gilinsky and Another v Superb Launderers and Dry Cleaners*** *...* "

[26] Colman J. in **Breitenbach (supra)** makes the following pertinent observation regarding Rule 32 (3) (b) that the defendant is required to set out in his affidavit *"facts which, if proved at the trial, will constitute an answer to the plaintiff's claim".* The current Rule 32 (4), in my opinion, calls for a similar understanding. Defendant is in effect required to satisfy the court by presenting so much facts or information in support of the 'issue or question' which, if proved at the trial, would constitute an answer and bona fide defence to the claim. That is, a defence which would be valid and good in law. For there is no way a

[11] Bank of Credit and Commerce International (Swd) Ltd v Swaziland Consolidated Investment Corporation Ltd and Another 1982 - 86 SLR 406 (HC) at 407B and C

defendant can satisfy the court and avert judgment without sufficient material facts placed before the court. The material facts and particularity therefor will naturally differ from case to case. But it is true that *"There is no magic whereby the veracity of an honest deponent can be made to shine out of his affidavit"*, as Colman J, says (p 228A). It is ultimately at the trial that the veracity or otherwise of a deponent's averments can be tested.

[27] Corbett JA in **Maharaj,** (supra), cautioned that *"undue formalism in procedural matters"* must always be eschewed in summary judgments under Rule 32. The learned Judge of Appeal noted: *"The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law".* And that, in principle, *"in deciding whether or not to grant summary judgment, the Court looks at the matter* 'at the end of the day' *on all the documents that are properly before it". In casu,* it does not appear that the learned Judge *a quo* looked at the matter on all the documents before the court.

[28] **National Motor Company Ltd v. Moses Dlamini** [12] is a judgment handed down by Dunn Jin April 1994, a couple of years since the amendment of Rule 32 which ushered in sub-rule 32 (4) (a) and (b). The case was probably the first since the amendment. Justice Dunn traced the amendment as best he could on the material available at the High Court Library at the time and found that it had been copied from Order 14 of the English Supreme Court Rules, 1965, set out and discussed in **The Supreme Court Practice 1991, Vol. 1,**
p. 140. According to Dunn J: *"The Rule [32] is almost identical to Order 14 of the English Rules".* Justice Dunn also noted that the words *"bona fide* and good in law", found in the old sub-rule, were left out in sub-rule (4) (a) *"although the absence of such a defence is one of the averments which a plaintiff is obliged to make under sub-rule (3) (a)".* The learned Judge further observed: *"The question to be decided is as to how far a defendant need go before he can be said to have satisfied the court under the amended Rule, that*

[12] 1987 - 95 (4) SLR 124

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". That approach is from the old Rule 32.

[29] It was also noted from the English authorities that where under the old sub-rule (3) (b) the defendant had to satisfy the court that *"he has a* bona fide *defence to the action on the merits",* under sub-rule (4) (a) the defendant has to satisfy the court that *"there is an issue or question in dispute which ought to be tried".* The English authors of Order 14 say that: *"These words accurately reflect the previous case law which speaks of a 'triable issue' but no doubt the collocation of words 'defence on the merits' will continue to be used";* and they go on to stress that *"In all cases, sufficient facts and particulars must be given to show that there is a triable issue".* The learned Judge commented: *"In dealing with Order 14 Rules 3 and 4 (our sub-rules (4) and (5)) the learned authors state that a defendant may show that he has a good defence to the claim on the merits, or that a difficult point of law is involved, or a dispute as to the facts which ought to be tried, or a real dispute as to the amount due which require the taking of an account to determine, or any other circumstances showing reasonable grounds of a* bona fide *defence".*

[30] In the English case of **Miles v Bull**[13] the Queen's Bench Division had occasion to deal with the rule allowing for summary judgment. Megarry J. had this to say:

> *" ... I think it is necessary to examine the precise wording of RSC, Ord. 14.*
>
> *Under the former RSC, Ord. 14 r.l a defendant could obtain leave to defend if he satisfied the judge that he had a good defence to the action on the merits, or disclosed 'such facts as may be deemed sufficient to entitle him to defend the action generally' ... But the language of RSC, Ord. 14 has been changed, and it is the language that I must apply.*
>
> *Under r.3 and r.4 of the present RSC Ord. 14 the defendant can obtain leave to defend if (and I read (13) from r.3 (1)) the defendant satisfies the court 'that there*

[13] Miles v **Bull** [1968] 3 All ER 632 at 637

is an issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial'. These last words seem to me to be very wide. They also seem to me to have special significance where(. ..) most or all of the relevant facts are under the control of the plaintiff, and the defendant would have to seek to elicit by discovery, interrogatories and cross-examination those which will aid her. If the defendant cannot point to a specific issue which ought to be tried, but nevertheless satisfies the court that there are circumstances that ought to be investigated, then I think those concluding words are involved. There are cases when the plaintiff ought to be put to strict proof of his claim, and exposed to the full investigation possible at a trial; and in such cases it would, in my judgment, be wrong to enter summary judgment for the plaintiff".

[31] By the above excerpt, it is hoped that our understanding of Rule 32 would be broadened. RSC. Ord. 14 r.3 (1), which is similar to our Rule 32 (4) (a), reads as follows:

"(]) Unless, on the hearing of an application under r.1, either the court dismisses the application or the defendant satisfies the court with respect to the claim or part of the claim, to which the application relates 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, the court may give such judgment for the plaintiff against the defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed".

[32] The mere recitation of the Rule does not advance our understanding of what the sub rule requires of the defendant, that is, how the defendant is supposed to satisfy the Court that there is an issue or question that ought to be tried. Justice Annandale, in the statement cited above from the **MHP Geomatics** [14]case, does throw some light and provide some helpful excerpts on how to go about Rule 32. In para [14], Annandale J, as he then was,

[14] MHP Geomatics Swaziland (Pty) Ltd t/a Swaziland Surveys vs Umbane (Pty) Ltd, Civ. Cas. No. 4236/07 (11.9.09)

refers to the traditional understanding and purpose of the summary judgment procedure as explained by Herbstein and Van Winsen at page 302[15] and says that *"the passage accurately states the position"* of our law. That is fine, if the understanding of the (new) Rule 32 is, as in my opinion it is, that the amendment does not substantially change the concept of summary judgment as we have come to understand it. The amendment was only meant to allay fears among Judges, legal practitioners and litigants that the summary procedure is not intended to be stringent on the defendant, even as it deprives the defendant some defences ordinarily available at the defendant's disposal in a civil suit.

[33] It is only to be noted that the third edition ofHerbstein and van Winsen's book was published in 1979, before the 1990 amendment introducing the current Rule 32. If the book "accurately states the position" with regards our current Rule 32, that can only mean that between the old and the new Rule 32 there is no substantial difference. That is what the case law shows. That is why, in my view, the amendment of the Rule was only cosmetic; the wording of the Rule somehow changed but not the understanding of the procedure. His

Lordship Justice Annandale proceeded, with reference to the defence expected of the defendant: *"[15J.....Presently, it does not need to go so far as to say that undoubtedly, the Plaintiff has an unanswerable case. What really needs to be done is to look at the issue raised by the Defendant in its resisting affidavit and its relevance to the validity of the*

claim. Otherwise put, has a viable issue been raised or not"[16]. With respect, I agree with the views expressed by Justice Annandale on this topic. As to what needs to be set out in defendant's affidavit in support of the existence of an issue or question or part thereof to be tried that will depend on the facts and circumstances of the particular case.

[34] In **MHP Geomatics,** supra, Justice Annandale states at paragraph [4]:

> *"In an application for summary judgment, the brief fact of the matter is that the applicant must have a 'cut and dried' case, virtually unassailable, against*

[15] The Civil Practice of the Superior Courts in South Africa, 3" edition

[16] Zanele Zwane v Lewis Stores {Pty) Ltd t/a Best Electric, Civ. App. No. 22/ 2007

> *which no **bona fide** defence has been raised, a defence which need not be finely detailed but at least having reasonable prospects of staving off the claim if properly ventilated during a trial ...* "

It is then said that to stave off the claim and push the matter forward to trial, the defendant *"must have set out material facts of his defence in his affidavit though not in an exhaustive fashion".* To what extent the defendant must pack his defence for a favourable outcome is truly oracular.

[35] Again Ota Jin **MTN Swaziland v. ZBK Services**[17] in 2011 cited with approval the cases of **Zanele Zwane** and **Supa Swift.**[18] It is clear from these judgments, including that of this Court written by Ramodibedi JA, as he then was, that the approach to Rule 32 did not seem to draw the court's attention that the Rule was relatively new, dating from 1990. It was just business as usual. For instance, in the **Zanele Zwane** case, Ramodibedi JA, as he then was, boldly stated, as if the new Rule made no difference whatever:

> *"[8} It is well recognised that summary judgment is an extraordinary remedy. It is a very stringent one for that matter. This is because it closes the door to the defendant without trial. It has the potential to become a weapon of injustice unless properly handled. It is for these reasons that the courts have over the years stressed that the remedy must be confined to the clearest of cases where the defendant has no **bona fide** defence and where the appearance to defend has been made solely for the purpose of delay. The true import of the remedy lies in the fact that it is designed to provide a speedy remedy and inexpensive enforcement of a plaintiff's claim against a defendant to which there is clearly no valid defence ...See* **Maharaj v Barclays National Bank Ltd** *1976 (1) SA 418 (A);* **David Chester v Central Bank of Swaziland,** *Civ App. Case No. 50 I 03"*

[17] MTN Swaziland v ZBK Services and Another, Civ. Cas. No. 3279/2011
[18] Supa Swift (Swaziland) (Pty) Ltd v Guard Alert Security Services Ltd, Civ. Cas. No. 4328/2009 (17/12/10)

[36] In **Supa Swift,** supra, delivered in 2010, we again come across statements which do not indicate that the Rule has been modified. Ota J stated, at pp 3 and 4:

> *". . . A summary judgment is one given in favour of a plaintiff without a plenary trial of the action. ... It is for the plain and straight forward, not for the devious and crafty ..... a plaintiff may therefore apply to the court for instant judgment, if his claim is manifestly unanswerable both in fact and in law ....*
>
> *Summary judgment therefore by its characteristic features, shuts the door of justice in the face of a defendant who may otherwise have a triable defence. Thus, the wise caution which has been sounded in the ears of the court over the decades, to approach this application with the greatest of trepidation. This is to prevent foreclosing a defendant who may otherwise have a triable defence from pleading to the plaintiff's case".*

In the result, in this country, pre-1990 judgments have been freely cited in support of post 1990 summary judgment proceedings. In this regard must be included, in general, the South African cases before and after 1990. In principle, I support this approach because in my view the amendment only legitimised what was already extant in practice.

[37] In para [33] of the **Swaziland Development and Savings**[19] case, the learned Maphanga J. states that the amendment to the Rule *'substantially'* altered the Swazi - South African law regulating summary judgment procedure. The question, unanswered so far, is how substantial has been the change from the old to the new Rule 32. After referring, with approval, to Mamba J's *'eloquent'* exposition of Rule 32 (4) (a) in **Sinkhwa Semaswati,** *infra,* Maphanga J then cites what he calls *"operative qualifying words or phrases that define what would constitute valid grounds for refusal of summary judgment that a defendant must set out".* In para [39] his Lordship Maphanga J. states his understanding of the requirements of the sub-rule 32 (4) (b) as follows:

[19] Swaziland Development and Savings Bank v Pheneas Butter Nkambule, Civ. Cas. No 129/2015 (HC)

"Upon that premise and in the context of our sub-rule 32 (4) (b),it is *my considered view that in terms of our rules as presently framed, a bare counter-claim for an unliquidated claim for damages does not constitute a valid defence for a summary judgment application. It* is *my understanding that such a claim in convention founded, as it were, on a separate cause of action does not qualify as a valid ground for resisting summary judgment. That sub-rule* is *complementary to Rule 32 (4)*
(b) ".

NB The question here is which sub-rule is complementary to sub-rule 32 (4) (b)? This is further complicated by the learned Judge's reference to Rule 32 (4) (c) in paragraph [40], when there is no such sub-rule in our Rule 32. The sub-rule referred to as 32 (4) (c), which the learned Judge has quoted, is in fact sub-rule 32 (4) (b).

[38] In **Sinkhwa seMaswati** case,[20] His Lordship, Mamba J stated as follows regarding the Rule regulating summary judgment procedure:

"[3J In terms of Rule 32(5) (a) of the Rules of this Court a defendant who wishes to oppose an application for summary judgement '.....may show cause against an application under sub-rule (1) by affidavit or otherwise to the satisfaction of the court and.... ' In the present case the defendant has filed an affidavit. In showing cause Rule 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 told, to Rule 32(3)(b) of the Uniform Rules of Court of South Africa. Thus, under the old Rule, a defendant*

[20] **Sinkhwa SeMaswati t/a Mister Bread** & **Conf. v PSB Enterprises (Pty) Ltd,** Civ. Cas. No. 3830/2009 (HC)

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 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.....*

"[4] 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 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. Moisa *1982 - 1986 SLR 77 at 80-81, and* ***Bank of Credit and Commerce International (Swaziland)*** *Ltd....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 .....Under the present Rule, the defendant is not confined or restricted to satisfying the court that he has a bonafide_defence to the action or to complain of procedural irregularities".*

[39]But, short of repeating the words of the present Rule, what exactly is required to move the court to grant or not to grant summary judgment remains beyond easy grasp. What is to be done does not come out clearly in Justice Mamba's helpful comparison/contrast of the old and present Rule. The 1990 amendments had been pre empted in earlier cases. We may begin with Aaron JA, in the **Variety Investments** case, supra, at 79 - 81. In that case the learned Justice of Appeal set out *"to consider how far a defendant need go when he takes the course of opposing an application for summary*

judgment by filing an opposing affidavit". Aaron JA went on to point out that: *"There has been much discussion in the reported cases in South Africa as to how far a defendant need go before he can be said to have 'satisfied' the court, and as to what is meant by the requirement that the affidavit should 'fully' disclose of the nature and grounds of the defence".* In my considered view, what Aaron JA explained in that case which had already been stated by Corbett JA in **Maharaj** is very much in line with the amended version of the Rule. In these and many other cases the concerning aspects of the old Rule were explained and moderated, clarifying what the defendant need state in his opposing affidavit. Our courts do not seem to have made a clean break with the old rule. I have no complaint about that. In my view, the way the old Rule had been interpreted was virtually in line with the later amendment. At is, however, true, I think, that as Megarry J said and Mamba J agreed, the words of the current sub-rule (4) (a) that "or that there ought for some other reason to be a trial of that claim or part ... " do seem to widen the scope of the defence for the defendant. But how wide I do not profess to know. It would depend on the particular cases. Even then, the words of the sub-rule must be given flesh to be meaningful and persuasive.

[40] Due to the somewhat overlapping judgments on the procedure for summary judgment, notwithstanding the purported change in the rules since 1990 and the judgments before and after that date, it is worth noting that Rule 32(1) states, in part, *" ....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".* And Rule 32(3) (a) states, in part: *"An application under sub-rule (1) shall be made on notice to the defendant accompanied by an affidavit verifying the facts ..... and stating that in the deponent* 's *belief there is no defence to that claim or part, as the case may be ..."* On the other hand, sub-rule (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..."* And sub-rule (5) (a) states that the

"defendant may show cause against an application under sub-rule (l) by affidavit or otherwise to the satisfaction ofthe court ... " (My underlining)

[41] It would appear then that the current Rule 32 is somehow moderate to the plaintiff who is only required to allege that defendant has no defence to the claim under sub-rule (1) and sub rule (3) (a). In practice, however, the plaintiff must say why he belies the defendant has no defence to the claim. Needless to observe that taken literally the sub-rules could lead to an abuse of the court process. On the other hand, the defendant is required under sub-rule (4) (a) to satisfy the court that there is an issue or question in dispute ... and under sub-rule (5) (a) the defendant must (disguised as 'may') show cause.... to the satisfaction of the court that he has a defence to the claim or part of the claim. And, showing cause is not a mere bare allegation: it requires of the defendant to virtually make a case for his defence. For, how else could the court be satisfied that there is a defence? The grant of the remedy is not based on a determination as to the merit but as Corbett JA[21] put it: *"The grant of the remedy is based upon the supposition that the plaintiff's claim is unimpeachable and that the defendant's defence is bogus or bad in law..... The principle is that, in deciding whether or not to grant summary judgment, the Court looks at the matter* 'at the end of the day' *on all the documents that are properly before it".* It is imperative therefore that if the defendant is to succeed he must show that his defence is not bogus or bad in law.

[42]In **Mater Dolorosa High School** case the court stated:

> *"It would be more accurate to say that the court will not merely 'be slow' to close the door to a defendant, but will in fact refuse to do so, if a reasonable possibility exists that an injustice may be done if judgment is summarily granted. If the defendant raises an issue that is relevant to the validity of the*

[21] Maharaj v. Barclays National Bank Ltd 1976 (1) SA 418 4239 (A) at 423G, and Sand and Co Ltd v Kollias 1962 (2) SA 162, (w) 165

whole or part of the Plaintiff's claim, the Court cannot deny him the opportunity of having such an issue tried".

[43] In **Swaziland Livestock Technical Services,** Ota J noted that in order to modify the sting of the summary judgment as an extraordinary, stringent and drastic remedy, which closes the door to the defendant through a judgment without a trial, checks and balances have been introduced to prevent it from working a miscarriage of justice: *"[6]. The rules have therefore laid down certain requirement to act as checks and balances to the summary judgment procedure in an effort to prevent from working a miscarriage of justice. Thus, Rule 32 (5) requires a Defendant who* is *opposed to summary judgment, to file an affidavit resisting same and by Rule 32 (4) (a) the court* is *obligated to scrutinize such an opposing affidavit to ascertain for itself whether '.....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'".* The learned Judge further noted that *"for the Defendant to be said to have raised triable issues, he must have set out material facts of his defence in his affidavit, though not in an exhaustive fashion. The defence must be clear, unequivocal and valid",* that is, it must be full, 'bona fide and good in law' - effectively back to square one. (My emphasis).

Counter-claim as a defence

[44] In their 4th edition, Herbstein and van Winsen write: *"It* is *open to the defendant to raise a counter-claim to the plaintiff's claim. In this case also, sufficient detail must be given of the claim to enable the court to decide whether it is well founded. The counter claim may be unliquidated and need not arise out of the same set of facts as the claim in convention, though it must be of such a nature as to afford a defence to the claim".*

[45] In proceeding from the principles of a set-off in terms of Rule 22 (4/5) the court below acted as if summary judgment had not been invoked. For, if the counter-claim had been pleaded as set-off to the claim in convention then on the application for summary

judgment the set-off ought to have been redeployed in terms of Rule 32 (4) (a). Even that was not really necessary because the Appellant had under sub-rule (5) (a) duly filed an affidavit in resistance containing substantially the same information as already set out against the claim in convention. The Appellant's counsel in their heads of argument recites the sub-rule: "3 ... *Sub-rule (4) (a) states the position to be that a defendant must satisfy the court with respect to the claim that there is an issue or question which ought to be tried or that there ought for some other reason to be a trial of the claim ..."* Surely, the thrust of the argument should be that the litigant has met or satisfied the requirement of the relevant rule. In this regard the litigant must make specific averments alleging certain facts which support that he has met or satisfied the relevant rule. In that way, the naked rule is, like a bride, beautifully clothed for the Court to deliberate on.

[46] **In Swaziland Development and Savings Bank, supra,** Maphanga J. wrote:

> *"[29] Ordinarily, where a counter-claim is put up as a defence in an action, a full disclosure of the nature and grounds thereof must be made in order for it to succeed as a defence. In the context of a summary judgment procedure it would be sufficient to set out those facts from which a viable counter-claim could be founded. (See* ***Soil Fumigation Services Lowveld CC v Chemjit Technical Products*** *2004 (6) SA 29 SCA).*
>
> *"[32] Under the old Rule on summary judgment there was nothing in principle to prevent a defendant from pleading a counter-claim founded on a separate and completely unrelated cause of action in defence to an action. In that regard there is a preponderance of judicial opinion in support of the proposition that a defendant could raise the existence of an unliquidated counter-claim as a defence to the plaintiff's action. (See* ***Wilson v Hoffman and Another*** *1974 (2) SA 44 (R) .* . . . "

[47] If Justice Maphanga is asserting that under the current Rule 32 a counter-claim is no longer available as a defence, it would be good to know where and how that change has occurred. What has been the reason or consideration for the change? At any rate, sub-rule

(6) (a) does seem to contemplate a counter-claim. Essentially, I do not agree that there has been a 'substantial' move from the old to the current Rule. Whatever may be correct regarding the above position, our concern in this matter is not related to an "unliquidated claim for damages". Ota J. in **MTN Swaziland** (supra) also had to grapple with the issue of a counter-claim as a defence to summary judgment application. In para [69] the learned Judge stated as follows:"... *There is no doubt as rightly contended by the defendants that, generally, a counter-claim will operate as a* ***bona fide*** *defence to a summary judgment application, more especially where the amount of the counter-claim is more than the amount of the claim in convention, ...* " In that regard, the learned Judge referred for her authority to the work of Van Niekerk *et al, cited as* *Summary Judgment: A Practical Guide*, *Butterworths, (1998),* ofwhichparagraph 9.5.7 reads:

> *"An unliquidated counter-claim does constitute a bona fide defence to the plaintiff's liquidated claim. A defendant may, accordingly, rely on an unliquidated counter claim to avoid summary judgment even when he admits owing a liquidated amount in money to the plaintiff*
>
> *"There is no requirement that the counter-claim should depend upon the same facts as those upon which the plaintiff's claim is based. Any unliquidated counter-claim, even when it depends upon facts and circumstances differing entirely from those forming the basis of the plaintiff's claim, may be advanced by a defendant and in law constitutes a* ***bona fide*** *defence in summary judgment proceedings".*

[48] Colman Jin **Breitenbach** (p 228C - E) also addressed the *"sub-rule which causes difficulty"* by requiring the defendant's affidavit to disclose fully the nature and the grounds of his defence as well as the material facts relied upon for the defence. In this regard, Colman J remarked:

> *"A literal reading of that requirement would impose upon a defendant the duty of setting out in his affidavit the full details of all the evidence which he proposes to rely upon in resisting the plaintiff's claim at the trial. It is inconceivable, however, that the draftsman of the Rule intended to place that burden upon defendant. I*

respectfully agree, subject to one addition, with the suggestion by Miller J in ***Shepstone v Shepstone*** *1974 (2) SA 462 (N) at pp 466 -467, that the word 'fully' should not be given its literal meaning in Rule 32 and that no more is called for than this: that the statement of material facts be sufficiently full to persuade the court that what the defendant has alleged, if it is proved at the trial, will constitute a defence to the plaintiff's claim. What I would add, however, is that if the defence*

is averred in a manner which appears in all the circumstances to be needlessly bald, vague or sketchy, that will constitute material for the court to consider in relation to the requirement of bona fides ".

[49] What in my view seems to have happened is that the present Rule 32 was amended with a view to capturing and meeting the sentiments expressed by the courts on the old Rule 32. In the result, there is really not much difference in the operation of the two Rules. The expression *bona fide* is not technical; that is why under the present Rule the plaintiff still avers that defendant has no *bona fide* defence even though this expression is not found under the present Rule. The same is true of the word 'fully'. Whether it is 'fully' or 'sufficiently full' or 'facts' or 'material facts', the difference on the ground is hardly perceptible: it really makes not much difference, persuasive or satisfying facts must somehow be material and presented with some 'particularity' and 'completeness'.

[50] Also, the court would not normally be persuaded by a bald allegation that "for some other reason there ought to be a trial". There must be (material) facts or information to substantiate the need or reason for a trial and pointing to some reasonable prospects of a defence materialising at the end of the day. Accordingly, the problem that the applicant faces is that he still must aver that in his opinion the defendant has no *bona fide* defence. If that averment is not a requirement under the present sub-rule, how else does the plaintiff attack the defendant's intention to defend as a mere ploy or figment put up to delay the action? The term *'bona fide'* has become standard averment in summary judgment proceedings. To counter the plaintiff's averment, defendant is obliged not to merely allude

to a potential defence but to set out in his papers the requisite material or necessary facts to found his defence. See para [30] in **Swaziland Development and Savings Bank v Phineas Butter Nkambule** [2018] SZHC 123 (12 June 2018). In my opinion, the sting of the summary judgment remains as does the concern that the defendant should not be unfairly denied justice by an abridged trial procedure which prematurely closes the door to the defendant.

[51] Whatever the court *a quo* found, in this matter, having regard to the defence based on annex 'A' (the Acknowledgment of Debt document) there was enough material facts disclosed in support of the defence. As I have stated, the unchallenged acknowledgment of debt was virtually all that Appellant had to place before court to defeat the summary judgment application. The Respondent did not deny receiving the alleged stock from Appellant. The Respondent did not deny acknowledging indebtedness to Appellant in the sum alleged. The Appellant had succeeded to put up a "defence which is both *bona fide* and good in law". In light of the explanation provided by the learned Corbett JA of the use of the word 'fully' under paragraph (a), in the facts and circumstances of this case, the requirement for full disclosure "of the nature and grounds of his defence and the material facts upon which it is founded" had been discharged.

[52] In para [19] the Judge *a quo* referred to an "illegible document in support of its claim for goods sold and delivered" to the Respondent by the Appellant, and continued: "A close reading of this document ..... shows that this document is for a loan advanced and not for goods delivered..." The learned Judge *a quo* held the document to be ambiguous and consequently unhelpful to the Appellant. That was splitting hairs, in my view. I do not lmow which 'document' the learned Judge was referring to in that paragraph because it is not identified by any means. The learned Judge does not refer to the aclmowledgment of debt for that document does not give the source of the debt other than the aclmowledgment of its fact or existence. That document is complete in itself, and, as already observed, it was

not challenged by the Respondent. Out of abundance of caution, Appellant explained that the debt was related to goods or stock sold and delivered to Respondent.

[53] In my opinion, there was enough material in defendant's affidavit to take the matter to trial for the amount of stock allegedly given to Respondent as part of the claim. Reading through the judgment *a quo,* I have not been able to gather how the defence failed under both paragraph (a) and (b). To have rejected both the aclmowledgment of debt and the counter-claim was unjust to Appellant. The court does have a discretion to exercise but the Rule requires exercise of that discretion "having regard to the nature of the remedy or relief claimed". Summary judgment procedure can be unjust to the defendant. The court must therefore be slow in granting it if it may be reasonably avoided on the material before it. Even the court's discretion is better used in favour of a trial as against the summary judgment. In para [17] of **MHP Geomatics,** Justice Annandale stated: " **. . . .** *What a defendant is required to do, without having to meet the detailed exposition of setting out precisely what the defence is as would be required in a plea, is to persuade the court that if what he has set out in his affidavit is proved at the subsequent trial, it will constitute a defence".*

[54] After quoting the two paragraphs mentioned above, the learned Judge *a quo* adopted a *"two fold enquiry approach in deciding whether to accept the defence thereby rejecting the summary judgment application",* based on *"whether the defendant has disclosed sufficient averments for his defence,* " and *"whether such averments are* bona fide *and good in law".* That approach is at the heart of the decision in **Maharaj** where, as already shown above, Corbett JA after referring to the two paragraphs, proceeded to say: *"If satisfied of these matters the court must refuse summary judgment, either wholly or in part, as the case may be".* Rather curiously, however, the learned Judge does not decide to grant or reject summary judgment on the two fold enquiry. Instead her Ladyship, without further ado, proceeds to hold that *"the sum of E50,000 is due to the plaintiff following plaintiff's failure to raise the full sum of EJ00,000".*

[55] Short of a full-blown trial, what more did defendant/ Appellant have to submit to satisfy the court that it had a *prima facie* or reasonable or *bona fide* defence? The facts of the case are in themselves very simple. In para [3] of the judgment *a quo*, the learned Judge stated that the *"defendants do not dispute the particulars by the plaintiff.. They however raise a counter-claim".* Admitting the receipt of the E50,000-00 the defendant, however, averred as follows under paragraph 6 of its plea: *"For the afore-going reasons there* is *no amount due to the plaintiff He is therefore not entitled to the claim sought".* The counter claim is predicated on a principal amount plus interest totalling £51,435-00 which is then partially backed up by annexure 'A', the Acknowledgment of debt document reflecting the principal amount which in fact was the loan amount also reflected in Annexure 'A'. The claim was therefore clearly and sufficiently opposed.

[56] In paragraph 7 of its opposing affidavit, the Appellant wrote by its Director:

> *"I further submit that the initial investment amount paid by the Plaintiff is not due to him purely because the Plaintiff and myself, that* is *inclusive of J3' Defendant, agreed that the investment amount would be used to offiet the £42,020-00 (Forty-two....) which had an interest rate of 0.83% per month and administration fees of 9.17% and now totals £51, 435-00... which* is *debt owed to the 1st Defendant by the Plaintiff".*

[57] Again, annexure 'A' is attached to the opposing affidavit. Surely, the combined strength of the opposing affidavit and Annexure 'A' was, in my opinion, sufficient to satisfy the court that there was an issue or question in dispute that needed to be tried in connection with the claim. And if for any reason, there was doubt as to the amount of the interest, Appellant could have been ordered to put in security to the amount of the interest plus any costs that might be deemed proper, and the matter allowed to proceed to trial. With respect, in my opinion, there was enough material before court to justify that approach

and I cannot understand how the learned Judge *a quo* completely overlooked Annex 'A'. It will be recalled the words of Marais J in **Mowschenson and Mowschenson** (cited in **Breitenbach,** supra,) that the doors of the court should be closed to a defendant only if 'there is no doubt but that the plaintiff has an unanswerable case'.

Conclusion

[58] Having determined that the sum of E50,000-00 was returnable to Plaintiff, the learned Judge *a quo,* turned to consider the counter-claim and observed that the counterclaim was "based on a liquid document" and that as such it could be used as a set off of the Plaintiff's claim in terms of paragraph (a) but that it failed on paragraph (b) as a "bona fide and good defence". This failure on the second part was due to what the Judge found to be "a somehow illegible document" attached by the Defendant in support of its claim. On the foregoing the Judge *a quo* concluded: "20 ...The probabilities favour that the unchallenged claim ofE50,000-00 be granted in favour of plaintiff'. It is not clear to me in what way the claim of E50,000 was unchallenged in light of annexure A and the explanation given for it and the opposing affidavit. I cannot agree with the conclusion of the learned Judge *a quo* in granting summary judgment on the facts of this case. In my opinion there was enough material facts to satisfy the court. I agree that the court *a quo* misdirected itself in law in granting the application without deciding whether there was an issue or question in dispute or for any other reason requiring the matter to proceed to trial.

[59] This appeal was somehow handicapped by the fact the court a quo did not deal with Rule 32 squarely. Be that as it may, the Appellant, having complied with Rule 32(5), what remained was whether the Appellant had also complied with Rule 32 (4) (a), that is, whether Appellant had raised, to the satisfaction of the court, any "issue or question in dispute which ought to be tried or that there ought for some other reason to be a trial of [the] claim or part [of the claim]". In the **Swaziland Livestock Technical Services** case (supra), Justice Ota carefully considered the opposing affidavit and replying affidavit and found that the claim was "vehemently disputed", and concluded. *"[17] .....The dispute*

clearly raise triable issues constituting a possible defence at the trial. This state of affairs defeats summary judgment entitling the Defendants to proceed to trial". Needless to add that the defence raised need not be successful at the trial: it is enough if on paper it is *bona fide* or legitimate and valid or good in law. The appearance of these features would of course differ more or less from case to case.

[60] A comment regarding what Mamba J. says in paragraphs [3] and [4] of **Sinkhwa seMaswati** case may be in order. With respect, it is hard to see where the line between the old and new Rule 32 is drawn and the difference it makes to the defendant in practice. The question is whether the legal burden of the defendant is in any manner made lighter under the new/present Rule than was the case under the old. In saying, in para [4], that *"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"* is *"wider than merely satisfying the court that the defendant has a* bona fide *defence to the action as provided in the former Rule",* does the learned Judge mean that the requirement for the defendant to avert summary judgment under the current Rule has become easier to satisfy? Between the old and the new the divide is rather very faint and by no means a straight one.

[61] It seems to me that once the judicial observation that the old Rule be not taken literally was embraced, any difference between the old and the new was only in form or theory. As I see it, the Rule was amended to bring it in line with the observation (criticism) so that the theory and practice were aligned. To say that the new Rule has improved on the old is to say that defendant is now in a stronger position to stave off summary judgment and secure a full-blown trial than was the case before. I have some reservation about that being necessarily the case. It seems to me that under both Rules the defendant must still satisfy the court one way or the other to thwart the application. I do not see in what way the new Rule is wider than the former. What seems to have happened is that the requirement for a bona fide defence has been replaced by a triable issue or question; instead of full

disclosure there is needed material facts. But 'at the end of the day' the court must be satisfied either way. In the result, the amendment of Rule 32 had practically been achieved long before 1990, and summary judgment is still the summary judgment as it has been, only brushed up.

[62] In the result and on all the foregoing, I have come to the conclusion that-

1. The appeal be allowed;
2. The judgment of the court *a quo* is set aside,
3. The matter is returned to the High Court for a trial.
4. The parties to bear their own costs here and below.

I Agree

I Agree

SM Jele *for Appellant.*

B. Phakathi *for Respondent.*