1272

THE HIGH COURT OF SWAZILAND

**GOOLAM HOOSEN DESAI**

Applicant

**And**

**KENNETH DLAMINI**

Respondent

Civil Case No. 1869/99

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| Coram | S.B. MAPHALALA – J |
| For the Applicant | MR. N. HLOPHE |
| For the Respondent | MR. Z. MAGAGULA |

**RULING**

**(05/06/2003)**

This is an extra ordinary application as there are no papers motivating it. It was moved from the bar on behalf of the Defendant by *Mr. Magagula*. The circumstances which prompted him to make the application are as follows: This matter is a part-heard case before me where substantial evidence of the Plaintiff was led and one witness was still to be cross-examined. The matter has been in abeyance for over two years from the last

time the matter came to court. The Defendant as represented by *Mr. Magagula* has always defended the matter.

The Registrar of this court set the matter for trial for the 26th and 27th *ultimo* for continuation. It was duly included in the court's roll for the second session starting on the 12th May 2003, to the 30th June 2003. The Plaintiff through his attorneys set the matter for trial for those dates in a notice of set-down dated the 21st May 2003.

The matter was called for trial on the 26th May 2003, the Plaintiff appeared and the Defendant did not appear. The Plaintiff proceeded in terms of Rule 39 (1) of the rules of court. As the Plaintiff has already given evidence and led one witness *Mr. Hlophe* contended that Plaintiff has proved his claim and was accordingly entitled to judgment in his favour. After hearing submissions by *Mr. Hlophe* for the Plaintiff I reserved judgment to a future date.

In the afternoon of the same day *Mr. Magagula* for the Defendant appeared before me in Chambers giving reasons for the Defendant's non-appearance when the matter was called earlier on in the morning. I then directed that I may hear whatever application he wishes to make the following morning at 9.30am and that he informs the other party of this.

Indeed, when the court sat at 9.30am *Mr. Magagula* sprang to his feet and launched an application from the bar for the re-opening of the matter. He advanced a number of reasons for the re-opening of the case. Firstly, he submitted that the Defendant has always wanted to defend this case from its inception to date. He has filed all the requisite affidavits and thus joining issue with the Plaintiff and even when Plaintiff gave evidence the Defendant cross-examined him and, for all in intents and purposes has displayed a strong desire to defend this case. Secondly, he contended that as there was no pre-trial conference conducted in this case no period of set-down was agreed to by the parties. Thirdly, he submitted that since his practice operates from Manzini he has to rely on his correspondent P.R. Dunseith for all court processes in this matter. In this instance he received a telephone call from his correspondent at about 12.00noon that the matter was

underway. *Mr. Magagula* submitted that his client was prepared to pay wasted costs for the day.

All in all it was *Mr. Magagula's* plea that for the interest of justice and fair play the court in the circumstances of the case ought to reconsider the matter by allowing the Defendant to present its defence of the claim.

*Mr. Hlophe* argued *per contra*. Firstly, he challenged the manner this application has been moved in that Defendant has not filed a proper application with the necessary affidavits. The Defendant has been embarrassed in that he did not know the nature of the application to prepare a defence. Hearsay evidence has been presented to court as *Mr. Magagula* launched a tirade from the bar. The second ground which appears to me, to be gravamen of the Plaintiff's response is that the Plaintiff was perfectly entitled to have proceeded as he did in terms of Rule 39 (1). The said Rule reads as follows:

> "If, when a trial is called, the Plaintiff appears and the Defendant does not appear, the Plaintiff may prove his claim so far as the burden of proof lies upon him and judgment **shall be given accordingly,** in far as he has discharged such burden ..." (my emphasis).

To buttress his position he cited the work of ***Erasmus, Superior Court Practice, (Juta)*** at page ***B1 - 290.*** The learned author state that under the rule a Defendant who appears when the hearing of a trial action starts, but thereafter withdraws and absent himself from the remainder of the proceedings, is regarded as being in default. To what constitutes "default" the learned authors cited the case of ***Katritsis vs De Magedo 1966 (1) S.A. 613 (A)*** and that of ***Hayes vs Baldachin 1980 (2) S.A. 589 ®. Nathan et al, Uniform Rules of Court (3rd ED)*** at page *248* also cited the case of ***Katritsis*** *(supra)* in this regard. Also the authors ***Herbstein et al, The Civil Practice of the Supreme Court of South Africa (4th ED)*** at page ***660*** cites the same case for this proposition.

*Mr. Hlophe* contended that the only course open to the Defendant is to await the judgment of the court and then he may apply for a rescission of that judgment on

whatever ground he may be advised to advance. At this stage it is not proper to ask the court to re-open a case where there is a pending judgement.

In reply on points of law, *Mr. Magagula* argued with all the force in his command that justice requires that Defendant's side be heard. Another point which he raised was that this matter did not come by way of action but by way of application and thus Rule 39 (1) is not applicable in *casu.*

These are the issues before mė. I have considered the submissions made before me. It would appear to me *Mr. Magagula* is correct in respect of whether Rule 39 (1) is applicable in the instant case. The Rule seems to apply to action proceedings and not application proceedings. Therefore, allowing the Plaintiff to proceed in terms of the said Rule was clearly erroneous. I was unable to find any authority which applies in application proceedings to cater for what happened on the 26th *ultimo.* It is on this basis that I would allow the Defendant to re-open its case. Further, I was moved by the explanation given by *Mr. Magagula* for Respondent's default. The Respondent has always opposed this matter and it is my considered view that re-opening the case would be in the best traditions of justice. Even if one would have ruled that Rule 39 (1) applies the notice of setdown would not have conformed to Rule 56 (1) (a) and (b) in that the notice of setdown for trial was served and received less than 10 days of the date allocated for trial. It would appear to me proceedings then in terms of Rule 39 (1) was null "*ab initio*". In the case of ***Barclays Western Bank vs Gunas and another 1981 (3) S.A. 91*** a party was allowed to re-open his case and lead further evidence of certain witnesses, the application being made only after the court had reserved judgment. (see also ***Oosthuizen vs Stanley 1938 A.D. 322;*** and ***Mkhwanazi vs Van Der Merve and another 1970 (1) S.A. 609***).

In the result, the Respondent is allowed to re-open the case and Respondent is to pay the wasted costs of the 26th May 2003.

Further, the matter is referred to the Registrar to set another trial date/s.

**S.B. MAPHALALA**

**JUDGE**