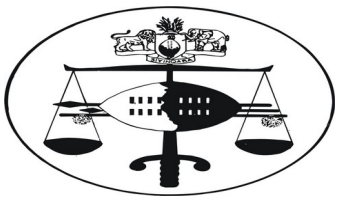

IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 2598/06

In the matter between:-

NDLELENI ABSALOM MASEKO **Plaintiff**

and

OPEN YOUR EYES (PTY) LTD **1st Defendant**
MICHAEL TSABEDZE **2nd Defendant**
AMOS TSABEDZE **3rd Defendant**

Neutral citation: *Ndleleni Absalom Maseko v Open Your Eyes (PTY) LTD & 2 others* (2598/06) [2012] SZHC195 (13th September 2012)

Coram: HLOPHE J

For the Plaintiff: Mr. N. Fakudze

For the Defendane: No appearance

Heard: 3rd July 2012

Delivered: 13th September 2012

JUDGMENT

[1] With the proceedings having reached the discovery stage, the Plaintiff called upon the first Defendant, who was by now the only Defendant in the proceedings following an amendment which excluded the 2nd and 3rd Defendants, to file its discovery in terms of the Rules.

[2] The first Defendant failed to do so, resulting in an order to compel discovery being sought and granted by this court. Notwithstanding the service of this order, the Defendant still failed to file the discovery required from it. This led to the Plaintiff approaching this court at the end of the period stipulated in the order compelling discovery for an order striking out the first Defendant's defence which was granted owing to its being unopposed. Notwithstanding this order having been served upon the Defendant's attorneys, no challenge to it was made to this court.

[3] The Plaintiff subsequently set the main matter down for hearing as undefended action proceedings in terms of which the Plaintiff was to lead its evidence in proof of its case. In short the matter had to proceed as an application for default Judgment.

[4] The legal position is settled that where a defendant's defence has been struck out following his failure to file a discovery after having been compelled to do so, the Plaintiff is then entitled to set the matter down for hearing as undefended action proceedings or to seek a default Judgment.

[5] The position was expressed in the following words in ***Herbstein and Van Winsen: The Civil Practice of Superior Court in South Africa, 4th Edition, Juta, at page 612***:-

> *"[T] he party desiring discovery or inspection may apply to a court, which may order compliance with the rule and, failing compliance, may dismiss the claim or strike out the defence of the party in default. If the defence is struck out, the defendant cannot appear at the trial and cross –examine the Plaintiff's witnesses".*

[6] The foregoing position is also supported by the following cases ***Legatt and Others v Forester 1925 WLD 36*** and ***Mostert v Pienaar 1930 WLD 151*** as well as ***Langley v Williams 1907 TH 197***. In the latter case it was stated that where a defence is struck out a defendant has no right to appear or cross –examine at the trial.

[7] With the foregoing depicting the effect of a defence that has been struck out; the Plaintiff was allowed to lead evidence in proof of its case or damages suffered.

[8] In his evidence, the Plaintiff informed the court that he was an uncle to the late Mavela Maseko who was his brother's son and had been brought up by him following the death of his own parents. Mavela Maseko had died on the 29th October 2003. He says that during his lifetime the said Mavela was for all intents and purposes, his own son who used to maintain him during his lifetime. At the time of his death the late Mavela Maseko was in the employ of the first Defendant. He died whilst actually performing his duties and in the course of employment, whilst working on an erect electrical pole, where he was electrocuted.

[9] The Plaintiff attributes the said Mavela's electrocution to the negligence of the employees or officers of the first Defendant who he says had switched on the electricity at the time they were not supposed to during the course and scope of their employment by first Defendant. This the Plaintiff says was admitted to him by the Defendant's Director, who came to report the death of Mavela to him as a parent to the late. This latter aspect in my view deals with the hearsay nature of the initial evidence.

[10] The Plaintiff went on to contend that during his lifetime, the late Mavela Maseko was responsible for his maintenance and support and used to pay or contribute towards same by paying him a monthly average sum of E 300.00. He alleged that the deceased had a duty to support him which stemmed from section 29 (5) of the Constitution of Swaziland which states the position as follows:-

> *"Children have the duty to respect their parents at all times and to maintain those parents in case of need."*

[11] It is not in dispute that the deceased was at all times and for all intents and purposes taken to be a son of the Plaintiff as he brought him up to the extent that even Mavela's death was reported to him to the extent he ended up being responsible for his burial. For this reason I have to accept that Mavela Maseko was a son to the Plaintiff and their relationship attracted the necessary father/son rights and duties As there was no opposition to the Plaintiff's case and in view of his having proved a case against the Defendant, I was convinced that the Plaintiff deserved to succeed subject to his proving the damages he suffered.

[12] It was not in dispute that the deceased used to pay him a sum of E300.00 per month on average towards his maintenance or support. The question can only be over the quantum of the damages the Plaintiff is entitled to.

[13] As I understood him, the Plaintiff's claim was for damages arising from his loss of support. Whilst I am very much alive to the fact that maintenance may not be claimed in areas in law unless already determined by the court or agreed specifically between the parties; as was stated in the following words in H.R. Halilo; ***The South African Law of Husband and Wife, 4th Edition, Juta & Company at page 115***:-

> *"In the absence of an agreement or order of court a wife cannot claim maintenance for the past, for in praeterium non –vivitur."*

The same principle was expressed in the following case; ***Obeholzer v Obeholzer 1947 (3) SA 294; Woodhead v Woodhead 1955 (3) SA 138*** and ***Young V Coleman 1956 (4) SA 213***.

[14] I have no hesitation that such a principle cannot be a bar to one's recovery of damages suffered by him as a result of loss of support which I understand is what Plaintiff's case is all about herein. Put differently the Plaintiff is claiming damages occasioned by the negligent killing of the person who supported him and not arrear maintenance.

[15] In his submission, and whilst reacting to the Plaintiff's testimony, Mr. Fakudze for the Plaintiff, stated that from the date of the deceased's death to the date of the hearing of his matter, the Plaintiff had been out of support for 108 months. It was submitted that the Plaintiff would be content with an amount covering the said period as damages together with costs irrespective of the E50 000.00 he had claimed in his papers. This means that the amount concerned would be a product of the multiplication of the number of months aforesaid by the average maintenance amount per month. This comes to the sum of E32 400.00. I note further that the Plaintiff had confined his claim to the damages already suffered and not on any future losses in his papers.

[16] Having considered the evidence and submissions made including having read all the papers filed of record, I have no hesitation that the Plaintiff's claim has to succeed to the extent proved and as amplified by the submissions made by counsel.

[17] Consequently I make the following order:-

1. The first Defendant be and is hereby ordered to pay Plaintiff :-

    1.1 The sum of E32 400.00 as damages

    1.2 Interest thereon at 9% per annum from date of judgment.

    1.3 Costs of suit.

Delivered in open Court on this the ……day of September 2012.

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N. J. HLOPHE

JUDGE