

IN THE COURT OF APPEAL OF SWAZILAND

Held at Mbabane Case No. 44/99

In the Appeal of:

PHANGISILE DHLAMINI APPELLANT

In re:

SWAZILAND NATIONAL HOUSING BOARD APPLICANT

And

PHANGISILE DHLAMINI 1st RESPONDENT

THE TAXING MASTER 2ND RESPONDENT

CORAM : BROWDE J.A.

VAN DEN HEEVER J.A.

: SHEARER J. A

JUDGMENT Shearer J A:

This appeal is directed against the judgment of Sapire C. J. in which he, pursuant to a rule nisi granted by Maphalala J., made an order setting aside the taxation of the appellant's Bill of Costs dated 29th January 1999 and ordering the appellant to pay the costs of the proceedings.

It is against this order that the appeal is directed. The background to the appeal is as follows: The Housing Board (the successful applicant before the two learned judges in the lower court with respect to the rule nisi) will be referred to as such and the first respondent in those proceedings (PHANGISILE DLAMINI) as appellant.

2

On the 21st January 1999 at 12.50pm. the Housing Board was served with a Notice of Application instituting proceedings directing the first respondent to restore to the appellant possession of Flat No. 1A, Embangweni Township, coupled with a final interdict against dispossession and interference with peaceful possession. The order is annexed to the founding affidavit in the present proceedings by the Managing Director of the Housing Board, the last portion of which reads as follows: The Housing Board to "pay the costs on a scale as between attorney and client".

I pause at this stage to quote from the answering affidavit of the appellant's attorney -"costs were awarded against the applicant on a scale between attorney and own client". It seems to me that this misapprehension may have coloured his subsequent conduct and may have influenced the proceedings before the taxing master. I shall return to this later.

On the day following this order, the appellant's attorney addressed a letter to the Housing Board, to which was attached the order quoted above and a statement of account for E7, 148 - 96. Payment on that same day was demanded and the letter stated that the appellant's attorney would tax a bill and thereafter cause a writ to issue against applicant's property. The founding affidavit continues:

"I personally received several telephone calls from the first respondent's attorney Mr. Mamba regarding payment of the costs. I informed him that the fees were extravagant and unjustified: I further informed Mr. Mamba that applicant had instructed its attorneys to give advice on this matter." In his opposing affidavit Mr Mamba says he only called the Housing Board once. He does not contest the Managing Director's statement that the latter communicated his dissatisfaction with the account. Mr Mamba must have appreciated that, if the Housing Board was represented before the taxing master, there would be strenuous opposition to the Bill of Costs.

The original statement of account dated 22nd January 1999 (the day after the order) indicates total fees of E7, 148 - 96.

3

The next information the appellant received was when its attorney "contacted" Mr. Mamba on the 29th January 1999, The attorney was told that the bill had been taxed and allowed in the sum of E13, 456 - 72. The attorney then enquired from the taxing master as to the circumstances under which the bill was taxed. The affidavit reports the taxing master's reply but Mr. Mamba says "I do admit however that the taxing master asked me whether the other party had been served". It seems that she was pressed to attend to the matter urgently and did so. The final bill submitted included figures substantially higher than those recorded in that of the 22nd January 1999.

It is accepted by Mr. Mamba that he persuaded the taxing master that notice to the appellant was unnecessary. This is at odds with the "Taxing Master's directive no. 1/98" which provides inter alia that:

"4 If the bill is not opposed the liable party returns two copies (of the bill) to the party being awarded costs together with a certificate in terms of Rule 68 (5) (a) (ii) consenting in writing to the taxation of the bill in his absence"

And

"7 If the opposing party does not turn up on the date and time fixed for the taxation of the bill, the Registrar must then satisfy himself that the opposing party was duly notified of the date and time of the taxation, and the bill can then be taxed in his absence".

The first respondent nails Ms colours to the mast of an undefended spoliation order in proceedings for which the most slender notice was given. The attorney then proceeds with unseemly haste to get the bill taxed without notice to the appellant. The original account is inflated in the bill to almost double. The attorney, it must be assumed, believed that the order for costs was on "an attorney and own client scale". That was not the appropriate scale having regard to the order. An examination of the taxed bill makes it clear that the scale of the taxation was that which Mr. Mamba records in his affidavit - and was therefore based on a misapprehension. Quite plainly, the taxation cannot stand.

4

Mr. Mamba for the appellant argued strenuously that review proceedings was the only appropriate course when attacking a decision of the taxing master. However all the relevant issues were appropriately canvassed and defined in the papers both before the lower court and in this court. The argument is purely technical and the remarks of Schreiner J.A. in *Trans - African Insurance Co. Ltd vs Maluleka* 1956 (2) S.A. 273 at 278 F - G are apposite: "technical objections to less than perfect procedural steps should not be permitted to interfere with the expeditious and, if possible inexpensive decision of cases on their real merits." The appeal must succeed. Because of the misapprehension of the attorney as to the order for costs in the lower court, of the unseemly haste which this matter came before the taxing

master without notice, it would be unfair that the 1st respondent, a lay client, should bear the costs of the appeal.

The appeal is allowed with costs and the following order made;

1. The taxation of the 1st respondents bill is set aside;
2. The taxation of the bill shall be effected on proper notice to the appellant;
3. It shall be effected on the basis of attorney and client costs;

SHEARER J.A.

I agree

BROWDE J.A.

I agree

VAN DEN HEEVER. J.A.

Delivered in open Court this 3rd day of December 1999.