



IN THE HIGH COURT OF SWAZILAND
JUDGMENT

Reportable
Case No. 708/2004

In the matter between:

SIPHO REUBEN MAPHALALA

PLAINTIFF

and

SWAZILAND ELECTRICITY BOARD

1ST DEFENDANT

SWAZILAND ROYAL INSURANCE CORP

2ND DEFENDANT

In re:

SWAZILAND ELECTRICITY BOARD

APPLICANT

and

SIPHO REUBEN MAPHALALA

RESPONDENT

Neutral Citation: Sipho Reuben Maphalala v Swaziland Electricity Board & Swaziland
Royal Insurance Corporation (708/2004) [2014] SZHC 41 (21 MARCH 14)

Coram : Q.M. MABUZA J

Heard : 28 JULY 2013

Delivered : 21 MARCH 2014

Summary **A.Practice – Pleadings – Amendment to Amended Plea Withdrawal**

of admission.

- B. A proposed amendment of a pleading involving the withdrawal of an admission cannot be had merely for the asking - The Court will generally require to have before it a satisfactory explanation for such withdrawal.**

JUDGMENT

MABUZA-J

- [1] Serving before me is an interlocutory application brought by the 1st Defendant to amend an amended plea. For the sake of convenience the parties will be referred as they appear in the main case.
- [2] The Plaintiff sued out a summons in this court against the Defendants in respect of damages incurred by him at the instance of the Defendants in the sum of E1,414,400.00 (One million four hundred and fourteen thousand four hundred Emalangen) for which he seeks payment together with interest at the rate of 9% a *tempora morae*, costs of suit and further and or alternative relief.
- [3] Initially the Plaintiff was represented by Mr. Shilubane who is now deceased and is now represented by Mr. S. Hlophe. The Defendants were represented by Messrs S.A. Nkosi and Company whose mandate was withdrawn after the close of pleadings when the present attorneys Magagula & Hlophe Attorneys were instructed. Mr. N. Mthethwa represents the latter firm.
- [4] Shortly after close of pleadings the 2nd Defendant amended its plea by raising a special plea of misjoinder of itself and there being no objection

within the stipulated time, successfully amended its plea. The amended plea was filed on the 22nd September 2009.

[5] On the 19th November 2009 another notice to amend the amended plea was filed on behalf of the 1st Defendant who sought to amend paragraphs 6 and 8 of the amended plea.

[6] The Plaintiff objected to this proposed amendment on the ground that the proposed amendment amounted to a withdrawal of admissions which were made in the original plea and in the amended plea filed by Messrs S.A. Nkosi and the Defendants present attorneys of record respectively.

The Amendments

[7] For contextual understanding and analysis of the nature of the objection, I set out hereunder the proposed amendments of the amended plea which is juxtaposed with the relevant paragraphs of the particulars of claim and the amended plea:

(a) Paragraph 6 of particulars of claim states:

“The 1st Defendant is the owner of an electrical power line and a transformer situate approximately 300 meters from the Plaintiff’s aforesaid dwelling house.

6.1 The Plaintiff’s dwelling house is provided with electrical power supply connected from the Defendant’s power-line and transformer”.

(b) Paragraph 6 of Amended plea:

“Save to admit that it supplied electricity to the Plaintiff, the Defendants’ deny the contents thereof and put the Plaintiff to the strict proof of these allegations”.

(c) Proposed Amendment to the Amended plea:

AD PARAGRAPHS 6 AND 6.1

1st Defendant denies that it supplied the Plaintiff’s dwelling house with electricity.

The Defendant pleads that:

The Plaintiff was only temporarily connected with electricity supply for purposes of enabling him to construct his dwelling house;

The electrical supply was not connected to the Plaintiff’s house but to a meter box outside the dwelling house which was still under construction;

The Plaintiff did not at any stage apply for a permanent connection which would have been done once the house was completed.

The Plaintiff illegally abstracted the electricity from the meter box to his dwelling house.

As a result of the illegal abstraction of electricity, the 1st Defendant did not conduct tests for:

- . Insulation;
- . Polarity test;

. Earthing;

The illegal electrical connection in the Plaintiff's dwelling house may have been defective and likely been the cause of the fire".

[8] (a) Paragraph 8 of the Particulars of claim states:

"The fire arose out of an explosion of the 1st defendant's transformer

8.1 The fire and the resultant damage to the plaintiff's property was occasioned by the negligence of the 1st defendant in that:-

8.1.1 the 1st defendant being the owner and in control of the transformer failed to take steps to prevent the occurrence of the fire, alternatively;

8.1.2 the 1st defendant being the owner and in control of the transformer and electricity power lines failed to take steps to prevent the explosion of the transformer".

(b) Paragraph 8 of the Amended plea states:

AD PARAGRAPH 8

The Defendants deny each and every allegation contained in this paragraph as if specifically traversed and in particular deny that the fire arose out of an explosion of the 1st Defendant's transformer as alleged or otherwise and the Plaintiff is put to the strict proof thereof".

(c) Proposed amendment to the amended plea is to add the following paragraphs:

8.2 In particular, the **1st Defendant** denies:

8.2.1 That the fire arose out of explosion of a transformer;

8.2.2 That the fire was occasioned by the negligence of the
1st Defendant

8.2.3 That the 1st Defendant was negligent in the alleged
respects or at all.

8.3 The **Defendant** pleads:

8.3.1 That its transformers did not and could not under the
circumstances have been the cause of the fire;

8.3.2 The electrical connection of the house was unsafe as
the safety tests had not been conducted by the
1st **Defendant** in accordance with established practice.

[9] Due to inaction by the 1st Defendant after filing its intention to amend, Plaintiff's attorney moved for a dismissal of the notice to amend the amended plea on the grounds that there should have been a formal application supported by an affidavit in support of the notice to amend in terms of Rule 28 (4), accompanied by a prayer for condonation. Rule 28 is entitled: Amendments of Pleadings and Documents and subrule (4) provides as follows:

“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 on notice for leave to amend and set the matter down for hearing, and the court may make such order thereon as to it seems fit.”

[10] It has been held that the application to be made in terms of subrule 28 (4) is not an application where the formal notice of motion procedure supported by affidavit as contemplated in Rule 6 (1) has to be used. In **Swart v Van der Walt t/a Sentraten** 1998 (1) S.A.N53 at 57 Claasen J stated as follows:

“Amendments to pleadings can be of a wide variety. Some are simple and purely formal in nature, i.e. to amend arithmetical and clerical errors in pleadings. Other amendments may be more substantial, for example amendments seeking to withdraw an admission made on the pleadings. It is trite law that amendments constituting the withdrawal of an admission have to be done on affidavit. However, it would, in my view, be absurd to interpret the new Rule 28 (4) as prescribing the use of the Rule 6 procedure in all cases of applications for leave to amend pleadings. In cases where a mere word or figure requires amendment, it would be totally absurd to file a notice of motion supported by an affidavit to secure such amendments. Affidavits would only be necessary in more substantial amendments, such as the withdrawal of admissions”.

The 1st Defendant thereafter launched the present application in which is sought an order in the following terms:

1. Condoning the late filing of the application for leave to amend.
2. Granting the Applicant leave to amend its amended plea.
3. Costs of the application in the event it is unsuccessfully opposed.
4. Granting Applicant any further or alternative relief.

[11] The application is opposed by the Plaintiff whose answering affidavit was deposed to by Mr. Shilubane.

Condonation

[12] The founding affidavit in support of the notice of motion is deposed to by Mr. Pius Gumbi the 1st Defendant's Managing Director. With regard to the prayer on condonation Mr. Gumbi says that the failure to set the matter down for hearing in terms of Rule 28 (4) was occasioned by the fact that the parties were engaged in negotiations for a possible settlement which said negotiations came to naught. Mr. Shilubane for the Respondent denies that there were any negotiations for settlement in this matter and that the only negotiations pertained to the Applicant seeking a postponement of the hearing of 30th November 2009, 1st and 2nd December 2009 because the Applicant was not ready to proceed with the trial that was due to begin on the 30th November 2009.

[13] In his replying affidavit Mr. Gumbi insists that there were settlement negotiations and has referred the Court to the confirmation affidavit of his attorney Mr. Mangaliso Magagula. With regard to the condonation application Mr. Magagula states therein at paragraph 6, that he was involved in the negotiations for a possible settlement with Mr. Shilubane. He says that the negotiations went on even after it became apparent that the matter would not proceed and that it only became apparent that settlement was not possible sometime in December 2009.

[14] Both Mr. Gumbi and Mr. Magagula do not disclose to the Court what possible settlement was being negotiated. The factual legal issues raised in the amended plea and the amendment to the amended plea are not only diverse but they also go to the core of the 1st Defendant's plea; equally so the 1st Defendant's plea raises complex legal issues. It is very difficult to believe that any of these issues could have been the subject of negotiation; they all need ventilation in court of either oral evidence (factual issues) and argument (legal issues). Because of the foregoing reasons I am inclined to believe Mr. Shilubane's version of events that the Defendants were not ready to proceed with the trial on the dates set aside for it and that the negotiations related to a postponement of the matter; and this belief has a bearing on the award of costs.

[15] Does the court have any discretion in the matter? The delay was some three months long but there is substance in the contention that no prejudice was suffered by the Plaintiff because of it nor has the Plaintiff shown any such prejudice. Consequently the application for condonation for the late filing of the application is hereby granted with costs awarded to the Plaintiff.

[16] The 1st Defendant concedes at paragraph 5 of its replying affidavit dated 10th June 2010 that the amendment seeks to withdraw an admission. The legal authorities state that a satisfactory explanation of the circumstances in which the admission was made and the reasons for seeking to withdraw it must be given: See the case of **Bellairs v Hodnett and Another** 1978 (1) S.A. 1109 (AD) at 1150 where it was held that: “A proposed amendment of a pleading involving the withdrawal of an admission cannot be had merely for the asking: the Court will generally require to have before it a satisfactory explanation of the circumstances in which the admission was made and the reasons for now seeking to withdraw it”.

[17] The Plaintiff submits further that in *casu* there is no explanation why the 1st Defendant’s erstwhile attorney made the admissions in the first place and goes on to suggest that the 1st Defendant should have obtained an affidavit from its former attorney why the admission was made.

[18] However, the 1st Defendant has explained how the admission was made and I accept this explanation. Mr. Gumbi says that the 1st Defendant's erstwhile attorney confused the two circumstances under which electricity is supplied to a customer. He then explains that a customer can be supplied with electricity on a temporary basis i.e. a connection to a meterbox to facilitate the customer in the construction of his house. In the second scenario, a customer can be supplied with electricity on a permanent basis i.e. when the connection is done to a house or a permanent structure. This connection only takes place once the following the safety tests have been conducted:

- Insulation;
- Polarity test and
- Earthing.

[19] He further states that the 1st Defendant's erstwhile attorney had been instructed to make a denial that the electricity had been supplied to the Plaintiff's house and further plead that the electricity was connected to a meter-box to facilitate the construction of the Plaintiff's house. The former attorney committed an error which was not readily discernible to the 1st Defendant's then Managing Director as he is not a qualified attorney. Not only did the erstwhile attorney commit an error, he also acted contrary to his mandate.

[20] With regard to obtaining his erstwhile attorney's affidavit confirming the mistake, he says that route would present certain difficulties which difficulties I accept.

[21] In the case **Trans-Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd & Another**, 1967 Vol. 3 SA 632(D) at pages 641 para A-B the Court held that:

“Having already made his case in his pleading, if he wishes to change or to add to this, he must explain the reason and show *prima facie* that he has something deserving of consideration, a triable issue; he cannot be allowed to harass his opponent by an amendment which has no foundation. He cannot place on record an issue for which he has no supporting evidence, where evidence is required, or, save perhaps in exceptional circumstances, introduce an amendment which would make the pleading excipiable...or deliberately refrain until a late stage from bringing forward his amendment with the purpose of catching his opponent unawares...or of obtaining a tactical advantage ... or of avoiding a special order as to costs”.

[22] As a general rule an amendment to any pleadings will be permitted unless the application to amend, on the one hand, is mala fide on the part of the one party and, on the other hand, is prejudicial or unjust to the opposite party, which cannot be compensated by way of postponement and/or order of costs.

See: **JOMOVEST TWENTY FIVE CC t/a CHAS EVERITT CITY BOWL v ENGEL & VOLKER WESTRN CAPE [PTY] LTD** [2010] 4 ALL SA 619 [WCC].

[23] It lies within the Court's discretion, exercised judicially, to grant or refuse an amendment. However, a Defendant for an amendment must show that:

- the application is bona fide;
- it introduces a triable issue; and
- that there is no prejudice to the Plaintiff, alternatively, the prejudice is not such that cannot be remedied by an order for costs or postponement

See: **TECMED [PTY] LTD & OTHERS V SOJITZ CORPORATION, CASE NO: 03/03539, RSA @ PARAGRAPH 15:**

SMM PAPIER AND OTHERS V THE MINISTER OF SECURITY AND OTHERS CASE NO. 552/2001 LABOUR COURT OF SOUTH AFRICA.

[24] The second ground on which the Plaintiff seeks to discredit the explanation for the withdrawal of the admission is that if there was any substance in the 1st Defendant's assertion that the plea did not embrace the assessment report compiled by its employees, it should have discovered the report in its discovery affidavit.

[25] I accept the 1st Defendant's response which is that the assessment report cannot be classified as a report compiled by an expert witness and that the report was compiled by the employees of the 1st Defendant and is therefore protected from disclosure of discovery by the attorney-client privilege.

[26] The Plaintiff further alleges that he would suffer prejudice that cannot be remedied by an order for costs for the application and further alleges that since 2004 he has proceeded on the basis that it would not be necessary to prove that the defendant supplied electricity to his house and took no steps to gather the necessary evidence to prove this fact. In the result he is thereby prejudiced.

[27] The 1st Defendant counter-argument is that the Plaintiff has failed to state what would prevent him from securing evidence between now and the date of trial if the proposed amendment is granted. I agree with the 1st Defendant submission and fail to see how the Applicant would be unable to secure such evidence.

[28] In the case of **J.R. Janisch (Pty) Ltd v W.M. Spilhaus & Co (WP) Ltd** 1992 (1) SA 167 at pages 169 – 170 paragraph J – B it was said:

“The court has the greatest latitude in granting amendments, and it is very necessary that it should have. The object of the court is to do justice between the parties. It is not a game we are playing, in

which, if some mistake is made, the forfeit is claimed. We are here for the purpose of seeing that we have a true account of what actually took place, and we are not going to give a decision upon what we know to be wrong facts. It is presumed that when a defendant pleads to a declaration he knows what he is doing, and that, when there is a certain allegation in the declaration, he knows that he ought to deny it, and that, if he does not do so, he is taken to admit it. But we all know, at the same time, that mistakes are made in pleadings, and it would be a very grave injustice, if for a slip of pen, or error of judgment, or the misreading in pleadings by counsel, litigants are to be mulcted in heavy costs. That would be a gross scandal. Therefore, the court will not look to technicalities, but will see what the real position is between the parties”.

[29] The Court has to exercise its discretion in favour of allowing an amendment even if the amendment introduces a withdrawal of an admission where a refusal of the amendment will deny the Defendant the opportunity of raising a substantive defense despite the paucity of the information contained in the affidavits filed in support of the application.

See: J R JANISCH [PTY] LTD SUPRA at Pages 172 – 173 Paragraphs 1 – 2.

[30] The 1st Defendant has prevailed upon this court that the proposed amendment establishes a substantive defense, a triable issue worthy of consideration by court. The 1st Defendant contends that if the proposed amendment is declined by this Honourable Court, it would be denied the

opportunity of raising a substantive defense, and that any prejudice that may be suffered by the Plaintiff can be adequately compensated by an order of costs for the application. There is substance with this submission which resonated with this Court.

PROPOSED AMENDMENT OF PARAGRAPH 8

[31] The preliminary issue for determination hereto is whether or not the proposed amendment or the effects thereof introduce a withdrawal of an admission.

[32] The 1st Defendant contends that a close examination of the amended plea appears to patently indicate an unequivocal denial by the 1st Defendant that the fire arose out of an explosion of the 1st Defendant's transformer and a further unequivocal denial that the 1st Defendant was negligent in any of the respects set out in paragraph 8.1.1 and 8.1.2 of the particulars of claim (see paragraph 8 supra).

[33] The 1st Defendant further contends that what the proposed amendment seeks to do, when contrasted with the amended plea, is to expand and/or elucidate and/or supplement paragraph 8 of the amended plea; and that therefore the proposed amendment cannot be conceived as a withdrawal of an admission.

[34] I am satisfied that the 1st Defendant has satisfactorily explained the circumstances under which the admission was made and the reason for withdrawing it and has demonstrated that the Plaintiff would not suffer any prejudice if the proposed amendments are granted.

[35] I am further satisfied that the Plaintiff opposed both applications in good faith. It is my considered opinion that the 1st Defendant was caught napping with regard to the requirement to file a formal application for condonation and only realized when its attention was drawn thereto by the application filed by the Plaintiff to refuse the application. It is further my considered view that the 1st Defendant should have carried out all its amendments with the amended plea but failed to do this and only realized its mistake on the date of the trial on the 30th November 2009. To that end the 1st Defendant must be mulcted with costs and I so order.

[36] The order of the Court is as follows:

- (a) The application for condonation is hereby granted;
- (b) The application to amend the amended plea is granted.

(c) The Plaintiff is hereby awarded costs in respect of (a) and (b) hereinabove.

Q.M. MABUZA
JUDGE OF THE HIGH COURT

For the Plaintiff : Mr. S. Hlophe
For the Defendant : Mr. N. Mthethwa