IN THE HIGH COURT OF LESOTHO

In the matter between:-

EVARISTUS R. SEKHONYANA	1ST APPLICANT
ABIEL MOUPO MATHABA	2ND APPLICANT
DR. EBENEZER MALIE	3RD APPLICANT
LEKHOOANA JONATHAN	4TH APPLICANT
TEBOHO VINCENT LEPHEMA	5TH APPLICANT
NATHANAEL NKUATSANA	6TH APPLICANT
RANTHOMENG MATETE	7TH APPLICANT
PITSO AUGUSTINE TSOTSI	8TH APPLICANT
JEREMIA MORENA LETSIE	9TH APPLICANT
TSOLO LELALA	10TH APPLICANT
FELIX THABO PUTSOA	11TH APPLICANT
MAKHABANE HLASOA MOLAPO	12TH APPLICANT
PHALE MOKOENA	13TH APPLICANT
EMMANUEL LEPHELE	14TH APPLICANT
LIAU MOLETE	15TH APPLICANT
EMMANUEL MOLEFI THENE	16TH APPLICANT
JUSTIN METSING LEKHANYA	17TH APPLICANT
FLORA SELLOANE SELESO	18TH APPLICANT
KHOMOMOSOTHO MOLAPO	19TH APPLICANT
MICHAEL PHOSO MOKETA	20TH APPLICANT
BOKANG LELIMO	21ST APPLICANT
MOKHOFU SIMON HLALELE	22ND APPLICANT
PETER KHAMANE	23RD APPLICANT
KALI MASILOANE	24TH APPLICANT
KHETLA THABO J. RAKHETLA	25TH APPLICANT
VITALIS KEFUOE 'NGOAE	26TH APPLICANT
RAMABILIKOE G. MASHAPE	27TH APPLICANT

and

THE ATTORNEY-GENERAL	1ST RESPONDENT
REGISTRAR OF THE HIGH COURT	2ND RESPONDENT
DEPUTY SHERIF	3RD RESPONDENT

J U D G M E N T

Delivered by The Honourable Mr. Justice M.M. Ramodibedi
Acting Judge on the 30th day of August, 1996

This is an application to review the taxation of a bill of costs on attorney and client scale arising from failed petitions filed by the applicants, who were BNP candidates, against their BCP counterparts in the National General Assembly Election held on the 27th March, 1993. It is apparent

from the judgment of Cullinan C.J. who presided over the said petitions together with two other judges in the Court of Disputed Returns of Lesotho that the Attorney General was "in fact the second respondent in each of the twenty-eight petitions."

It is further apparent from the said judgment of the Learned Chief Justice which was concurred in by the other two judges that in dismissing the petitions costs were granted "to all twenty-nine respondents on the attorney and client scale, each petitioner to bear the costs of the respective respondent, all petitioners to bear the costs of the Attorney-General jointly and severally." That was on the 1st day of September, 1993.

It is common cause that on the 11th day of July, 1995 the Attorney-General served attorneys M. Ntlhoki & Co. with twenty-eight bills of costs as against each of the twenty-eight petitioners in the matter. These bills were duly taxed without any objection by the petitioners or their attorney on the 20th day of July, 1995.

It is further common cause that on the 29th day of August 1995 the Attorney-General then filed twenty-eight warrants of execution against the respective property of each of the twenty-eight petitioners for the amounts taxed by the Taxing Master as aforesaid.

Thereafter the record of proceedings styled "TM1 - TM7"

which is the only record of proceedings made available to me indicates that only two petitioners namely Lekhooana Jonathan and Peete Nkuebe Peete subsequently applied for stay of execution in the matter. Since the latter does not feature in the present application before me it is convenient to deal with Lekhooana Jonathan's application only by way of clarification in as much as he is the fourth Applicant herein. His affidavit in support of the aforesaid application for stay of execution was sworn to on 31st day of October 1995 and the application filed on the 7th November 1995.

It seems to me that the whole basis of Lekhooana Jonathan's application for stay of execution was not to enable him to review the Taxing Master's decision as such but to challenge by review the decision of the Court of Disputed Returns on costs in as much as he states in paragraphs 10, 11 and 12 of his founding affidavit therein:-

> 10. "I was served with writ of execution sometime in September of this year in terms of which 4th respondent is instructed to raise the amount of M17,647.20 as costs out of my property as costs in CIV/APN/185/93."

(I observe that the Warrant of execution Annexture "TM6" actually reflects the sum of M6 314-49 which is the sum actually allowed by the Taxing Master.)

> 11. "I was extremely shocked to find that I was to pay such heavy costs. I immediately went to my attorneys who promised to make investigations

into the whole matter and their findings were that an attorney I had engaged to conduct the proceedings in CIV/APN/185/93 had not attended the taxation of the bill of costs on the day he had been notified to do so."

12. "After discussing this matter with some of my colleagues I instructed my attorneys to file a notice of review of the 3rd respondent's decision in awarding costs against me when my matter in CIV/APN/185/93 had never been decided by the Court of Disputed Returns of Lesotho when leave to withdraw it had been refused by the same court. It was thereafter agreed that it would be appropriate to angage a Senior Counsel from South Africa to handle this case on review."

I observe that it was only on the 23rd day of May 1996 that the Applicants herein including the said Lekhooana Jonathan filed an "urgent" application for an order in the following terms:-

"1. Dispensing with the forms and periods of service of this application on the grounds of its urgency.

2. That the Rule Nisi be issued calling upon the Respondent to show cause, if any, why the following orders should not be confirmed and made absolute and final.

(a) The Warrants of Executions issued against Applicants in various election petitions should not be stayed pending the final determination and adjudication of this application.

(b) The various Bills of Costs taxed and allowed by the Registrar of this Honourable Court should not be reviewed, corrected and set aside.

(c) The 1st Respondent should not be ordered to pay the costs of this application on attorney and client scale.

3. Prayers 1 and 2 (a) should operate with an immediate effect and as interim order of this Honourable Court.

4. Granting such further and or alternative relief as the above Honourable Court may deem fit."

I turn now to deal with the law and procedure relating to costs in the matter as I conceive it to be. Section 17 of the Court of Disputed Returns (National Assembly Election Petition) Rules Legal Notice No.54 of 1993 provides in part:-

"(1) Costs of and incidental to the presentation of a petition and to the proceedings consequent thereon shall be paid by the parties in such manner and in such proportions as the Court may determine.

(2) The Court in making an order as to costs may -

(a) order any unsuccessful party to pay the costs of any other party or parties; or

(b) order any unsuccessful parties to pay jointly or severally, the costs of any other party or parties,

the one paying the other or others to be absolved, and that if one of the unsuccessful parties pays more than his pro rata share of the costs, he shall be entitled to recover from the other unsuccessful party or parties his or their pro rata share of such excess.

(4) Costs shall be taxed by the Registrar in the same manner as costs are taxed in a civil suit in the High Court, but subject to any general or specific directions given by the Court. Costs when taxed may be recovered in the same manner as the costs of a civil suit in the High Court."

Section 19 specifically provides that "the Rules of the High Court shall, so far as they may be applicable, apply to any matter for which provision is not made in these Rules."

Now Rule 49 (1) of the High Court Rules 1980 which specifically deals with "Review of taxation" provides as follows:-

"Any party who is not satisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed **mero motu** by the taxing master may within fourteen days of the allocatur require the taxing master to state a case for the decision of a Judge, which case shall set out each item or part of an item together with the grounds of objection advanced at the taxation and shall include any relevant findings of fact by the taxing master,

> Provided that, save with the consent of the taxing master, no case shall be stated where the amount, or the total of the amounts, which the taxing master has disallowed, or allowed, as the case may be, and which the party dissatisfied seeks to have allowed or disallowed respectively, is less than ten rand."

It seems to me that the words "an item which was objected to" are not just empty words but were clearly intended to lay down a prerequisite for review of taxation namely that there must first be an objection raised before the Taxing Master in respect of the affected item. The reason for this is not hard to find as it is trite law that taxation of costs is pre-eminently a matter for the discretion of the Taxing Master. In fact Rule 56 (3) of the High Court Rules makes this abundantly clear in unequivocal terms as follows:-

> "The taxing master shall allow such costs, charges, expenses, and disbursements as, in his opinion appear to him to have proper (sic) 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."

Rosenow J. in interpreting a substantially similar South African Section as the above mentioned Rule 56 (3) of the High Court Rules had this to say in **Phiri v Northern Assurance Co. 1962 (4) S.A. 284 at 285 :-**

> "The discretion to decide what costs have been necessarily or properly incurred is given to the taxing master and not to the court. The court can therefore only interfere where the taxing master has exercised his discretion improperly, on the basis well established in relation to matters coming before a court on review."

With respect I entirely agree and it is upon this basis that I approach the matter placed before me.

As earlier indicated the applicants did not object to any of the items of the bills of costs presented to the taxing master.

I am prepared therefore to hold that their review application is irregular and contrary to Rule 49 (1) of the High Court Rules as aforesaid. Nor does the matter end there.

In terms of Rule 49 (1) of the High Court Rules the applicants were further obliged to "require the taxing master to state a case for the decision of a judge" within fourteen days of the allocatur if they were not satisfied with the ruling of the taxing master. The said Rule further provides in mandatory terms that the stated case shall set out each item or part of an item together with the grounds of objection advanced at the taxation and shall include any relevant findings of fact by the taxing master. It is common

cause that none of these prerequisites were observed by the applicants in this matter and the Rule in question has been blatantly ignored. Nor is there any slightest explanation furnished for the non observance of the Rule in question. Worse still there is no application for condonation of the late filing of review beyond the fourteen days of the allocatur in terms of the aforesaid Rule.

It is correct that in a proper case the court is quite entitled to condone non observance of the Rules of Court including time limitations. The High Court does have inherent jurisdictions in that regard. In my judgment, however, condonation is not just there for the taking. I consider that in the special circumstances of the case before me the applicants ought to have made a substantive application for condonation to deal with and explain, inter alia, non compliance with the Rules of Court, the degree of such non compliance, prospects of success, convenience of the court, the magnitude of the case, the question of the avoidance of unnecessary delay in the administration of justice and that there should be finality to litigation (the list is not exhaustive). See **Leribe Poulty Cooperative Society v Minister of Agriculture and 2 others C of A (CIV) No. 13 of 1991** in which Ackerman J.A. referred, with approval, to the case of **Federated Employers' Insurance Co. v Mckenzie** 1969 (3) S.A. 360 (A) at 362 G. I respectfully adopt the principle enunciated in those cases.

In **Michael Mthembu v Lesotho Building Finance Corporation C of A (Civ) No. 4 of 1984** Schutz P. quoted with approval Muller JA's remarks in **P.E. Bosman Transport Works Committee and others v Piet Bosman Transport (Pty) Ltd.** 1980 (4) S.A. 794 (A) at 797 F to the following effect:-

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> "In a case such as the present there has been a flagrant breach of the Rules of Court in more than one respect, and where in addition there is no acceptable explanation for some periods of delay and, indeed, in respect of other periods of delay, no explanation at all, the application should, in my opinion, not be granted whatever the prospects may be."

With respect I find that these words are apposite to the case before me and I respectfully adopt them herein. There has been a complete failure to comply with any of the provisions of Rule 49 (1) of the High Court Rules as aforesaid. Nor has there been any attempt whatsoever to identify any of the perceived objectionable items in the bills of costs taxed by the Taxing Master. The Court is expected to hazard a guess in that regard. This is totally unacceptable, to say the least. In the circumstances I would dismiss this application for non compliance with Rule 49 (1) of the High Court Rules as aforesaid and on the ground that there is no application for condonation before me.

The applicants then complain that they were not aware that the various bills of costs concerned were taxed against them since they were served on their "previous attorney" whom they had allegedly "dismissed during the proceedings" (see paragraph 7 of the founding affidavit of Everistus R. Sekhonyana). Mr. Mphalane who appeared for the applicants initially persisted with this line of argument until he was soon driven to concede,

quite properly in my view in the circumstances of the case, that the said bills of costs were properly served on Mr. Ntlhoki who up to that stage was still the attorney of record for the applicants. I am prepared to accept the version of the respondents in this regard as deposed to in paragraph 15 of the opposing affidavit of Tsokolo Makhethe in as much as it is supported by the aforesaid judgment of Cillinan C.J. It is quite clear from the said judgment, as I read it, that although Mr. Ntlhoki tried his level best to withdraw as attorney for the petitioners in the matter at no stage did the court ever grant him leave to do so. What is more, he never served any notice of withdrawal upon the respondents nor did he ever file one with the court. I observe that even in the said judgment of Cullinan C.J. he is indicated as appearing for the petitioners. In the circumstances therefore I conclude that the bills of costs in this matter were properly served upon applicants' attorney who had no objection thereto and that they cannot be heard to complain.

Finally the Applicants further complain that only one Bill of costs should have been taxed against them in as much as they were ordered to pay costs to the Attorney-General jointly and severally and that the petitions were consolidated and heard together. I consider that there is no merit at all in this complaint. In terms of the order of court the Attorney-General was entitled to recover costs against the applicants either jointly or severally. He could do so by preparing one bill of costs or individual bills as long as he claimed what was due to him. The real question to be determined is, as I see it, whether one service was performed

or more than one service.

See In re Lubbe 1964 (1) S.A. 855 T. The difficulty that the applicants face in this application is that they do not show that the Attorney-General was performing only one service. For my part I cannot but imagine that he would have certainly performed more than one service regard being had to the fact that he featured as a respondent in each of the twenty-eight different petitions from twenty-eight different Constituencies.

In any event if it is the applicants' case that there was unnecessary duplication of costs I observe that in law that is primarily the function of the taxing master and not the court.

see **Silber v Silber 1964 (3) S.A. 473 (T) at 476.**

It has not been shown that the taxing master exercised his discretion improperly. In the circumstances the court declines to interfere with his discretion.

In conclusion I think there is merit in Mr. Makhethe's submission that this application is an abuse of court process aimed at delay and frustrating the Attorney-General from enjoying the fruits of the judgment of the Court of Disputed Returns of Lesotho. I respectfully discern the need to reproduce the remarks of Cullinan CJ in his judgment in the Court of Disputed Returns as they tell the whole story:-

> "I am drawn to the inevitable conclusion therefore that these petitions were filed solely as a matter

> of political expediency and that thereafter full political capital was made of Mr. Mpiti's unsuspecting and bona fide efforts to assist the Court by extracting the relevant documents, culminating in the High Court's refusal, on a jurisdictional basis, to intervene, thus presenting the petitioners with a timely justification for withdrawal, in the ill-advised belief that withdrawal was a matter for the petitioners' discretion. Thereafter, rather than pursue their alleged grievances before the Court, the petitioners opposed every effort of the Court to investigate such grievances.
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> On 2nd June, when the Court reluctantly granted an adjournment for five days, the Court, even at that stage, observed that it was "being treated in a cavalier manner." I am now convinced that matters can be taken further and that the process of this Court, the first Session of a Full Bench of the Court of Disputed Returns, has been blatantly abused for political purposes, displaying on the part of the petitioners a cynical disregard for the administration of justice."

This Court is satisfied on a balance of probabilities that the applicants' delaying tactics are still continuing to date as manifested in this application.

In all the circumstances of the case as outlined above I would dismiss the application and discharge the rule with costs and it is so ordered.

M.M. RAMODIBEDI
ACTING JUDGE

FOR APPLICANTS: Mr. Mphalane
FOR RESPONDENTS: Mr. Makhethe