



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Civil Case No.3654/2009

In the matter between:

THOBILE DLAMINI-DZIMBA

Applicant

vs

PURELL (PTY) LTD

Respondent

Neutral citation: *Thobile Dlamini-Dzimba v Purell (Pty) Ltd (3654/2009*
[2014] SZHC 39(12th March 2014)

Coram: **MAPHALALA PJ**

Heard: 6th March 2014

Delivered: 12th March 2014

For Applicant: Mr. Z. Magagula

For Respondent: In absentia

- Summary:
- (i) *Before court is an Application where on the date of trial the Plaintiff was in attendance and the Defendant was in default;*
 - (ii) *The attorney for the Plaintiff then applied for default judgment as Defendant was duly served with the Notice of setdown for that day.*
 - (iii) *In the circumstances the court grants default judgment as sought by the Plaintiff with costs.*

Legal authorities referred to in the judgment:

Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4th Edition at page 661.

JUDGMENT

Introduction

[1] This civil matter was set for hearing before this court for 3 (three) days commencing from 6th March 2014 and Mr. Z. Magagula appeared for the Plaintiff and there was no appearance for the Defendant.

[2] The attorney for the Plaintiff in the circumstances then applied that a judgment be entered by default of the Defendant stating that the other side were served with the notice of trial. I ordered that the name of the Defendant be called 3 (three) times to confirm the presence of the Defendant. I was informed that there was no response. I then ordered

that the matter proceed on the basis that it is an Application for judgment by default.

The cause of action

[3] The Plaintiff filed a Combined summons before this court on the 9th October, 2009.

[4] It is averred in the Particulars of Claim at paragraph 4.1 thereof that on or about the 31st December 2008 the parties entered into a verbal agreement in terms of which the Defendant was to sink a borehole at Plaintiff's homestead situate at Ludzidzini area in Manzini.

[5] The material terms of the verbal agreement were *inter alia* that:

“5.1 Plaintiff would pay the sum of E15, 000.00 (fifteen thousand Emalangeni) for the works, to the Defendant.

5.2 Further, the Plaintiff was to pay the sum of E2, 000.00 (two thousand Emalangeni) to the Defendant as a survey fee.

5.3. The Defendant was to commence and complete the works within a reasonable period of time.”

- [6] The Plaintiff duly paid the said amounts to the Defendant on the 31st January, 2009 and the 4th April 2009 respectively.
- [7] In breach of the terms of the contract, the Defendant despite the lapse of a reasonable period of time and despite demand has failed and/or neglected to commence the works.
- [8] Plaintiff therefore contends that in the premise Defendant is liable to Plaintiff in respect of refund in the sum of E17, 000.00.
- [9] The Defendant had filed a Notice of Intention to Defend and later filed a Plea in accordance with the Rules of this Court. The essence of the Defendant's defence is found in paragraph 5 of the Plea to the following effect:

“5.1 The contents herein are denied and the Plaintiff is put to strict proof thereof.

5.2 The Defendant avers that Plaintiff was advised that the drilling would commence once a rig was available. The Plaintiff was advised that the Defendant did not own a rig but leased same from the Swaziland Government.

5.3 *The Plaintiff was further advised that commencement of the drilling work could take anything up to a period of up to twenty four months.”*

The court’s analysis and conclusions thereon

[10] In the circumstances in my assessment of the pleadings filed for and against the Application for default judgment that I am duty bound to grant the Application. It would appear to me that the averments in the Plea reproduced above in paragraph [9] of this judgment do not answer to the Plaintiff’s cause of action. The reason being that the Defendant in the said averment only state that it will take time to commence the drilling work. Nothing is said concerning liability under the verbal contract.

[11] It is trite law as stated by the learned authors *Herbstein et al, The Civil Practice of the Supreme Court of South Africa, 4th Edition* at page 661 that if 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 that burden.

[12] Further on, the learned authors state in the same legal text that where, however, the claim is for a debt or liquidated demand, no evidence is necessary unless the court otherwise orders.

[13] In the result, for the foregoing reasons the Application for default judgment is accordingly granted in terms of pages (a), (b), (c) and (d) of the Particulars of Claim.

STANLEY B. MAPHALALA
PRINCIPAL JUDGE