Reportable:	NO
Circulate to Judges:	NO
Circulate to Magistrates:	NO
Circulate to Regional Magistrates:	NO

IN THE HIGH COURT OF SOUTH AFRICA

[NORTHERN CAPE HIGH COURT, KIMBERLEY]

CASE NO: 1742/11

In the matter between:

FREDERIK SNYDERS	1ST APPLICANT
SIMON PETRUS SNYDERS	2ND APPLICANT
JOSEPH HERMANUS SNYDERS	3RD APPLICANT
ANDRIES ALBERTUS SNYDERS	4TH APPLICANT

AND

ABRAHAM JACOBUS SNYDERS (Executor)	1ST RESPONDENT
THE SHERIFF	2ND RESPONDENT
P.S LANGE	3RD RESPONDENT

Date: 19 January 2012

Reasons for the Order

TLALETSI J

[1] On 26 October 2011 the applicants approached this Court on urgent basis seeking orders on the following terms:

> *"1. That the Applicants' failure to comply with the provisions of Rule 6(5) of the Uniform rules of the Court with regard to form and service be condoned.*
>
> *2. That rule nisi be issued calling upon the First Respondent to show cause on the 11th of November 2011 why this order should not be made final.*
>
> *3. That pending the application to be brought by the Applicants before the Honourable Court to have the First Respondent removed as the Executor of the Estate, the First Respondent be interdicted from selling the Applicants properties.*
>
> *4. That the Second Respondent be interdicted from attaching, removing and selling the Applicants properties on a public auction.*
>
> *5. That the order prayed in (3) and (4) should be of an interim nature;*

> 6. *That the First and Third Respondents be ordered to file for taxation amended statements of accounts within a period of one month.*
>
> 7. *That in the event of opposition, the Respondent be ordered to pay the cost of this application on the scale of attorney and client;*
>
> 8. *That the Applicants be granted such further and/or alternative relief as the Honourable Court may deem fit; and*
>
> 9. *That this application be dealt with as one of urgency in terms of Rule 6(12) (a) and (b) of the Uniform Rules of Court."*

[2] The application was opposed by the first respondent ("the respondent"). After listening to the parties' submissions I made an order dismissing the application with costs and directed that reasons for the order would follow upon request by either of the parties. The applicant's attorneys have written to the Registrar indicating that "*We request reasons for the order"*. What follows are my reasons for the aforesaid order.

[3] The facts relevant to this application are brief and straightforward even though the applicants have introduced background information that is not relevant to the application and to which the first respondent had to answer. The applicants as well as the respondent are named as beneficiaries in the last Will and Testament of their late father. The respondent is the executor of the said deceased estate. The applicants instituted proceedings in the North West High Court against the respondent relating to a dispute about the sale of the asset of the estate. That case was subsequently transferred to this Court. The matter was placed on the roll and on 13 August 2010 **Majiedt AJP** made an order on the following terms:

(a) The application is postponed sine die;

(b) The applicants are to pay the wasted costs occasioned by this postponement on attorney and client scale jointly and severally, the one paying the others to be absolved;

(c) The applicants shall not set the matter down for hearing before the said costs are taxed and paid by the applicants.

(d) The applicants may as they deem proper set the matter for hearing despite the orders made above.

(e) The Registrar is in so far as it may be possible, to give preference to this case when an application for a date of hearing is filed. In the event that the costs referred to above are not taxed and paid by the time the matter is set down for hearing by the respondent in the fourth term, the respondent is granted leave to approach this Court on proper application to apply for the dismissal of the applicants' claim with costs.

As it will be shown in due course it is the implementation of this order that has brought about the present application. Subsequent to the above order, the matter was set down for hearing on 25 February 2011. On this day **Phatshoane AJ** made an order dismissing the applicants' application with costs.

[4] On 01 November 2010 the respondent served a notice of taxation of costs on the applicants' attorneys. In the notice the applicants were informed that:

4.1 They may attend at the respondent's attorneys within ten days of the notice, to inspect documents or notes related to the bills of costs;

4.2 Within 20 days of the notice file a notice of their intention to oppose the taxation;

4.3 State in the said notice of opposition any items(s) in the bills that they are objecting to together with brief reasons for such objection;

4.4 In the event that no notice of opposition is served and filed, the respondent would place the said bills before the Taxing Master for taxation without further notice to the applicants.

4.5 In the event that the notice of opposition is filed within the period provided the applicants may during the taxation of the bills note their objection.

[5] It is not in dispute that no objection was served or registered by the applicants. The bills of costs were placed before the Taxing Master on 06 December 2010. On 12 January 2011 the Taxing Master formally taxed the bills.

[6] On 14 January 2011 the respondent's attorney wrote to the applicants' attorney and attached the taxed bills and demanded that payment be made by 21 January 2011 failing which the respondent will apply for the dismissal of the applicants' claim as provided for in the court order referred to above.

[7] On 26 January 2011 the applicants' attorneys acknowledged receipt of the letter dated 14 January 2011 from the respondent's attorneys and advised that they *"have been experiencing difficulties in getting hold of [their] clients and consequently they could not get instructions."* The letter stated further that they "*have now been able to get our clients and they must convene a meeting and favour us with further instructions"*. The letter concluded that:

> *"In the circumstances we request your indulgence so that our clients can consider their options. It might be that they might decide mero moto to abandon this action"* (sic).

[8] On 02 February 2011 the respondent's attorneys replied to the above letter and advised that their clients' instructions are that they should proceed to apply for the dismissal of the applicants' claim since there had not been compliance with their request for payment. They advised further that the applicants' request was not acceptable.

[9] On 08 March 2011 a Writ of Execution against property to the amount of R122 860-65 representing the respondent's costs was issued. The applicants' property was subsequently placed under attachment by the Sheriff.

[10] On 4 April 2011 applicants' attorneys wrote a letter to the respondent's attorney in which they advised, *inter alia*, that a letter had been written to the Master of the High Court requesting that the respondent be removed as the executor of the estate.

[11] On 12 April 2011 the respondent's attorney replied to the above letter and in addition to responding on the matter relating to the removal of the respondent as the executor and other court applications, he advised that the applicants were liable to pay the taxed bills of costs and that the Sheriff's returns of service for attachment of property had been received. The letter concluded that:

> *"Our clients due to the family ties are hesitant to give instructions that execution auctions must be held and we therefore enquire as to whether or not your clients will pay the taxed costs. We need your response within the following 10(ten) days.*

It would be obvious that it would be in all concerned interest if the estate is finalized and the costs be paid from the inheritance of your clients in which event their assets will be spared from execution auction."

[12] On 18 October 2011 applicants' attorneys wrote to the respondent's attorney. In the letter they indicated that:

"We refer to your taxed bill of costs (inclusive of your correspondent) herein drawn in terms of attorney and own client.

We verily believe that you have made an error in that the Courts decision of 13 August 2010 awarded costs in an attorney and own client for two court dates only. A copy of the judgement upon which the bills of were drawn is included herewith for you ease of reference.

We believe that when you appeared before the Taxing Master to tax the bills, the error persisted that the Court ruled that you must get costs on attorney and own client for all your costs. On a proper reading of the Court's decision, that conclusion cannot be sustained.

As a consequence of the error, it is clear that our clients must settle the two days of attorney and own client and the rest must be drawn on a party and party scale. A copy of the Court Order of 25 February 2011 is also transmitted for your ease of reference and you will note that the Court did not order punitive costs.

In order to enable our clients to comply with the Court Order, we request you to send us a day's taxed attorney and client account for the two days as per the Court's decision. It follows that if you agree that you made an honest *error, you will cancel your instructions to the Sheriff to attach and to finally sell the property of our clients.*

We trust you will revert to us on an urgent basis." (sic)

[13] On 20 October 2011 the respondent's attorney replied to the said letter and stated *inter alia*, that:

13.1 The time provided for in the bills of costs relate to the wasted costs brought about by the postponement of the matter due to the applicants' unpreparedness for the hearing and to fees for counsel's reservation of two days for the hearing of the matter.

13.2 There is therefore no mistake in the compilation of the bills of costs, and have been taxed in accordance with the court order.

13.3 They are therefore not prepared to cancel the auction sale on the reasons provided by the applicants.

[14] On 20 October 2011 the applicants' attorneys forwarded a letter to the respondent's attorneys in which they in addition to other issues relating to another matter, reported that their clients had advised them that the Sheriff, on the respondent's instructions, had advertised the intended sale of their property that was attached on the basis of the *"bills that are patently wrong if regard is had that the order of Court has limited your attorney and own client fees to two days."* The letter concluded thus:

"If by end of business today, you have not reversed your instructions to the Sheriff and advised us of same ,we will accept that you have no interest in correcting your bills, even after the issues we have raised in our letter to you dated 18 October 2011."

[15] The respondents' attorneys responded on the same day and on the relevant issues to this matter advised that the applicants should pay the taxed costs as demanded already and that they do not agree with the applicants' interpretation and or understanding of the court order of August 2010. They mentioned further that the auction sale had been arranged because of the applicants' failure or refusal to pay the taxed costs; that the taxation had been finalised and that despite the notice served on the applicants they chose not to attend taxation; that to raise these type of arguments and objections at this late stage seemed opportunistic and in any case wrong; that they would not give instructions to the Sheriff to cancel the sale and would not correct a taxation process that had been properly processed. The letter concluded by suggesting to the applicants to in the interim, deposit the amount claimed in the writ in a trust account and that the sale be suspended pending the finalisation of the dispute regarding the court order.

[16] Four days later on 24 October 2011 the applicants issued this application. They contended in the founding affidavit that the matter was extremely urgent in that the Sheriff was on the instructions of the respondent, going remove the applicants' assets within a week and sell them; and that from the time the deponent became aware of the local newspaper advert, namely, 20 October 2011 and the anticipated date of removal of the assets, being 31 October 2011, they would be left with only a week to act.

[17] The deponent contended further that he had been advised that he had no other remedy available to enforce his rights and to protect his assets other than to approach this Court especially that the assets would be removed on 31 October 2011 followed by the public auction on 03 November 2011.

[18] Prayer 3 of the notice of motion sought to interdict the respondent from selling the applicants properties pending the application to be brought by the applicants to have the respondent removed as the executor of the estate. This prayer, in my view, is intended to interdict the respondent from selling the properties of the applicants in his capacity as executor of the estate pending the application to be brought by the applicants to have him removed from the office he holds. There is no basis for such order on the papers. The essence of the applicants' application on the papers was that the respondent was incorrectly interpreting an order of court that granted costs in his favour. This conclusion is further supported by the inclusion of prayer 2. The applicants' counsel's concession is this regard is well founded.

[19] Prayer 2 though worded as a final interdict, when read in the context of all other prayers, particularly prayers 5 and 6 is intended to be a temporary interdict. Its proper interpretation in the context is that the respondent should be interdicted from attaching, removing and selling the applicants' properties pending the filing for taxation by the respondent amended statements of accounts within a period of one month.

[20] In order for the applicants to persuade this Court to exercise its discretion in favour of granting them the temporary interdictory relief , they had to show that they have prima facie right though open to some doubt; there is a well grounded apprehension of irreparable harm to the applicants if the interim relief is not granted and ultimately succeeds in establishing the right; that the balance of convenience favours the granting of interim relief; and that the applicants had no other satisfactory remedy. (See: ***LF Boshoff Investments (Pty) Ltd v Cape Town Municipality 1969***(2) SA 256 (C) at 267 A-F).

[21] The applicants had to show that the matter was urgent in order for their compliance with Rule 6 be dispensed with. They had to provide reasons and evidence to show that they could not be afforded substantial redress at a hearing in due course. This matter was only urgent for it to be heard on 26 October 2011 merely because of the impending attachment and intended sale in execution. However, as it would be shown in due course, this application was unnecessary. Furthermore, the applicants had ample opportunity to avoid this application had they followed the procedures provided in the Rules of this Court.

[22] Mr Khokho who appeared on behalf of the applicants contended that the respondent had misled the Taxing Master by presenting a bill that did not reflect the terms of the order entitling the respondent to the costs and that the respondent should therefore be interdicted from proceeding with the execution process until such time that a proper bill of costs has been prepared and presented to the Taxing Master. For this reason, he contended, the applicants were entitled to the relief claimed.

[23] This contention on behalf of the applicants is without merit in a number of respects. In the first place the applicants were duly served with a notice of taxation that set out in details the steps they had to take in order to participate in the taxation process, and most importantly what to do in the event that they had objection to any of the items of the bills of costs. As already pointed out the applicants and or their attorneys did absolutely nothing about the taxation process. They only acted once there was attachment of their properties. Had the applicants regarded this matter as important and gave it serious consideration, they would have taken steps to participate in the taxation process which was conducted openly and on proper notice to them. There are no reasons whatsoever on the papers why the applicants and or their attorneys failed to participate in the taxation process.

[24] Furthermore, the applicants had a satisfactory and adequate remedy. Applicants' counsel's attention was drawn to the provisions of Rule 48 that set out a procedure to be followed to review the decision of the Taxing Master. There is no good reason why the applicants did not follow the procedure set out in Rule 48 other than that they were not aware of the provisions. I find no merit in the assertion by the applicants' counsel when confronted with the provisions of Rule 48 to state that the applicants are not *per se* challenging the decision of the Taxing Master but that the decision was based on wrong information presented by the respondent. It remains the decision of the Taxing Master irrespective of the kind of information presented on the bills and any party aggrieved by the outcome of that process is entitled to follow Rule 48 for redress. There is also no reasonable basis for this Court to order the respondent to abandon the taxed bills and present "*amended bills*" when there is a procedure provided in the Rules for the review of the Taxing Master's decision. Such order is incompetent under the circumstances.

[25] It is also strange that the applicants did not take advantage of the offer made to them as far back as 20 October 2011 to deposit the amount of money claimed on the bills in a trust account and to take whatever steps that were necessary to review the taxing Master's decision. This was a reasonable offer which would have dispensed with this application especially that the applicants maintained that it is not that they cannot afford to pay the bills but that they want the bills "*corrected*". This offer was a window of opportunity for them to embark on that process without engaging in a costly urgent application to this Court.

[26] I was therefore satisfied that the applicants had failed to make out a proper case for relief and that their application had to be dismissed with costs.

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L P TLALETSI

JUDGE

Appearance:

On behalf of the Applicants:	Adv Khokho
Instructed by:	Mjila & Partners
On behalf of the Respondent:	Mr. G Terblanche
Instructed by:	Duncan & Rothman