



IN THE HIGH COURT OF SWAZILAND

Civ. Case No. 1180/94

In the matter between:

PAUL MHLABA SHILUBANE N.O.

Plaintiff

and

SWAZILAND ELECTRICITY BOARD

Defendant

CORAM:

Hull, C.J.

FOR PLAINTIFF

Mr. Shilubane

FOR DEFENDANT

Mr. Flynn

Judgment

(28/10/94)

In this action, the plaintiff as the executor testamentary of the estate of the late James Shadrack Mkhulunyelwa Matsebula seeks the removal from the estate's land of an electric substation built on it by the defendant, the Swaziland Electricity Board.

It is alleged that the Board erected the substation unlawfully on the land.

In its plea, in paragraph 3.2, the Board denies that this, and says that it duly complied with the requirements of section 32 of the Electricity Act No. 10 of 1963.

In response to a subsequent request for further particulars the Board, by a letter of 12th September 1994, says -

(a) that it complied with all the provisions of the section;

- (b) that a copy of a notice attached at "A" to the letter is of the notice served on the occupier of the land under section 32(6), and that copies of registered mail slips at "B" and "C" are those of the slips proving service;
- (c) that the District Commissioner gave the Board permission to build the substation, in terms of section 32(7), on land that was not occupied by the plaintiff at that time;
- (d) that a document attached at E to the letter of further particulars is a copy of the written permission in terms of which the Board occupies the property under section 32(7) - and that a document at "F" is a written request to the District Commissioner in terms of section 40 "paragraph 4".

The plaintiff now excepts to the Board's response, as pleaded, on the grounds that it has not disclosed a defence because -

- (a) the District Commissioner had no power to permit the Board to occupy the land; and
- (b) the Board did not serve the notice referred to "in section 32" in terms of "section 43."

Mr. Flynn, for the Board, has been able to show that since the proclaiming of the Electricity Proclamation, 1963, that statute has been edited by the Attorney General in the course of the revision of the statute law. This has led to some confusion - in short, I think, because both Mr. Shilubane and I had first assumed that the same sequence of numbering had been maintained over the years, whereas the references in the documents attached to the further particulars refer to the provisions of the Proclamation as it stood originally.

It does seem to me that further confusion may be avoided if the parties abide by the sections and their numerical order as they stood at the time when the Board first occupied the land and built the substation, but I appreciate that that is a matter for the parties.

However I do not consider that the exception can be sustained on the basis of which it has been brought, namely that the Board's pleadings (including its further particulars) do not disclose a defence.

Under section 40(1) as it stood the Board was empowered, subject to the provisions of the Proclamation, to place electrical plant on land not covered by buildings. Before doing so, it had to serve notice in writing of its intention on the occupier: see section 40(2)(a).

If the person served with the notice did not consent within fourteen days, or attached terms or conditions of consent to which the Board objected, the District Commissioner of the district concerned could under section 40(4) give his consent - in other words to authorise the project to proceed. In certain circumstances, section 40(4) provided that the Resident Commissioner, instead of the District Commissioner, was the person empowered to do so. These circumstances are not shown to be relevant here. With respect, I think counsel for the plaintiff has misconstrued section 40(4) in that regard. If in that subsection the words "or, where such District Commissioner is the person on whom the notice was served, the Resident Commissioner" are enclosed in brackets, then I think it becomes clear at once that in the ordinary case it is the District Commissioner for the district who is empowered by the subsection to allow the Board to proceed.

It is the plaintiff's case, as pleaded, that the District Commissioner consented. This head of exception must therefore fail.

Section 51 of the original Proclamation governed service of notices. It began with the words "Without prejudice to any other method of service". It did not require that the notice had to be delivered to or affixed on the land itself. This ground of exception, as taken, cannot be sustained. But in any event the Board's plea is that it did serve the requisite notice; and section 51 expressly allowed for service by post - a fortiori, in my view, registered post.

The exception is accordingly dismissed. Strictly, I think, the plaintiff may have been entitled at least to the costs of the

postponement but that was not pursued. They therefore follow the event on the application as a whole, i.e. they will therefore be the Board's costs in any event.



DAVID HULL
CHIEF JUSTICE