IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIV. CASE NO. 1190/08**

In the matter between:

LYDIA FAKUDZE **Plaintiff**

And

THE SWAZILAND ELECTRICITY COMPANY **Defendant**

Date of hearing: 05 March, 2005 Date of judgment: 10 March, 2009

Mr. Attorney S.C. Dlamini for the Plaintiff Mr. Attorney Sabela Dlamini for the Defendant

J U D G M E N T

MASUKU J.

[1] The matter presently serving before Court is in respect of an opposed application for leave to amend pleadings in terms of the provisions of Rule 28 (4) of this Court's Rules.

[2] Briefly stated, the context in which this application arises is the following: The Plaintiff, a widow of Lobamba, sued out a combined summons in which she claimed from the Defendant, the Swaziland Electricity Company, a parastatal, with power to sue and to be sued in its own name payment of the sum of E243, 600.00. The said amount was a dependant's claim in respect of the death of one Sibusiso Mandlenkhosi Fakudze, the Plaintiffs son. It was alleged by the Plaintiff that the deceased was killed on 15 January, 2007, after he came into contact with an electrical power line owned by and was under the Defendant's control.

[3] Pursuant to receipt of the summons aforesaid, the Defendant, having filed its notice to defend, filed a notice of exception in terms of Rule

23 of this Court's Rules. The pith of its exception was that the Plaintiffs claim lacked averments sufficient to sustain a cause of action for the reason that there were no averrals relating to any conduct attributable to the Defendant and which could serve as a causal link with the deceased is death. Furthermore, it was stated in the exception that there was no allegation that as a consequence of the electrocution alleged, the deceased sustained any injury and that in the absence of such an allegation, it cannot be shown that the Plaintiffs claim is actionable at law.

[4] In the face of this exception, what did the Plaintiff do? The exception was received by the Plaintiff on 22 April, 2008 and on 22

June, 2008, about two months later, the Plaintiff filed a notice to amend its particulars of claim. This was purportedly done in terms of the provisions of Rule 28 aforesaid, which governs matters relating to amendment of pleadings. This notice of amendment, it must be mentioned, was prepared and filed in total oblivion to the existence of the exception, which I may mention has to date not been determined by this Court.

[5] Upon receipt of the said notice of amendment, the Defendant filed a notice opposing the notice of amendment. The gravamen of the opposition is two-pronged - first, the Excepient claimed that the said notice of amendment is irregular for the reason that it was filed before the determination by the Court of the sustainability or otherwise of the exception and yet the proposed amendment sought to address the deficiencies raised by the Excepient in its exception.

Secondly, the Defendant raised the point that the Plaintiff did not at any stage, tender any wasted costs occasioned by both the exception and the proposed amendment, it being apparent that by filing the amendment, the Plaintiff was indirectly acknowledging that the exception was good.

[6] Before I can deal with the issues that arise, there is a procedural matter that I feel constrained to address. It would appear that

simultaneously with the notice of amendment, the Plaintiff filed amended particulars of claim. This, it must be mentioned, was done even before the Defendant could indicate its attitude to the proposed amendment. This is in my view irregular. I say so for the reason that an applicant for amendment may only file the amended pleading upon one of two events happening.

The first occurs when the other parry does not object to the proposed amendment by either stating explicitly that it does not contest the amendment proposed or by implication. The latter occurs where that party does not file opposition to the amendment within the period of ten days stipulated in Rule 28 (1) of the High Court Rules and this is governed by the provisions of Rule 28 (3). The second occurs where the Court, notwithstanding the opposition by the other party, adjudges that the amendment should be granted. In the absence of one or other of these variables, it is my firm view that an applicant for amendment of the pleadings may not file the amended pleading. The procedure adopted by the Plaintiff of filing the amended particulars of claim simultaneously with

the notice to amend neither finds support in the Rules of this Court nor in any practice of which I am aware.

I now revert to the arguments advanced by the parties. In his erudite heads of argument, Mr. Dlamini for the Plaintiff, cited some good authorities generally dealing with the Court's policy regarding amendment of pleadings. He took the position that the Defendant's opposition was unreasonable in the circumstances and that the Court ought, regard had to the entire conspectus of the case, to grant the amendment applied for. In view of what Mr. Dlamini considered to have been an obstructionist attitude on the Defendant's part, he urged that the latter should be mulcted with an adverse order as to costs.

[9] It is my considered view that correct as the submissions by the Plaintiff are regarding the Courts' general approach to amendments, the Court has not, with respect, properly come to the point where it has to decide on the question whether the amendment ought to be or not to be granted. I say so for the reason that the issue of the exception which was pertinently and timeously raised by the Defendant has not been determined by this Court.

[10] Furthermore, there has been no formal or other acknowledgement by the Plaintiff that it accepts the correctness of the deficiencies in its particulars of claim as raised by the Defendant in its aforesaid exception. The latter event would, in my view, have obviated the need to argue the exception. In view of the fact that neither of the above imperatives exist in the present matter, I come to what appears to be the only inexorable conclusion that by proceeding to

apply for leave to amend as she has done, the Plaintiff has, by so doing put the cart before the horse.

[11] In the circumstances, it is clear that the amendment proposed by the Applicant is objectionable as it seeks to avoid dealing directly with the issues raised in the notice of exception. In this regard, as pointed out above, the Plaintiff has two options. She may set the matter down for the hearing of the exception in order for the Court to make a final determination on whether or not the exception is meritorious. In the alternative, the Plaintiff may well formally concede in a letter or other communication that the exception is good and embody a tender for costs therein. Mr. Dlamini, for the Plaintiff, did in argument, concede that the exception is good and that he would in due course make the appropriate concession, which should ordinarily be accompanied by a tender for costs of the exception.

[12] It would appear to me from the foregoing that the objection to the proposed amendment is well taken and Mr. Dlamini for the Plaintiff could say nothing to persuade the Court otherwise. It is also my view that the filing of the notice of amendment constitutes an irregular step or proceeding within the meaning of Rule 30, which the Defendant could have utilized to similar effect.

[13] There was another reason advanced by Mr. Dlamini, for the Defendant as to why the proposed amendment was objectionable. He referred this Court to the provisions of Rule 28 (4), which provide the following:

> "If objection is made within the period prescribed in sub-rule (2) which objection shall clearly and concisely state the grounds upon which it is founded, the party wishing to pursue the amendment shall within ten days after the receipt of such objection, apply to court on notice for leave to amend and set the matter down for hearing, and the court may make such order as to it seems fit." (Emphasis added).

[14] It was Mr. Dlamini's contention that in the instant case, the Plaintiff had failed to comply with the mandatory provisions stated above for the reason that the Plaintiff did not set the matter down for hearing within the ten day period stipulated. The notice of objection was received by the Plaintiff and filed with the Court on 1 July, 2008. On the other hand, the notice to apply for leave to amend was received by the Defendant and filed with the Court on 13 August, 2008, almost six weeks later. This was done with no regard for the provisions of the said sub-Rule quoted immediately above and more importantly, without seeking an extension of time in terms of Rule 27 or making an application for condonation for that matter. It is my view that the contention by the Defendant is correct and constitutes a further good reason why the amendment proposed should not be sanctioned by the Court at this stage.

[15] For the foregoing reasons, it is my considered view that the Defendant's objection to the proposed amendment is meritorious and has to be upheld. To that end, I issue the following Order:

15.1 The Defendant's objection to the proposed amendment is hereby upheld and the Plaintiffs proposed amendment is hereby declared to be irregular at this stage.

15.2 The Plaintiff be and is hereby ordered to bear the costs of this application.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 10th DAY OF MARCH, 2009.

T.S. Masuku

Judge

Messrs. S.C. Dlamini & Co. for the Plaintiff

Messrs. Magagula & Hlophe Attorneys for the Defendant