IN THE SUPREME COURT OF ESWATINI

JUDGMENT

Held in Mbabane **Case No. 54/2021**

In the matter between:

ESW INVESTMENT GROUP LIMITED **Applicant**

AND

EVART V. DLAMINI **Respondent**

Neutral citation: ESW Investment group limited vs Evart V. Dlamini (54/2021)[2021] SZSC 32.(03 August 2022.)

Coram: **MJ Dlamini JA, MJ Manzini AJA and MM Vilakati AJA**

Heard: **11 April 2022**

Delivered: **03 August 2022**

Practice and Procedure : Summary judgment – Rule 32 - Application for – Compliance with rule 18 (6) and proviso to rule 30 (1) - Affidavit resisting summary judgment – Objection to application – Point *in limine* – Taking 'further step'- Requirements in terms of rule 32 (4) (a) considered – Appeal dismissed with costs.

JUDGMENT

MJ Dlamini JA

Introduction:

[1] The Appellant, ESW Investment Group Ltd, has appealed against the judgment of Her Ladyship Judge M. Dlamini at the Court *a quo* delivered on 5th October 2021 under Case No 807/21. There are some eleven grounds of appeal which I trust are not intended to intimidate the Court. I say this because as it often happens, Appellants do not deal with all their grounds of appeal, and do not even let the Court know which of the grounds have been abandoned. Happily, however, that is not quite the case here.

[2] For ease of reference, the grounds of appeal are as follows-

> "1. That the Honourable Court *a quo* erred in law and in fact by granting the Respondent Summary Judgment contrary to the contractual Agreement between the parties.
>
> 2. That the Honourable Court *a quo* erred in fact and in law by granting summary judgment despite plaintiffs' action being irregular and being contrary to Rule 18 (6) of the High Court Rules.
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> 3. That the Honourable Court *a quo* erred in law and in fact in holding that the contractual agreement was not required under **High Court Case Number**

807/2021 despite the plaintiff claiming interest is that determined in accordance with the contractual agreement between the parties.

4. That the Court *a quo* erred in law and in fact in holding that a point *in limine* can only be raised on the Affidavit Resisting Summary Judgment and cannot be raised over the bar on argument.

5. That the Court *a quo* erred in fact and in law in holding that the share certificate presented by the Plaintiff is enough to determine the terms of the agreement between the parties.

6. That the Court *a quo* erred in law and in fact in holding the material terms of the contractual agreement between the parties were not in issue.

7. That the Court *a quo* erred in law and in fact in interpreting the Defendants Affidavit without having cognizance to the terms of the contractual agreement being referred to in the Affidavit Resisting Summary Judgment.

8. That the Honourable Court *a quo* erred in fact and in law in holding that the letters undertaking to pay the Respondent were a waiver of the Appellants rights in the contractual agreement between the parties.

9. That the Honourable Court *a quo* erred in fact and in law in holding that the Appellant approbated and reprobated at the same time.

10. That the Court *a quo* erred in fact and in law in holding that there was no distinct prayer in Summary Judgment Application for interest at the rate of 9% per annum *a tempore morae* as was in the particulars of claim.

11. That the Court *a quo* erred in fact and in law in holding that the Respondent merely combined the two prayers from the combined summons, merely prayer (b) (on proportionate) interest and (c) 9% interest *a tempore morae* to make one prayer in the summary judgment application".

Background

[3] The **record of appeal** in this matter was duly prepared by the Appellant and certified by the Registrar of the High Court and lodged on 21 October 2021. The High Court had granted the summary judgment and ordered payment of the claimed amount of E206,416.17; proportionate interest accrued on the sum of E206,416.17 from 26 February, 2021 to date of final payment; interest at the rate of 9% *per annum a tempore morae* and costs of suit. The Court a quo did not grant costs at attorney and own client scale as claimed.

[4] On 31 March 2022, the Appellant purported to file a *Supplementary Record of Appeal*. This supplementary record was opposed and objected to by the Respondent. In his notice of objection dated 7 April 2022, Respondent objected not only to the supplementary record but also to a *Further Bundle of Authorities* filed by the Appellant on 22 March, 2022. Noteworthy of the supplementary record is that it was not certified as required; it purports to be a 'Transcript of Court Record,' in Case No. 807/2021. As for the Further Bundle it appears to contain only the ***Eswatini Prospectus***, 12th Issue, (pages 1 – 31) prepared by **Ecsponent** Limited, Eswatini.

[5] The Further Bundle is objected to for allegedly being *"evidence sought to be produced by the Appellant before the Honourable Court for the first time"*. And that the *"Appellant has neither sought nor obtained any leave of ...Court to file the alleged Bundle of Authorities which ...is evidence"*. Respondent also alleged that the Supplementary Record was *"in fact a record of arguments made by the attorneys in the Court a quo and same does not constitute or form part of the Record of Appeal that ought to be filed in terms of the Rules of Court"* and the Appellant had not obtained leave or condonation for filing those documents which should be disallowed with costs.

[6] Respondent's notice of objection to the two additional documents by the Appellant was dated and filed on the 7th April 2022. On the 8th April 2022, which was in fact a day before the hearing, the Appellant filed condonation application for the late filing of further

heads of argument, but was silent on the supplementary record and further bundle of authorities. In part, the founding condonation affidavit reads:

> "4. This is an application for condonation of filing of the [Appellant's] further supplementary Heads of Argument in the main appeal scheduled to be heard on the 11th April, 2022.
>
> "5. The present application has become necessitated that in terms of the Rules of Court specifically in terms of rule 31(1) which states that heads of argument together with their main authorities are to be filed not later than 28 days before the hearing of the appeal. In terms of rule 31(1) ....the Applicant's heads of argument were to be filed on or before the 2nd March 2022 (sic).
>
> "6.7 I verily believe and I am advised that the interests of justice do warrant that this Honourable Court condone the . . . late filing of these heads of argument. ...the late filing was occasioned by events totally out of Applicant's control ..."

[7] For the reasons for the delay, the Applicant/Appellant states that "it has always been and still remains Applicant's intention to instruct experienced Counsel, Mr. DJ Vetten, to argue the matter before Court..." From the issuance of the roll on 26 January 2022, Applicant averred to have had *"1 month to engage and confirm availability of Counsel ... Whilst awaiting Counsel's heads of argument, it became necessary in the meantime for Applicant to file the main heads of argument on the 2nd March 2022 pending Counsel's supplementary heads of argument"*. Due to prior engagements, including treatment of a medical condition, *"Counsel was only able to complete the supplementary heads on 6th April 2022"* which were then filed on 8 April, 2022.

[8] After averring that the late filing of the heads of argument be condoned in "the interests of justice" as the non-compliance was "occasioned by events totally out of Applicant's control" and that Respondent will not suffer any prejudice by the admission of the further heads, the founding affidavit further asserts-

"7. The late filing is in no way meant to be disrespectful to this Honorable Court or meant to look down upon the integrity of the Court but is occasioned by the above mentioned set of facts and the complexity of the issues that have been raised in the matter. I state that the filing of the further heads of argument will help assist the above Honourable Court in fully understanding the matter in its quest to apportion justice".

[10] The heads prepared by Counsel are described in the condonation affidavit alternately as "further heads of argument" and as "further supplementary heads of argument". And are described in the introduction as 'supplementary submissions . . . to be read together with the original heads of argument filed on 22 February 2022" (possibly an error for 2 March 2022). The original and supplementary heads are contained in some 72 paragraphs, some of which have several sub-paragraphs.

[11] A cursory look at the Appellant's heads of argument shows that the first or original set of heads canvassed grounds of appeal 1 to 8. The second set of the heads considered the 'nature of the investment'; 'misdirection and error (by Court *a quo*); the terms of the agreement; test for summary judgment; evolution of the test at summary judgment; application to the facts and conclusion. I have highlighted these subheadings because evidently we cannot consider all of them, even as we have tried to do so.

[12] On the other hand, the Respondent in a 26 page document dealt with all the Appellant's grounds of appeal but, understandably, could not deal with the supplementary heads.

[13] The Respondent naturally opposed both of Appellant's additional documents including the application for condonation. As stated above, the supplementary record of appeal was a transcript in which reference was made to cases during the hearing *a quo*, but no bundle of those cases was attached. The so-called 'Further Bundle of Authorities' was in fact the Ecsponent *"Eswatini Prospectus, 12th Issue"*. Not having been introduced in the Court below, the usefulness on appeal of the Prospectus was doubtful. In my view, this

Prospectus, if so required, could have been annexed to the affidavit resisting summary judgment or leave of court sought for its introduction. However, to the extent to which the Appellant may have relied on the Prospectus the Court allowed it but not the supplementary record which was not certified. As for the condonation application for the supplementary heads, it too, notwithstanding its shortcomings, was granted in the interests of justice and finality of the proceedings. Applicant to pay wasted costs on the condonation application only.

[15] It is worth restating what has been stated many times in cases before this Court in connection with the application for condonation. Holmes JA in **Federated Employers Insurance Company**[1] said:

> "In considering petitions for condonation under Rule 13, the factors usually weighed by the Court include the degree of non-compliance, the explanation therefor, the importance of the case, the prospects of success, the respondent's interest in the finality of his judgment, the convenience of the Court and the avoidance of unnecessary delay in the administration of justice; see **Meintjies v HD Combrinck (Edms) Bpk** 1961 (1) SA 262 (AD) at p264 A-B; **Melane v Santam Insurance Company Ltd** 1962 (4) SA 531 (AD), and **Kgobane's** case ([2]). The cogency of any such factor will vary according to the circumstances, including the particular Rule infringed. Thus, a badly prepared record - ... - involves both the convenience of the Court and the standard of its proceedings in the administration of justice. A belated appeal against a criminal conviction - .... - may keenly affect the public interest in the matter of the law's delays. On the other hand the late filing of the record in a civil case more closely concerns the respondent, who is allowed to extend the time under Rule 5(4) (c). The late filing of a notice of appeal particularly affects the respondent's interest in the finality of his judgment – the time for noting an

[1] **Federated Employers Fire and General Insurance Co. Ltd and Another v McKenzie** 1969 (3) SA 360 (AD) at 362-3.
[2] **Kgobane and Another v Minister of Justice and Another** 1969 (3) SA 365 AD

appeal having elapsed, he is *prima facie* entitled to adjust his affairs on the footing that his judgment is safe; see **Cairns' Executors v Gaarn** 1912 AD 181 at p193..."

[17] In **Liquidators, Myburgh, Krone and Company**[3] Innes CJ said: *"What amounts to sufficient cause in each case; what constitutes a ground for the exercise of indulgence must depend upon the circumstances. The cause of the delay and the excuse for it, though necessary factors to be considered, are not decisive. The merits of the appeal may in some cases be very important; . . ."* And Herbstein and Van Winsen write[4] *"A reasonable prospect of success on appeal is naturally an important consideration relevant to the granting of condonation, but it is not necessarily decisive in every case. Standing alone, it cannot itself be conclusive".*

The sequence of events after letter of demand

[18] The sequence of events after the letter of demand dated 18 February 2021 was as follows –

1. On 28 April 2021 Respondent filed combined summons in which he claimed the maturity value of his investment with interest in the amount of E206, 416.17 plus a proportionate interest accrued on the E206, 416.17 from 26 February 2021 to final payment as well as interest at 9% per annum.

Attached to the particulars of claim were –

(a) **'EV1'** being 'Copy' of 'Class E Share Certificate' duly signed by two Directors of the Applicant;

(b) **'EV2'** being the "Statement for the period 26 November 2015 to 25 November 2020" apparently prepared by the Appellant in respect of the Respondent and reflecting the Maturity Value of E200,000.00;

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[3] **Liquidators, Myburgh, Krone and Co v Standard Bank of South Africa Ltd** 1924 AD 226 at 231

[4] **The Civil Practice of the High Courts of South Africa**, 5th edition, 1234.

(c) **'EV4'** being Appellant's response dated 26 February 2021 to Respondent's letter of demand dated 18 February 2021. In that response Appellant wrote, *inter alia*-

"(2) We confirm that on or about the 26th of October 2015, the company received an investment of the sum of E100, 000.00 (One Hundred . . .) . . . from your client. We confirm further that the said investment portfolios were and are redeemable with interest in the month of 25 November 2020.

(3). We confirm further that as at the month of November 2020, the redeemable amount for both classes is the sum of E200,000.00 and to date the redemption value of the aforesaid amount is the sum E206,416.17.

(4). We advise that the company is and has always been committed to paying all redemptions due to its clients including your client . . .

(5). We therefore undertake to pay all redemptions due to your client within the next 21 (. . .) working days . . .

(6). We reiterate that the company remains committed to paying all redemptions due to its clients. . . ."

2. Appellant's *'Notice of Intention to Defend'* dated 11 May 2021;

3. Respondent's *'Notice of Application for Summary Judgment'* with verifying affidavit, dated 14 May 2021;

4. Appellant's *Affidavit Resisting Summary Judgment'* dated 28 May 2021 with some attachments **ESW 1 – ESW 3.**

5. Respondent's Replying Affidavit dated 24 June 2021

[18] It bears noting that whilst the judgment a quo and earlier court documents in this matter reflect the parties as **Evart V Dlamini,** Plaintiff and **Ecsponent Limited,** Defendant, the Notice of Appeal cites **ESW Investment Group Ltd** as Appellant and **Evart V Dlamini** as Respondent. The notice of appeal was filed by the same attorneys who represented the appellant at the High Court. The Record of Appeal certified by the Registrar reflects the parties as they were below. Incidentally no one during the appeal hearing raised any finger concerning the new party. I can only assume that the change in the name of the appellant was all in order as the attorneys before this Court were the same as below. But in all fairness Mr. Mdladla should have explained the change in the name of his client.

Summary judgment

(a) General

[19] It is common cause that the period of the investment was five years. Thereafter the investment matured and became payable to the investor. According to Appellant, at the end of the five year period, the Respondent had the *"right or option to withdraw and or redeem the said investment together with all interest accrued thereon"*. This is stated in paragraph 2 of Appellant's heads of argument. In paragraph 3 it is stated that *"on or about the month of October 2020 the Respondent applied for the withdrawal of the investment in line with the terms of the parties' written contractual agreement"*. The undisputed amount claimed as at date of maturity was E200,000-00 plus the proportionate interest accruing over the period of non-payment beyond the maturity date. This amounted to E206,416-17 at the time summons was issued.

[20] In paragraph 5 of its heads, the Appellant stated: *"It is common cause that when entering into the agreement the parties made a provision for a* ***circumstance****, such as when the Appellant would default in making a redemption payment which is clearly set out on the prospectus detailing the terms of the agreement between the parties"*. (My emphasis). In paragraph 8, Appellant admitted and confirmed that as of November 2020 the redeemable value of the investment was the amount of E206, 416-17, but argued: *"8.1 It*

is important to highlight that the Appellant merely confirmed the existence of the investment and that the invested amount was now redeemable. The Appellant never made an acknowledgement of indebtedness to the Respondent". In paragraph 12 Appellant charged that the Respondent issued summons *"without having regard for Clause 1.5.5 of the prospectus bearing the terms of agreement between the parties".*

[21] Appellant asserted that it had a *bona fide* defence and further *"contended that in as much as it was in default, the Appellant was not in breach of the terms of the agreement between the parties".* Accordingly, all the declarations of commitment to pay in light of its alleged default, were not to be understood in a literal sense. Admittedly, the Appellant was in default but nothing was *"due and payable"* to Respondent. That, it would seem, was due to the circumstance referred to above. And, so the Appellant argued: Acknowledgement of default did not mean indebtedness to Respondent in any amount due and payable as Respondent alleged. Thus, according to Appellant, Respondent was at all times labouring under total misapprehension. This line of argument by Appellant raises the fundamental question as to whether the parties were ever *ad idem* to the agreement. In passing, with respect, creating a contractual situation where default could legally arise but without breach of the contract being implicated reeks of fraudulent implications.

[22] Appellant went on to aver that it had recently had a change in its shareholding resulting in a restructuring by new shareholders to rectify problems that had been caused by the out-going management on the company's investment processes. The effect of the restructuring was that the assets of the company were available but were not liquid: *"This as a result handicaps the Defendant's ability to service its clients' redemptions that have fallen due as in the case of the Plaintiff. It is in light of these developments that Defendant has fallen in default."* The Appellant also stated that the nature of the investment was such that the parties agreed that the terms of the investment portfolio would be guided by a prospectus that had been rightly approved by the Financial Services Regulatory Authority: *"The terms of this prospectus are regarded as the clear terms of the agreement entered into between the parties."* Clause 1.5.5 is then set out in full. But a copy of the prospectus

was not annexed save for a copy of the acknowledgment of receipt of the prospectus by the Respondent . . . *"which clearly shows the investor's acknowledgment and agreement to the terms of the agreement as set out in the prospectus."* With reference to the prospectus, Appellant also stated: *"The terms unequivocally make it clear that in the event the defendant is in default the linked loan units will be converted into ordinary shares. This will happen pursuant to a notification by a client that there has been a default."*

(b) Clause 1.5.5

[23] In the affidavit resisting summary judgment, the Appellant, by its chief executive officer, deposed that it was *"in default to the [Respondent] in the sum of E206,416.17 (.....)"* but stated that *"based on the agreement between the parties, the [Appellant] was not in breach of the terms of the agreement between the parties"*, and that *"the amounts that have been invested with the defendant are not due, owing and payable as alleged by the [Respondent]"*. Does this statement constitute or raise an issue or question that is in dispute which ought to be tried?

[24] To justify why Appellant was in default but not in breach, Appellant referred to a recently introduced change in its shareholding as a result of new shareholders coming in the company intent to rectify problems that had been caused by the out-going management on the investment portfolio of the company. The Appellant averred that the new management embarked on a restructuring programme of which the Respondent was 'well aware.' Appellant further stated: *"The restructuring process for the Defendant in effect means that the Defendant's assets are there, but are not liquid as the rebuilding process of the Defendant includes refinancing of the Defendant and its processes. This, as a result, handicaps the Defendant's ability to service its client's redemptions that have fallen due as in the case of the Plaintiff. It is in light of these developments that the Defendant has fallen in default"*. With respect, it is not clear from the foregoing how the restructuring and the illiquidity of Appellant's assets justify the Appellant to be in default but without

being liable to make good the default in the terms of the investment as admitted. All in all, it is a simple, bare denial of liability arising from the default, and by no stretch of the imagination raising an issue or question in dispute which ought to be tried.

[25] In explaining, rather lamely, the Appellant stated that *"the nature of the investment portfolio"* in question, *"being linked loan units would be guided by a prospectus that has been rightly approved by the Financial Services Regulatory Authority. The terms of this prospectus are regarded as the clear terms of the agreement entered into by the parties. The said prospectus is renewed on a yearly basis...."* However, the *prospectus* was not annexed, as might have been expected.

[26] To the foregoing deposition was then annexed "ESW3" called *'Investor Information'*, to which was a declaration by the Respondent in these terms:

> *'Whereas the Applicant hereby confirms his/her intention to participate in the share capital of the company by purchasing linked loan units in Escponent Limited in accordance with the invitation extended to the Applicant in the prospectus, a copy of which has been handed to the Applicant, and the Applicant hereby acknowledges that he/she knows and understands the contents thereof'.*

Appellant then referred to a clause in the *prospectus* and stated:

> *"In light of the foregoing, and in the event the Defendant is in default as and when a redemption accrues to any of clients, it is a clear term of the parties' agreement that in such an instance Clause 1.5.5 guides the said circumstances."*

[27] Clause 1.5.5 was then reproduced in full, as follows:

> **"Conversion of linked loan units into ordinary shares is obligatory in the following events:-**
>
> - **Default by the company on repayment of the capital on the redemption date.**
> - **Non – payment of three consecutive returns on the linked loan units by the company.**

In any of the above events, the linked loan unit holder will immediately notify the company in writing. Upon such notification all outstanding linked loan units, dividends, interests and capital shall convert into ordinary shares. The conversion rate into ordinary shares shall be calculated at the fair and reasonable price of the ordinary shares as determined by the auditors of the company on the day of default. If there is a change in any circumstances affecting the company, which change, in the opinion of the directors necessitates the consideration by any or all classes of linked loan unit holders of a restructuring of the shareholding of the company, the company shall be entitled to convene a meeting of any or all classes of shareholders at which meeting proposals will be considered. Including but not limited to the early or partly redemption of linked loan units into ordinary shares or cash or a combination or ordinary shares and cash."

[28] Appellant further contended that Respondent disregarded the terms of Clause 1.5.5 which did not support the claim made by Respondent. *"Clause 1.5.5 of the prospectus states clearly that in the event there is a default as and when a redemption accrues to Respondent, then in such a case Clause 1.5.5 of* the *prospectus comes into operation and guides the said circumstances"*, contended Appellant. And so it would seem, Clause 1.5.5 is the basis of the 'circumstance' already mentioned above. A kind of exit clause, in my view. The Clause *inter alia* obligates conversion of linked loan units into ordinary shares in the event of default by the company on repayment of the returns on the redemption date.

[29] In terms of Clause 1.5.5 when default or non-payment (of three consecutive returns of the linked loan units) by the company occurs, the unit holder is supposed to *"notify the company in writing"* of the occurrence. When the notification happens *"all outstanding linked loan units, dividends, interests and capital shall convert into ordinary shares"*. And if as a result of the default or non-payment, and consequent upon the notification, *"there is any change in any circumstances affecting the company, which change, in the opinion of the directors necessitates the consideration by any or all classes of linked loan unit holders of a restructuring of the shareholding of the company, the company shall be entitled to convene a meeting of any or all classes of shareholders at which meeting proposals will be considered"*.

[30] In the present case, we are not told that the Respondent notified the company of the default or non-payment. But why would a unit holder have to notify the company when the company admitted to be in default. And, if no one notifies, as provided, what happens? Does the company continue to be in undeclared default, until when? Further, a *"change in any circumstances affecting the company"* is determined by the company directors, not the unit holders, like the Respondent. One also wonders, why default in respect of one unit holder should give rise to a restructuring possibly affecting other unit holders for whom there might have been no default because maturity had not occurred. It is hard to rationalize the arrangement set out in Clause 1.5.5.

[31] It seems that default or non-payment is at the behest of the company. It is the company that knows and decides whether it will pay or not, long before the investor is told or becomes aware that the company would not pay. The investor is an outsider to the operations of the company. The main priority for the investor is payment of his redemption at due time. The investor is not interested in Clause 1.5.5. That Clause does not give the investor any sense of real comfort; instead it takes him in a journey of blind corners and uncertain destination. On the occurrence of a default or non-payment, the investor is placed in a hopeless situation. It is the directors of the company who know where the money is and why the company finds itself purportedly unable to pay. Whether any alleged failure to pay is real or faked, it is the company that has the inside information. *In casu*, it was common cause between the parties that maturity time had arrived. The maturity date was October 2020. That was when the Appellant was supposed to pay Respondent the amount of E200,000-00 plus accrued interest. It is now the middle of 2022, Respondent has not been paid. The Appellant says it is not liable to pay as claimed by Respondent. When, if at all, payment will be made, Respondent has not been told except for empty promises and extensions of time. Appellant has not made any offer, even of the return of the capital or any partial payment according to the company's means. In my view, it is no answer to the claim by Respondent for the Appellant to say that Respondent had been forewarned of the nature of the investment in light of the prospectus handed to Respondent.

[32] With respect, I cannot find anything in clause 1.5.5 which exonerates the Appellant from being legitimately liable when in default. If clause 1.5.5 is an avoidance or escape clause then surely its validity may very well be questioned if, potentially, it might give rise to a fraudulent investment scheme. And I dare say if a scheme tends to produce more losers than winners, there must be some fundamental flaw in the scheme, consistent with deliberate mischief.

[33] Let us look at this Clause 1.5.5. We have already said something about the clause. It says that when default on repayment of capital or non-payment of three consecutive returns on the linked loan units occurs conversion of the linked loan units (from being preference shares) to ordinary shares becomes 'obligatory'. But the obligation is not automatic. The linked loan unit holder, like the Respondent, must *"immediately notify the company in writing"* of the default or non-payment. And then *"upon such notification all outstanding linked loan units, dividends, interests and capital shall convert into ordinary shares"*. It looks like the company may not notify itself or take notice of the default or non-payment. It also seems that restructuring follows upon due *notification* of default or non-payment in light of the impact of the default *as assessed by the directors* and agreed upon by *"any or all classes of linked loan unit holders"*.

[34] In light of the provisions of Clause 1.5.5, Appellant correctly states that Respondent did not make "such notification" as required. But the Clause does not say what happens, as here, when client does not notify a default. It is worth asking, how the restructuring came about when Respondent did not give notice of default. And, as Respondent avers in his replying affidavit, Respondent as a linked loan unit holder, was never invited to nor did he ever participate in company meeting to consider the effect of any default as clause 1.5.5 anticipates.

[35] Appellant admits that redemption has not been paid *"mainly as a result of the on-going restructuring process, a process which will be once completed in the Plaintiff's full benefit and advantage"*. When that payment would be, only Appellant knows. That there

was a restructuring, only Appellant and its team of managers knew. Who brought about the process of restructuring only Appellant knew. Respondent was correct when he said the restructuring process was none of his business as he had no hand in it. In the replying affidavit Respondent pertinently states: *"6. The Honourable Court will note that .... (6.2) regarding the alleged terms of the prospectus (which is unknown to me)....I have made no such notification as per the prospectus..."* And as to the restructuring process and illiquid assets, Respondent averred that those issues had *"got nothing to do with my claim and or do not raise a triable issue or a* bona fide *defence to my claim"*. All that Respondent was interested in was for the Appellant to abide by and be held to its promises to pay the amount claimed in the summons. In my view, Clause 1.5.5, so prominently relied upon by Appellant, does not provide an answer to Respondent's claim, if for any other reason, simply because Respondent never notified a default to give rise to a restructuring of the company. Even the change in management was a matter entirely within the knowledge of the company and whether it was ever necessary or not is a matter outside the scope of knowledge of Respondent as a linked loan unit holder.

[36] In its opposing affidavit the Appellant concluded by saying that *"...as up to date the Defendant has convened a meeting of any and or all classes of shareholders at which meeting proposals are being considered including but not limited to the early or partly redemption (sic) of linked loan units into ordinary shares or cash or combination of ordinary shares and cash. In light of the foregoing, it is clear that the Defendant* bona fide *has stated a good defence in the matter, which in all sorts is not in any way prejudicial to the Defendant. In the event the court would find against the Defendant the Plaintiff would suffer great prejudice as it would lead to a liquidation of the Defendant and the Plaintiff would suffer great loss. It is therefore in protecting the Plaintiff's interests that the Defendant has defended this matter in order to protect the interests of the Plaintiff and other investors."* (*Emphasis* added)

[37] However, Respondent would hear none of the foregoing plea by a party who had made un-kept promises. And, with respect, to expect the Respondent to have read and

understood the terms of the prospectus, as it is recorded, would be expecting too much. In my view, there is no *bona fide* defence presented. In the foregoing paragraph, Appellant virtually confesses its inability to pay the investors, and in an attempt to allay widespread fears and out cry about the Appellant's investment portfolio on the brink of liquidation, Appellant has mounted the hopeless court defence as we find in this matter. Simply put, Appellant has no defence nor any triable issue or question.

(c) Contract not annexed – Rule 18 (6)

[38] In grounds of appeal numbers 5, 6, and 7 it is implied that the Respondent ought to have attached the agreement entered into between the parties. In ground **number 5** Appellant contended that the Court *a quo* was wrong in holding that the share certificate presented by the Respondent was enough to determine the terms of the agreement between the parties; that in ground **number 6**, the court *a quo* erred in holding that the material terms of the contractual agreement between the parties were not in issue; and, **ground 7** that the defendant's opposing affidavit could not be properly understood without having cognisance to the terms of the agreement between the parties.

[39] In its heads of argument it is expressly stated that Respondent ought to have attached the contract as required by Rule 18 (6). It is also implied in grounds of appeal 5, 6, and 7. But this procedural requirement is not contained in the resisting affidavit. In my view the answer to the foregoing grounds of appeal depends on the exact basis of the application for the summary judgment. Rule 18 (6) requires a *"party who in his pleading relies upon a contract"* to attach a true copy of that contract or part of that contract. To his particulars of claim Respondent had annexed documents (EV1,2,3) he had considered necessary to sustain his claim which was at that time not denied by the Appellant. Following the letter of 26 February 2021 in which Appellant promised to pay due redemptions within 21 days, on 29 March 2021 Appellant wrote appealing for a further 10 days, alleging that it had not been able to pay as earlier promised due to *"operational*

glitches which the company has experienced over the past few weeks, in particular the disbursement of your client's redemption". (My emphasis) Needless to observe that no such disbursement reached Respondent. Other than a mere legal technicality, it is not clear to me what else the Contract would add to the action other than unduly drag on the matter. From a procedural point of view, it is the party who relies on a contract who must attach it to his application or opposing affidavit. Rule 18 (6) speaks to a party who "relies upon a contract". *In casu*, Respondent had a ready-made, liquidated claim that did not require the contract to be attached. It was the Appellant who sought to rely on the contract.

[40] Respondent did not attach any 'contractual' document in support of the application for summary judgment. In my opinion, the question here is whether the documents annexed to the particulars of claim adequately supported the claim. The Court *a quo* dealt with this aspect in para [8], pointing out that the failure to annex the contract should have been raised in the affidavit resisting the summary judgment application and not at the bar. Had that happened, Respondent would have annexed the contract to his replying affidavit, if so advised. As happened, raising that issue at the bar amounted to 'litigation by ambush'. The statement by Tebbutt JA would seem to put the issue beyond dispute:

> *"It is now well established that when a factual issue which appears in the founding affidavit is challenged or denied by the respondent in the answering affidavit, the courts will allow the applicant to clarify or rectify the issue in a replying affidavit.*[5]

[41] In support of the argument that the prospectus should have been annexed as required by Rule 18 (6), Appellant relied on **Gulf Steel**[6] where the High Court stated that there were two basic requirements to be met by a Plaintiff in summary judgment applications, to wit, a claim that is clearly established and pleadings which are technically correct, failing any one of these, the Court would be obliged to refuse summary judgment. The other case cited by Appellant was **Absa Bank v Haynes**[7] where the Court (per Daffue J) stated that

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[5] **Shell Oil Swaziland (Pty) Ltd v Motor World (Pty) Ltd t/a Sir Motors** [2006] SZSC 11 (21/6/06) at para [28]
[6] **Gulf Steel (Pty) Ltd v Rack-Rite Bob (Pty) Ltd and Another** 1998 (1) SA 679 (O) 683H-684B.
[7] **Absa Bank Ltd v Haynes NO and Others** (3619/2013) at [12] (High Court, Free State Division) (12 / 12 / 2013)

"If the written underlying agreement is not attached to the particulars of claim such pleading shall in terms of rule 18(12) be deemed to be an irregular step and the opposite party shall be entitled to act in accordance with rule 30". In **Absa Bank**, Daffue J also stated that *"it is not necessary for a party to apply rule 30 but he may sit back and when confronted with an application for summary judgment object to the validity of such application".* The authorities are to the effect that in summary judgment proceedings the Court must be independently satisfied that the claim is clearly established and is technically correct even before defendant's defence is examined. *In casu* these two requirements were met in that Respondent's claim was on its face not contested by the Appellant who had unequivocally promised to pay the amount claimed and Respondent had attached documents (EV 1, 2, 3) in support of the claim and the irregularity associated with rule 18(6) is not automatic – it awaits triggering by defendant and it was not triggered.

[42] What Daffue J is saying above is a bit challenging. Failure to comply with rule 18 (6) renders the pleading irregular in terms of rule 18 (12). The latter rule provides that when faced with an irregular pleading, the opposite party "shall be entitled to act in accordance with rule 30." Daffue J says that that party does not have to do anything once the pleading is deemed irregular; that party may just 'sit back' and do nothing and await the next move of the defaulting party. Rule 18 (12) refers the proceeding to rule 30 because it is that rule which regulates irregular proceedings. Rule 30 has its own demands. Firstly, a party aware of the irregular step or proceeding must within fourteen days act to have that step or proceeding set aside. It stands to reason that failure to so comply might cause the party to lose by peremption the right to challenge. Secondly, a party aware of the irregular step loses the right to challenge if he should take a 'further step' in the cause. This is per the proviso to rule 30 (1). It is apparent that failure to comply with rule 18 (6) could where necessary be rectified by an appropriate order of court such as by extension with leave to rectify such as by attaching the relevant contract.

[43] As to the meaning of 'further step', Herbstein and van Winsen (3rd edition, p 385) refer to Broome J. in **Petersen v Burnside** (1940 NPD 406) who said that "a step in the

proceedings is some act which advances the proceedings one step nearer completion," but would not include entry of appearance, although taking of exception would be such a 'further step,' but "precludes the excipient from moving to set aside the irregular proceeding. So, too, is an application for further particulars. A filing of a declaration and notice of bar is a further step. So also is the filing of a replication." *In casu,* clearly the filing of the affidavit resisting summary judgment was a further step in terms of the proviso to rule 30 (1). In the result, Appellant became precluded from challenging the application in terms of rule 18 (6).

[44] Even though in its opposing affidavit, in paragraph 6, Appellant adverts to the terms of the prospectus being *"regarded as the clear terms of the agreement entered into between the parties"*, the non-attachment of the prospectus as such is not then raised. The issue of the non-compliance with rule 18(6) was only raised in heads of argument which are not part of pleadings. Argument on the point was allowed. In response Mr Simelane for the Respondent in addressing rule 18 (6) argued in essence that the summary judgment application did not rely on the contract as contended by Mr. Vetten for the Appellant. According to the Respondent, the contract could be said to have been impliedly novated. But I do not find it necessary to determine the point. Once the claim was unequivocally acknowledged, there was no need to rely on the contract. The acknowledgment of liability made this matter qualify for summary judgment and the Court *a quo* was correct in dismissing the defence as bogus and bad in law. Mr. Simelane argued and further stated at paragraph 7.4: *". . . It is humbly submitted that in light of the above highlighted admissions or acknowledgments or election or acquiescence, the Appellant's alleged defence cannot be said to be bona fide and good in law."* Mr. Simelane also submitted that there was no alleged irregularity or contravention of rule 18(6) that was raised in the affidavit resisting summary judgment.

[45] Rule 18 (12) states that failure to comply with rule 18 (6) renders the proceeding or summons irregular. With respect to irregular summons, application may be made to have it set aside. However, Herbstein and Van Winsen[8] write: *"No party who has taken any 'further step' in the cause with knowledge of the irregularity or impropriety is entitled to make such an application"*. The reference to **Bowfam Leasing**[9] cited for the Appellant in a case of provisional sentence summons does not quite assist in this part of the case generated on rule 18 (6). In that case, the issue concerned *"whether or not it was competent in law for a company ABC . . . to claim (and obtain) provisional sentence on a liquid document executed in favour of XYZ . . . in the absence of any cession or endorsement . .* ." In a case where the defence had not raised the point in its affidavit but was raised by the Court before the hearing, Berman AJ dismissed the objection to the point supported by the defence at the hearing and held that *". . . the point raised by the Court could always have been taken* in limine *by the defendant, notwithstanding that he had filed an affidavit dealing exclusively with the merits of the matter, and his action in filing such an affidavit on the merits did not (and could not), without anything more, constitute a waiver on his part on the defence afforded to him by this point, . . ."*

[46] The foregoing is not the situation in this case. In **Bay Loan Investment,**[10] involving a case of *dies induciae* amounting to short service but not raised on affidavit, van Winsen J. stated as follows:

> *"There is in the present case no express waiver by defendant of its rights. Counsel for defendant at the hearing claimed those rights and had defendant done nothing else but appear on 1st September and object to the short service then it would seem from the authorities that the Court ought either to have dismissed the summons (. . .) or postponed the action (. . .). In fact, however, an affidavit was filed on defendant's behalf on 23rd August in which he raises a defence to the*

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[8] **Bowfam Leasing (Pty) Ltd t/a Metropole Finance (Pty) Ltd v. Muller** 1982 (2) SA 759 (C), 761 F-G
[9] Herbstein and Van Winsen **The Civil Practice of the Superior Courts in South Africa,** 3rd ed. p189
[10] **Bay Loan Investment (Pty) Ltd v Bay View (Pty) Ltd** 1971 (4) SA 538 (C) at 540

summons on merits and mentions another defence which he chose. . . Defendant does not claim in the affidavit that the summons should be dismissed because it has not been afforded the statutory time within which to appear.

Does this conduct amount by implication to a waiver by the defendant of its rights?

A court does not lightly assume that a party has waived its rights. . . . To constitute a waiver the Court must be satisfied that the holder of right knew of his right and intended to surrender it. Where his intention to surrender is to be derived by implication from his conduct, his conduct must be such that it is necessarily inconsistent with an intention to maintain his rights. The only conduct from which such an implication can arise in this case is the filing by defendant of an affidavit on the merits and its failure to state in its affidavit that it objected to short notice. This conduct is not necessarily inconsistent with an intention to pursue its undoubted right. Defendant would have been entitled to make objection in limine at the hearing, . . . which was in fact done on defendant's behalf. The filing of an affidavit dealing with the merits is equally consistent with an intention to fit a second string to his bow and in itself is not a waiver of defendant's right." (My emphasis).

[47] **Bowfam Leasing** and **Bay Loan Investment** were cases on provisional sentence. In the first case, plaintiff's claim was dismissed while in the second the case was postponed to allow plaintiff to amend its summons. That is how the different Judges exercised their discretion in matters of procedure where the rule was not hard and fast one way or the other. In the present case, we have a situation in which the defendant clearly knew its right, and must have known that without the Contract being annexed to the summons the summons was irregular and objectionable and must also have known that taking a 'further step' in the proceedings has the effect of stopping a challenge to the irregularity of the proceeding. By pleading to the merits the defendant waived its right to object to the

summons. This is not a case where pleading to the merits of the summons is, without more, not necessarily inconsistent with waiver. *In casu*, in my view, the waiver is virtually automatic on the taking of a further step beyond the notice to oppose being aware of the irregular step. Even if the objection to the application was contained in the resisting affidavit, it would still not pass, for the simple reason that the opposing affidavit is a further step in the cause.

[48] We have pointed and that Clause 1.5.5 did not kick-in because the Respondent did not make the prerequisite notification in terms of that Clause. That the combined summons was possibly irregular was not taken up in time before any other step as the proviso to rule 30 (1) states. It may now be fairly pronounced that in this matter any submission by the Appellant based on the relevance or otherwise of the regularity of the summons will not pass. Whilst it may be proper to raise a point *in limine* at the bar that is not the case in the present matter where the court is obliged to consider rule 30 (1). Had the matter of the non-attachment of the prospectus been raised promptly, as the Court *a quo* also noted, the Respondent had the right in terms of rule 30 (4) to comply with the order of court as might be required. And it will be noted also that plaintiff's failure to comply with rule 30 (4) will lead in the first place to the claim being struck out and not dismissed in terms of rule 30(5). Thus raising the point *in limine* over the bar has the effect not only of ambushing the plaintiff but also of stalling the finality of the action. And it will also be remembered that the Court does not separately look at the case of the plaintiff and separately at that of the defendant. By the time of the hearing all the pleadings are before Court. It would not make good sense to deny summary judgment on a curable technical defect when on the other hand it is evident on the papers before Court that there is no defence or triable issue or question justifying the matter to proceed to trial. Going to trial is not a mere formality; it is a requirement based on the Court being satisfied that there is an issue or question reasonably likely to raise a defence for the defendant.

(d) Grounds of appeal

[49] The **fifth** ground of appeal was to the effect that the Court *a quo* erred in holding that the share certificate (EV 1) presented by the Plaintiff was enough to determine the terms of the agreement between the parties. This ground is based on the interpretation of the certificate and its adequacy in support of the claim founded on Appellant's acknowledgment of debt. In this regard, Appellant denied acknowledgment of liability and based the denial on Clause 1.5.5. In EV 2 and EV 3 Appellant admitted being in default to the extent of the amount claimed by Respondent but, based on Clause 1.5.5, denied that the default translated to liability in any payable amount. Based, no doubt, in part, on the admission of default in the affidavit resisting summary judgment, the Court *a quo* held that there was no dispute on the facts over the existence of the contract and that in essence the "certificate was *prima facie* evidence of the contract of investment by plaintiff". Once the position was taken that the summons was not defective as stated above, the admission of default understood as acknowledgment of debt, the share certificate (EVI), the statement confirming maturity value payable (EV2) and the letter of 26 February 2021 (EV4) confirming *inter alia*, the redeemable amount in the sum of E206,416-17, was all that was held necessary to found and sustain the claim in a summary judgment application. I can find no misdirection in this reasoning and holding by the Court *a quo*. Accordingly, it would appear there was no point in attaching the contract (the prospectus) for the sake of only doing so. The Respondent did not rely on the prospectus for his claim or at least not materially and directly. Accordingly this ground, and the earlier grounds, cannot stand.

[50] In light of what I have already stated and observed herein above, I can find no merit in **sixth** ground of appeal. This ground revolves around the *"material terms of the contract between the parties."* The allegation by the Appellant that there was a dispute regarding the material terms of the contract was a dispute artificial and of no material bearing on Respondent's claim. The Appellant did not aver facts giving rise to a triable issue regarding this ground of appeal. The alleged dispute is once again essentially around Clause 1.5.5 already dealt with. It is not my understanding that the contract was novated except, may

be, by implication. For what it is worth the prospectus could have been annexed in terms of rule 18 (6), but the absolute requirement to do so was missed when the Appellant took a "further step" without raising the point. It is therefore not that the prospectus was or was not necessary but was of no practical effect in the pursuit of the claim in light of the certificate and the correspondence between the parties relied upon by the Respondent. It is true that novation must be intentional and that the validity of the initial contract is a prerequisite. I see no good reason why novation could not be implied if the facts pointed in that direction. I find no merit in this **sixth** ground nor in the **seventh** and **eighth** grounds of appeal. Enough has been canvassed to dismiss the **ninth** ground as also unmeritorious. The **tenth** and **eleventh** grounds must also fail on the basis that summary judgment is essentially concerned with the liquidity or otherwise of the primary claim. See rule 32(2).

(e) The supplementary heads of argument – Search for a triable issue

[51] In light of Appellant's argument that since the parties entered into a written agreement, 'especially one that is such a complex investment agreement', the Respondent ought to have attached the written agreement to his combined summons for ease of understanding the merits, the Appellant then submitted that there was a triable issue which the Court *a quo* ought to have considered. In the result, Appellant argued *"the court a quo when making its findings, was not aware of Clause 1.5.5 of the agreement between the parties which provides for a circumstance such as when a party in the position of the Appellant defaults in making payments"*. Further, that *"had the Court a quo properly applied its mind to the defective nature of the Respondent's summons... and further that the contractual agreement between the parties provide for a circumstance....then the Honourable Court a quo would have come to a different finding"*. The essence of Appellant's argument is that there was a triable issue or question which the Court *a quo* was not aware of because the prospectus had not been annexed. In this Court we have seen and considered and made a finding on Cause 1.5.5, I see no reason to further deliberate on

it. In my opinion, the supplementary heads of argument prepared by Counsel for the Appellant relate mainly to whether the defence raises a triable issue or question requiring the matter to proceed to trial. In that case, we must again look at the affidavit resisting summary judgment.

[52] Before we consider the affidavit resisting the application it is proper to echo the words of Gihwala AJ in **Gulf Steel:** [11]

> *"In view of the nature of the remedy of summary judgment, the Court must be satisfied that a plaintiff who seeks summary judgment has established its claim clearly on the papers and that the defendants have failed to set up a bona fide defence as required in terms of the Uniform Rules of Court. There are accordingly two basic requirements that the plaintiff must meet, namely a clear claim and pleadings which are technically correct before the Court. If either of these requirements is not met, the Court is obliged to refuse summary judgment. In fact, before even considering whether the defendant has established a bona fide defence, it is necessary for the Court to be satisfied that the plaintiff's claim has been clearly established and its pleadings are technically in order. Even if a defendant fails to put up any defence or puts up a defence which does not meet the standard required of a defendant to resist summary judgment, summary judgment should nevertheless be refused if the plaintiff's claim is not clearly established on its papers and its pleadings are not technically in order and in compliance with Rules of Court."*

[53] There is no doubt in my mind that the learned Judge in **Gulf Steel** "put the bar a bit too high for a plaintiff." But Gihwala AJ is not without support. See **Shackleton Credit Management (Pty) Ltd v Microzone Trading 88 CC and Another** 2010 (5) SA 112 (KZP) at [25] where Wallis J stated that the fact that a defendant goes for the merits instead of points *in limine* does not cure an otherwise defective application or mean that the defects will be overlooked: *"The fact that they set out that defence does not cure the defects in the*

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[11] **Gulf Steel (Pty) Ltd v Rack-Rite BOP (Pty) Ltd and Another** [1997] 4 All SA 178 (O) at 184

application, and to permit an absence of prejudice to the defendants to provide grounds for overlooking defects in the application itself seems to me unsound in principle. The proper starting point is the application. If it is defective, then cadit quaestio." It is generally correct that *"where a plaintiff's cause of action is based on a written document, a copy thereof is required to be attached to the simple summons in order for the summons to disclose a cause of action." In casu,* as we have been saying, the application is not squarely based on the contract asserted by Appellant. The documents on which the application is founded have been attached in accordance with the general requirement and it has not been shown that those documents do not prove the claim. Appellant's approach has been as if the contract is required just for its own sake. That is not so.

[54] After remarking on the extra-ordinary, drastic and stringent remedy of summary judgment, Ota J in **Nedbank (Swd) Ltd v Baslam Investments (Pty) Ltd t/a Fair Price Furnitures and Another** [2013] SZHC 65 stated that "[16] . . . *[I]n cases where the defendant has no defence and the appearance to defend is not entered* bona fide *but is a dilatory stratagem geared at stultifying the plaintiff's early dance of victory"* the Court would be justified in granting summary judgment. The learned Judge continued:

> *"[18] It is in a bid to ensure that this procedure is properly utilized that the rules require a defendant who is opposed to summary judgment to file an affidavit resisting same. The task of the Court in the face of such an affidavit resisting summary judgment, is to scrutinize the affidavit to ascertain whether 'there is an issue or question in dispute which ought to be tried or that there ought for some reason to be a trial of the claim or part' thereof.*
>
> *[19] Once the defendant raises a triable issue or discloses a* bona fide *defence in its affidavit, that should emasculate summary judgment and permit the defendant proceed to trial."*

See also **Mater Dolorosa High School v RJM Stationary (Pty) Ltd,** App. Cas. No. 3 of 2005; **Zanele Zwane v Lewis Stores (Pty) Ltd t/a Best Electric,** Civ. App. No. 22 of

2007; **Supa Swift (Swd) (Pty) Ltd v Guard Alert Security Services Ltd,** Civ. Cas. No. 4289/09; **National Motor Co. Ltd v Moses Dlamini** 1987 – 1995 (4) SLR 124

[55] In **Nedbank (Swaziland) Ltd**, supra, the learned Ota J. also stated: ***"[22]...Triable issues are said to be raised where the material facts upon which the claim is premised, and which are contained in the affidavit serving before Court are in irreconcilable conflict. That is when the application is said not to be proper by way of motion, and in that case, the Court may make an order for viva voce evidence to be led in a trial action for its resolution on a balance of probabilities, in accordance with Rule 6 (17) of the High Court Rules which provides:-*** *'Where an application cannot properly be decided on affidavit, the court may dismiss the application or make such order as to it seems fit with a view to ensuring a just and expeditious decision.'"* And in **Nokuthula N Dlamini v Goodwill Tsela,** App. Cas. No. 11/2012, Agim JA said, at para [29]: "***The established and trite judicial practice which now determines the approach of the courts world-wide, to be found in a long line of cases across jurisdictions, is that a court cannot decide an application on the basis of opposing affidavits that are irreconcilably in conflict on material facts. So where the facts material to the issue to be determined are not disputed, the application can properly be determined on the affidavits. It will amount to an improper exercise of discretion and an abdication of judicial responsibility for a court to rely on any kind of dispute of fact to conclude that an application cannot properly be decided on the affidavits. The Court has a duty to carefully scrutinize the nature of the dispute with microscopic lens to find out*** – *(i) If the fact being disputed is relevant or material to the issue for determination in the sense that it is so connected to it in a way that the determination of such issue is dependent on or influenced by it; (ii) If the fact being disputed, though material to the issue to be determined, but the dispute is such that by its nature, can be easily resolved or reconciled within the terms of the affidavits; (iii) If the dispute of a material fact is of a nature that even if not resolved does not prevent a determination of the application on the affidavits; (iv) If the dispute as to a material fact is a genuine or real dispute."*

[56] Justice Agim JA continued and further stated as follows:

[30] A fact is material or relevant where the determination of a claim is dependent on or influenced by it. Not all facts in a case are material. So it is only those that have a bearing on the primary claim or issue for determination in a way that they influence the result of the determination of the claim one way or the other. It is conflicts or disputes on such facts that are relevant in determining whether an application can be decided on affidavits. If the conflict or dispute is not on a material fact, the application can be decided on the affidavits. If the dispute or conflict is on a material fact but the dispute is of such a nature that it is reconcilable or resolvable on the affidavits, then the application can be decided on the affidavits. If the dispute on a material fact is of such a nature that it cannot prevent the proper determination of the application on the affidavits, then the court will decide the application on the affidavits. If the dispute on a material fact is not genuine or real, then the application can be determined on the affidavit. This can arise where the denial of fact is vague, evasive or barren or made in bad faith to abuse the process of court and vex or appress the other party. A frivolous denial raised for the purpose of preventing a determination of the application on the affidavits or to instigate a dismissal of the application or cause a trial by oral or other evidence thereby delaying and protracting the trial as a stratagem to discourage or frustrate the applicant is a gross abuse of process. We cannot close our eyes to the high incidence of abuse of court processes. Parties often times do not show a readiness to admit liability even when it is obvious that they have no defence to an application or a claim. Such a party, if he or she is a defendant or respondent, tries to foist on the plaintiff or applicant and the court a wasteful trial process or a dismissal of the application through frivolous denials. The objective of rule 6 is to avoid a full trial when there is no basis for it and avoid delayed and protracted trials in such cases. It is the duty of a court to ensure that a law meant to facilitate quicker access to

justice through the expeditious and economic disposal of obviously uncontested matters is not defeated by frivolous denials or claims." [Underlining added]

[57] Paragraph 5 of the affidavit resisting the summary judgment seems central to the issue for determination. But its centrality also seems severely compromised. On the one hand, Appellant admits being in default (in terms of the contract) and on the other hand Appellant pleads not to be in breach of the contract. The Appellant's purported defence is then to be looked for in Clause 1.5.5 in terms of the 'circumstance' thereof seemingly novating the contract as a result of the change in the terms of engagement introduced in the restructuring with possible loss of returns. This apparent contradiction of being in default without being in breach perplexed the Court below. That provision in the prospectus is gross; it seeks to allow the Appellant to avoid the consequences of being in default. Where as in the present case huge moneys are involved it could amount to daylight robbery of the investor. The Court will not permit it. The Court will not be party to such a scheme. In short, no defence is availed by the Clause. And no triable issue or question which ought to be tried is raised by the Clause.

[58] Paragraph 6 of the said affidavit is somewhat out of place because the condition, that is, the notification of default by Respondent, for restructuring was not set off or triggered. Any restructuring undertaken by the company did not concern the Respondent. And so the 'circumstance' also did not arise. Paragraph 7 of Appellant's affidavit refers specially to Clause 1.5.5 and its implications. Again, on its face, the Clause did not come into operation by a notice of the Respondent. The Clause was accordingly seriously hamstrung. In the result the aspect that would normally have supported the argument that Appellant was not in breach of the contract did not come alive. The contradiction referred to in paragraph 5 of the affidavit stood unmitigated.

[59] I have already said that I have found the application for summary judgment clearly established and that the deficiency or irregularity alleged by the Appellant not such as to derail the application for all the reasons already canvassed. I have not found grounds

sufficient to dismiss the application without even considering the resisting affidavit. The issue for consideration then is whether the Appellant's affidavit meets the requirements of rule 32 (4) (a) which reads:

> *"Unless on the hearing of the application under sub-rule (1) either the court dismisses the application or the defendant satisfies the court with respect to the claim, or the 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."*

[60] The Respondent having applied for summary judgment duly averred that Appellant had no defence to the action and had only entered notice to defend in order to delay payment. In response to Respondent's case, Appellant was expected under rule 32 (4) (a) and (5) (a) *"to satisfy the court with respect to the claim, or the 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...."* If the defendant (Appellant) satisfies the court of the existence of a triable issue or question, then the court would be obliged to dismiss the application for summary judgment and order the matter to proceed to trial.

[61] In the Court *a quo*, and in light of the averments contained in the affidavit resisting the summary proceedings, parts of which have already been highlighted, it was held that a case for a *bona fide* defence had not been made out by the Appellant, in that Appellant had conceded being in default and promised to pay. Summary judgment proceedings were not approached head-on in the judgment. As we have said, rule 32 was not at all mentioned. In para [14], the learned Judge *a quo* stated: *"My duty is to examine the affidavit resisting summary judgment application for a* bona fide *defence. Has the defendant raised a* bona fide *defence to the particulars of claim? Or further, are there any disputes of material and*

relevant facts in casu?" And later quipped *"Surely, by any stretch of imagination the above cannot be a defence, let alone a* bona fide *one, to the plaintiff's claim"*. Having examined Appellant's affidavit the Judge found no *bona fide* defence in light of the admissions of being in default made by the Appellant. *"It is not clear why defendant came to court to resist plaintiff's claim in light of the above admission attested by defendant in its affidavit resisting summary judgment application"* said the learned Judge. The Judge *a quo* also rejected any defence based on Clause 1.5.5, on the conversion of the linked loan units to ordinary shares, noting that Appellant should not have admitted being in default if the Clause was anything to go by. *"The law cannot allow defendant to approbate and reprobate at the same time..."* the Judge observed. The court *a quo* in the result granted summary judgment.

[62] Regarding the nature and purpose of summary judgment a great deal has been said by high and eminent judges and legal luminaries to require anything really new, short of a radical departure in statute law. In light of defendant's resisting affidavit, plaintiff's case must be 'unanswerable' for summary judgment to be granted. The reason for this high standard on the part of the plaintiff is that summary judgment procedure deprives the defendant most of the defences, regular and technical, otherwise ordinarily available to the defendant. Thus the *"remedy should be resorted to and accorded only where the plaintiff can establish his claim clearly and the defendant fails to set up a bona fide defence"*, says Erasmus.[12] The summary judgment remedy, for other just purposes, stops proceedings that commence as an action from remaining an action, *"with the parties knowing and being assured of their rights to plead properly having been afforded sufficient time to formulate the defence, to obtain evidence from their opponent through discovery, to engage expert evidence if necessary, to procure evidence through subpoena* duces tecum, *and understand aspects of an opposing party's claim through a request for trial particulars"*, Counsel for Appellant submitted.

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[12] **Superior Courts Practice**, RS 17, 2021, D1 - 383

[63] The summary judgment application concerned in this matter falls under rule 32 (2) (a), a liquid document, and or (b) a liquidated amount in money, with any other claims for interest and costs. And it should be borne in mind that in **W.M. Menz en Seuns (Edms) Bpk v. Katzake** 1969 (3) SA 306 (T) *'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 amount.'*[13] In paragraph 15 of his particulars of claim Respondent annexed 'EV4' being correspondence dated 26 February 2021 from Appellant in terms of which Appellant, *inter alia,* stated: *"3. We confirm further that as at the month of November 2020 the redeemable amount for both classes is the sum of E200,000-00 and to date redemption value of the aforesaid amount is the sum of E206,416-17".* The said correspondence is headed: *'Re: Letter of Demand: Evart Vusumuzi Dlamini / ESW Investment Group Limited'.* Paragraph 4 thereof reads: *"We advise that the company is and has always been committed to paying all redemptions due to its clients including your client. We advise further that the company is committed to paying the interest accrued beyond the aforementioned date; 5. We therefore undertake to pay all redemptions due to your client within the next 21 (....) working days, and as such we kindly seek your client's indulgence until then".* In the same paragraph 15 just referred to, the Respondent stated that he *"granted the defendant the indulgence to pay the maturity value"* as requested by Appellant in the letter of 26 February 2021. In my view, even standing alone, this letter of 21 February was sufficiently liquid and sufficient acknowledgment of debt.

[64] Respondent's verifying affidavit had only three short paragraphs, ending *"3. I verily believe and humbly state that the defendant has no bona fide defence to the claim in the particulars and the Notice of intention to defend has been filed solely for purposes of delaying the final outcome of the action..."* The Appellant was similarly terse in this regard: *"3. I deny that I do not have a bona fide defence to the plaintiff's claim and that I have entered an appearance to defend solely for the purpose of delaying the action".* And, in paragraph 10, added: ".... *In light of the foregoing it is clear that the defendant bona*

[13] Herbstein and Van Winsen, 3rd ed. p.303

fide has stated a good defence in the matter, which in all sorts is not in any way prejudicial to the defendant....."

(f) Counsel's Submissions on rule 32

[65] It would seem to me that both litigants did not have rule 32 before them when they prepared their affidavits. They only had a general recollection of the rule, mostly from case law. Rule 32(1) predicates plaintiff's application "*on the ground that the defendant has no defence to the claim...*" In answer, defendant, in terms of rule 32 (4) (a), must *"satisfy the court ...that there is an issue or question in dispute which ought to be tried or that there ought for some reason to be a trial of that claim or part...*" Evidently, in asserting the existence of an issue or question to be tried, defendant proceeds from the premise that he has a defence to the claim. From the outset, the arguments in the court *a quo* mainly concerned plaintiff's non-compliance with rule 18 (6) and whether defendant had a *bona fide* defence.

[66] In a helpful commentary on rule 32, learned counsel for Appellant, referring to the judgment *a quo,* concluded: *"The above analysis reveals a significant shortcoming in the Court a quo's analysis. The question the Court asked focused on the existence of a bona fide defence. This has not been the test since 1990, when the rule was amended – and an audit of the decisions in this jurisdiction shows that they are still applying a test that was left behind with that amendment".* Learned Counsel was correct in that observation. Counsel also pointed out, (to the benefit of some of us who may not have been aware), that in South Africa the remedy and procedure of summary judgment has since July 2019, undergone *"far-reaching amendments."* This, no doubt, provides a warning to our jurisdiction to be aware of the more recent decisions from our neighbor on the remedy of summary judgment, depending on the direction and scope of that amendment.

[67] On rule 32, as amended in 1990, Advocate Dirk Vetten asserted: *"31. The Rule in eSwatini followed the Rule in England. The emphasis is now on whether there is an issue*

or question in dispute which ought to be tried. Although it might be argued that this amounts to the same thing as whether there is a bona fide defence, it is unhelpful to use language that belongs to a bygone era rather than reflecting the language of the Rule as it presently reads. This is so because the attention can be diverted from the true question, which is what, it is respectfully submitted, occurred in this case". The observation is accepted. What learned counsel is asserting is that the Court *a quo* did not deal with the 'true question' as it "focused on the existence of a *bona fide* defence". This must be admitted in the short instance in which it appears. The question that follows is whether the Court *a quo* erred in its conclusion as a result of the reference to a *"bona fide"* defence instead of just a 'defence' as the rule provides. With respect, to Learned Counsel, I do not think so. The Court *a quo* did not define, or explain what it meant by, *bona fide*. In the result, it is fair to assume that the Court used the expression in its usual sense to refer to a defence that was credible and honestly held and believed in by the defendant to be true. The error in the use was therefore purely technical, which, in any case, had been the unfortunate tendency in this jurisdiction since the amendment. There was nothing really sinister about the use of *bona fide* in the circumstances of this case in the judgment *a quo.*

(g) Triable issues submitted by counsel

[68] Counsel for Appellant listed five matters which he said were issues which were due for trial *in casu.* These matters were:

> "32.1 Whether the agreement was partly oral and partly written, or only written;
>
> 32.2 Whether clause 1.5.5 of the prospectus was a term of the contract;
>
> 32.3 Whether the circumstances of default had been achieved that would trigger the conversion of the shares;
>
> 32.4 Whether the defendant was in breach of the agreement;
>
> 32.5 Whether the plaintiff could claim specific performance and what that performance would be under the contract"

[69] Counsel contended that the foregoing matters were *"vital to the plaintiff being able to claim its contractual rights. The plaintiff's rights are only created by contract"*. Counsel asserted that these issues were all matters of dispute between the parties. In part, counsel based his argument on the *Plascon-Evans Rule*. He submitted that the position of defendant should not be worse off in summary judgment trial than it would be in opposed motion proceedings with respect to contested questions and issues that are relevant to a proper hearing and disposal of the matter. In the circumstances *"the Court ought to have held that there was a triable issue in the matter and should not have granted the summary judgment"* contends counsel. Unfortunately, the position of Appellant is by virtue of the very practice and procedure of the summary proceedings thwarted and worse off than in opposed trial.

[70] With respect in light of plaintiff's cause as framed, the said five matters were not at all vital. On the basis of the claim as framed there was no real need for plaintiff to step back and look into the contract. The plaintiff had in his hand defendant's written affirmation of default and willingness to pay the claimed amount. Whether the contract was partly oral and partly written was of no moment to Respondent. And likewise, Clause 1.5.5 was of no use to Respondent in pursuit of his claim. The question was whether Appellant had a defence to the claim. It was for the Appellant to satisfy the Court that it had a defence in the form of a triable issue or question or that for some reason there ought to be a trial of that claim. The Appellant did not satisfy the Court as required.

[71] To begin with, the documents that Respondent presented for his claim were sufficiently liquid to support the application. In those documents, Appellant admitted unequivocally its indebtedness to Respondent. That is how the Court *a quo* viewed the documents annexed to the supporting affidavit. I find no fault in that. In my view, notwithstanding the 1990 amendment, the fundamental character of the summary judgment has not materially changed; the procedure still bears the limited objective, namely, *"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".[14] The position would seem to be that once the plaintiff embarks on the summary judgment proceeding, unless the defendant nips it in the bud by means of an objection, exception or other point *in limine,* as provided by the proviso to rule 30 (1), defendant must present a defence and that defence has, at least, to be *bona fide* if it is to be sustained and stave off the summary action..

[72] It is rather hard to clearly articulate the post 1990 rule 32 without the benefit of the pre 1990 understanding. In **TQM Investments** at para [17] I had occasion to consider the old rule 32 (3), quoting Colman J in **Breitenback,**[15]after at observing that the sub-rule was not intended to demand the impossible:

> *"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,* bona fides *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 he made to shine out of his affidavit".* (My emphases).

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[14] See **TQM Investments (Pty) Ltd v Samkeliso Abel Dlamini** [2021] SZSC 35 (8 Dec. 2021)
[15] **Breitenbach v Fiat SA (Edms) Bpk** 1976 (2) SA 226 (T) 227G-228A

[73] Fast forward to our current rule 32. The words in Colman J's quote "facts which, if proved at the trial" would seem to equate to the "issue or question in dispute which ought to be tried" under sub-rule (4) (a) which defendant must aver to "satisfy the Court that he has a defence", for if the 'issue or question' (in dispute) does not translate to a defence it is not worth considering. In other words, there is no point in the Court debating an issue or question which at the end does not seek to answer plaintiff's claim. I do not quite understand the expressed difficulty in the reference to 'bona fide' defence. Would the court for instance be satisfied with a *mala fide* defence? Surely, if the defence is to be worth the judicious attention of the Court then it must be *bona fide* in the normal sense of being honestly entertained by defendant. Colman J is correct where he states: *"It is difficult to see how the defendant can be expected to 'satisfy the court 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"*. Thus in my view whether the 'defence' required of defendant is expressed by the plaintiff as *bona fide* or not does not make much difference, so long as the presence of the words 'bona fide' is not made a *sine qua non* of the defence. That is why, with respect to the old rule 32 (3) (b), Colman J in **Breitenbach** (supra, p228B) was willing to say "it will suffice, if the defendant swears to a defence, valid in law, in a manner which is not inherently and seriously unconvincing", in effect meaning the words *'bona fide'* may be conveniently dispensed with even under the old sub-rule.

[74] Advocate Vetten's concern above is that *"it is unhelpful to use language that belongs to a bygone era rather than reflecting the language of the Rule as it presently reads. This is so because the attention can be diverted from the true question"*. Learned Counsel is of the view that that is what happened in this matter. Whilst Counsel's concern is welcome, considering the judgment as a whole,, however, the feared diversion of attention from the real question, in the Court *a quo,* is not a serious concern. I say this because it seems to me that the former or traditional understanding of the defence has quietly morphed into the new sub-rule. Even as it then existed, sub-rule (3) (b) was not

without some problems. For instance, in 1984, in **Variety Investments,**[16] Aaron JA had occasion to reflect on the old 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: . . . 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 ..."

[75] In the case referred to above, the problem was the word *'fully'* in describing the adequacy of the defence and whether the affidavit disclosed a *'bona fide'* defence. Different Judges came up with different formulations of what the test for the defence required by the sub-rule was. Aaron JA (0p. cit.) stated: "Where the defence is based upon facts, . . . the Court does not attempt to decide these issues . . . 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 have . . . a defence which is both *bona fide* and good in law." Whist Lawrence Ag J.[17] held that *"...The statement of material facts should be sufficiently full to persuade the court that what the defendant had alleged, if proved at the trial, would constitute a defence to the plaintiff's claim"*. Thus the argument that the court *a quo* failed to deal with the "real question' because it focused on *'bona fide* defence' instead of a defence does not carry much weight. It will be recalled that the Appellant had denied that it did not have a '*bona fide'* defence. A defence cannot be more or less because of the presence or absence of *bona fides* on the part of the defendant.

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[16] **Variety Investments (Pty) Ltd v Motsa** 1982 – 1986 SLR 77 (CA) at 79 – 80. See **TQM Investments (Pty) Ltd v. Samkeliso**, supra para [20]

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

[76] In **National Motor Company,**[18] Dunn J, in 1994 traced the current rule 32 to the English Supreme Court Rules, 1965, and noted that the former words 'bona fide and good in law' had been left out in sub-rule (4)(a). The learned Judge observed that notwithstanding the exclusion of the words the defendant was still obliged to aver in his opposing affidavit that he had a *bona fide* defence which was good in law. In other words, from a procedural point of view, the question was no longer whether defendant had a *bona fide* defence good in law but "*how far a defendant need go before he can be said to have satisfied the court under the Amended Rule, 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*". This is what the current rule 32 (4) (a) has prescribed. See **TQM Investments,** supra, para [28].

[77] It is to be noted that whilst acknowledging the change in the wording of the sub-rule, Justice Dunn remarked that the excluded words were still part of the averments a plaintiff was obliged to make under sub-rule (3) (a). In my view, therefore, whether the plaintiff averred as to '*bona fide* defence' or simply 'defence' there is nothing materially wrong with that averment: for a defendant either has a defence or he has none. Where the defendant has a defence that defence will inevitably be *bona fide* whether it is so described or not. It is of course true that sub-rule (4) (a) has widened the scope of the defence by the use of the words "or that there ought for some other reason to be a trial of that claim or part". That is, even where the defence does not come out clearly in terms of the "issue or question" for trial, a trial could still be granted on the basis of "some other reason". It then all depends on how defendant has framed the defence. Accordingly in my view, the amended rule 32 has somehow moderated the sting of the remedy of summary judgment. Furthermore, "in all cases, sufficient facts and particulars must be given to show that there is a triable issue", and likewise, that the matter ought for some other reason to be tried. *In casu*, no sufficient facts or particulars have been presented by the defence to persuade the Court that the application was a proper case for trial.

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[18] **National Motor Co v Moses Dlamini** 1987 – 95 (4) SLR 124

[78] In this matter in light of the defendant's declaration of being in default and the promise to pay the claimed amount, it may fairly be said that the purported defence by defendant is "bogus or bad in law". As it is, the defendant is not confined to any form of defence; defendant must show he has a defence and how that defence is framed is defendant's decision. And as was stated in **Mater Dolorosa High School:**[19] "If the defendant raises an issue that is relevant to the validity of the whole or part of the Plaintiff's claim, the court cannot deny him the opportunity of having such an issue tried," and for that, defendant must have set out material facts of his defence in his affidavit sufficient to satisfy the Court that 'at the end of the day', there will be a defence.

Conclusion

[79] Appellant appealed on several grounds alleging, *inter alia,* that the Judge *a quo* erred in granting summary judgment contrary to the contractual agreement and the action being irregular in terms of rule 18 (6). That the Judge also erred in holding that a point *in limine* not raised in the resisting affidavit cannot be raised over the bar during argument. We have considered the extent of the impact of rule 18 (6) in light of rule 30 and concluded that if the Judge *a quo* erred in respect of the point *in limine,* Appellant was still obliged to abide by rule 30(1) by not taking a 'further step' in the matter. Rule 18 (6) is special in that failure to comply with it has its prescribed consequences. We have found all the eleven grounds of appeal to be without substance. And that Clause 1.5.5 could not be relied upon in the case of an investor who did not notify a default. The weakness of any possible defence in the form of a triable issue or question to be tried based on Clause 1.5.5 is that

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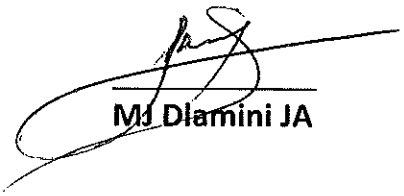
[19] **Mater Dolorosa High School v RJM Stationary (Pty) Ltd**, App, Cas. No. 3 of 2005

Appellant undertook to pay fully the claim, even after restructuring. In the result, Appellant has not shown that in the face of a possible restructuring Respondent stands to fail in his claim. The appeal is dismissed with costs.



MJ Dlamini JA

I Agree **JM Manzini AJA**

I Agree **MM Vilakati AJA**

For Appellant Adv. DJ. Vetten

For Respondent K. Simelane