IN THE HIGH COURT OF LESOTHO

HELD AT MASERU CIV/APN/156/2002

In the matter between:

O-RIVER TEXTILES (PTY) LTD **Applicant**

and

N. MOKABO	**1st Respondent**
M. Thoo	**2nd Respondent**
S. Kopano	**3rd Respondent**
T. Makhoali	**4th Respondent**
N. Lenkoe	**5th Respondent**
R. Phosa	**6th Respondent**
M. Mpholo	**7th Respondent**
M. Makhula	**8th Respondent**
M. Mofolo	**9th Respondent**
Nthethe	**10th Respondent**
R. Kolane	**11th Respondent**
M. Mokitimi	**12th Respondent**
M. Thabi	**13th Respondent**
M. Mosoeunyane	**14th Respondent**
L. Lekefe	**15th Respondent**
Commissioner of Police	**16th Respondent**
Attorney General	**17th Respondent**

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 19th day of September 2002

On Monday the 16th September 2002 Counsel came before me in my Chambers.

Indeed a few things were discussed in my Chambers on the last mentioned about a matter of this application. It was against the background that the Applicant had on the 15th April 2002 withdrawn its application, meaning that the order that was recorded was that the rule was discharged. What followed was an application by the Respondents for costs of their opposition. This was opposed by Applicants.

This Court insisted that on the same day there be argument over the award of costs. This was done because on that day Mr. Fosa and Mr. Semoko appeared before me, argument followed and I made an award of costs to Respondent. The ordinary principle being that costs follow the result. This principles was well captured by Solomon ACJ, CG Maasdorp JA and De Villiers AJ concurring in the case of **Union Government v Meiberg** 1919 ADA 77 at 489. He did not of course lose sight of the general rule that the judge has a discretion on the question of costs. See also **Civil Practice of the Supreme Court of South Africa** Van Winsen et.al 1997 4th ed p. 703-705 and authorities cited thereat; **Nqojane v Liphoto and Others** 1980(1) LLR 51.

It was in the circumstances such as the present where withdrawal of the application would be tantamount to the opposition being successful and the Respondents having to be put back in pocket in their costs that I made an order

of costs against the Applicant after he had withdrawn his application. The discharge of the rule is tantamount to a judgment or final order and the effects thereof are to render the Respondent thereat successful against the Applicant. Joubert *et.al* have the following to say on this point:

> "A plaintiff or applicant who withdraws his action or application is in the same position as an unsuccessful litigant because after all his claim or application is futile and the defendant or respondent is entitled to all costs caused by the institution of proceedings by the withdrawing party. (**The Law of South Africa** 1985 Vol.3 at p. 478-479).

I am aware that these Respondents accordingly filed their bill of costs which is dated the 25th April 2002, rather when it was filed before Court. It was on 25 April 2002 and it called for the parties to present themselves before Taxing Master. It is recorded that Mr. Fosa and Mr. Mohaleroe did appear before Taxing Master Mr. Mphakoanyane.

This morning my impression was disabused. It had been as if the Taxing Master had sent the matter for review. What seems to have been the correct situation is that the Taxing Master was appraised of a certain notice of motion having been filed in the 25th April 2002 which was connected with the order that had been made as stated hereinbefore. Furthermore it is said, this morning, by Mr. Fosa that at that time he had not been served with the notice of motion when he appeared before the Registrar.

Indeed I realise that the minute by the Taxing Master speaks of variation of recission in terms of Rule 45 of the Court Rules which confirms what Counsel are saying this morning. Nothing in the papers suggested any good ground why the order of withdrawal and discharge of the rule and my order for costs against Applicant ought to be varied or rescinded. I must say with emphasis that the rules of Court are quite clear on the requirements for rescission as outlined under Rule 45. And these requirements have been repeated in many cases including the cases of **Athmaram v Singh** 1989(3) SA 953(D) at 957; **Ntlaloe v Attorney General** 1985-1990 LLR 345. And the learned authors, Van Winsen et.al (supra) summarise those requirements in the following manner:

> "..... but it is clear that in principle and in the long standing practice of our courts, two essential elements are:
>
> (1) that a party seeking relief must present a reasonable and acceptable explanation for his default, and
>
> (2) that on the merits that party has a bona fide defence which prima facie carries some prospects of success."

It is being kind to say that this is abuse of Court process. It is more than that.

This morning Counsel were to argue this application, when an important principle is revealed namely that the Rule 45 which allows for variation or rescission can only apply where there was a substantive order made by the Court. This substantive order can come about by reason of a judgment by

default or judgment as to merits after hearing evidence. I am satisfied that this was not the position inasmuch as the application was withdrawn. On this principle therefore the application should fail much as this was conceded to by Mr. Semoko for Applicant.

I have to comment more about this application. It is that it was seriously misconceived and I agreed that it was misplaced. It could only be called abuse of Court process. Clearly the purpose of the rules of Court is to expedite the business of the Court. Counsel should therefore interpret and apply the rules in a spirit that will facilitate expeditious and prudent work of the courts and enable speedy and inexpensive litigation. In this regard the Court has powers to prevent flagrant abuse of court process and vexatious litigation. See the cases of **Standard Credit Corporation v Bester & Others** 1987(1) SA 812; **Eastern Assurance Co. V Cardwell's Trustee** 1918 AD 262 at 272.

In the case of **Phakiso Molise & Others v Commissioner of Police & Others** LLR 1997-98 228 it was held by the Court that where there are apparent irregularities of procedure which render a case frivolous, then an award of costs on attorney and client scale is justifiable. I would be bund by these authorities to award costs on a higher scale but I am reluctant to do so because the impression I get from the notice of motion leaves no doubt that it was a result

of serious misunderstanding of High Court rules and a serious error of judgment. The content of the notice of motion was an instant indication that there was something gone awry. For the future Counsel are advised to consider more seriously the true meaning and interpretation of rules. So that I would nevertheless award costs on an ordinary scale.

I am tempted to make any observation about the dispute about the number of Respondents. Inasmuch as the bill was already presented before the Taxing Master, this is the matter that will be dealt with by the Taxing Master who will still make his own judgment and necessary orders. If there is need to refer this matter to a Judge of the High Court he will do so on proper grounds.

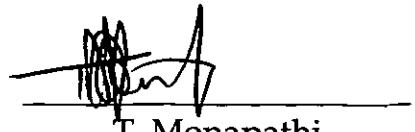
Clearly the Applicants herein were dissatisfied with the bill of costs as placed before the Taxing Master. They felt, and rightly, that they could not proceed to tax the bill because the bill as a whole was not proper. Hence their argument that it be set aside. In simple terms, their argument was that the appearance of many respondents on the bill of costs, which respondents had not been joined or cited in the case itself, at least on the papers that they proceeded on amounted to little more than unnecessary duplication of costs. As it was held by the learned judge Mr. Justice Ramodibedi in the case of **Evaristus R Sekhonyana & 26 Others v Attorney General & 3 Others** 1991-96 LLR 1417 at

1421 that is the issue following basically in the powers and functions of the registrar. I agree entirely with the learned judge. I must add that Rule 49 state in unequivocal terms, the procedure to be followed in review proceedings. This rule must be read together with Rule 56(3) of the Rules which provides thus:

> "(3) The taxing Master shall allow such costs, charges, expenses, and disbursements as, in his opinion appear to him to have proper or necessary for the attainment of justice or for defending the rights of any party but, save as against the party who has incurred the same, no costs shall be allowed which, in the opinion of the Taxing Master, were incurred through over caution, negligence or by mistake, or by unusual disbursements."

On the strength of the requirements laid down by these rules, as acknowledged with approval in the cases of **Evaristus R Sekhonyana and 26 Others v Attorney General & 3 Others** (supra) and that of **Mothebesoane v Mothesoane** 1973 LLR 211; I find that Counsel did not comply with procedure and were wrongly before me. Perhaps the right procedure as rightly pointed out in the case of **Mothebesoane v Mothebesoane** (supra) would be that provided under Rule 8(7) of the High Court Rules thereby annexing the said bill of costs. Otherwise Applicant will only come before Court when the bill has been taxed and certain items were taxed off or on as the case may be.

This is my judgment.



T. Monapathi
Judge
19th September 2002