IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE — Civil Case 2576/2007

SINDISIWE KUNENE — Plaintiff

And

SDEEZ AND SPIKE — 1st Defendant

BANELE SDEE ZWANE — 2nd Defendant

LUCKY KUNENE — 3rd Defendant

Coram: *SB*. MAPHALALA - J

For the Plaintiff: MR. N. PILISO

For the Defendants: MR. B. SIMELANE

JUDGMENT

[1] Presently 1 and 2n Defendants seek amendment of their plea.

[2] The application is opposed by Plaintiff on the basis that:

(i) Defendants were *mala fide* in that they refrained from bringing such amendment until the last stages of the proceedings.

(ii) That attorney cannot represent a non-existent entity.

[3] The position taken by Defendants is that a new fact was brought to their attention being the fact of the existence of a company known as **Sdee & Spike Investments (Pty) Limited.** Defendant believes that it is imperative that the true position be brought to the attention of the court for the court so that it can decide on proper pleadings brought before it. Defendant did not thereby prejudice Plaintiff in anyway because if the court grants the amendment Plaintiff would be afforded the opportunity to amend its particulars accordingly.

[4] It is contended for the Defendants that Plaintiff does not suffer any prejudice if the amendment is granted because it is Plaintiff who created the confusion by alleging a non-existent entity being 1st Defendant and stating that such entity was a partnership, when in fact it was a company.

[5] In support of its position the Respondents relied on a number of legal authorities that ordinarily courts are not inclined to grant amendment unless the amendment is *mala fide* and prejudicial to the other parties. These include the cases of *Moolman vs Estate Moolman and Another 1927 CP. P. 27* at *29* and *Herbstein and Van Wins en, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page *515* and the authorities cited therein.

[6] The court was further referred to the *dictum* by Innes CJ in the case of *Robinson vs Randfontein Estates GM Co. Ltd 1925 AD 173* at *198* to the proposition of law that because **"the object of pleading is to define issues; and parties will be kept strictly in their pleas where any departure would cause prejudice or would prevent full enquiry but within those limits**

the court has a wide discretion. For pleadings are made for the court and not court for pleadings".

[7] On the other hand it is contended for the Plaintiff that she objects to 1st and 2nd Defendant's amendment application on the following grounds:

> 1. 1st and 2nd Defendant's amendment alter his defence wholly in a manner prejudicial to Plaintiff, by introducing new facts which they ought to have been aware of and pleaded earlier in that;
>
> > 1.1. After receipt of particulars, they requested further particulars, filed their plea and went on to serve Plaintiffs attorneys with a Notice to make discovery, served Plaintiff with their discovery affidavit before filing of their Notice to amend. This is a sign of *mala fides.* In this regard the court was referred to the case of *Cross vs Ferreiry 1950 (3) S.A. 443.*

[8] It is contended further for the Plaintiff that 1st and 2nd Defendant's attorney insists on representing 1st Defendant (described as a partnership in the summons) moreover denying its existence. This shows that such amendment is not *bona fide* and is meant to catch Plaintiff unaware and a way of obtaining a tactical advantage. In this regard the court was referred to the case of *Florence Soap and Chemical Works (Pty) Ltd vs Ozen Wholesalers (Pty) Ltd 1954 (3) S.A. 945.*

[9] Amendments will always be allowed unless the application to amend is *mala fide* or would cause injustice to the other side which cannot be compensated by an order as to costs or unless the parties cannot be put back in the same position they were when the pleading is sought to amend was filed. In this regard the court was referred to the cases of *Myers vs Abrahamson 1951 (3) S.A. 438 C* and that of *Cross vs Ferreira (supra).*

[10] Furthermore, it is contended for the Plaintiff that the position of law is that an amendment of a pleading so as to permit the withdrawal of an admission contained therein will only be granted if such admission has been made in error. In this regard the court was referred to the cases of *Young vs Landvalues Ltd 1924 WLD 216, Frenkeluise & Co. vs Cuthbert 1946 C.P.D. 735* and the

textbook by *Nathan and Barnett; Uniform Rules of Court, 3rd Edition* at page *170* at paragraph 1.

[11] Having considered the arguments of the parties it would appear to me that the position adopted by the Respondents is correct on the facts of this matter. It is imperative that the position be brought to the attention of the court so that it can decide on proper pleadings brought before it. The fact of the matter is that **Sdee and Spike Investments (Pry) Limited** is a company and not a partnership and this fact cannot be wished away for any amount of convenience. It would appear to me also that it is the Plaintiff who caused the confusion by alleging a non existent entity being 1st Defendant and stating that such entity was a partnership, when in fact it was a company.

[11] In the result, for the afore-going reasons the application for leave to amend is granted and costs to be costs in the trial.

Pronounced at the High Court sitting at Mbabane this 29th day of August 2008.

SB. MAPHALALA

PRINCIPAL JUDGE