IN THE HIGH COURT OF SWAZILAND

(HELD AT MBABANE)

CASE NO.: 996/01

In the matter between

THE EDITOR, TIMES OF SWAZILAND	**1st Applicant**
AFRICAN ECHO (PTY) LTD.	**2nd Applicant**

and

ALBERT SHABANGU	**Respondent**

In re:

ALBERT SHABANGU	**Plaintiff**

and

THE EDITOR, TIMES OF SWAZILAND	**1st Defendant**
AFRICAN ECHO (PTY) LTD.	**2nd Defendant**

JUDGMENT DELIVERED ON: 20th SEPTEMBER 2006

CORAM: P.Z. EBERSOHN J.

For Applicant **ADV. P. FLYNN**

For Respondent **ATT. P.M. SHILUBANE**

JUDGMENT

EBERSOHN J:

[1] The respondent successfully sued the applicants for damages in this Court. The applicants noted an appeal and the judgment of the court a quo was reversed and the Court of Appeal substituted the order of the Court a quo with the following:

> **"The action is dismissed with costs."**

[2] The preamble to and the prayers of the notice of motion in the present application, which is now before me, read as follows:

> **"TAKE NOTICE THAT application shall be made to the above Honourable Court on Friday 26th May 2006 at 9:30 a.m. for an order in terms of Rule 68(2) of the Rules of Court:**
>
> **a) Directing that the taxing master on taxation of the costs in the above case is not to be bound by the amount set out in Section H of the tariff (costs of counsel).**
>
> **b) Costs, but only in the event of this application being opposed.**
>
> **c) Further and/or alternative relief."**

[3] At present the applicants are only, with regard to the taxable costs of their advocate which they employed during the trial, entitled, on the party and party basis, to a rather low amount, and it would appear that they are out of pocket as attorney and client costs were not granted.

[4] If costs of counsel were certified in terms of rule 68 it would result in a higher amount of counsel's fees taxable by the Taxing Master. As I understand rule 68 with regard to the granting of a special directive with regard to the costs of an advocate, the exercising of a judicial discretion is involved in the process.

[51 During the hearing of the application I raised with Mr. Flynn whether I had the jurisdiction to hear the matter. Mr. Flynn argued that I had. Mr. Shilubane, who appeared for the respondent, on the other hand, argued that the Court a quo was functis officio and so was the Court of Appeal and that I did not have the necessary residual jurisdiction to now amend the order of the Court of Appeal.

[6] Mr. Flynn's response to that was that what they sought was not an amendment, variation or alteration of the order of costs and that the order of the Court of Appeal would remain as it stands and "that the order sought in this application is merely a direction to the taxing master as to the taxation of those costs". I disagree as it is clear that the applicants wanted to obtain an additional benefit with regard to the costs which the Court of Appeal did not grant them.

[7] In the founding affidavit it was stated that the tariff currently to be applied was hopelessly inadequate and out of date and that the defendants would be substantially and inequitably out of pocket unless the Taxing Master was authorised to depart from the tariff and to allow such larger sums as he thought reasonable.

[8] It is so that the tariff clearly differentiates between instances where an attorney himself acts for his client and where the attorney employs an advocate

to act for his client.

[9] I am of the opinion that the applicants have insurmountable problems.

[10] Firstly, the court where the question of the special order for costs should have been raised and determined was the Court of Appeal when it was seized with the matter. If it was raised there and they decided not to grant such a special order for costs there is nothing this Court can do about it.

[11] Secondly, if it was not raised there it is too late to try and raise it before me as I am not seized with the matter. It is even too late to bring the matter before my Brother Matsebula J. who was the Court of first instance as he is functis officio.

[12] Thirdly, I as another Court who was not seized with the matter cannot now come and give directions to the taxing Master as I would do so basically arbitrarily and solely on the basis that the present order prejudiced the applicants. I was in any case neither seized with the matter and the merits thereof, nor do I have details of the facts of the matter so as to be able to exercise any judicial discretion in the matter.

[13] The Court of Appeal was ultimately seized with the matter, including the costs aspect, and to now presume that it did not apply its mind to the costs aspect which pertains to counsel's fees would be presumptuous on my part.

[14] In paragraph 1.07 of CILLIERS: Law of Costs, 3rd Ed., p. 1.7 the learned author stated the following:

> **"The two groups of rules supporting and conflicting with the general rule that a successful litigant should be awarded his costs do not exhaust the different approaches to the problem. There is a third approach, one which accentuates the essentially discretionary nature of judicial decisions regarding costs. This approach is well illustrated by the rules governing payment into court. Where a high court has given judgment on a question of costs in ignorance of an offer or tender in terms of the relevant rule, the court is obliged, in certain circumstances, to consider afresh the question of costs in the light of such offer or tender. In reconsidering the matter the matter the court retains its discretion in awarding costs. Surely this last-mentioned express provision not only implies that success does not necessarily carry costs, but also that the basic rule of the court's discretion is a more fundamental rule than the rule that costs follow the event."**

Where the learned author referred to costs for the purpose of this judgment it must be read as "all costs including attorney and client costs".

[15] In paragraph 2.03, Cilliers, op. cit., on page 2-5, reference is made to **Kruger Bros and Wasserman v Ruskin,** 1918 AD 63 at 69, where **Innes** CJ 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."**

[16] In paragraph 2.04, Cilliers, op. cit. on page 2-6, reference is made to **Fripp v Gibbon** 1913 AD 354 at 363 where it was held that where the Judge or magistrate **"brings his unbiased judgment to bear upon the matter and does not act capriciously or upon any wrong principle"** a court of appeal may not interfere with the honest exercising of the discretion. That also applies where it is now asked from me to literally vary or extend the order of the Court of Appeal after the Court of Appeal undoubtedly applied its mind to the matter.

[17] Furthermore, even if this Court had the jurisdiction to make supplementary orders, the mere fact that counsel was involved in the matter and his clients thus incurred attorney and client costs which they cannot tax does not per se warrants the making of such a supplementary order in the absence of very good grounds which in any case have not been put before me.

[18] To grant such an order would, furthermore, amount to the making of a punitive award which I cannot make as no grounds for making such a punitive award were advanced before me by the applicants.

[19] I accordingly make the following order:

P.Z. EBERSOHN
JUDGE OF THE HIGH COURT