



IN THE HIGH COURT OF SWAZILAND

Held at Mbabane

Case No.: 1740/2010

In the matter between

PETER PIETERSE

1st Plaintiff

ABIGAIL PIETERSE

2nd Plaintiff

And

SWAZILAND ELECTRICITY COMPANY

Respondent

Neutral Citation: *Peter Pieterse & Another Vs Swaziland Electricity Company (1740/2010) [2017] SZHC 81 (28th April 2017)*

Coram: Hlophe J.

For the Plaintiffs: Advocate Mr P. Flyn instructed by Henwood and Company

For the Respondent: Advocate Mr F. Joubert instructed by Magagula and Hlophe Attorneys

Date Heard: 12th April 2017

Date Delivered: 28th April 2017

Summary

Law of Evidence – Similar Fact evidence – What it entails – Circumstances under which it may be accepted – Notice to the other side – What it should entail – When an objection to similar – fact evidence should be raised – Whether the similar fact evidence proposed should be accepted in the circumstances.

JUDGEMENT

- [1] The circumstances of this matter bring to the fore the question when similar fact evidence can be accepted in a matter including the stage at which an inquiry whether or not to admit such evidence should be entertained.
- [2] The facts of the matter reveal a very painful and sad state of affairs. A fire broke out inside the house of the First Plaintiff situate at Lots 193 and 194, 10th Street Hlathikhulu. Among the people who stayed in the said house were the First Plaintiff, the Second Plaintiff the First Plaintiff's wife and at least four children among whom was the second Plaintiff's daughter namely Tazneem Pieterse, who was a grand- daughter to the First Plaintiff. At the

time the said Tazneem was three years and three months old. The evidence further reveals that there were also two lady helpers in the house.

[3] It was realized that the fire had broken out when the Second Plaintiff smelt something burning and heard a child screaming. When she opened the door of the room from which the scream came, to try and assist the child who had been screaming, she was burnt by the fire, which made it impossible for her to carry on with her attempts. Further attempts by her and those employees of the first plaintiff who tried to assist her gain entry into the room so as to save the screaming child proved impossible. Not even their trying to enter through the window could help as the whole room was by now ablaze.

[4] The upshot of the incident was the burning of almost the entire house together with the death of the minor child Tazneem who was herself burnt to death. Contending that the fire was a result of an electric fault or surge, the Plaintiffs instituted the current proceedings seeking an order of this court awarding them a total sum of E1,822,000-00 made of repairs to the house and its contents, general damages and those damages occasioned by the death of the minor child, Tazneem.

[5] It is not in dispute that throughout the night of the 4th to 5th March 2010, electricity had gone out and only returned sometime in the morning between 0700 hours and 0730 hours. This somewhat coincided with the discovery of the fire in the burning house. Telephone calls were thereafter made to all those that needed to be informed including the First Plaintiff and the Police.

[6] Whereas the Plaintiffs contend that the fire was caused by an electric fault in the form of an electric surge, the Defendant denies that the fire was a result of such a fault or surge but contends the fire was probably caused by a candle light that had burnt clothes in the children's room with the fire from there burning spreading through the house and causing the damage complained of. The main issue for determination in the main matter is clearly what the cause of the fire was.

[7] The court was told that each one of the parties was going to lead expert evidence to try and prove what the cause of the fire was, that is, was it as contended by the Plaintiffs or by the Defendant. With both Plaintiffs having

been led in evidence, it was clarified that they now sought to lead the evidence of one Gilbert Fakudze as well, who was said to be a neighbour of the Plaintiffs. It was explained he wanted to lead evidence to the effect that, at about the same time electricity returned to his place and that of the First Plaintiff, and at about the same time the fire started at the Plaintiff's house, the electric supply at his house had returned in a surge and had in the process destroyed some four bulbs simultaneously. This obviously suggested that the fire in the Plaintiffs house was a result of the same electric surge as the houses were supplied from the same transformer and were in the same neighbourhood. The obvious insinuation was that in that area electricity there had been a faulty electric surge which had caused the fire in the Plaintiff's house and the resultant damage complained. This insinuation, as it further goes, is that whereas it manifested itself in the fire in the Plaintiff's house, it had manifested itself in blowing the bulbs in Mr Fakudze's house. That this was the evidence to be led from Mr Gilbert Fakudze was confirmed in the Notice to lead similar evidence filed by the Plaintiff.

- [8] The Defendant's counsel objected to this piece of evidence being led on the grounds that it was similar fact evidence which could not be led because it was irrelevant. The Plaintiff's counsel on the other hand insisted that he was

entitled to lead this evidence claiming it was going to show that indeed at the same time the electricity returned, a fire broke out at the Plaintiff's house confirming that such was a result of an electric fault or surge, as it had caused the simultaneous blowing of some four globes at Fakudze's house.

[9] The thrust of this assertion was obviously that the Defendant was liable to make good the damage caused by the fire at the Plaintiff's house as specified in the Plaintiff's claims. It was agreed between the parties that this stage of the proceedings was the appropriate one to have the objection to the admission of the similar fact evidence argued and determined as it was just before the impugned evidence could be led.

[10] According to **L.H.Hoffman and D.T.Zeffert's The South African Law of Evidence, Fourth Edition, Butterworths at Page 53**, similar-fact evidence is only exceptionally admissible. This evidence will only be accepted where it is sufficiently relevant to warrant its reception and if it has a relevance other than one based solely upon character. On the relevance and value of similar fact evidence the learned authors put the position as follows on the same page 53 of their book.

“The relevance of similar – fact evidence depends upon the argument that the same conditions are likely to produce the same results. As a proposition of logic this is difficult to fault. But its practical value is very limited because it is not often possible to satisfy the court that the conditions on both occasions were sufficiently similar.”

[11] The starting point in similar – fact evidence matters entails proving that the circumstances in the two different instances are sufficiently similar. Once this has been proved, one requires as well to prove that all the circumstances that needed to be closely considered, have been so considered with neither an issue being overly accorded weight or deprived of some weight that should be accorded it. It is also important to note that the court is required to also ensure that it is not involved in determining a multitude of collateral inquiries or issues having the effect of confusing and embarrassing it.

[12] The exercise of determining a multitude of collateral issues, entails a waste of time and money. This exercise is bound to be prejudicial to the Defendant

who comes to court facing a certain specific case only to find himself having to be involved in probing a completely different one as the collateral issues are being determined for which he ordinarily has no desire to determine and would surely not have sufficiently prepared himself. The cases of **Delew Vs Town Council of Sprins 1945 TPD 128** and that of **Hollingham Vs Head (1858) 4 CB (WS)388, 140 ER 1135** are instructive in this regard.

[13] Turning to the circumstances of this matter, it seems to me that there is no indication that the circumstances in the two houses were similar as the starting point. It is for instance not clear whether the connection of electricity in the two houses was similar. It is also not clear whether the alleged blowing of bulbs occurred at exactly the same time the fire started in the Plaintiff's house. The difficulty with this is that from the evidence, no one seems to know when exactly the fire started in the Plaintiff's house. Furtherstill there is a great difficulty in examining several collateral issues which are similar to determining the very issue in the matter. This would be time consuming and would possibly involve a further expense. Determining the collateral issues would also mean this court has to delve into issues that are not of the Defendant's concern at great prejudice to it. They would now have to be involved in determining cases that are different from the one they

set out to meet. In this sense the collateral issues are not sufficiently relevant.

[14] I agree with the view expressed by **Hoffman and Zeffert's The South African Law of Evidence, 4th Edition at page 55** when they say the following, which in my view is opposite to the matter at hand:

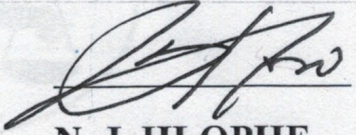
“Before similar fact evidence can be admitted, the similarity of conditions applicable in each case has to be satisfactorily established. It should not be admitted unless its value as proof warrants its reception in the interests of justice and its admission does not operate unfairly against the other party.”

See also: Mead Music Publishing Co.Ltd [1976] IALL ER 763 (CA) and Laubsher Vs National Foods Ltd 1986(1) SA 553 (ZS)554 I-J.

[15] I am convinced that it would be inconvenient and time consuming to try to satisfactorily establish the similarity of the circumstances in the Plaintiff's house and those in Mr Fakudze's house. I also do not think that its value as proof warrants admission because whereas the surge in the current allegedly

manifested itself in the globes being blown off, the same thing is not said to have happened in the Plaintiffs house as the globes there were allegedly found normal and on even after the fire complained off had caused the damage in the other parts of the house. It therefore would not be in the interests of justice in my view to accept the similar fact evidence concerned in these circumstances and it would operate unfairly against the Defendant.

[16] Consequently I have come to the conclusion that the Defendant's objection to the use of the similar fact evidence as intended to be led from Mr Gilbert Fakudze be and is hereby upheld. The costs are to be costs in the course.



N. J. HLOPHE
JUDGE – HIGH COURT