

**IN THE HIGH COURT OF SWAZILAND  
HELD AT MBABANE**

**Civil Case No. 738/09**

In the matter between:  
**The Attorney General**

**Applicant**

**And**

**The Taxing Master  
Sibusiso Gwebu  
Respondent**

**First Respondent  
Second**

CORAM

MCB MAPHALALA, J

For Applicant

Mr. T. Vilakati

For Second Respondent

Mr. S.C. Simelane

**JUDGMENT  
21 February 2011**

[1] The Applicant instituted legal proceedings for the following relief:

- (a) Reviewing and setting aside the First Respondent's taxation of the bill of costs in favour of the Second Respondent made on the 15<sup>th</sup> August 2010.
- (b) Directing that the bill of costs be re-submitted to a different Taxing Master for re-taxation.

(c) That the Second Respondent pays costs of this application.

(d) Further and/or alternative relief.

[2] It is common cause that on the 27<sup>th</sup> February 2009 the Second Respondent obtained judgment in his favour against the Applicant under High Court Civil Trial No. 738/2009 which included an order for costs on the ordinary scale. The bill of costs was taxed and allowed at E4 722.81 (Four thousand seven hundred and twenty two Emalangeni eighty one cents).

[3] On the 12<sup>th</sup> April 2010 the Second Respondent obtained another order compelling the Applicant to pay the taxed costs of E4 272.81 (Four thousand two hundred and seventy two Emalangeni eighty one cents) and costs at a scale between Attorney and own client. The Second Respondent submitted a bill for taxation on the 2<sup>nd</sup> July 2010, it was drawn on the basis of the Law Society's Fees Schedule dated 7<sup>th</sup> December 2006 which provided for an hourly rate of E2 000.00 (Two thousand Emalangeni). It was taxed on the 7<sup>th</sup> July 2010 in the presence of the parties; it was allowed at R42 331.32 (Forty two Thousand three hundred and thirty one Emalangeni thirty two cents).

[4] The Applicant refused to pay the bill arguing that the First Respondent allowed costs that were unnecessary and unreasonably incurred. The parties agreed to re-tax the bill; this was done on the

10<sup>th</sup> August 2010 in the presence of the parties. It was allowed at E34 614.61 (Thirty four thousand six hundred and fourteen Emalangeni sixty one cents). Again the Applicant objected to payment of the bill arguing that it was excessive and grossly unreasonable in view of the fact that the original taxed bill sought to be enforced was E4 272.81 (Four thousand two hundred and seventy two Emalangeni eighty one cents).

[5] The taxation of bills is governed by Rule 48 which provides as follows:

" 1. Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed *mero motu* by the taxing master, may within fourteen days of the *allocatur* require the taxing master to state a case for the decision of a judge, which case shall set out each item or part of an item together with the grounds of objection advanced at the taxation and shall embody any relevant finding of fact by the taxing master:

Provided that, save with the consent of the taxing master, no case shall be stated where the amount, or the total of the amounts, which the taxing master has disallowed or allowed, as the case may be, and which the party dissatisfied seeks to have allowed or disallowed respectively, is less than E50.

2. The taxing master shall supply a copy of the case to each of the parties, who may within ten days of the receipt of the copy submit contentions in writing thereon, including grounds of objections not advanced at the taxation in respect of any item or part of an item which was objected to before the taxing master or disallowed *mero motu* by the taxing master.

3. The taxing master shall thereafter make His report and supply a copy thereof to each of the parties who may within seven days of the receipt thereof submit contentions in writing thereon to the taxing master who shall forthwith lay the case together with the contentions of the parties thereon, his report and any contentions thereon before a judge, who may then decide the matter upon the case and contentions so submitted, together with any further information which he may require from the taxing master, or may decide it after hearing, if he deems fit, the parties or their advocates or attorneys in his chambers or he may refer the case for decision to the court.

4. Any further information to be supplied by the taxing master to the judge under sub-rule (3) shall be supplied by him to the parties who may within seven days of the receipt thereof submit contentions in writing thereon to the taxing master who shall forthwith lay such further information

together with any contentions of the parties thereon before the judge.

5. The judge or court so deciding may make such order as to the costs of the case as he or it may deem fit, including an order that the unsuccessful party shall pay to the opposing party a sum fixed by the judge or court as and for costs."

[6] Rule 48 sets out both the requirements and the procedure to be followed by a party who is dissatisfied with the ruling of the Taxing Master. Contrary to the submission advanced by the Applicant, the said party does not have an option either to follow this procedure as laid down in the Rule, or to lodge an application as the applicant has done. On a proper interpretation of Rule 48, the aggrieved party has no option but to follow the procedure as laid down therein.

[7] It is apparent that the Applicant has not complied with Rule 48; it has not asked the First Respondent to state a case for the decision of a judge. Furthermore, the Applicant did not object to particular items during the taxation as it is envisaged by Rule 48. It is implicit in the Rule that for the Applicant to qualify to utilize Rule 48, it should have objected to specific items during taxation and not the whole Bill as allowed by the Taxing Master. Failure to do this disqualifies the aggrieved party from applying Rule 48. In the circumstances, the Applicant does not even qualify to review the bill in terms of Rule 48.

[8] In the case of **Preller v Jordaan and Another** 1957 (3) SA 201 (0) at 203 **Smit A.J.P.** stated the law as followed:

"...it is rule of practice which must in future be observed, that the Notice of revision to the opposite party should refer to the items objected to, so that the latter may, if he so desires, concede correctness of the objections before the expense of drawing up an application is incurred."

[9] In the case of **Daywine Properties (PTY) Ltd v Murphy and Another** 1991 (3) S.A. 216 (D) at 219 **Broome J** stated:

"If the party opposing the taxation fails to object when before the Taxing Master, he cannot thereafter invoke the review of taxation procedure provided by Rule 48 in a belated attempt to attack items which the Taxing Master allowed."

[10] The Applicant further submits that the First Respondent did not comply with Rule 68 which requires the Taxing Master to be guided by the tariff as laid down in the Fourth Schedule to the High Court Rules. The Rule provides as follows:

"(1) Subject to sub-rule (2), the scale of fees payable to attorneys and advocates shall as far as possible be in accordance with the tariffs contained in the Fourth Schedule to these Rules (hereinafter referred to as the "Tariff).

(2) Where the court or the judge is satisfied, on application being made, that having regard to the nature of the case or any exceptional circumstances the costs allowable under section H of the tariff (costs of counsel) may be inadequate, the court or judge may direct that the taxing master on taxation is not to be bound by the amounts set out in that section, and where such a direction is given the taxing master may, if he thinks fit, allow on taxation such larger sums as he thinks reasonable.

(3) It shall be competent for any taxing master to tax bills of costs for services actually rendered by an attorney in his capacity as such, whether in connection with litigation or not. In the latter event the taxing master shall nevertheless be guided as far as possible by the scale of fees fixed by the tariff:

Provided that the taxing master shall not tax costs in instances where some other official is empowered so to do: for example he shall not tax such costs as are referred to in section 73 (2) of the Insolvency Act of 1955, in so far as these do not relate to litigation to which a trustee is a party.

(4) At the taxation of any bill of costs the taxing master may call for such books, documents, papers or accounts as in his opinion are necessary to enable him properly to determine any matter arising upon such taxation.

(5) With a view to affording the party who has been awarded an order for costs a full indemnity for all costs reasonably incurred by him in relation to his claim or defence and to ensure that all such costs shall be borne by the party against whom such order has been awarded, the taxing master shall, on every taxation, allow all such costs, charges and expenses as appear to him to have been necessary or proper for the attainment of justice or for defending the rights of any party, but save as against the party who incurred the same, no costs shall be allowed which appear to the taxing master to have been incurred or increased through over-caution, negligence or mistake, or by payment of a special fee to an advocate, or special charges and expenses to witnesses or to other persons or by other unusual expenses.

(6) (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 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.

(7) The taxing master shall be entitled in his discretion, at any time, to depart from any of the provisions of the tariff in extraordinary or exceptional cases, where strict adherence to such provisions would be inequitable.

[11] Rule No. 68 has no application in the present case because the costs complained of is costs at Attorney and own client scale. This rule is applicable to costs at the ordinary scale. The Fourth Schedule is of no assistance in the present case since it does not set out the tariff applicable to costs at Attorney and own client scale. It is against this background that in 2006 the Law Society of Swaziland in the exercise of their powers enshrined in the Legal Practitioners Act of 1964 issued the Schedule of Fees to be charged by Attorneys; this is the only guide in determining costs at Attorney and own client scale.

[12] In the circumstances the application is dismissed with costs on the ordinary scale.

**M.C.B. MAPHALALA**  
**JUDGE OF THE HIGH COURT**

