IN THE HICH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION MTHATHA)

CASE NO 460/99

In the matter between

MPELEKI TSHIKI	**APPLICANT**

and

PREMIER FOR EASTERN CAPE PROVINCE	**1ST RESPONDENT**
MEC FOR AGRICULTURE AND LAND AFFAIRS	**2ND RESPONDENT**
TAXING MASTER, MR. NDLEBE, MTHATHA	**3RD RESPONDENT**

IN RE:

R.Z. TWANI & TEN OTHERS	**PLAINTIFFS**

and

PREMIER FOR EASTERN CAPE PROVINCE	**1ST DEFENDANT**

MEC FOR AGRICULTURE AND LAND AFFAIRS 2ND DEFENDANT

TRANSKEI AGRICULTURAL CORPORATION

LIKMITED (IN LIGUIDATION) 3RD DEFENDANT

JUDGMENT

ROBERSON J

[1] The applicant applied for an order reviewing and setting aside the taxation of a bill of costs by the third respondent ("the Taxing Master"). The application was opposed by the first and second respondents, and, according to the applicant, the Taxing Master abided the decision of the Court.

[2] The applicant is a practising attorney. During April 2004, a costs *de bonis propriis* order was made against him during the course of certain litigation, in which he acted for the plaintiffs in an action against the first and second respondents, as first and second defendants.

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[3] On 3 March 2010 the first and second respondents, represented by the State Attorney, served a notice of taxation of the first and second respondents' bill of costs on the applicant. The date for taxation was 24 March 2010.

[4] On 12 March 2010 an amendment to Rule 70 of the Uniform Rules came into operation. It provided for the insertion of the following sub-rule:

> "(3B) Prior to enrolling a matter for taxation, the party who has been awarded an order for costs shall, by notice as near as may be in accordance with Form 26 of the First Schedule-
> a) afford the party liable to pay costs at the time therein stated, and for a period of ten (10) days thereafter, by prior arrangement, during normal business hours and on any one or more such days, the opportunity to inspect such documents or notes pertaining to any item on the bill of costs; and
> b) require the party to whom notice is given, to deliver to the party giving the notice within twenty (20) days, a written notice of opposition, specifying the items on the bill of costs objected to, and a brief summary of the reason for such objection."

The amendment also provided for the substitution of Rule 70 (4) as follows:

> "(4) The taxing master shall not proceed to the taxation of any bill of costs unless he or she is satisfied that the party liable to pay the same has-
> (a) received due notice in terms of subrule (3B); and
> (b) received due notice as to the time and place of such taxation and notice that he or she is entitled to be present thereat: Provided that such notice shall not be necessary-
> (i) if the party liable to pay costs has consented in writing to taxation in his or her absence;
> (ii) if the party liable to pay costs failed to give notice of intention to oppose in terms of subrule 3B; or
> for the taxation of writ and post-writ bills:

> Provided further that, if any party fails to appear after having given notice of opposition in terms of subrule (3B) (b), the taxation may proceed in their absence."

[5] On 24 March 2010 the applicant attended on an official at the Mthatha High Court, whom he thought was the Taxing Master, and informed him that he (the applicant) was due to appear in the Magistrate's Court. He further informed this official of the amendment to Rule 70, and then left, before the arrival of the representative from the State Attorney. The amended Rule was brought to the attention of the Taxing Master, who attempted a number of times to contact the applicant, without success. The bill was then taxed in the sum of R61 680.54.

[6] The applicant's stance is that the amendments to Rule 70, being procedural, are retrospective. In that case, the Taxing Master should not have taxed the bill because no notice had been given to the applicant in terms of Rule 70 (3B).

[7] The submission that legislation governing procedural matters is retrospective, is not an unqualified statement of the law.

In *Minister of Public Works v Haffejee NO* 1996 (3) SA 745 Marais JA, after considering various authorities, said at 753 B-C:

> "In other words, it does not follow that once an amending statue is characterised as regulating procedure it will always be interpreted as having retrospective effect. It will depend upon its impact upon existing rights and obligations. If those substantive rights and obligations remain

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> unimpaired and capable of enforcement by the invocation of the newly prescribed procedure, there is no reason to conclude that the new procedure was not intended to apply. *Aliter* if they are not."

[8] At the time the notice of taxation was served on the applicant, Rule 70 (3B) was not in operation. The first and second respondents were not legally required to comply with Rule 70 (3B) because it was not in existence. They were only legally obliged, and were entitled, to give notice of the time and place of taxation, which they did. To insist that they should have complied with Rule 70 (3B) would be to render ineffective a procedural step which had already legally been taken, and which was all that was required at the time, in relation to notice of taxation. Although at the time the bill was taxed, Rule 70 (3B) had come into operation, the Taxing Master could not have insisted on compliance therewith before taxation, because the first and second respondents were not, at the time of enrolling the matter for taxation, legally obliged to comply with Rule 70 (3B).

[9] Further, the procedure of taxation had already commenced when notice was given to the applicant. The taxation was a further step in this procedure.[1] The obligation on the Taxing Master not to tax without being satisfied that Rule 70 (3B) had been complied with, must be seen in the context of the taxation process as a whole, and not in isolation.

[10] The interpretation for which the applicant contends, would have the effect

1 In *Transgroup Shipping SA (Pty) Ltd v Owners of MV Kyoju Maru* 1984 (4) SA 210 (D) at 213B-C Leon J said: "However, procedural provisions in statutes operate prospectively in relation to all procedural matters *arising after them coming into force*." (My emphasis)

that every matter properly set down for taxation prior to 12 March 2010, but taxed thereafter, would be a nullity. He submitted that such bills should be removed from the roll and the party seeking to tax should comply with Rule 70 (3B). Such a result could not have been the intention of the Legislature.

[11] In my view Rule 70 (3B) and Rule 70 (4)(a) apply to bills of costs which were enrolled for taxation as from 12 March 2010.

[12] In the result, I am of the view that there was no irregularity in the taxation of the bill and the application cannot succeed. It is not necessary for me to consider the issue of the delay in bringing the review.

[13] The following order is made:

The application is dismissed with costs.

J.M. ROBERSON
JUDGE OF THE HIGH COURT

Appearances

Applicant: Mr. M. Tshiki, Tshiki & Sons Incorporated, Mthatha.

First and Second Respondents: Adv. P. Msiwa, instructed by the State Attorney, Mthatha.