

IN THE HIGH COURT OF LESOTHO

HELD AT MASERU

In the matter between:

BOFIHLA MAKHALANE

Applicant

And

LETŠENG DIAMONDS (PTY) Limited

1st Respondent

JUDGEMENT

Coram : Hon. Mr. Justice T. E. Monapathi
Date of Hearing : 14th May, 2013
Date of Judgement : 3rd June, 2013

SUMMARY

An application for review must follow Rule 50 of the rules of court. In regard to the ruling of the Taxing Master then Rule 49 be utilized where no opposition was made before the Taxing Master. The unexplained failure to attend before the Taxing Master becomes more telling and the application more untenable as was the present application.

CITED CASES

Sole v Cullinan NO and Others LAC (2000-2004) 572 at 585D

Tseka v Majalle LAC 2000 – 2004

STATUTES

Rules of Court

[1] This is an application in which the Applicant (Mr Makhalane), who appeared in person seeks an order staying a writ of execution issued pursuant to a taxed costs-order made by Peete J. Applicant did not attend before Taxing Master despite notice. Mr Woker has raised, points of law in terms of ***Rule 8 (10) (c)*** of the ***Rules of Court***. These dealt with as below.

[2] I had already dismissed points of law raised by Applicant about numerous disputes of fact “for the reason that no such disputes were shown or demonstrated” in a matter that was an application for stay “in order to turn into a trial” involving an issue which was completely different from the issue giving rise to the consequent application. I could not refer this matter for trial or for oral evidence in the circumstances. Mr. Woker correctly referred to the case of ***Tseka v Majalle. LAC 2000 – 2004***.

[3] The stay is sought “pending a review application” which, despite this application having been instituted over a year ago, has still not been instituted. In this instance, well in excess of a reasonable time has elapsed. Mr. Woker submitted that accordingly the contemplated

review proceedings would not be entertained and hence the application could never succeed. And it followed that a stay in this application could never be granted.

[4] **Rule 49** reads as follows:

“(1) 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 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.” (my emphasis).

As correctly submitted a party dissatisfied with a decision of the Taxing Master must proceed in terms of this **Rule 49**. The Applicant says so himself. This he said as much in paragraph 12 of his founding affidavit (at page 5 of the record). But he has not proceeded in terms of this Rule. Respondents submitted that this too non-suits Applicant in this application. There were, in my view, no sound reasons why the Applicant would proceed otherwise.

[5] It is a correct background that on 27 May 2010 Hon. Judge Peete dismissed with costs the application launched by Mr. Makhalane under case number CIV/APN/150/2010. Mr. Makhalane unsuccessfully appealed that decision. The judgement of the Court of Appeal was handed down on 20 April 2011. By notice of Taxation issued on 2 August, 2011 notice was given that the bill of costs (raised pursuant to Hon. Judge Peete’s judgement) would be taxed

on 10 August 2011. This was received at the Applicant's chosen address on the same day.

[6] It was not contested that Mr. Makhalane did not attend the taxation on 10 August 2011. The taxation commenced in Mr. Makhalane's absence. The taxing Master did not complete taxing the bill. This was because he could not make a decision on certain items in the bill. Eventually a new Taxing Master Miss Palesa Phenethi took over the matter. Now the taxation was scheduled for 1 December 2011 at 14h30. The Applicant was notified of this date and time by notice dated 24 November 2011.

[7] On 1 December 2011 Mr. Makhalane failed to attend. For this reason the Taxing Master postponed the proceedings to the next day, 2 December 2011 at 09h00. The Taxing Master directed that the Applicant be advised of the postponement. Mr. Ramolefi Molupe, a candidate attorney at Webber Newdigate, then telephoned Mr. Makhalane to advise him of the postponement to the next day. In this telephone conversation Mr. Makhalane informed that he could not attend the taxation because he had another matter before my court at the same time. This excuse was not true. Only previously had there been a hearing before me. He also said he was too busy to attend the taxation. He specifically stated "that he would not attend the taxation on 2 December 2011".

[8] The Applicant then did not attend the taxation the next day on 2 December 2011. Mr. Molupe informed the Taxing Master then proceeded to tax the bill in the absence of the Applicant. Respondent submitted that the fact above show that the Applicant was given every opportunity to attend the proceedings before the Taxing Master. The Applicant spurned these opportunities. Not only did he know

about the date but he was also untruthful about his unavailability. In my view he cannot, in the circumstances, complain about the bill being taxed in his absence. With respect Mr. Makhalane waived his right to be present at the taxation proceedings. Waiver in law occurs when a person with full knowledge of his legal rights abandons them. See, for instance, Christie – **The Law of Contract in SA** 1983 Chapter **12 at 431-8**; **Wille & Millin – Mercantile Law of SA** 18th ED 1984 at 163-164.

“A waiver entailed by a failure to (attend the taxation proceedings) need not be express: it need only be clear” - See **Sole v Cullinan NO and Others LAC (2000-2004) 572 at 585D**.

The conscious decision by (Mr. Makhalane, having been given due notice that the taxation would proceed on 2 December 2011) not to attend, supports the assertion that he waived his right to be present. See **Sole v Cullinan NO and Others OPCIT at 585F to H**.

[9] I agreed with respect that it was Applicant declared attitude not to attend taxation. In the circumstances the Respondent submitted that Mr Makhalane was not entitled to the Order of stay sought in this application. Respondent accordingly prayed that this application be dismissed with costs.

[10] I said there was much to say about the Applicant intention to have the matter reviewed. It is this that the clear impression was that in due course the application to review would be filed. When a complaint is voiced about the delay and the need to comply with **Rule 50** the Applicant now said the papers filed in the present application

comprised the application for review itself. Still this would be untenable.

[11] While in agreement that an application for review shall be on notice of motion the **Rule 50** (b) provides that:

“Such notice shall call upon all the persons to whom the notice is addressed to show cause why such decision or proceedings should not be reviewed and corrected or set aside and the notice shall call upon the magistrate, pre-siding officer, chairman, officer or person (as the case may be) to dispatch, within fourteen days of the receipt of the notice, to the Registrar of this court the record of such proceedings sought to be corrected or set aside together with such reasons as he is required or desired to give, and to notify the Applicant that he has done so.”

The present application is certainly not one envisaged under **Rule 50**. In addition it is not clear as to how, if not in terms of **Rule 50** or **Rule 49**, a review of the Taxing Master’s allocatur can be brought about. None of this has happened. I was satisfied that the Respondents’ submission that the application was misconceived was correct.

[11] The application ought to be dismissed with costs.

T. E. MONAPATHI
ACTING CHIEF JUSTICE

For Applicant : **Mr. Makhalane (In person)**
For Respondents : **Mr. Woker**