IN THE SUPREME COURT OF ESWATINI
JUDGMENT

Case No. 06/23

HELD AT MBABANE
In the matter between:

JOSEPH SIPHO DOS SANTOS	**Appellant**
and	
LIASON NTINI	**1st Respondent**
MATTHEWS POTGIETER N.O.	**2nd Respondent**
THE TAXING MASTER	**3rd Respondent**
ATTORNEY GENERAL	**4th Respondent**

Neutral Citation: *Joseph Sipho Dos Santos vs Liason Ntini and Others* (06/2023) [2023] *SZSC* 46 (22/11/2023)

Coram: **S.P. DLAMINI JA; J.M. CURRIE JA AND M.R. FAKUDZE AJA.**

Heard: 5th October, 2023.
Delivered: 22nd November, 2023.

SUMMARY : *Civil procedure - appeal against judgment of Court a quo dismissing application in terms of Rule 53 as being res judicata and the court being functus officio after an application in terms of Rule 48 had been dismissed – Principles governing taxation, Rule 48 and review in terms of Rule 53 considered – Held that Rule 53 not applicable to a party who did not oppose proceedings and who was not entitled to notice in terms of rule 68 - Appeal dismissed – Costs awarded to first respondent.*

JUDGMENT

J.M. CURRIE – JA

INTRODUCTION

[1] This appeal arises as a result of a judgment granted by the Court *a quo* on 18 November 2022 in favour of the first respondent together with costs on the attorney and own client scale.

BACKGROUND

Proceedings in the court *a quo*

[2] The first respondent had instituted urgent motion proceedings in August 2022 against the appellant for the grant of a *mandament van spolie* on the basis that the appellant had unlawfully taken a motor vehicle belonging to him without a court order sanctioning him to do so.

[3] A rule *nisi* issued calling upon the appellant/respondent to show cause why a final order should not be granted on the return day. A copy of the application and the *interim* order were served on the appellant by the deputy sheriff, being the second respondent. The appellant did not oppose the proceedings either personally or through a legal representative, nor did he appear nor was he represented on the return day.

[4] As a result the rule was confirmed by Manzini J and costs were awarded to the first respondent, at the instance of his legal representative, on the attorney and own client scale. In issuing the punitive costs order Manzini J stated that

same is called for *"in order to sound a clear warning to parties who take the law into their own hands."*

[5] Pursuant to the judgment the first respondent's attorneys prepared a bill of costs for taxation, which was not served on appellant as he had not entered appearance to defend and he was thus not entitled in terms of Rule 68 (6) (a) (i) to be served with the bill and to be given notice of the taxation. Taxation took place on 26 November 2022 in the absence of the appellant and the bill was allowed in the sum of E 47 106.04.

[6] Upon completion of the taxation of the bill of costs the first respondent issued out a warrant of execution and in executing the warrant the second respondent attached and removed a Land Cruiser Prado belonging to the appellant.

Appellant's application for a stay of execution in the court *a quo*

[7] Attempts were made by the parties to settle the amount owing in terms of the bill of costs but same were unsuccessful. As a result the appellant filed an application for a stay of execution pending the review of the bill of costs by

the taxing master in terms of Rule 48 of the High Court Rules, although execution had already taken place.

[8] On 16 December 2022 Manzini J issued an *ex tempore* judgment dismissing the application on the basis that the right to review taxation in terms of Rule 48 did not apply to appellant as he did not oppose the main proceedings which gave rise to the taxation. Rule 48 (1) is only applicable to a party who appeared at the hearing or was represented at the hearing, but was not served with the bill of costs, or was dissatisfied with the ruling of the taxing master.

[9] The appellant then purported to "*abandon*" the Rule 48 taxation proceedings by way of a letter addressed to the taxing master and on 21 December 2022 launched, what was, in essence, a review application in terms of Rule 53 seeking to review and set aside the same bill of costs dated 25 November 2022 and, once again, seeking a stay of proceedings of the sale of the Toyota Land Cruiser, the sale in execution of which was set for 30 December 2022.

[10] The application in terms of Rule 53 was opposed by first respondent by Notice to Raise Points in Law and the application was dismissed by the Court *a quo* on 20 January 2023 per Masuku J on the basis that the matter was *res judicata* and therefore that the Court *a quo* was *functus officio.*

[11] Dissatisfied with the latter judgment, the appellant has noted the instant appeal. The essence of the appeal is that the Court *a quo* was wrong in finding that the matter was *res judicata* and that the Court *a quo* was thus *functus officio.*

ARGUMENT OF THE APPELLANT

[12] The appellant concedes that Rule 48 is only applicable to a litigant who attends the taxation and opposes the bill of costs. He relied on the case of **TWK Agriculture Limited v Swaziland Meat Industries Limited And Another (41 of 2009) [2009] SZSC 28 (27 November 2009)** where the Court stated at paragraph 25 that:

"The provisions of Rule 48 are applicable where a party who was present during the taxation is dissatisfied with a ruling by the taxing master in respect of any item which was objected to or was disallowed mero motu by the taxing master. It 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. This does not of course mean that a party whose case does not fall under or is not governed by rule 48 has no remedy. He has such remedy under the common law and rule 53 of the rules of this court."

[13] The appellant submits that he did not have a remedy under Rule 48 as he did not oppose the main application, nor was he present during the taxation, nor was he served with the notice of taxation, but that he has a remedy under Rule 53, with reliance on the case of **TWK** referred to above. He had seen no point in appealing the first ruling of the Court *a quo* because same would be '*tantamount to flogging a dead horse.*" However, the issue of taxation remained alive save for the fact that appellant had *"used the wrong door"* by using Rule 48 instead of Rule 53. The relief sought in the two applications were distinguishable and therefore there was nothing barring the appellant from pursuing an application in terms of Rule 53.

[14] The appellant contends that in the circumstances, not having attended the taxation, he had not had an opportunity to oppose the taxation, but maintained the right to do so, which opportunity Rule 53 affords him. The Court *a quo* was therefore wrong in holding that this avenue was not open to him.

[15] Appellant draws a distinction between the relief claimed in the two applications. He claims that the rule 48 application was for a stay of execution pending the review of taxation which was to take place before the taxing master. However, in the rule 53 application the appellant sought the review and setting aside of the decision of the taxing master and that the taxation be redone before another taxing master. In the circumstances the rule 53 application was not *res judicata.*

ARGUMENT OF THE FIRST RESPONDENT

[16] The first respondent contends that as the appellant did not oppose the initial application he was not entitled in terms of Rule 68 (6) (a) (i) to receive notice of the taxation. Following from this he is not entitled to seek a review of the bill of costs on the basis that he did not oppose the application as a result of

which judgment on default was ordered against him. It is only a party who defended the proceedings who is entitled to seek a review of the taxation.

[17] The appellant did not challenge the first order of the court *a quo* when the application under Rule 48 was dismissed but sought to formally abandon the application after it was dismissed by formally writing to the taxing master on 20 December 2022 to this effect. Masuku J, rightly, held this had no effect on the already dismissed Rule 48 application.

[18] Regarding the issue that the second application brought under Rule 53 was held to be *res judicata* by the Court *a quo,* the first respondent referred the court to the matters of Firestone **South Africa (Pty) Ltd v Genticuro A.G. 1977 (4) S.A. 298 (A.D.)** and **Mannanyana v the State [2002] 1 B.L.R. 72 (C.A.)** where the principles governing the issue of *res judicata* and the exceptions thereto were fully considered. The first respondent submitted that the Court *a quo,* after consideration of the relevant authorities correctly found that the second application brought under Rule 53 was *res judicata.*

THE LAW AND FINDINGS OF THIS COURT

[19] The issue to be decided by this Court is whether the appellant was entitled to bring a second application for review of the bill of costs under Rule 53. The appellant had not opposed the initial proceedings, nor did it appeal the decision of Manzini J in dismissing the Rule 48 application. In the circumstances, the question arises whether the Court *a quo* was correct in finding that the matter was *res judicata* and the Court thus *functus officio.*

RES JUDICATA

[20] In the matter of **Ascendis Animal Health (Pty) Ltd v Merck Sharpe Dohme Corporation and Others [2019] ZACC 41 (24 October 2019)** that Court summarised the principles of *res judicata* and held that where a matter has been litigated to finality between parties on a previous occasion, the same parties are not permitted to litigate the same cause of action in a subsequent attempt.

[21] On determining *in casu* whether the matter was *res judicata,* the central enquiry is whether the taxed amounts had been arrived at correctly. That

requires a determination on the *merits* of a given case. In **Graham and Another v Law Society, Northern Provinces and Others 2016 (1) SA 279 (GP)** that Court said:

> *"Res judicata is a special substantive defence that can be pleaded by the respondents in their answer to the counter-application, which will require determination on the evidence of whether the same question was disposed of in a final judgment in respect of which the same relief is sought in a new lis between the same parties"*

[22] The judgment of Manzini J was an *ex tempore* ruling in respect of points raised *in limine* by the respondent with regard to the procedure adopted by the appellant. The facts of the matter were not considered and no substantive issues between the parties were finally resolved. In essence, Manzini J held that the cause of action in the form of Rule 48 was not a competent remedy.

22.1 To this extent the judgment was final in form and effect for purposes of an appeal and was therefore appealable. However, the appellant chose not to appeal the judgment and he should therefore have abided by the

judgment; the appellant cannot then go back to the same court using a different remedy.

22.2 In the case before us the determination of the evidence, or put differently, the question of the merits, was never entered into but only the question of which remedy would be a competent remedy, which is a procedural aspect. I am therefore of the opinion that this is indicative that it was not a matter of *res judicata* but a question of the appellant utilising the wrong remedy. To this extent, it cannot be said unequivocally that the matter has been litigated to finality between the parties and therefore that it is *res judicata.* Were it not *res judicata,* the appeal on the face it would have to succeed.

[23] However, had it not been *res judicata,* it does not mean that the appellant was at liberty to proceed afresh under the flagship of a different rule and in this case, review by way of Rule 53.

REVIEW OF TAXATION

[24] A party aggrieved by any aspect of a taxation may have three possible remedies, being Rule 30 (an irregular step) -see **Brenner's Service Station and Garage (Pty) Ltd v Milne and Another 1983 (4) SA 233 (W)**; a Rule 48 review upon a stated case or a *"general"* Rule 53 review.

[25] Rule 30 would accommodate the situation where taxation proceeded in the absence of a party who was entitled to notice but did not receive notice of the date of taxation.

25.1 Rule 68(6)(a) provides that:

> *"68 (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 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."

25.2 *In casu* there had been a default judgment and because the appellant had not been entitled to notice of the taxation, Rule 30 would not have been apposite.

[26] Rule 48 would apply where a party takes issue with the *allocatur*. This remedy, it appears to be common cause, is only available where the aggrieved party had been entitled to notice; *in casu* the appellant was not entitled to notice for the reasons aforestated.

[27] Rule 53, as a general proposition, is of general application to all matters and provides as follows:

"(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of any inferior court and of any

tribunal, board or officer performing judicial, quasi-judicial or administrative functions shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceedings to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected —

(a) calling upon such persons to show cause why such decisions or proceedings should not be reviewed and corrected or set aside, and

(b) calling upon the magistrate, presiding officer, chairman or officer as the case may be, to despatch, within fourteen days of the receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside together with such reasons as he is by law required or desires to give or make, and to notify the applicant that he has done so." (My underlining)

27.1 For purposes of review of taxation and in the broader context of procedural issues, Rule 53 can serve as an alternative remedy to Rule 30 where, for instance, due notice had not been given or taxation

otherwise had proceeded in the absence of the party entitled to receive notice.

27.2 Should a party not be entitled to notice but the taxation comes to that party's knowledge, that party should be at liberty to attend the taxation and to participate in the proceedings, after which that party would have the same rights as a party entitled to notice.

27.3 It, however, in my view, cannot be employed to come to the aid of a non-appearing party, as this would then render Rules 48 and 68(6)(a) nugatory.

[28] With refence to the **TWK** matter relied on by the appellant (wherein it had been held that *"The provisions of Rule 48 are applicable where a party who was present during the taxation is dissatisfied..."*) the aggrieved party in that matter in fact had opposed the proceedings. The issue therein was that the taxation had proceeded in the absence of the party opposing the taxation due

to the fact that inadequate notice had been given of the date of the postponed taxation.

28.1 Not being present during the taxation, the Rule 48 remedy was not at the disposal of that party and it is in this context that Rule 53 would come to the aid of the party who had been entitled to notice, inclusive of proper and timeous notice.

28.2 Rule 53 cannot be employed to come to the aid of a non-appearing party or a party not entitled to notice of taxation, as was the case in *casu.* Put differently, a party not entitled to notice in terms of Rule 68(6) is so not entitled by virtue of its own doing as regards failure to appear, or consent to taxation its absence.

28.3 Having elected not to oppose or not to appear in the main matter, or having elected to consent to taxation *in absentia,* a party has to abide by its election not to participate and cannot be permitted to approbate and reprobate, *ex post facto,* by insisting on entering into the arena to

rehash what had gone before. To hold otherwise, would lead to absurdity and as aforestated, would render Rules 48 and 68(6) nugatory.

[29] In this case appellant was not entitled to notice of the taxation as he had not opposed the proceedings. Accordingly, if the appellant wished to reinstate or revive his right to receive notice or to participate in taxation proceedings he ought to have applied for rescission of the default judgment granted by Manzini J.

[30] It follows therefore that Rule 53 would apply in a case where taxation proceeded in the absence of a party who was entitled to receive notice, but did not, or where taxation was postponed to a date not communicated to a party and such like situations where a right to proper notice had been infringed. A party cannot use Rule 53 to bypass the non-entitlement to notice provided for in terms of Rule 68 (6).

[31] In any event, had Rule 53 been apposite, the appellant should have relied on Rule 53 as an alternative vehicle for relief in the initial Rule 48 application by way of express reference in the papers to rule 53. The appellant had done neither. Generally, where the wrong label had been attached to the relief claimed, but the *causa* relied on and the relief sought were clear, a court would entertain the merits of a matter based on the (analogous) premise that pleadings are made for the Court, and not the other way around. (See **BOWMAN NO v DE SOUZA ROLDAO 1988 (4) SA 326 (T) at 331E-I.)**

[32] If the relief under Rule 53 been appropriate under the mantle of a prayer for further and/or alternative relief and had it been so argued, the remedy of the appellant would have been to appeal the dismissal of the application. This the appellant did not do and that particular ship has already sailed.

[33] Ultimately, in my view a litigant cannot be permitted to try out one alternative option after the other until he or she or it succeeds. Conversely put, in colloquial parlance, only *"one bite at the cherry"* is permitted and it is for this reason that the appeal cannot be upheld.

CONCLUSION

[34] In view of the aforegoing the following order is made:

1. The appeal is dismissed.
2. Costs are awarded to the first respondent.

J.M. CURRIE
JUSTICE OF APPEAL

I agree

S.P. DLAMINI
JUSTICE OF APPEAL

I agree

M.R. FAKUDZE
ACTING JUSTICE OF APPEAL

For the Appellant: MOTSA MAVUSO ATTORNEYS
For the Respondents: MTM NDLOVU ATTORNEYS