IN THE HIGH COURT OF LESOTHO CIV/APN/38/99

In the matter between:

LESOTHO WHOLESALERS' AND CATERING WORKERS UNION	1st Applicant
THABANG NKOALE	2nd Applicant
DANIEL THOALA	3rd Applicant
ELINDA THEKO	4th Applicant
ELIZABETH PEETE MOLAPO	5th Applicant
LINEO THETSANE	6th Applicant
MERRIAM MAFATHLE	7th Applicant
TEBELO MATŚELA	8th Applicant
ELINAH NTLALOE	9th Applicant
TEFO MOSIUOA	10th Applicant
MOHAU MABESA	11th Applicant
MATHA MAPETLA	12th Applicant
ABRAHAM KHOTLE	13th Applicant
CHRISTINE MOKHELE	14th Applicant
JACOB RAMOSOTHOANE	15th Applicant
PHATELA MOLAPO	16th Applicant
MANGOSITO MOKHETHI	17th Applicant
DABITHA MOIKETSI	18th Applicant
SELANE RAMOKHELE	19th Applicant
ELIZABETH MOTOA	20th Applicant
KHOTSO MOHALE	21st Applicant
IDLETT HLALELE	22nd Applicant
DANIEL TŠILO	23rd Applicant
TEBOHO LEFUNYANE	24th Applicant
EDWIN NTHAKO	25th Applicant
EDWIN LETŚOARA	26th Applicant
AMELIA MAKHOEBE	27th Applicant
MASEABI KHOELE	28th Applicant
BOHLALE MOTOLO	29th Applicant
MASSA FAKO	30th Applicant
MAMPE PHANTŚI	31st Applicant
MOLEFI RAKHAPU	32nd Applicant
TELANG KHANA	33rd Applicant
MAMOTHIBELI MAKHETHA	34th Applicant
POPI KALELE	35th Applicant
FLORENCE SECHECHE	36th Applicant

and

METCACH LESOTHO LIMITED	1st Respondent
METCASH TRADING LIMITED	2nd Respondent
DEPUTY SHERIFF OF THE COURT	3rd Respondent
DU PREEZ LIEBETRAU & CO	4th Respondent

For the Applicants : Mr. Kulundu

For the Respondents : Mr. Buys

Judgment

Delivered by the Honourable Mr. Justice T. Monapathi on the 7th day of November 2002

Applicants in essence seek to set aside a Warrant of Execution dated the 15th February 2001 issued pursuant to an "allegedly taxed" Bill of Costs against the Applicant. The allocatur was signed by Mrs Khiba-Matekane who was then Deputy Registrar. The lady is presently in the Foreign service of this country and outside the country.

The allocatur was dated on the 8th day of December 2000 as shown by two documents separately attached to the proceedings. See annexures "C" and "D" The claim further prays for interim relief which seeks to stay the execution of the Warrant of Execution pending the outcome of this application.

There was no prayer for setting aside the Taxing Master's allocatur. The reason put forward by Mr. Kulundu for Applicants was that the decision of the Bill of Costs would only be reviewable in terms of the Rule 49 of the High Court Rules. And that Rule 49 did not apply here because any taxation if done was

done irregularly, as the Applicants substantially submitted. The present was a situation where the whole taxation process was being questioned as against when the items are "part of any item" in the bill were disputed where the Taxing Master had commenced the process. See Rule 49(1)

I even ventured to suggest whether if the prayers in the notice of motion were granted this Court would be entitled to allow removal or expunction of the Taxing Master allocatur under prayer 4 "Further and or alternative relief." It will be clear later why the question would be pertinent in proper circumstances.

Mr Buys explained that a proper motion where "respondents and or their attorneys of record did not and have not caused a Notice of Taxation of the Bill of Costs to be served upon ourselves or our attorneys of record. "(See para 6 of Matamo Manyeli - President of Applicant) - would have been to apply under Rule 50 for review where the taxing master could have made any mistake with regard to his power under Rule 56(4). I did not agree.

I thought the policy behind the procedure in Rule 50 was to make available before Court evidence of the proceedings being reviewed. Where evidence is available on affidavit the Court might well dispense with the strict requirement of the rule. Even the prayers may not even use the word "review"

as long as the decision of the tribunal or official is sought to be set aside and corrected. It does not matter whether one calls the prayers certiorari, prohibition (interdict) or *mandamus*, as long as one is able to have, as a basis of the claim, a complaint as to illegality, irrationality and/or procedural impropriety.

Mr. Buys further added that if Applicants insisted that they are entitled to have the Taxing Master's allocatur invalidated under further and alternative relief that has not been supported by any facts setting out the basis of the relief except that the Applicants sought to do that in their reply. I would not have agreed in the circumstances of this case. In any event this was not consistent with what Mr. Buys later submitted in his Heads of Argument that "A just and expeditious decision in this regard may be an order that the bills be served and be taxed again" as one of the orders permissible.

The gravamen of this issue in the Applicants' reply is that subsequent notices of set down (to that of the 12th September 2000) of the bill of taxation "have not been received" by either party. On the 8th December 2000 the date stamp impression of the Assistant Registrar Mrs Khiba-Matekane was made on the original allocatur. It became clear in my view, who did that but what had to be cleared, as Applicants submitted, was that the Applicants had not received notice that there would b e taxation on that day of the 8th December 2000.

Reference was made by Applicants' Counsel to the original of the notice of taxation. The notice and bill which was all in blank had for unknown reasons came into possession of the Applicants. This adds to the murky surroundings and the mystery of all. This original notice is to be contrasted with that of the taxed bill of the 8th December 2000 from page 28-39, 41-43 of the record. The original of the bill has been blank except for the unsigned for number stamp impression showing "Assistant Registrar of the High Court - 8th December 2000." I was keenly awaiting that Mr. Buys would produce his own copy of the notice of taxation or the taxed bill but he did not.

The question then should have been how did it come about that the Applicants' attorney was served with such a deficient notice. It was blank where would there be proof that Applicants were given notice of the date of taxation. It is because the notice which was said to have been the proper and later one appointed the date of the 7th December 2000. This Court received no explanation why the Taxing Master's allocatur is dated the 8th December 2000. This is against the background that the Respondents' deponent Mr. Phillip William Hunt the manager of the Respondents says the taxation took place on the 7th December 2000.

The Applicants' Counsel then captured their essential complaint by

suggesting that since dramatically different perspectives has been presented by the two different bills one blank and the other resulting in an allocatur and award the latter "was shamelessly concocted" by the Respondents' attorneys. And this "smelled of fraud." In this trend the Applicants further state that:

> "On the 26th day of January 2001 the respondents attorneys, knowing very well that their bill of costs had not been taxed allowed in terms of the law proceeded to issue a writ of Execution against the applicants."

I thought that it normally needed some conviction to make a statement of this kind attributing unbecoming conduct on colleagues. But however highly stated the Applicants' case remained as stated in paragraph 6 of the founding affidavit that notice of Taxation or Bill of costs had not been served or Applicants or their attorneys.

Applicants suggested that all the documents purportedly received by them could not have been received by their attorneys offices. They maintain that two things should show the probabilities in that direction. It is the issue of their receipt date stamp, the signature of the person who received the documents who the Applicants averred did not know and lastly their address shown on the documents which they had since the month of October 1998 changed when they moved to Lesotho Bank Tower and later to Lenyora House.

I noted that in none of the documents allegedly received by the Applicants was there a "received" rubber stamp impression except the filing sheet of accompanying the opposing affidavit of the 11th January 2002. It was received by K.E.M. Chambers. Significantly even the original notice of taxation received on 29th August 2000 did not bear that rubber stamp impression. The notice of "appearance" to oppose received on 18/10/2001 did not. The notice of set down for a date of hearing in terms of Rule 8(13) received on 14/03/2002 did not. Another notice of the same kind received on 22/03/2002 did not. The notice of taxation dated 28th November 2000 received on 30/11/00 did not. The notice of taxation received on 29/08/2000 did not.

The above was overwhelming and Mr. Kulundu, on this issue, had to concede to the factual situation. I concluded that on this issue the Applicant could not make the right impression. But there was still something that did not seem right about the undated notice of the 20th August 2000 especially the original notice. This was more so when contrasted with annexure "D" dated the 28th November 2000.

Next to consider was the signature of receipt of the disputed documents. This I decide to deal with separately from the question of the "service at our office" which the Applicants preponderantly made issue of. Why I would be

bound to allude to the latter is because despite their movement of office from Manonyane Centre to Lesotho Bank Tower and then lastly to Lenyora House there has been consistently one similar signature except a few occasions over that period. There had however even been a concession by Respondents that in October 1998 the Applicants' Attorneys were no longer at Manonyane House.

This signature of receipt by a person having the same signature was found on four documents received by Applicants' Attorneys. There were documents dated 30/11/00, 4/02/99, 10/02/99, 18/10/2001 and 26/02/99. This included the notice of taxation of the 28th November 2000 received on 30/11/00) which ended in the allocatur of the 8th December 2000.

The last mentioned bill of costs was received "to be taxed on 7 December 2000". There was however something distinctly worrisome about this "another" notice. Considering that the Respondents had issued and served six documents in all that was a great number. Mr. Kulundu accepted that it was in four documents where a similar signature acknowledged receipt of the four documents issued by the Respondents.

Mr. Kulundu suggested that the Court could not safely reach any conclusion that the signature which "received" the four documents were that of

any professional or member of staff. His suggestion was that the Court could not resolve this except by calling *viva voce* evidence on that point. In the absence of such evidence the Court would, as he said, be disabled to resolve the point on affidavit. I would have agreed if probabilities did not point to things that were inherently incredible that would definitely sway probabilities. In my view the question of signatures was not an overriding issue for the following reasons.

If the denial of the signature of receipt had been clear and pointed that would have been something as far as requiring proof of such signature was to be dealt with in the way suggested. To illustrate what the real attitude of the Applicants were on the issue one needed to look at the reply in paragraph 4 (AD para 5, 5.1 and 5.2 thereof) is concerned. It reads thus:

> "In the first place, as of the 29th August 2000, Mr. Maieane's offices were not at Manonyane Centre. They were already at Lesotho Bank, Kingsway, Maseru. If it is correct that the papers were served at Manonyane Centre which is about 3 kilometres away from Lesotho Bank Tower in the Maseru City then it is clear that the Notice of Taxation was never served on Mr. Maieane's notice at all. There is in fact nothing to indicate that Mr. Maieane's offices (at Manonyane Centre for that matter) ever received the documents. Mr. Maieane's office accept service of process by impressing it with a date stamp as appears in the papers, especially the opposing affidavit hence and or the first page thereof. I therefore deny the contents thereof and put deponent to the proof thereof. In fact even the alleged address of Mr. Maieane's offices is non-existent at Manonyane."

It should be clear that the aspect of denial of the signature of the receiver of the

documents was never put in issue on the dispute centering on the said on the said signature. I therefore found it difficult to accept that the issue of the signature could be singled out as an aspect where other overriding circumstances had to be taken into account about the totality of probabilities.

I next considered the question of the Applicant's attorneys address. Respondents' attorney did not deny that the Applicants attorneys had moved to three different places for offices. Mr. Buys however sought to make the point that despite that movement they had not been notice of the same. I thought the point was not good inasmuch as Mr. Buys was not saying he had not been able to serve the Applicants' Attorneys. On the contrary he was contending that he has nevertheless able to effect service on either the staff or professionals of the Applicants' attorneys office.

I thought it would have been telling (as Defendants Counsel contend) that while service is not invariably made at their respective office that Counsel and Attorneys sometimes acknowledged receipt outside their offices and their member of staff did the same even while out of their offices. I thought the point about lack of notice of movement of office would rather redound to Applicants in the circumstances of this dispute. But there was this conflict between the Defendants' Counsel statement and what was on affidavit.

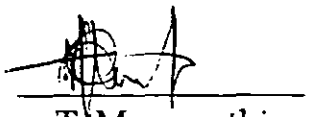
This Court observed what really cannot be inconsequential. This Court would rightly sensed (and I did) a great amount of uneasiness and discomfort on the Respondents Counsel on this point of service of the notices of Taxation. It had to do with a simple thing. It is this that all these things about the circumstances of this dispute were deposed to by Mr. Phillip William Hart; the manager of the Respondents. Amongst the things he deposes to (as a client) and strangely so is that the notices were served at the offices of M.T. Maieane, 1st Floor, No.3 Manonyane Centre. This he says when it was clear and unchallenged that the Applicants offices were no longer at that former address. In my mind this was crucial to probabilities.

I thought this latter aspect made the Respondents' version so inherently improbable that without much else that in the circumstances it was not supportable on the facts. The anomaly is demonstrable where in a situation where Mr Hart's evidence would be hearsay except where he is supported. But he is not supported by Mr. Buys who would normally (as an Attorney) be the source of his information in a dispute of this kind.

In my opinion, and through a robust approach to probabilities the Applicants cannot have received notice of taxation for the 7th or the 8th December 2000.

This application succeeds. Costs are awarded on the ordinary scale. I am not convinced that despite many inexplicable things I should award costs on a higher scale.

The order made is that the stay of execution is confirmed. The Writ of Execution is set aside. The Taxing Master's allocatur of the 8th December is set aside. The notice of taxation and bill of costs is to be served to enable a fresh and proper taxation on a proper date. Costs will be as ordered.



T. Monapathi
Judge

7th November 2002