1286

# IN THE HIGH COURT OF SWAZILAND

**HELD AT MBABANE** **CIVIL CASE NO. 2919/2000**

In the matter between:

**TOTAL SWAZILAND (PTY) LIMITED** **PLAINTIFF**

**And**

**GORDON WILFRED ANGUS** **1ST DEFENDANT**
**ANTHONY G. ANGUS** **2ND DEFENDANT**

**CORAM** **ANNANDALE, J**

**FOR PLAINTIFF** **ADVOCATE P. FLYNN, INSTRUCTED BY ROBINSON BERTRAM**

**FOR DEFENDANTS** **MR. GWEBU**

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**ORDER ON AN APPLICATION UNDER RULE 30:**

**16TH MAY 2003**

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During the course of already over-protracted litigation, this matter, which was being dealt with by the learned former Chief Justice, was

brought before me for hearing of argument. I reluctantly heard the matter as the papers appeared to be not quite in order, with a duplicate file being opened for the interlocutory application and with no book of pleadings being available. On an initial hearing of counsel, it was agreed to entertain argument on the premise that all defects and shortcomings in the papers would be sorted out by the end of the day. This was not done and over the past few weeks it was with difficulty managed to at least get some of the necessary papers together. This sorry state of affairs leaves the court in an unenviable position - to write a judgment without the proper court file, a book of pleadings or most importantly, until belatedly found, the order of the learned Chief Justice, apparently dated the 26th November 2002, which forms the core of this matter.

A further search by the court interpreter eventually unearthed a copy of the Court Order of the 26th November 2002. It reads:-

*"By agreement between the parties, the following order is made:*

1) *That the matter be postponed to 24 March 2003 for trial for one week.*

2) *That the defendants be ordered, jointly and severally, to pay the Plaintiff's wasted costs occasioned by the postponement, and the plaintiff's costs of the application for the postponement, on the Attorney and client scale. That the Plaintiff's costs above to include the costs of Counsel which are certified in terms of Rule 68 of the rules of this Court.*

3) *That the Defendants be ordered:-*

*(i) To comply with the order granted in favour of the Plaintiff compelling further and better particulars by 13 December 2002; and*

*(ii) To reply to the Plaintiff's Notice in terms of Rule 35(4) by 13 December 2002.*

*4) That the Defendants deliver to the Plaintiff a bundle of all documents which the Defendants intend to use at the trial by 31 January 2002."*

Thus the Appellants/Respondents were visited with an adverse costs order on the attorney and client scale, following a trial date on which the matter was not proceeded with. From neither the Notice of Appeal or the above order, or anywhere else in the available papers, is there any indication that the costs order was endorsed to the extent that costs had to be taxed and paid forthwith.

Certainly and most importantly, it is not contained in the Order that gave rise to this application, which was reached by agreement between the parties. One can expect that if it was also the intention of the litigants to first have the costs taxed and paid instead of waiting until the finalisation of the action, it would have formed a very prominent part of the order.

In the ordinary course of events interlocutory orders that are given during the course of litigation do not also allow the successful party to present a Bill of Costs for taxation and thereafter demand payment. The

usual practice is that costs are taxed once only, at the conclusion of a trial. A piecemeal approach is out of the ordinary and is usually ordered by Court when special circumstances require it to be done.

Although more relevant to procedure in South African lower courts, ***Eckard's Principles of Civil Procedure in the Magistrate's Courts*** *(4th edition by Paterson, Juta 2001 at pages 235)* provides healthy guidance on the question of costs in interlocutory orders.

> "Unless the court for good cause orders otherwise, costs of interim orders are not taxed until the conclusion of the action and a party may present only one bill for taxation up to and including the judgment or other conclusion of the action."

> "Although normally only one bill may be presented for taxation, the court may for good cause direct that a separate bill be presented for taxation. It is submitted that a good reason for granting such order would be, for example, that the matter is lengthy and complicated, so that It would be reasonable towards the attorney in question to allow his bill of costs to be taxed at some time during an interval in the proceedings."

> Footnote 12 (page 235) reads:

> "Although the court usually orders the costs of interlocutory proceedings to be costs in the cause, a court ought nevertheless to order, if it is clear that one of the parties is entitled to succeed at the interlocutory application stage, that that party is entitled to his costs in respect of the interlocutory application. The costs will

then only become payable, however, only after taxation, at the conclusion of the case: *Gering v Gering & Another, 1974(3) SA 358(W) at 363H – 364A; Cape Underwear Manufacturers (Pty) Ltd v Consolidated Fashion Industries Ltd 1948(1) SA 175(C )".*

As said above, there is no endorsement that I am aware of whereby the learned Chief Justice ordered that the interlocutory costs order, adverse to the two defendants, is to be taxed and paid forthwith, or before the matter continues. Although it is risky to rely on further pleadings to reconstruct an order of court, the defendants' attorneys state in paragraph 1.1 of their Notice of Application in terms of Rule 30, dated the 21st February 2003, that:

*"There is no order directing that the cost (sic) be taxed immediately and/or forthwith."*

When one has regard to the contents of appellants (defendants) Notice of Appeal, it appears according to them that the court was not impressed with the manner in which the defendants conducted their case, at all. Apart from the adverse punitive costs order, it is said that the court found them (defendants) to be responsible for a second postponement of the trial, that their papers were not ready, and that they were generally at fault. This order was however made by agreement between the parties. Even so, it is not a foregone conclusion that the court had to exercise its discretion in such a manner, to further emphasise its alleged dissatisfaction, that it needed to order them to pay taxed costs forthwith, or even that a Bill of Costs had to be prepared for taxation right after the postponement.

Yes, they were ordered to pay costs of the postponement, on a punitive scale. No, they were not also ordered to pay it there and then, before the trial has been brought to finality, with an eventual costs order.

This is what the defendants argue. This is what they seek to be ordered in this present application, which is that the intended taxation must be set aside as an irregular step.

My view that it is improper and undesirable to tax and pay costs in a piecemeal fashion is not only founded on the statutory position of the South African Magistrate Courts (Rule 49(3)) which reads:-

> *"Unless the court shall for good cause otherwise order, costs of interim orders shall not be taxed until the conclusion of the action, and a party shall present only one bill (my emphasis) for taxation up to and including the judgment or other conclusion of the action."*

A further consideration is that when eventually costs are taxed *uno contextu* after finalisation, it will become potentially impossible for one party to have costs offset against the other if the other already had a substantial costs order paid in the interim. The bill sought to be taxed at present certainly falls into the category of "substantial costs."

Further support for my view is found in *Scott v Nel N.O. and Another, 1963(2) SA ELD 384 at 387 A – B:-*

*"There is, however, a salutary practice that save in exceptional cases the costs of a law suit are taxed at one and the same time in one bill of costs."*

Also at 387 – H:

*"In any event it is an undesirable duplication of proceedings with a probable addition to the costs of the action"*

In my research I managed to find only one authority that suggests otherwise as the view I hold. That judgment is however rather dated and the relevant portion was said *obiter.* It did not form part of the *ratio decidendi* of Blackwell J in *Balomenos v Fanels (Pty) Ltd and another, 1954(3) SA 481 (W.L.D) at 483 C – D.* Therein, the learned Judge mentioned what his own personal knowledge of taxation practise is and postulated as to what the party may have been able to do if it so chose. In any event, that judgment is not binding on this court.

In their Notice under Rule 30 dated the 21st February 2003, defendants ask for the setting aside as irregular step not only the taxation (and payment of taxed costs before the matter is eventually finalised) on the abovestated ground but also due to an appeal since filed and a further technical complaint under Rule 68.

The last ground reads:-

*"3. The Plaintiff's Notice of Taxation is not in compliance with Rule 68 of the rules of Court."*

Mr. Flynn quite correctly argued that particulars of the alleged irregularity are conspicuous in their absence, which causes this complained of aspect to fall foul of Rule 30(2), which requires that "application ... shall be on notice to all parties specifying particulars of the irregularity alleged."

Incidentally, the advanced ground by defendants attorneys is as flimsy as a technicality could ever be. In argument, it was said that the complaint centred around the absence of a further document which was expected to have been served together with the Notice of Taxation. That document was one on which consent to taxation in the absence of a party could be endorsed on, a certificate under Rule 68(5)(a)(ii). This requirement, that a draft certificate must accompany the Notice of Taxation, is contained in a Taxing Master's Directive, No. 1 of 1998 dated the 16th September 1998.

That compliance with the directive may be a salutary practise and that it can expedite taxations, is beyond argument. Different though is the consequence of a failure to enclose such a *pro forma* certificate. The omission complained of at present is of no consequence. It was never to affect or influence or prejudice the defendants. They had not the slightest intent at all to accede to a taxation in their absence. From the lengthy list of items for taxation, barely a single handful are not marked to be contested items. The Bill is not of insignificance either – the untaxed claimed amount approaches E120 000, to which is still to be added near enough some seventy percent. Even if still untaxed and it being a very rough estimation, such amounts of costs, long before finality of the claim has been reached, is a lot of money.

Certainly, in my view, this ground, the absence of a document on which to agree to leave the taxation in the hands of the taxing master, must fail in so far as it was relied upon to have the intended taxation set aside as irregular step.

Incidentally, it is noted that costs were ordered on the attorney and client scale whereas the Bill of Costs for taxation clearly states it to be on a party and party scale.

The further ground relied on for setting aside the taxation is the fact that an appeal has been noted by the defendants against the order requiring them to pay costs of the postponement of trial.

In the chronological sequence of events, Notice of Taxation was served on the 14th February 2003, with Notice of Intention to oppose it being served on the 20th February, the date of the notice itself being two days earlier.

*Ex facie* the Notice itself, the order complained of was given as far back as the 26th November 2003, being an order for costs.

Counsel for plaintiff argued that there are sufficient defects in the appeal that it will be disposed of on points *in limine* only, without even entering the merits. The defects are said to be that as the appeal is one against an order as to costs only, Section 14(1)(b) of the Court of appeal Act of 1954 mandates leave of the court *a quo* to appeal. No proof of such leave being sought or granted was brought to the fore.

Further argument has it that in any event, Rule 9 of the Court of Appeal Rules required the appeal to have been filed within six weeks of the date of judgment. Thus, it should have been done by the seventh January 2003, which defect has not been sought to be cleared or condoned.

Mr. Flynn thus contends the appeal to be deemed as abandoned in terms of Rule 30(4) of the Court of Appeal Rules.

If for no other purpose than to show that one must be careful with what is argued and what one reads, I briefly refer to the written plaintiff's Heads of Argument. It is signed at the end by its advocate, with the clear endorsement of "Defendants' Counsel"(*sic*). Also, in the final paragraph, it is stated that the defendants (*sic*) have obtained the costs order, that the defendants (*sic*) are to have it taxed and that it is the defendants (*sic*) who are not required to await the finalisation of the case. Such obvious and glaring mistakes can and do happen and the court is perhaps enjoined to read it as it was meant to be and not as it is printed on paper.

At least it is correctly stated that having obtained a costs order, a party is entitled to have it taxed. It is however not also the case that it is to be taxed forthwith and then payable on demand, unless either the order was made at the time of finalisation of the matter or if it was accompanied by a further order that it be so taxed and paid at the interim stage, during the lull in the proceedings.

Whatever the merits of this line of argument might be and what effect it may have on the Court of Appeal remains to be determined. It is not proper for this court to pronounce on it, not even purporting to do so.

No opinion is thus ventured on the prospects of an appeal either being successful or nipped in the bud. Of more importance is whether the noting of an appeal is to suspend the intended taxation, more correctly, whether it forms a ground to have the taxation set aside.

The Notice to set it aside partly reads that:-

*"1.1 Whilst the matter is pending before court the plaintiff has prepared a Bill of Costs and set it down for taxation; and*

*2. Defendants have file (sic) a Notice of Appeal against the Order of Court."*

The defendants contend that due to the above, the Notice of Taxation is to be set aside as an irregular step. The notice does not state that the noting of an appeal has as result that it suspends payment, in obedience to the order.

Whichever way it is viewed and whatever the merits and demerits of an appeal may be, it is the requirement to pay costs of a postponement of the trial that is the subject of the appeal. The appeal has not yet been and could not yet have been prosecuted. To complicate the issue, there is no court of appeal in Swaziland, following the resignation of the Appeals Bench.

As said, the normal consequence of an appeal being noted is that it puts the subject matter of the appeal on hold, it being non executable unless otherwise ordered. No such order is either sought or made.

Accordingly, the application stands to succeed on two grounds, the appeal issue set out immediately above and also the absence of an order to forthwith tax and pay the costs, long before the action is finalised. At present, the plaintiff has in hand an order of the 26th November 2002 that the two defendants must pay the costs of the postponement of the trial on an attorney and client scale. If the noted appeal is prosecuted, it will either confirm or alter the order. Trial in the action has not yet been concluded and the final result, with an accompanying costs order at the end, is still to be made on some date in the future. Meanwhile, the plaintiff will have to await finalisation before it can insist on taxation and payment of the costs as ordered in November 2002.

This in turn causes the application under Rule 30, dated the 21st February 2003, to be successful. As prayed therein, the Notice of Taxation is ordered to be set aside.

Defendants attorneys did not pray for an costs order in this particular interlocutory proceeding and none is made, with the consequence that costs hereof be costs in the cause.

JACOBUS P. ANNANDALE
ACTING CHIEF JUSTICE