IN THE HIGH COURT OF SWAZILAND

CIV. CASE NO. 116/99

In the matter between

SWAZILAND NATIONAL HOUSING BOARD	APPLICANT
And	
PHANGISILE DHLAMINI	1st RESPONDENT
THE TAXING MASTER	2nd RESPONDENT
Coram	S.B. MAPHALALA – J
For Applicant	MISS P. P. DLAMINI
For 1st Respondent	MR L. MAMBA
For 2nd Respondent	IN ABSENTIA

JUDGEMENT

(19/02/99)

Maphalala J:

The matter came with a certificate of urgency for an interim order inter alia that a rule nisi do hereby issue calling upon the respondent to show cause on the 12th February 1999, why they should not be interdicted and restrained from executing a writ of the judgement obtained in the main action on the 21st January 1999, pending the determination of this application. That the taxation of the first respondent's bill of costs dated 29' January 1999, be rendered invalid and set aside, etc. Mr. Mamba opposed the application when it appeared before me in the uncontested roll of the 5th February 1999, and filed two points of law. Miss Dlamini indicated that she was not ready to argue the points of law raised by the first respondent, but insisted that the interim order be granted. The court declined this application for the simple reason that the grant of the very interim order was being challenged by the points of law raised. The court directed counsel for the applicant to go and prepare to argue the points of law. The matter was stood down until 3.30pm for that purpose.

When the matter was called at 3.30pm Miss Dlamini made an application to amend applicant's notice of motion. She submitted that she was withdrawing the allegation which is the subject matter of the first points of law that they should have gone by way of review in terms of Rule 53 which governs reviews before this court. The notice of motion was substantially amended, if I may say so. Miss Dlamini submitted that the amendment is sought in order to curtail the proceedings and save the court's time. The court heard submissions for and against the application for amendment and reserved judgement to the 12th February 1999. On the 12th February 1999, the court dismissed with costs applicant's application for amendment and the court's reasons

are clear in its judgement delivered in open court on the 12th February 1999. The effect of the court order was that applicant was to argue the two points of law raised by the first respondent.

Before proceeding to outline the submissions made by counsel at this stage I think it important to mention the points raised by the first respondent. The points of law are as follows:

a) The applicant's application is irregular in that, it be set aside the decision of the second respondent, should have been brought in terms of Rule 53, by way of review;
b) The applicant's application is misconceived and should have joined the Sheriff or Deputy

Sheriff, being the persons charged with the execution of the writ".

Mr. Mamba to support the points of law raised by his client submitted that he still stands to the submissions he made on the 5th February 1999, Mr. Mamba contends that the only way of setting aside a decision of a taxingmaster is by way of review not by application. On the second point of law Mr. Mamba contends that the Sheriff or Deputy Sheriff who is charged with the execution of writs should have been joined in these proceedings, as the applicant cannot execute a writ.

On the other hand Miss Dlamini submitted that this application was brought on an urgent basis and thus applicant in prayer 1 specifically applied that the rales of procedure be waived thus:

"1. Waiving the rules of the above honourable court relating to service, forms, and time limits (my emphasis) and treating this matter as one of urgency".

She argued that the procedure used in terms of Rule 53 is applied in application. The court has a wide discretion to make a proper order. The whole issue here in this matter is that this application was brought under a certificate of urgency. She referred the court to Herbstein & Van Winsen on the Civil Practice of the Supreme Court of South Africa (4th ED) page 743 where the learned writers states that it has also been held that the court's discretion is not limited to the ordinary review stricto sensu and that the court can interfer when in its view the taxingmaster has been clearly wrong in regard to some item (see Century Trading Co. (Pty) Ltd vs The Taxing Master & Another 1958 (1) S.A. 78 at page 84 c - f; Legal & General Assurance Society Ltd vs Lieberum No. and another 1968 (1) S. A. 473; Agency & Property Holdings (Pty) Ltd vs Bankovs Ltd 1952 (3) S.A. 297. The court in the present case has a wide discretion. Further on prayer 2 the court had a discretion to stay execution. The court has to look at the interest of the parties and also the interest of justice, (see Herbstein & Van Winsen at page 808). The test is who will suffer greater prejudice.

On the question of non-joiner of the deputy Sheriff there will be no need for this exercise, as he has no interest in this matter.

These are the issues for determination. I am inclined to grant the applicant the relief she seeks on the original papers. It appears to me that Miss Dlamini has satisfied the court that this is a matter of urgency and the rules of the court as to service, forms and time limits are not to apply as per prayer 1 seeks a waiver. In a case like this I agree with the authorities cited in Herbstein and Van Winsen (supra) at page 743 that the court's discretion is not limited to the ordinary review stricto sensu and the court can interfer when in its view the taxingmaster has been clearly wrong in regard to some item. I have read the authorities cited in Herbstein & Van Winsen and my view is that it would not seem unto wards for the court to intervene in the interest of justice. There is authority that a court has a judicial discretion to order that a review of taxation be proceeded with where justice requires (see Bestbier vs Jackson & another 1986 (3) S.A. 484 h - 455b). It appears to me that prima facie there is something wrong with the taxation by the taxingmaster which call for a full enquiry in the form of a full blown application to determine this state of affairs. I do not think the respondents would be prejudiced by this enquiry. Further, it is trite law that the procedure prescribed by Rule 53 is prima facie mandatory, that an applicant should normally adhere to the procedure prescribed by Rule 53, except in urgent cases and instances in which interim relief is necessary (see SAFCO Forwarding (Johannesburg) (Pty) Ltd vs National Transport Commission 1982 (3) S.A. 654 (A)). It is my respectful view that this seem to be the case in casu.

On the second leg of the point of law in paragraph 7, Isaacs Beck's Theory and Principle of Pleadings in Civil Action 5th ED, paragraph 6 and 7 states clearly the general rule on when it is essential to join parties thus:

"Where two or more persons are jointly and indivisibly interested in a contract it is essential that all join as plaintiff in enforcing such contract. If, however, one of them refuses to join in the action he may be joined as co-defendant although, in such a case, it is necessary to allege why he is so joined, and it is necessary to allege why he is so joined, and it is usual to allege also no relief is sought against him unless he opposes plaintiff's claim.

The general rule may be stated that when a person has an interest of such a nature that he is likely to be prejudicially affected by any judgment given in the action, such person must be joined either as a plaintiff or defendant. Whether or not a judgement would be res judicata as against a person is not a conclusive test and substantial interest in the proceedings. A person should also be joined if it would be convenient in the administration of justice to so join him".
It appears to me that the Deputy Sheriff should be joined, as it would be convenient in the administration of justice to so join him. However, my respectful view is that his exclusion in these papers does not render applicant's papers fatally defective as to entitle the court to throw them out. My view of the matter is that a proper order in that regard is within the court's powers to make and in the interest of justice.

In the result I rule as follows:

1. A rule nisi do hereby issue calling upon the respondents to show cause on the 5th March 1999 why they should not be interdicted and restrained from executing a writ in terms of the judgement obtained in the main action of the 21st January 1999, and that pending the determination of this application the Sheriff or his Deputy in not to execute the writ.
2. That the taxation of the first respondent's bill of costs dated 29th January 1999 be set aside.
3. That the rule operates as a temporary interdict and staying order preventing the first respondent from executing a writ in terms of the judgment obtained in the main action pending the determination of this application.
4. That the first respondent's attorney be ordered to pay costs de bonis propris alternatively,
5. That the respondent's pay the costs of this application jointly and severally, the one paying the other to be absolved.

The respondents to file opposing papers by the close of business on the 2nd March 1999, and the applicant if necessary to file a reply by noon of the 3rd March 1999, and the matter placed on the return date the 5th March 1999 in the contested roll for arguments.

S. B. MAPHALALA

JUDGE