



IN THE HIGH COURT OF SWAZILAND

JUDGMENT

Case No. 861/2012

In the matter between:

DANIEL GEMA DLAMINI

Applicant

And

**THE TAXING MASTER – MANZINI
SAMUEL MAKHOSINI DLAMINI
THE ATTORNEY GENERAL**

**1st Respondent
2nd Respondent
3rd Respondent**

Neutral Citation: Daniel Gema Dlamini v The Taxing Master – Manzini & Two Others 861/2012) [2012] SZHC 209 (14th September 2012)

Coram: Dlamini J.

Heard: 27th June 2012

Delivered: 14th September 2012

Question of costs – conduct of party and whether party was justified in adopting the step taken as factors in determining scale of costs.

Summary: The applicant filed an application seeking for orders reviewing and/or setting aside 1st respondent's taxed bill of costs.

[1] The chronology of events are not in issue and are set as follows:

At the Magistrates' court, the 2nd respondent was granted an order with costs against the applicant. 2nd respondent lodged with 1st respondent a bill of costs for purposes of taxation. The applicant was served with the same accompanied by a notice of set down. On the date of taxation as per 2nd respondent's notice of set down, applicant failed to appear. 1st respondent postponed the matter to another specific date. The 1st respondent took upon herself to communicate the new date to the applicant. Applicant undertook to send his pupil to attend to the matter. However, on that date neither applicant nor his pupil was present. The 1st respondent proceeded to tax the bill. I must mention that when the notice of set down was served on applicant, 2nd respondent attached a bill of costs which reflected attorney and own client scale. The applicant informed both 1st and 2nd respondents that such was irregular as the presiding officer had awarded cost at an ordinary scale. Upon this communication, 2nd respondent as demonstrated by applicant at page 49 paragraph 51 of the book of pleadings:

“To show that the 2nd respondent's attorney realised that the bill was improper, they wrote to my attorneys and further re-drew the bill, ...”.

[2] On explaining his failure to attend to the taxing twice, applicant avers at paragraph 5 page 49 of the book of pleadings:

“I could not personally attend or through my attorneys since the bill was fatally defective.”

[3] When the matter came before me for adjudicating, 1st respondent’s counsel indicated that the 1st respondent as communicated to applicant prior was still willing to entertain the applicant. I then ordered the matter to be referred back to 1st respondent and I reserved the question of costs.

[4] **Innes C. J. in Kruger Bros and Wasserman v Ruskin 1918 AD 63** at 69 wisely stated:

“The rule of our law is that all costs – unless expressly otherwise enacted – are in the discretion of the judge. His discretion must be judicially exercised, but it cannot be challenged, taken alone and apart from the main order, without his permission.”

[5] In judicially determining the scale of costs to be awarded herein, I am guided by the comments in **Australia Conservation Foundation and Others v Forestry Commission (1988) 81 A.L.R. 166** where it was held:

“a party against whom an unsustainable claim is prosecuted is not to be forced, at his peril in respect of costs, to abandon every defence he is not sure of maintaining and oppose to his adversary only the barrier of one hopeful argument; he is entitled to raise his earthworks at every reasonable point along the path of assault. At the same time, if he multiplies issues unreasonably, he may suffer in costs.”

[6] The question before court is whether the applicant has “*multiplied issues unreasonably?*”

[7] I have already alluded to the common cause that the applicant was served with a notice of set down before the taxing master – 1st respondent. Applicant failed to appear. No reasons were advanced for his non appearance. Exercising her discretion and treading cautiously, 1st respondent postponed the matter in order to grant applicant an opportunity to appear. The taxing master, although not bound to do so by law, telephoned the applicant to appear before her on the next hearing date. Applicant assured her that as he would be engaged, he would send a representative. Again on the next date, applicant failed to appear either in person or by the representation. The 1st respondent was sent guessing as to the whereabouts of applicant. In fact, 1st respondent was justified in taxing the bill in the absence of applicant as it could correctly be inferred that the bill was not opposed. Further, not only did the 1st respondent tax the bill but considered what was noted by correspondence to her by applicant that the bill be taxed on an ordinary scale basis. As already demonstrated, applicant was fully aware that the 1st respondent had taxed the bill on an ordinary scale. It is therefore not clear as to why applicant moved this application or set the matter down for hearing.

[8] **Innes C. J. in *Geldenhuis and Neethling v Geuthin 1918 AD 426*** at 441 stated in this regard:

“after all court of law exist for the settlement of concrete controversies and actual infringement of rights, not to pronounce upon abstract questions or to advice upon differing contentions, however important.”

[9] What confounds applicant's application further is that he failed to appear before the taxing master twice. His reasons from his replying affidavit is that he could not do so on the basis that the bill was fatally defective. This reason, I am afraid, flies at applicant's own face because if he was of the strong view that the bill was defective, that was the very reason for applicant to appear before the taxing master. To rush to this court when he in fact failed to make representation before the very same court which he now intends to have its decision reviewed or set aside smirks of nothing else but an abuse of this court's process.

[10] **A. C. Cilliers** in "**Law of Costs**" at page 3-6 (issue 6) states in support hereof:

"The general rule is that a party is liable to pay costs incurred unnecessarily through his or her failure to take proper steps or because he or she took wholly unnecessary steps or adopted the wrong procedure altogether."

[11] The applicant failed to appear before 1st respondent to oppose the bill and that amounts to "*failure*" to take a proper step" and further ran to this court even though fully aware that 1st respondent was willing to grant him further audience and this was as per **Cilliers** *supra* "*wholly unnecessary step*".

[12] Applicant's conduct of taking a wholly unnecessary step has unfortunately caused the respondents to be out of pocket without any justification in law. It is the duty of this court to demonstrate that it frowns upon applicant's conduct by meting out the appropriate order as to costs.

[13] For the foregoing, the applicant is ordered to pay costs at attorney and own client's scale.

M. DLAMINI

JUDGE

For Applicant : N. Mabuza
For 2nd Respondent : T. Ndlovu
For 1st & 3rd Respondents : A. Matsenjwa