IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE — CIV. CASE NO.1363/93

In the matter between:

NATIONAL MOTOR COMPANY LIMITED — PLAINTIFF

AND

MOSES M. DLAMINI — DEFENDANT

CORAM : DUNN J.

FOR THE PLAINTIFF : MR KHUMALO

FOR THE DEFENDANT : MR G.B. SIMELANE

JUDGMENT

29 APRIL.1994

This is an opposed application for summary judgment. The plaintiff issued summons against the defendant claiming payment of the sum of E41,783.80 together with interest and costs. The plaintiff's claim is based on an acknowledgment of debt signed by the defendant on the 17th July 1990. The acknowledgment bears the signatures of two witnesses. The defendant admits his signature on the document.

The defendant explains in his opposing affidavit that he purchased a bus from the plaintiff for the sum of E170,000.00. The plaintiff accepted the defendant's bus valued at E50,000.00 as part payment of the purchase price. The defendant states that the balance of the purchase price was paid by Union Bank. According to the defendant when he took delivery of the bus he was made to sign "a bulk of blank forms" and he sincerely believes that was the time when he signed the acknowledgement of debt. There is no allegation that the defendant did not realise that he was signing an acknowledgement of debt. The document is clearly headed as such in bold type.

No explanation is given by the defendant for having signed the document in the light of the allegation that the bus he purchased was fully paid for. Certain correspondence between the attorneys for the parties is attached to the opposing affidavit, reflecting a request which was made on behalf of the defendant for the original acknowledgment of debt to be made availabe for forensic examination. The defendant avers that such request was refused by the plaintiff and submits that "the reason why the plaintiff is reluctant to furnish my attorneys with the original acknowledgment of debt is because they are aware that the Forensic Expert would tell that the ackowledgment of debt was completed after I signed the blank form." The defendant contends that he is entitled and should be allowed to defend the matter in order to test the plaintiff's allegations under cross-examination.

Prior to the amendment of Rule 32 in May 1990 a defendant who opposed a summary judgment application could under rule 3-

(a) Give security to the plaintiff to the satisfaction of the registrar for any judgment including costs which may be given, or

(b) Satisfy the court by affidavit (which shall be deliverd before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of 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.

The effect of this sub-rule has been the subject of numerous decisions of this court and the courts of South Africa where an identical Rule applies. See THE UNIFORM RULES OF COURT 3rd Edition 196 and the authorities there cited; VARIETY INVESTMENTS (PTY) LTD v MOTSA 1982-6 SLR 77; BANK OF CREDIT AND COMMERCE INTERNATIONAL (SWAZILAND) LTD V. SWAZILAND CONSOLIDATED INVESTMENT CORPORATION AND ANOTHER 1982-6 SLR 40. In one of the leading cases, MAHARAJ v. BARCLAYS NATIONAL BANK LTD 1976 (1) SA 418 (A),(referred to in the authorities just cited,) Corbett J.A. (as he then was) stated at 426 A-E

> Where the defence is based 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 have, as to either the whole or part of the claim, a defence which is both <u>bona fide</u> 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, **Herb Dyers (PTY) Ltd v. Mohamed and Another, 1965(1)** SA 31 (T); **Caltex Oil (SA) Ltd v Webb and Another,** 1965(2) SA 914(N); **Arend and Another v Astra Furnishers (PTY) Ltd, 1974 (1)** SA 298 (C) at pp. 303-4; **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 **Estate Potgieter v. Elliot,**1948(1) SA 1048(C) at p. 1087; Herb Dyers case supra at 32).

The amended Rule 32 is taken from the English Supreme Court Rules 1965. The Rule is almost identical to Order 14 of the English Rules. Sub-Rule (1) provides for summary judgment applications only in cases where a notice of intention to defend is filed following the issue of a combined summons or a declaration. Sub-Rule (3) provides that an application under Sub-Rule (1)-

> Shall be made on notice to the defendant accompanied by an affidavit verifying the facts on which the claim, or the part of the claim, to which the application relates is based and stating that in the deponent's belief there is no defence to that claim or part, as the case may be, and such affidavit may in addition set out any evidence material to the claim.

Sub-Rule (4)(a) provides-

> Unless on the hearing of an 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 that defendant on that claim or part as may be just having regard to the nature of the remedy or relief claimed.

Sub-Rule(5) provides that a defendant in an application under sub-rule(1) may show cause against such application by affidavit or otherwise to the satisfaction of the Court.

Sub-Rules 1 and 3 are relatively straight forward and do not represent a major departure from their predecessors with the exception of Sub-Rule (3) which now permits of evidence "material to the claim" being set out in the supporting affidavit. Sub-Rule (4)(a) introduces the requirement of the defendant satisfying the court that there is an issue or a question in dispute which ought to be tried or that there ought for some other reason to be a trial. The issue or question may be one of fact or law. The requirement of setting out a defence which is both bona fide and good in law is not set out under this Sub-Rule 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 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 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. Copied as the amended Rule is from the English Rules I have had to look to English texts and decisions (such as are available in the High Court Library) for guidance.

Order 14 of the English Rules is set out and discussed in THE SUPREME COURT PRACTICE 1991 VOL.I. p 140 paragraphs 14(1) to 14(11). The leading decisions dealing with the Order are cited by the learned authors. 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. The learned authors continue to state.

> "The former Order 14 rule 1(a) entitled the defendant leave to defend if he satisfied the court 'that he had a good defence to the action on the merits'. Rule 3(1) has replaced those words by the words 'that there is an issue or question in dispute which ought to be tried'. 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". (p 147)

The learned authors assert, citing relevant decisions that-

"the defendant's affidavit must condescend upon particulars, and should as far as possible deal specifically with the plaintiff's claim and affidavit and state clearly and concisely what the defence is, and what facts are relied on to support it. It should also state whether the defence goes to the whole or part of the claim and in the latter case it should specify the part". (p.148).

In THE LADY ANNE TENNANT v ASSOCIATED NEWSPAPER GROUP LTD (1979) F.S.R. 298 (cited by the learned authors at p 148) Megarry V.C. stated

" A desire to investigate alleged obscurities and a and a hope that something will turn up on the investigation cannot, seperately or together, amount to sufficient reason for refusing to enter judgement for the plaintiff. You do not get leave to defend by putting forward a case that is all surmise and Micawberism"

The learned authors again stress that-

In all cases, sufficient facts and particulars must be given to show that there is a triable issue (p. 148)

On the English authorities available to me it is clear that the test applied under Order 14 (from which our amended Rule 32 is copied) is the same as that applied by this Court and the South African Courts under the original Rule 32. It is clear from the English authorities that despite the absence of a specific reference to a bona fide defence under Order 14 a defendant is obliged to set out such a defence in order to satisfy the requirements of the Sub-Rule. The principles and approach in our decided cases must in the circumstances, continue to apply in applications under the amended Sub-Rule.

I turn then to consider the defendants opposing affidavit. The defendant makes a bare denial that he is indebted to the plaintiff in the amount claimed. He admits his signature on the document. He does not allege fraud on the part of the plaintiff. There is no suggestion that he was in anyway tricked into signing what he states was a blank form. He advances no reason whatsoever for signing a blank acknowledgment of debt form as he states that he was not indebted to the plaintiff, following the purchase of the bus. There can be no basis for the defendant's averment that forensic examination of the acknowledgment of debt would indicate that the document was completed after the defendant appended his signature to it. The defendant is here clearly embarking on a fishing expedition and has no answer to the plaintiff's claim. The plaintiff is armed with a liquid document which speaks for itself. The defendant has failed to satisfy the Court that he has a bona fide defence or that there is a triable issue.

Summary judgment is granted as prayed with costs.

B. DUNN

JUDGE