IN THE HIGH COURT OF SWAZILAND

HELD AT MBABANE **CIVi APPL. NO 391/09**

In the matter between:

NTULINI INVESTMENTS (PTY) LTD **Applicant**

And

P.K. MSIBI AND ASSOCIATES **1st Respondent**

THE REGISTRAR OF THE HIGH COURT **2nd Respondent**

THE ATTORNEY-GENERAL **3rd Respondent**

In re:

P.K. MSIBI AND ASSOCIATES **Applicant**

And

NTULINI INVESTMENTS (PTY) LIMITED **Respondent**

Date of hearing: 17 June, 2009.

Date judgment: 23 June, 2009.

Mr. Attorney B.J. Simelane for the Applicant

Mr. Attorney P.K. Msibi for the 1st Respondent

No appearance for the 2nd and 3rd Respondents

J U D G M E N T

MASUKU J.

[1] The main issue awaiting this Court's determination centres around the validity of a bill of costs which was allegedly taxed by the 2nd Respondent, in favour of the 1st Respondent but in the absence of the Applicant. The Applicant, as a result, seeks an order from this Court setting aside the said bill of costs and awarding it costs of the present application. The balance of the relief initially sought by the Applicant has been overtaken by events and need not be adverted to or considered at this stage.

[2] The setting in which the present application arose can conveniently be summarised as follows: The 1st Respondent, a firm of attorneys, approached this Court on an urgent basis seeking a spoliation order following a decision by the Applicant, a company duly incorporated in accordance with

the company laws of this Kingdom, to lock out the 1st Respondent from its premises for outstanding rental. It is important to state that the Applicant had let and the 1st Respondent had hired certain premises in Manzini described as office No. S6, 2nd Floor, Hatzin's Centre and in respect of which the latter had fallen into arrears.

[3] On 4 February, 2009, the spoliation application, which was,as stated above brought under a certificate of urgency, served before me and after hearing Mr. Msibi for the 1st Respondent, I granted an order directing the Applicant to restore *ante omnia* possession of the premises in question to the 1st Respondent. I also mulcted the Applicant with a punitive order as to costs. The Applicant, notwithstanding service of the spoliation application, did not appear in Court nor did they file any papers indicating their opposition to the Order sought by the time the application was heard and the order issued.

[4] Armed with the favourable judgment, particularly in regard to costs, the 1st Respondent proceeded to prepare a bill of costs for taxation by the Taxing Master, presumably in accordance with the provisions of Rule 68 of this Court's Rules. It is the pith of the Applicant's case that it was not served with any notice regarding the time and place for the taxation in question and contends therefore that the provisions of Rule 68 (6), in particular, which appear central to the determination of the matter and to which I shall advert in due course, had been flouted by the Taxing Master,

thus necessitating that the taxed bill be set aside as having been irregularly taxed.

[5] For its part, the 1st Respondent contends that it had no obligation to inform the Applicant of the date of taxation for the reason that the latter had not been present during the hearing of the spoliation proceedings. It further contends that the Applicant did not upon service upon it of the bill of costs, indicate its intention to oppose the same and that as such, it was entitled to proceed with the taxation of the bill of costs on the basis that the same was not opposed. In its answering affidavit, at paragraph 8, the 1st Respondent further contended that its Mr. Msibi saw the Applicant's present attorney of record and told him that the bill was due for taxation on that day but the latter simply walked out from the office of the Deputy Registrar without further ceremony. The bill of costs was later to be taxed by a Mr. Zulu, and according to the 1st Respondent, in its absence.

[6] The relevant provision of Rule 68 (6) reads as follows:

> "(a) The taxing master shall not proceed to the taxation of any bill of costs unless he is satisfied that the party liable to pay the same has received due notice as to the time and place of such taxation and notice that he is entitled to be present thereat, but such notice shall not be necessary -

(i) if the party against whom costs have been awarded has not appeared at the hearing either in person or by his counsel;

(ii) if the person liable to pay costs has consented in writing to taxation in his absence; and

(iii) for the taxation of writ and postwrit bills.

(b) In all cases where a notice of taxation is necessary, such notice shall be delivered, together with a copy of the bill of costs to be taxed, not less than four clear days before the date of taxation." (Emphasis added).

[7] I am of the considered opinion, regard had to the nomenclature employed by the lawgiver, that due to the financial consequences attendant upon the taxation of a bill of costs, it is vitally important and imperative that the party liable to pay the costs shall be afforded due notice of the date, time and place of the intended taxation. Furthermore, that party must, in the notice, be advised of its right to attend the taxation, whether in person or by Counsel. If any one of the two imperatives above have not been met, it is then clear that the taxing master may not proceed to tax that bill and if he does proceed, then the bill of costs so taxed is liable, on application, to be set aside for offending the aforesaid provisions.

[8] The notice required of the taxing master to observe, it would appear to me, is an adjunct of the *audi alteram partem* rule, which states that a person against whom an adverse order or decision is likely to be made, must be granted an opportunity to be present

thereat and to make appropriate representations to the body tasked with making the said order or decision as the case may be, before such order or decision is made. If the decision or order is made and affects that party's rights without it being so afforded an opportunity to make representations, it would then be an appropriate case for the Court, in exercise of its review jurisdiction, to set aside that decision or order for failure to afford the said party a hearing. See *Swaziland Federation Trade Unions v The President of the Industrial Court* Civ. App. 11 /97, per Browde J.A.

[9] The importance of the imperatives mentioned in paragraph [7], above were underscored by Lesetedi J. in the Botswana case of *Permanent Secretary, Ministry of Health v Acquah-Dzadzie and Another* [2003] 1 B.L.R. 270 (H.C.), where the learned Judge dealt with the provisions of Order 74 Rule 4, which are couched in similar terms as the sub-Rule quoted above. At page 281, paragraph D-E, the learned Judge said:

> "That means that before such taxation can proceed, the taxing master must satisfy himself of two things; firstly, that the party liable to pay costs has received due notice as to the time and place of such taxation. Secondly, that the said party has been notified that he is entitled to be present thereat. The two requirements are put in peremptory terms and they cannot be ignored by the taxing master to the detriment of a party to *{sic)* whom they were to benefit."

[10] I am in total agreement with the reasoning and conclusions of the learned Judge above. I hold that the said provisions are peremptory as

he held and that the reasoning he applied therein is fully applicable to our Rules of Court, particularly considering that the language of the same is actually in *pari materia.* Mr. Msibi cited two cases of the then Court of Appeal, which he contended state unequivocally that Rules of Court cannot in any case be regarded as peremptory. The cases he referred to are *Andile Nkosi and Another v The Attorney-General* Appeal Case No. 51/99 and *The Government of the Kingdom of Swaziland v Martin Samson Banda* Appeal Case No. 4/01.

[11] My reading of both cases does not bear out the interpretation that Mr. Msibi accords to them. In the *Andile Nkosi* case, the Court dealt with the function of rules of procedure, including Rules of this Court. At page 7, van den Heever J.A. (as she then was) said:

> "Rules governing procedure, such as rules of court, are not made to enable the lawyers representing the parties to a dispute to score points off one another, without advancing the resolution of that dispute in any way. They are guidelines aimed at obliging the litigants to define the issues to be determined, within a reasonable time, and enabling the courts, as a consequence, to organize their administration as quickly, effectively and as fairly as possible."

In the *Banda* case, on the other hand, the Court, per J.H. Steyn J.A. held as follows at page 6 said:

> "It is of great importance for a fair and efficient process of justice that the rules of procedure should be observed. This Court has on several

> occasions been critical of the callous disregard evidenced by the conduct of some practitioners. It will continue to encourage the Courts in this jurisdiction to insist on the maintenance of standards of excellence in the administration of legal proceedings."

[12] None of the above cases suggest, even remotely, as Mr. Msibi contended, that none of the provisions of the Rules of Court are in effect peremptory and/or that they need to be approached generally from that perspective. Indeed, in the latter case, the Court's voice resonated quite formidably the need to maintain standards of excellence, which can certainly not be achieved if no regard to the provisions of the Rules, particularly to those couched in peremptory terms, is had. To the contrary, there are cases which stipulate, and correctly so, that some of the provisions of the Rules are peremptory e.g. the provisions of Rule 6 (25) (a) and (b) of the Rules of this Court. See in this regard *Humphrey H. Henwood v Maloma Colliery and Another* 1987-95 (4) S.L.R. 48, per Dunn J.

[13] It needs to be pointed out in any event that the provisions of the said sub-Rule are not only to be found in the Rules of Court. They find pertinent mention in the primary legislation, *to wit,* the provisions of section 9 (3) of the High Court Act, 20 of 1954, (herein after referred to as "the Act"), which read as follows:

> "A person seeking to have a bill of costs taxed shall request the person against whom it is drawn, or his lawful representative, in writing, to be present at the taxation, with mention of place and time of taxation".

It will then be clear that the provisions in the Act, as much as they convey the same requirements as the sub-Rule in question, are also couched in peremptory terms, hence the use of the word "shall". I do not, in the circumstances, believe that Mr. Msibi can, in all honesty, persist in his argument that the provisions of the Act, peremptory as they are, should or could, in the premises, be construed and applied otherwise, particularly considering the injustice that visits a person in respect of whom the notice required above has not been given.

[14] The peremptory manner in which the provisions are couched in both the primary and secondary legislation has a laudable purpose. This was designed, in my view, to ensure that a person who stands to have a bill of costs taxed against him, thereby affecting his financial interests, is made aware and in good time of the said taxation and to be present thereat if he so wishes, so that he or his representative could make appropriate representations during the process of taxation in order to minimize as much as possible the financial damage to him, her or it, but within the confines of the applicable tariffs.

[15] I now turn to consider the exceptions admitted to the notice required to the party liable to pay the costs by the sub-Rule in

question, particularly (i) to (iii) thereof. Mr. Msibi contended that the exception contained in (i) of the sub-Rule applies in cases where the party liable to pay costs was in default during the hearing of the case in which he, she or it would have been unsuccessful and was therefor mulcted with an order for costs. He contended in essence that the word 'hearing', employed therein conveys that sense.

[16] I do agree. There is, however, a major problem with the exception in question and it is this: whereas in terms of the sub-Rule in question, notice of the taxation need not be given where the party did not appear for the hearing, section 9 (3) of the Act *[op tit),* does not admit of a similar exception. The latter, on a proper construction, requires the party against whom the bill of costs is to be taxed, whether he was present or not at the hearing, it would appear, to be notified in writing of the time and place of taxation and that he, she or it, is entitled to be personally present or be represented.

[17] It is clear in the premises therefor that there is a conflict between the two provisions. I say so for the reason that whereas the sub-Rule dispenses with the notice if the parry did not attend the hearing, the Act does not. The question then becomes: how must the Court interpret provisions of subordinate legislation where they are in conflict with provisions of primary legislation? The answer is plain: the Court must give effect to the primary legislation and hold that to the extent

of the inconsistency, the provisions of the primary legislation are *ultra vires.*

[18] The learned author E.A. Kellaway, Interpretation of Statutes. Contract and Wills, Butterworths, 1995, at page 382 - 383, states the following:-

> "*...prima facie* subordinate legislation which purports, without express power to alter or to modify existing statutory rights is *ultra vires.* Courts should lean heavily against implying that parliament has conferred power on a subordinate body to alter or repeal an Act of parliament."

Earlier at page 375, the learned author states that:-

> "A provision of statute must be interpreted before the regulation is considered and if the regulation purports to vary a provision so interpreted it is *ultra vires* and void. Also the regulation can not be used to cut down or enlarge the meaning of a statutory provision... Any provisions in subordinate legislation...must be *intra vires* its enabling legislation."

[19] It is apparent from the foregoing that Rule 68 (6) (a) (i) purports to take away rights accorded by section 9 (3) of the Act to a party against whom a bill of costs is to be taxed. To that extent, it is clear that the provisions of the Rule in question are *ultra vires* the enabling Act and therefore void. It also follows that in purporting to act in terms of

section 10 (1) of the Act, the learned Chief Justice acted *ultra vires* the Act in promulgating Rule 68 (6) (a) (i).

[20] In my view, the sub-Rule negates in a major way, the right of a person against whom a bill is to be taxed to be heard and this is a serious violation. I say so for the reason that a party may not oppose or defend a suit for the reason that it does not want to unnecessarily run up costs when the case it faces is totally indefensible. It is something else though to say that because that person did not appear at the hearing, he must for that reason alone be debarred from contesting the bill of costs by being adjudged not entitled to notice of the taxation.

[21] I am of the considered opinion that the hearing before Court and the taxation are two different processes of one matter and which are handled by two different Court officials at different stages. For that reason, it is my considered view that the absence of the party liable to pay costs at the hearing should not *per se* or at all render the said party ineligible to be given notice of the taxation for that party as indicated, may wish at the taxation stage, to attend in person or by Counsel and do whatever damage limitation it can at that juncture, regarding the amount of costs to be ultimately awarded against it.

[22] If it were otherwise, it would mean that the successful party would literally have a field day and present submissions and proof to the taxing master in circumstances where the opposite party is barred by

the Rules of Court from so attending even if it had wished to. This can hardly be said to be in consonance with the interests of justice and the provisions of section 23 (1) of the Constitution of Swaziland, Act 1 of 2005, in particular regarding a fair hearing. Such a practice would be opprobrious and would certainly serve to only bring the administration of justice into serious disrepute, an eventuality we can ill-afford.

[23] It would appear to me, in view of the foregoing, that the proper manner in which to interpret the said sub-Rule is to hold that to the extent that no notice is required in respect of a person who does not attend a hearing, the sub-Rule is *ultra vires* the Act and is hereby declared void. The provisions of section 9 (3) of the High Court Act should in that event take precedence and the person must, notwithstanding previous nonappearance, be notified of the place, time and date of the taxation and that he or it may attend in person or by Counsel for the taxation of the bill of costs.

[24] As indicated, this position is in full consonance with the hallowed principle of *audi alteram partem,* which has been enshrined in our Constitution as aforesaid. It must be mentioned in this regard that according to section 38 of the Constitution, the right to a fair hearing is non derogable. Accordingly, if the person, who previously was in default at the hearing notwithstanding notice of the taxation does not attend, he will have no one else to blame once the bill is taxed in his absence.

[25] In the circumstances, I am of the considered opinion that the reliance placed on the provisions of the above sub-Rule by the 1st Respondent for not serving the Applicant with the bill of costs is clearly wrong. Even if the Applicant may not have filed a notice to oppose the bill of costs, which I am advised is contrary to the current practice, that does not however serve to relieve the successful party of the duty to give the requisite notice and the taxing master from ensuring that the imperatives set out in the sub-Rule, as read together in harmony with section 9 (3) aforesaid, have been complied with and to the letter.

[26] Mr. Msibi, at some stage, contended (with tongue in cheek, I should mention), that he gave verbal notice to the Applicant's attorneys of record. There is simply no provision in the Rules or the High Court Act for that matter, for verbal notices. It is patently clear from section 9 (3) of the High Court Act that the notice is required to be in writing. In the sub-Rule, it is clearly implicit that the notice must also be in writing, otherwise there would be no means available to the taxing master to verify and satisfy himself that the other party did in fact receive due and timeous notice.

[27] My attention was drawn to a Practice Directive issued by the Honourable Chief Justice, which laudably sought to streamline the procedures relating to taxation of bills of costs. It would appear that in terms of the said Directive, bills of costs are to be

submitted for taxation to the "Registrar", who on receipt thereof, allocates dates of hearing and taxing officers for that process to ensue. It is plain that the date allocated to this matter in terms of the "Registrar's" notice proved unsuitable and an alternative date, it was agreed, would be identified. This latter date was not, however, communicated to the Applicant's attorneys in writing or at all and the taxation proceeded in their absence.

[28] This was clearly irregular and the taxing master ought to have satisfied himself that the imperatives of Rule 68 (6) as read with section 9 (3) of the Act as interpreted above, were adhered to before attending to the taxation, unless a date had been agreed upon by the parties together with the taxing master during the aborted attempt at taxation. The failure to give notice of the new date, time and place of taxation, in my view renders the taxation bad in law and liable to be set aside for want of the requisite notice to the Applicant. This is plainly wrong as I have pointed out above and courtesy, which Mr. Msibi claims to have acted in accordance with, plays no part in notifying the Applicant of the first taxation as notice is a legal requirement. The party liable to pay costs shall be informed and nothing less will suffice in that regard.

[29] In my view, the need to file a notice to oppose the taxation is not peremptory. A party may not be barred from attending and participating in the taxation process merely because he has not filed a notice to oppose nor may the taxing master not invite the

said party for the reason that it did not file a notice to oppose. A taxed bill of costs constitutes a serious diminution to a party's finances and that party should, as far as possible, be granted every opportunity to contest an adverse bill of costs.

[30] In any event, taking the issue of failing to file the said notice to oppose into account, I have seen the initial notice issued by Mr. Msibi to the Applicant. Nowhere does it inform the Applicant if he fails to file the notice to oppose that the bill may be taxed in his absence. This would, of course, be a necessary inclusion in the notice so that a party who fails to file the said notice would appreciate the severe risk that they run.

[31] It would also appear from Mr. Msibi's affidavit that he contends that the Applicant cannot be afforded the redress it seeks for the reason that it has not challenged any particular items in the taxed bill of costs. The effect of this argument, taken to its logical conclusions, is that a party seeking the review of a decision of the taxing master must not only base the review on the fact of non-service, but must also question certain contested or contentious items included in the bill of costs.

[32] I reject this argument as being entirely without merit. If the party liable to pay costs has not been notified of the taxation as required, that, without more, entitles that party to a favourable decision, regardless whether or not, at the end of the day, it may

succeed in challenging certain items. The affront, in that regard is the fact of proceeding with the taxation without the necessary notice to the interested party. Once proved, that, without further ado, entitles the applicant, in my view, to an order setting aside the taxed bill of costs. The scenario adverted to by Mr. Msibi is admittedly provided for under Rule 48 but has no application to the peculiar facts of the present case.

[33] I should, for purposes of guidance, state that it is important to recognize at the conceptual level that the office of the taxing master is different from that of the Registrar of this Court. This is so even if the taxing duties are, at the present moment, resident in the Registrar. The responsibilities of these separate and distinct offices, it would seem to me, must be recognized to be and treated as separate, though they presently reside in the same official. For that reason, it may even be incorrect to cite the Registrar *qua* Registrar in matters appertaining to taxation. This is, however, a matter that I need not express a firm view on for present purposes.

[34] I also have serious misgivings about the propriety of the taxing master delegating and as it would seem to be the case, allocating to certain officers, the important, onerous and necessary <u>judicial</u> duty of conducting taxations without enabling legislation in that regard and particularly in the absence of necessary lawful instruments in that regard. (Emphasis added). The provisions of

section 9 (1) of the Act are highly instructive in this regard. They provide as follows:

> "All bills of costs in lawsuits in the High Court shall be taxed by the taxing master, unless the court otherwise determines."

[35] It is abundantly clear from the foregoing provision that in cases where some other person than the taxing master is to be authorized to tax a bill of costs, the Court and not the taxing master or the Registrar, may make the necessary determination in that regard. This is so because taxation, as indicated above, is a judicial process geared to bring to a final close cases finalized by the Court hearings.

[36] Historical accounts show that it was the Judges themselves who used to tax bills of costs, but on account of the proliferation of cases crying for Judges' attention, the taxation duties were given to the taxing master. It then becomes clear why it is the Court and not some other official that may make the determination that some other person than the taxing master shall tax bills of costs. The manner in which the taxing duties are presently being conducted may open the entire process to challenge. It may even be necessary to enact legislation regarding taxation and modes appointment of taxing officers. For the proposition that taxation forms an integral part of the judicial process, see *Bill of Costs*

(Pty) Ltd v Registrar, Cape N.O. And Another 1979 (3) S.A. 925 (A.D.) and *Nedperm Bank Ltd v Desbie (Pty) Ltd* 1995 (5) S.A. 711 at 712 F-G.

[37] On the question of costs, the Applicant has applied that it be granted costs on the punitive scale, regard to the highhanded manner in which the 1st Respondent, being officers of this Court, in particular, conducted themselves. The manner in which they behaved is certainly opprobrious and not in keeping with the lofty standards of behaviour expected by this Court from its officers. In particular, the language employed in the answering affidavit and the gratuitous allegations of improprieties in the answering affidavit, directed at Mr. Simelane, a senior officer of this Court, which Mr. Msibi did not muster the courage to read out during argument, provides a poor example of how practitioners should behave, particularly against their fellow practitioners, worse still where the latter are senior. Mr. Msibi behaved in an extremely poor and inconsiderate manner, which was certainly fuelled by his insistence on handling a personal matter himself much against the advice issued by this Court on previous occasions, to the contrary.

[38] The only difficulty is that the Applicant did not, in its affidavit, indicate the punitive scale at which it argues the costs should be granted. Should this failure deprive the Applicant of the punitive

costs which they so richly deserve, all matters taken into account? I think not. Although it is normally good practice for a party to set out the scale of costs required and the reasons therefor in its affidavits, at the end of the day, it is the Court that has to make the determination, taking into account the entire conspectus of the facts before it.

[39] In the instant case, it is clear that the opprobrious behavior on the part of the 1st Respondent, appeared more from its conduct and depositions in the answering affidavit. This would, in my view constitute sufficient grounds to mulct the 1st Respondent with costs at the punitive scale, which the entire conspectus of facts otherwise desperately cry for. Having said this though, I must mention that Mr. Msibi was, in part influenced in his failure to serve the notice by the exception referred to earlier, contained in the provisions of sub-Rule 68 (6) aforesaid and that, in my view, should serve to ameliorate the seriousness of his office's breaches so far as the scale of the costs is concerned.

[40] Having regard to all the circumstances of the case, it is my considered view that the following order is appropriate:

40.1 The bill of costs taxed by the taxing master under the above case number, dated 6 February, 2009, be and is hereby set aside.

40.2 The 1st Respondent be and is hereby ordered to pay the costs of this application on the scale between party and party.

DELIVERED IN OPEN COURT ON THIS THE 23rd DAY OF JUNE, 2009.

T. S MASUKU
JUDGE

Messrs. B.J. Simelane & Associates for the Applicant Messrs.

P.K. Msibi & Associates for the 1st Respondent