IN THE HIGH COURT OF SWAZILAND
HELD AT MBABANE

Case No.3411/10

In the matter between:

Malamlela Dlamini	**Plaintiff**
And	
Biswajit Barua	**Defendant**
Coram	**Ota J.**
For Applicant	
For Defendant	

JUDGMENT

[1] The antecedents of this case is that the Plaintiff herein sued out a Combined Summons against the Defendant, claiming *inter alia,* the sum of E l 1,300-00, interest thereon and costs. Pursuant to the foregoing, the Defendant delivered a Notice of Intention to Defend. Thereafter, the Plaintiff filed a Notice of Intention to Amend his particulars of claim, by replacing September 2010, with September 2009, as appears in paragraph 7, thereof. The Notice of Intention to Amend was filed on the 22nd of September 2010 and served on the defendant on the same date. See page 9 of the book.

[2] The application for amendment was not opposed by the Defendant. Consequent upon which the Plaintiff proceeded to amend the Particulars of claim in terms of the Notice of Amendment.

[3] Thereafter, the Plaintiff applied for Summary Judgment as per the claim before the court. The application for Summary Judgment was set down for hearing and also served on the Defendant on the 22nd of September 2010.

[4] In the wake of the application for Summary Judgment, the Defendant commenced a **Rule 30** application dated the 7th of October, 2010, seeking for a setting aside of the Summary Judgment application and affidavit filed thereof, on the premises that same offends **Rule 28 (2) and (5)** of the Rules of this Court, for failure by the Plaintiff to deliver the amended process within the 5 days statutorily prescribed. **(See** pages 17 and 18 of the book)

[5] In the face of the **Rule 30** application, the Plaintiff filed a Notice of Set Down of this case, in terms of which he prayed for a setting aside of the Defendant's Notice of Application in terms of **Rule 30** and that

Summary Judgment be granted in terms of the claim before the court, as I have hereinbefore demonstrated. (See pages 24 to 25 of the book).

[6] It is against the back drop of the foregoing and in dissatisfaction thereof, that the Defendant commenced another application in terms of **Rule 30** of the Rules of this Court, which was filed on the 14th of October 2010, praying the court, *inter alia,* for the following reliefs:-

1. That the Plaintiffs application for Summary Judgment and affidavit thereof filed and served be set aside as an irregular step in that the Plaintiffs amended particulars of claim were served on Defendant on the 8th October, 2010, the *dies* for Summary Judgment application has not lapsed.
2. A Notice of Set Down cannot amend or change the irregularity of Plaintiffs Summary Judgment application that was served and Set Down prior to the amended Particulars of Claim being served.

   Rule 32 (1) and 3 (c) of the High Court Rules stipulates the sequence of the delivery of the application, namely that the

Summary Judgment application is made when either Combined Summons or a Declaration has been filed subsequent to Notice to Defend has been received, and that the application shall be Set Down not less than ten (10) court days before the date of hearing respectively. In casu, the amended Particulars of Claim were served on the 4th October 2010, whilst the Summary Judgment was served prior to the amended Particulars of Claim being served, an irregular step in the sequence of the papers.

4. Granting costs of this application
5. Granting further and/or alternative relief.

It is the foregoing, **Rule 30** application that presently vexes this court.

[7] I find it imperative to interpolate and observe at this juncture, that when this matter served before me for argument on the 2nd of March 2011, the Plaintiff was represented by Mr. S.K. Dlamini. The Defendant was absent and unrepresented, in spite of the fact that learned counsel for the Defendant Mr. B. Mndzebele, had attended the roll call on the 2nd of February, 2011 and was present in court when I postponed this

matter to the 2nd of March 2011, for argument at 10a.m. Since there was no reasons tendered in court for the absence of the Defendant and his counsel, I proceeded with this matter in their absence. I am however constrained to consider the totality of the papers serving before me, which includes the heads of argument filed by the Defendant, before reaching a decision in this matter.

[8] The foregoing said and done, **Rule 30 (1)** of the Rules of this Court upon which this application is predicated, provides as follows,

"*A party to a cause in which an irregular step or proceeding has been taken by any other party may, within fourteen (14) days after becoming aware of the irregularity, apply to court to set aside the step or proceeding provided that no party who has taken any further step in the cause with knowledge of the irregularity shall be entitled to make such application*"

[9] I agree entirely with the Plaintiff in paragraph 2 of his heads of argument, that the object of **Rule 30** is to provide a procedure whereby a hindrance to the future conduct of the litigation, whether created by non-observance of what the Rules of Court intended or

otherwise, is removed. This principle of law was clearly spelt out in the case of **S.A. Metropolitan Lewensversekeringsmatskappy Bpk vs Louw N.O. 1981 (4) SA 329 fO) at 333 G-H.**

[10] It is also the position of the law that an application in terms of **Rule 30** can only be successful, if the irregularity in procedure is such as to work substantial prejudice on the other party. See **Uitenhage Municipality vs Ulys 1974 (3) SA 800 (E) at 805 D-E.**

[11] The foregoing position of the law raises the following questions:-Is the Summary Judgment application filed by the Plaintiff herein an irregular step? If it is an irregular step, what prejudice has the Defendant suffered in consequence thereof?

[12] Now the contention of the Defendant is that the Summary Judgment violates not only **Rule 28 (2)** and **(5)** but also **Rule 32 (1)** and **(3)** of the Rules of this Court, in that the amended process was not served upon him within 5 days of said amendment as required by the rules, and also in the face of **Rule 32,** which requires that the

Particulars of Claim be serving before court, prior to filing an application for Summary Judgment.

[13] Is there any substantiality in the contentions of the Defendant *ante?* To answer this poser, I must of necessity have recourse to the relevant Rules of Court urged in this application, for therein lie the answer.

[14] I will commence this exercise from the tangent of **Rule 28 (1) (2)** and **(5)** respectively, which provide as follows:-

"*(1) Any party desiring to amend any pleading or document other than an affidavit filed in connection with any proceedings, may give notice to all other parties to the proceedings of his intention so to amend.*

(2) Such notice shall state that unless objection in writing to the proposed amendment is made with ten (10) days the party giving the notice will amend the pleading or document in question accordingly.

(5) Whenever the court has ordered an amendment or no objection has been made within the time prescribed in sub-rule (2), the party amending shall deliver the

amendment within the time specified in the court's order or within five (5) days after the expiry of the time prescribed in sub-rule (2), as the case may be"

[15] In the case of **The Attorney-General vs Austin Bonginkhosi Nhlabatsi and Others Case No.91/10,** judgment of 7th December, 2010 (Unreported), I had the occasion to adumbrate on the foregoing legislation, and exploded same in relation to the position of the law in the sister Republic of South Africa, a country whose case law is of high persuasive authority in this jurisdiction, and which has a provision in its Rules, which is in *pari materia* with our **Rule 28.** I had this to say on pages 27 to 29 of that judgment,

[16] "*The foregoing legislation which is couched in clear and peremptory language, demonstrates that an amended process, shall be delivered to the opposite party, within the time limits prescribed by the rules, whenever the court orders an amendment or the application for the amendment is not opposed. Case law in the neighbouring Republic of South Africa, a country whose statutes are largely in pari materia with our own, and whose case law is of persuasive authority in this jurisdiction, has adumbrated upon a legislation in that country which is in pari materia with this rule of our court, and has expounded its meaning.* **The case in point is the case of Fiat SA (PTY1 Ltd vs Bill Troskie Motors 1985 (1) SA 355 (O) In that case the South African Court examined the ambit of Rule**

28 (5) of the Rules of that court which is in *pari materia* with our own Rule 28 (5) and held as follows:

> '*where a Respondent has objected to an amendment of a pleading in writing, the Applicant would be obliged, in terms of* ***Rule of Court 28 (4)*** *to apply for leave to amend. According to this Rule the court may make such order "thereon as to it seems meet". There can be no doubt that the court when it is of the view that the amendment should be granted, may order the amendment. The amendment will then have immediate effect. The position is different when Notice of Intention to Amend has been given and no objections thereto, has been made. In such a case the actual amendment only takes place when the amendment has been delivered within the time stipulated in* ***Rule 28 (5)*** *. Because of the very wide powers granted to it in terms of* ***Rule 28 (4)*** *a court is also entitled apart from ordering an amendment, merely to grant leave to amend. In such a case the order will only take effect once it has been delivered within the time stipulated in the order*'
>
> *The authority ante has put it beyond disputation, that where the application for an amendment is not opposed, or objected to, like the one for joinder in this case, that the applicant is duty bound to deliver the amended process to the opposite party within the time prescribed by the Rules. It is the fact of the delivery that renders the amended*

process effective or as stated in the case ante 'the actual amendment only takes place when the amendment has been delivered within the time stipulated in ***Rule 28 (5).*** *I am persuaded by the* ***Fiat SA (PTY) Ltd*** *case (supra)".*

[17] In *casu,* it is obvious that the notice of amendment was served on the 22nd September 2010. It is also common cause that the Defendant did not oppose the said amendment. By virtue of the Rules, therefore, it was incumbent upon the Plaintiff to deliver the amended process to the Defendant within five (5) days after the lapse of ten (10) days period, since it is obvious that the court did not set a time frame for same.

[18] It is indisputable, as demonstrated by page 23 of the book, that the Plaintiffs amended Particulars of Claim was served on the 8th of October 2010, clearly outside the five (5) days period statutory prescribed for same. The effect of this; as I have hereinbefore demonstrated, is that the amended process was rendered ineffective for lack of delivery.

[19] It is my firm belief, that to set down the application for Summary Judgment, premised on the ineffective amended process does not only render the whole application irregular but is also highly prejudicial to the Defendant.

[20] I say this because the requirement of delivery of the amended process pursuant to **Rule 28 (5),** was to give the Defendant notice of the amendment effected on the process, to enable him plead to same, pursuant to **Rule 28 (6),** which provides as follows:

> "*where an amendment to a pleading has been delivered in terms of this Rule, the other party shall be entitled to plead thereto or amend consequentially any pleading already filed by him within fourteen (14) days of the receipt of the amended pleading*"

[21] I hold the view that the same principles must apply, irrespective of how insignificant or inconsequential the amendment sought to be effected is perceived. To apply different standards to different scenario would set a very dangerous precedent, and serve to defeat the very spirit of the rule, which is that of notice to the opposite party after the fact of amendment.

[22] We must always remain conscious of the fact that "*notice*" is a component of the fundamental right of a fair hearing, therefore, the court will insist on a strict compliance with Rules of Procedure meant to safeguard the fundamental right of an adverse party to fair hearing like the right to notice.

[23] More to this is that another insuperable obstacle in the path of the Plaintiff, is that the conspectus of the Summary Judgment application, herein, violently offends the established tenets of such an application, as is prescribed in **Rule 32 (1)** of the Rules of the Court in the following language:-

> "*where in an action to which this rule applies and a Combined Summons has been served on a Defendant or a declaration has been delivered to him and that Defendant has delivered Notice of Intention to Defend, the Plaintiff may, on the ground that the Defendant has no defence to a claim included in the summons, or to a particular part of such a claim, apply to the court for Summary Judgment against the Defendant*".

[24] The *ipssissima verba* of the legislation ante, puts it beyond disputation that, a Summary Judgment application is launched only after a Combined Summons or a declaration has been served on the Defendant. This is to enable the Defendant plead to the amended process.

[25] [In *casu,* by setting down the Summary Judgment prior to delivery of the amended Particulars of Claim to the Defendant, the Plaintiff effectively put the carte before the horse, and in so doing, shut out the Defendant, thereby prejudicing his right to a fair hearing as I have hereinbefore demonstrated. I hold the view that it is immaterial that the amendment effected on the process was a change of date from September 2010 to September 2009. The defendant is by virtue of the rules entitled to notice by way of service and such ought to have been availed him before the summary judgment application was set down for hearing, if the rules of fair hearing must be upheld. Another ill I see emanating from the fact of setting down the summary judgment application for hearing prior to delivery of the amended Particular of Claim upon which it is premises, is that this fact clearly rendered the summary judgment, application irregular. I say this because, it is the

fact of delivery after the amendment, pursuant to **Rule 28 (5)** that renders the amended process effective. It follows therefore, that the summary that the Summary Judgment application which was set down prior to delivery of the amended particulars of claim, was founded on an ineffective process, and in that event irregular.

[26] On these premises, and in the light of the totality of the foregoing, I hold the Summary Judgment application an irregular step in these proceedings and same is accordingly set aside, with costs.

DELIVERED IN OPEN COURT IN MBABANE ON THIS THE 8TH DAY OF MARCH 2011

OTA J
JUDGE OF THE HIGH COURT