IN THE HIGH COURT OF ESWATINI

HELD AT MBABANE **CASE NO.1564/22**

In the matter between:

JOSEPH SIPHO DOS-SANTOS **Applicant**

And

LIASON NTINI **1st Respondent**

MATHEW PORTIGIETER **2nd Respondent**

THE TAXING MASTER **3rd Respondent**

THE ATTORNEY GENERAL **4th Respondent**

In Re:

LIASON NTINI **Applicant**

And

JOSEPH DOS – SANTOS **Respondent**

Neutral citation: *Liason Ntini V Joseph Sipho Dos Santos (1564/2022) SZHC302 [2022] (20th January 2023)*

CORUM: S.M. MASUKU J.

DATE HEARD: **29th December 2022**

DATE DELIVERED: **20th January 2023**

Fly note: *Being dissatisfied with a taxed bill of costs that was taxed without being served on him and as such taxed in his absence, the Applicant approached the High Court to review the taxation process using Rule 48 of the High Court Rules and his application was dismissed with costs. The Applicant then approached the High Court for the second time but this time under rule 53 and the common law.*

Discussed: *Whether or not the Court's dismissal of the application under Rule 48 decided the ultimate question of Applicant's right to review a bill under Rule 48 was res judicata. Further, if the Applicant can bring the same question for determination before the same Court under rule 53 and the common law.*

Held: *Applicant's dismissed application decided the main issue of review of taxation brought under rule 48. Matter is res judicata and the Court therefore functus officio. The second Application dismissed with cost.*

RULING ON POINTS OF LAW RAISED

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[1] The Application before me came on a certificates of urgency. The notice of motion integrated a stay of a sale in execution of Applicant's Toyota Land Cruiser (Prado registered USD 463 AM) and the review and setting aside of a bill of cost sanctioned by the taxing master in favor of the 1st Respondent in the sum of E47 106.04. (Forty-Seven Thousand One Hundred and Six Emalangeni Four cents).

[2] In earlier proceedings (heard on the 15 December 2022), the Applicant filled an application to challenged and review the taxing master's taxed costs. He approached the Court by following the procedure under Rule 48 of the High Court Rules (Review of Taxation). The Applicant also sought a stay in execution of the writ pending the outcome of his application.

[3] The urgent application in the case (*supra*) in this Court was heard and finalized on the 16th December 2022. Her Ladyship K Manzini J issued an *ex tempore* judgment dismissing the application on the basis that applicant did not have the right to review the taxation under Rule 48 because he did not oppose the main proceedings and was not a party to the taxation.

[4] The Applicant argued in this matter that he took the judgment of the Court as guidance, he stated in paragraph 17 of his founding affidavit that;

> *"upon drawing up the necessary guidance from her Ladyship's aforesaid ruling, I gathered that my recourse is in terms of this Honorable Court's Rule 53 hence the present application".*

[5] He then filed this application with slight changes on the prayers in the notice of motion. In this application he prays that the bill of costs be reviewed and set aside and that this Court directs the taxing master to re – do the taxation.

[6] When this matter came before me, the 1st Respondent raised certain points of law and was adamant that the points he had raised had been served on the Applicant and they would sufficiently stand to defend his judgment and its execution without the need for him to file any substantive answering affidavit thereto. The parties agreed to argue the points, and I granted an interim order staying the sale in execution and issued a *rule nisi* operative immediate and with interim effect returnable on the 24th January 2023 pending the ruling in these proceedings. The ruling has however been delivered earlier than anticipated. There is no prejudiced likely to be suffered by any party in the anticipation of the return date in this matter.

[7] The brief facts of this application common to all parties are that, her ladyship K Manzini J, delivered a written judgment on the 18th November 2022 in the main matter (Liason Ntini V Joseph Sipho Dos Sontos (1564/2022) [2022] SZHC 261 (18/11/2022)), Where costs were awarded against the Applicant in *casu* at attorney and own client scale.

[8] Without service of notice to the Applicant the 1st Respondent prepared a bill of costs for taxation. The bill was taxed by the Taxing Master's Office on

the 25th November 2022 and was allowed in the time of E47 106.04. (Forty Seven Thousand One Hundred and Six Emalangeni Four Cents).

[9] A Writ of Execution against the Applicant's property for purposes of realizing the aforesaid amount was issued on the same date (25th November 2022) by the 1st Respondent. A motor vehicle, Toyota Land Cruiser (Prado) registered USD 463 AM belonging to the Applicant was attached and advertised for a sale in execution that was to be conducted on the 30th December 2022.

[10] As he was dissatisfied with the taxed bill of costs, the Applicant filed a application to review the taxation process using the Rule 48 of the rules of Court. This was subsequently followed by an urgent interlocutory application proceedings for a stay of execution pending the finalization of the Rule 48 review process.

[11] As stated earlier on in this judgment, that on the 16th December 2022,Manzini J delivered an *ex tempore* judgment dismissing the Rule 48 application on the basis that the 1st Respondent had no right to take this route as he did not object to the taxation of same and it was in any event taxed in his absence.

[12] The Applicant, having failed in its application per the judgment of the 16th December 2022, argued before this Court that he had formally abandoned the rule 48 taxation proceedings by writing to the Taxing Master to that

effect on the 20th December 2022. The Applicant submitted that he then brought the present application, this time under Rule 53 of the rules of High Court.

[13] I am of the view that a proposal that the rule 48 application could be capable of being abandoned after the Court's pronouncement dismissing the application earlier is a misnomer. There was certainly no application pending after it was dismissed on the 16th December 2022. Alternatively, a letter addressed to the taxing master "abandoning" the proceedings never formed part of the Court process and it came rather after the event on the 20th December 2022. It had no legal effect on the already decided rule 48 application.

[14] The 1st Respondent opposed the Rule 53 review application by raising points of law. The essence of the points raised are captured and dealt with by this Court not necessary in the order that they were raised but in a fashion that they can easily be disposed of in this judgment.

[15] First, the 1st Respondent argued that the Applicant has perempted his right to review the taxation by conduct. In that he has formally withdrawn the current taxing review procedure (Rule 48) and exhibited an intention to be bound by the decision dismissing his previous application and not seeking to assail it. He is thus no longer at liberty to seek another review.

[16] I have pointed out earlier in this judgment that the abandonment or withdrawal of the rule 48 before the taxing master had no legal effect on the dismissed rule 48 application. The Applicant was then left with the judgment against him to deal with. What needs to be determine by this Court is whether or not he is at liberty to file a new application under rule 53. Should this Court find that he is not entitled to file a new application as he has sought to do, then this point naturally falls away.

[17] The second point raised is that the Applicant has utilized the wrong procedure to review a taxation by invoking rule 53. It was argued by the 1st Respondent that rule 53 does not find application to review taxations and according to the 1st Respondent, review of taxation are solely governed by rule 48 of the rules of Court.

[18] If we follow the decision of the Court per Manzini J, that it is only a party who was present during taxation and dissatisfied with the ruling of the taxing master in respect of the items objected to that can invoke rule 48, then the rule is not applicable in *casu* since the Applicant was not present during the taxation sought to be impunged. The Applicant, (it is settled law) as will be shown below cannot rely on Rule 48. But he, in this second application has come to Court under Rule 53. Should this Court find that he is not entitled to now utilize rule 53, this point should also fall away.

[19] The third and last point raised by the 1st Respondent is that the Court has already decided the ultimate question being the Applicant's right to review a bill under rule 48, the matter therefore is *res judicata.* If the Applicant was dissatisfied with the judgment of the Court, he should (it was argued) have filed an appeal before the Supreme Court. He is barred from bringing the same question for determination before the same Court.

[20] I am of the view that the latter point is the determining point amongst all the points raised and I now turn to address it.

[21] The undisputed facts of this matter before Manzini J and this Court are simple that the taxed bill of cost was taxed without notice and in the absence of the Applicant. It was presented, taxed and allowed on the 25th November 202. Upon hearing the parties on the interlocutory application brought by the Applicant under Rule 48, the Court found correctly with respect that the Applicant did not have a right to review the taxation under Rule 48 and so, it dismissed the application.

[22] There is ample authority submitted by both counsel to support the contention that the provisions of rule 48 of the rules of Court are applicable only where a party who was present during the taxation is dissatisfied with a ruling of the taxing Master in respect of any item or part of an item which was objected to or was disallowed *mero motu* by the taxing master. It has been held that the rule has no application where the aggrieved party did not attend the taxation or did not object to specific items or part thereof or

where the whole bill is objected to, see Mamba J in the case of TWK Agriculture Holdings (Pty) Ltd V Taxing Master of the High Court (4263 of 2005) [2015] SZHC 133 (20th Mach 2015) at paragraph 25.

[23] See also His Lordship MCB Maphalala J (as he then was) in Sabelo Mncina V Vian Dlamini , The Taxing Master and Another case No. 1553/11 where he stated that Rule 48 (1) relates to a party who appeared at the hearing but was either not served with the bill or was served but is not happy with the ruling of the taxing master on certain items in the bill.

[24] Does it mean though that a litigant in the shoes of the Applicant who was not present during taxation of the bill is without a remedy? Mamba J in TWK (*supra*) at paragraph 25 said:-

> *"This does not mean of course that a party whose case does not fall under or is not governed by rule 48 has no remedy. He has such remedy under common law and rule 53 of the rules of this Court."*

[25] The Court in TWK (*supra*) proceeded to cite another authority on this subject matter Olga V Minister of Safety and Security and Another (586/2012) [2012] ZAECGHC 8, 2012 (4) SA 127 (ECG) (20th February 2012 .In Olga (*supra*) after reviewing the authorities the Court concluded that:-

> *"..... the proposed review of taxation under rule 48(1) could, in my view, never succeed. The Applicant instead have instituted proceedings for an order setting aside the taxation".*

[26] What is clear from the authorities TWK (*supra)* including Olga (*supra*) is that a review brought under rule 48(1) by a party who was not present during the taxation cannot succeed. The option presented by the Court in TWK (*supra*) may be exercised in my view by a party who was present during the taxation and is dissatisfied with the ruling by the taxing master in respect of any item or items objected to and disallowed. The facts in TWK (*supra*) present a slight different scenario in that, although the applicant was absent during the taxation date, an articled clerk attended but left the taxation office without participating as he lacked full instructions. The applicant had filed objections on certain items of the bill. The Court held that where the whole bill or *allocator* is objected to and the Master fails to exercise his discretion, rule 53 and common law is applicable to set side such taxation. In that matter there was also an application for an order to review and set aside the Master's taxation.

[27] In *casu*, this is not an avenue available to the Applicant who was absent when default judgment was granted together with costs against him. He was also not present during the taxation and never objected to any of the taxed items.

[28] I am of the view in *casu* that once the Applicant has chosen to follow rule 48 as his cause of redress, he cannot not after the dismissal of his application come back to the same court under a different rule 53. I am persuaded by the argument that, the decision awarded against him was final and if dissatisfied he should have appealed it, failing which to abide by the judgment.

[29] There are decisions of this Court and of the Supreme Court of Eswatini that are instructive in this regard to support this contention. In the case of Manzini City Council and Others v The Taxing of High Court and Another (3210 of 2010) [2016] SZHC 41 (10th March 2016), the applicants contested a bill of wasted costs that was allowed by the taxing master despite objections made. The applicants thereafter filed an application for review, correction and setting aside of the Master's taxation. The Court held that where a party is dissatisfied with the taxing master's ruling that aggrieved party is to follow the procedure laid down in rule 48. It held further that there was no compliance with the rule 48 and upheld the points raised by dismissing the application with costs.

[30] In African Tyres (PTY) Ltd and Others Vs Taxing Master and Others (1488 of 2010) [20]13 SZHC 136 (11th July 2013). The application came before Mabuza J, and was brought in terms of rule 48 (review of taxation) for a review and setting aside of *allocator* awarded by the taxing master. The 2nd Respondent in that matter did not file any opposing affidavit, it instead raised points of law *inter alia* that the application was fatally defective because it did not follow the steps provided for in Rule 48(2) (3) and (4), After examining the rule the Court cited the case of the Attorney General V Taxing Master and Another - Civil High Court case 738/09 Maphalala J (as he then was) stated of the above rule that:-

> *"On a proper interpretation of Rule 48, the aggrieved party has no option but to follow the procedure as laid down herein". The Court upheld the points and held that the applicants had failed to comply with the procedure set out in Rule 48 (1). The Applicant was dismissed with costs".*

[31] Being dissatisfied with the decision of the Court, the applicant in African Tyres (*supra*) filed an application for leave to appeal the judgment of Mabuza J. The applicants (appellants) then took the approach of applying for leave because the proceedings in the High Court were interlocutory. The leave to appeal in the case of African Tyres (PTY) LTD and Another V The Taxing Master and Another (37 of 2013) [2013] SZSC 67 (29th November 2013) was refused. Ebrahim JA held that the applicant did not comply with the provision of the rule 48 of the High Court rules.

[32] I have cited the above cases not as an exercise to review the decision of her Ladyship Manzini J, but to track what has become the trend where applications similar to the one before me were treated. In all the cited High Court cases above the taxation review decisions were appealable with or without the leave of the Court.

[33] I am therefore of the considered view that the Applicant's dismissed application in the judgment of Manzini J, decided the main issue of the review of taxation brought under rule 48. I am persuaded by the 1st Respondent's argument that the matter is *res – judicata* and this Court is therefore *fuctus officio*. I find that it was open to the Applicant to appeal the judgment if he was so minded and dissatisfied with it. I hold the view that it was not open to the Applicant to bring yet another review under the guise of rule 53. He made his call, choose to go by rule 48 and was dismissed.

[34] In the premises, and for the reason advanced above, I take the view that the application must be dismissed with the following orders:

1) The interim order and *rule nisi* granted on the 29th December 2022 is discharged.

2) Costs are granted in favour of the Applicant at an ordinary scale.

S.M. MASUKU

JUDGE – HIGH COURT

For The Applicant: **Mr Gcina B. Mhlanga of Motsa Attorneys.**

For The 1st Respondent: **Mr MTM Ndlovu of MTM Ndlovu Attorneys.**