

**IN THE HIGH COURT OF SWAZILAND**

HELD AT MBABANE

Civil Case No. 1934/2007

CITY ENGINEERING (PTY) LTD

T/A TOOL HIRE

Applicant

And

DORRINGTON MATIWANE

Respondent

Coram

S.B. MAPHALALA - J

For the Applicant

MR. M. NKOMONDZE

For the Respondent

IN ABSENTIA

JUDGMENT

7<sup>th</sup> March 2008

[1] A Notice of Set-down was filed for the 23 November 2007 where Applicant moved on a Notice a Motion for an order directing the Respondent to make payment to the Applicant in the amount of E4, 832-00 and costs to be awarded on the attorney and own client scale.

[2] The application required the Respondent if intending to oppose this application to file his Notice of intention to oppose on or before 1200hours on the 14<sup>th</sup> June 2007 and thereafter file his opposing affidavit, if any, on or before 27<sup>th</sup> June 2007. Further that if the Respondent fails to file his Notice of intention to oppose as aforesaid, or after having filed same, he fails to file opposing

affidavit as aforesaid, judgment shall be taken against them in terms of the orders prayed for herein above. On the facts these time frames were not observed by the Respondent such that when the matter appeared before court on 23<sup>rd</sup> November 2007, there was no appearance for the Respondent and the matter proceeded as an unopposed application.

[3] If, when a trial is called, the Plaintiff appears and the Defendant does not appear, the Plaintiff may prove his claim to the extent that the burden of proof lies upon him, and judgment must be given accordingly, in so far as he has discharged the burden (see *Herbstein et al (infra)*)

[4] In the circumstances the court proceeded to hear the case for the Applicant before court on the 23<sup>rd</sup> November 2007.

[5] When the application first came before court Annandale J ordered that the Applicant file Heads of Arguments to motivate why Applicant proceeded by way of motion rather than action. Plaintiff duly filed the Heads which were argued before me on the 23<sup>rd</sup> November 2007, where I reserved judgment.

[6] Counsel for the Applicant relied on the landmark judgment of *Room Hire Co. (Pty) Ltd vs Jeppe Street Mansions (Pty) Ltd 1949 (3) S.A. 1155 (T)* and that of *Frank vs Ohlsson's case Breweries (Ltd) 1924 A.D. 289 at 294* where the learned Chief Justice Innes pointed out that **"where the facts are really not in dispute, where the rights of the parties depend upon a question of law, there can be no objection, but on the contrary a manifest advantage in dealing with the matter by speedier and less expensive method of motion"**.

[7] The court was further directed to what was held in *Arnold vs Viljoen 1954 (3) S.A. 322* at 329 where it was stated that in appropriate circumstances it is both competent and desirable to adopt motion proceedings to enforce money claims other than unliquidated claims of damages. Whether the circumstances are appropriate for the decision of any money claim on motion depends upon the particular facts of the matter, but generally speaking where no real dispute of fact exist motion proceedings are permissible.

[8] It would appear to me on the facts of the present case as there is no opposition from the Respondent that the court is obliged to consider the version of the Applicant as stated in the Founding Affidavit as there is nothing to gainsay it.

[9] On the issue of costs after assessing all the arguments I have come to the considered view that costs be costs in the ordinary scale. I do not think the facts of the present case invite costs at the higher scale of attorney and client as suggested by Counsel for the Applicant. An award of attorney-and-client costs will not be granted lightly, as the court looks upon such orders with disfavour and is loath to penalize a person who has exercised his right to obtain a judicial decision on any complainant he may have (see *Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4<sup>th</sup> Edition* at page 707 and the cases cited thereat).

[10] In the result, for the afore-going reasons the application is granted in terms of prayers (a) and (b) of the Notice of Motion. That costs in prayer (b) be costs in the ordinary scale.

**S.B. MAPHALALA**

**JUDGE**