IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE DIVISION, MTHATHA)

CASE NO.: 962/2021

In the matter between:

MINISTER OF POLICE Applicant

and

LUBABALO GUNTU Respondent

JUDGMENT

MHAMBI AJ

[1] The applicant applies for the rescission and setting aside of an allocatur dated 07 June 2023. The application was served on the respondent's attorneys on 08 January 2024. This is despite being dated 11 December 2023. It was, in any event, prosecuted out of time.

[2] The applicant also seeks an order condoning the late filing of the application.

[3] The following are the issues for determination: -

(i) Whether a sufficient explanation has been made for the delay.

(ii) Whether good cause exists for the allocatur to be rescinded and set aside.

[4] Subsequent to damages claim instituted by the respondent against the applicant, the applicant failed to deliver and file his expert medico-legal reports. This resulted in the respondent obtaining an order against the applicant on 18 April 2023 compelling the latter to deliver and file his expert medico-legal reports within 60 (sixty) days from the date of that order. The applicant was also mulcted in wasted costs occasioned by the postponement of the matter on 18 April 2023.

[5] Following the grant of the order of 18 April 2023, the respondent's attorneys prepared a bill of costs and delivered same to the office of the State Attorney, Mthatha, by email on 25 April 2023. The bill of costs was taxed and allowed on an unopposed basis on 07 June 2023. It is this allocatur that is sought to be rescinded.

[6] The applicant alleges that on 14 June 2023, a taxed bill of costs was delivered to the office of the State Attorney, Mthatha. The bill of costs was forwarded to their offices for approval in July 2023. The applicant avers that it took it the whole of September to get the bill. It is only then that it felt some items in the bill were exorbitant so that they ought not to be allowed were allowed.

[7] It is also suggested that the State Attorney was instructed to oppose or challenge the taxed bill of costs. During October 2023, the State Attorneys resolved to outsource the bill to the applicant's current attorneys of record.

[8] This application was issued on 11 December 2023. Thereafter, it was served upon the respondent on 08 January 2024.

[9] The respondent opposed the application and raised several points of law.

[10] The respondent challenges the allegations made in the founding affidavit on several grounds. Among them is the introduction of hearsay evidence. The deponent to the respondent's papers alleges that the founding affidavit refers to State Attorneys resolving to oppose the bill of costs. The respondent alleges there is no resolution or minutes of the meeting where that decision was taken.

[11] The respondent further challenges the non-filing of an affidavit by tax consultants who prepared objections to the taxed bill. The Respondent then refers to that as constituting hearsay evidence which renders evidence of the applicant in that regard irrelevant and inadmissible.

[12] Lastly, the respondent challenges the procurement of the applicant's current attorneys. It relies on the fact that in the action, the applicant is represented by the State Attorney. The State Attorney has not withdrawn as attorneys of record. The respondent refutes that a case has been made for both the rescission of the allocatur concerned and the condonation application.

[12] First, I deal with the question of whether the allocatur is rescindable or not. The respondent does not refute that the allocatur is rescindable, however, it is relevant to give clarity on this issue.

[13] The rescission of an allocatur is dealt with on the same principles as applicable to the rescission of orders or judgment granted by default of one party. In *Grunder v Grunder and Another*[1]**,** Conradie J held that the common

[1] 1990 (4) SA 68 0 (C). See also In *Turneland Manufacturing (Pty) Ltd v Taxing Master Western Cape High Court and Another* [2023] ZAWCHC 90 (13 July 2023); *the Sheriff of Pretoria North East v SA Taxi Development and Others* [2023] ZAGPJHC 346 (14 April 2023).

law principles applicable to the setting aside of default judgments apply also to the setting aside of a taxing Master's allocatur[2]. He also said:-

> "An order as to costs cannot be enforced without the Taxing Master's Qualification thereof and a qualification done in the absence of one of the litigants ought to be open to challenge on the same basis as are default judgments[3]. This would ordinarily mean that an applicant would have to satisfy a court that the three requirements for the rescission of a default judgment are present which would justify such an order".

[14] It is my view that the applicant is entitled to apply for the setting aside or rescission of the taxation and allocatur, however, the applicant must give an adequate explanation for his default. The basis for the failure to attend taxation is the alleged nonservice of notice of taxation. This point was only canvassed in the replying affidavit and upon argument.

[15] Uniform Rule 70 regulates service of a notice of taxation. In particular, Uniform Rule 70 (4) (a) provides that the Taxing Master shall not proceed with the taxation of any bill of costs unless he/she is satisfied that the party liable to pay the costs has received a due notice in terms of Sub-rule (3B).

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[2] Ibid at 685 B-C.

[3] Ibid 685 G.

Uniform Rule 70(4) (a) together with sub-rule (3B) is not specific to say the notice of taxation shall be served in accordance with Rule 4 but requires the Taxing Master to be satisfied that due notice has been given to the party affected by taxation.

[16] The Taxing Master was not cited and therefore is not a party to these proceedings. It then makes a difficult to assess how the Taxing Master satisfied himself/herself as required by Rule 70 (4) (a). This court is only left to assess the chronology of events before and after the taxation.

[17] It appears *ex-facie* the papers that the notice of taxation was served upon the applicant by electronic mail on 25 April 2023. The electronic mail address to which the notice of taxation and the bill of costs was sent is: ALudidi@justice.gov.za. It was sent per electronic mail: dazanatsipa@gmail.com.

[18] After the lapse of twenty [20] days with no objections received, the respondent's attorneys requested the Taxing Master to proceed and tax the bill on an unopposed basis. This request was sent by electronic mail on 31 May 2023. This was followed by a letter from the respondent's attorneys attaching the taxed bill of costs. The letter was sent on 08 June 2023 to electronic mail: NNyangiwe@justice.gov.za.

[19] On 7 July 2023, the respondent's attorneys sent a letter advising nonpayment of the taxed bill and advising of intentions to issue a warrant of execution. This letter was sent by electronic mail to: ALudidi@justice.gov.za.

[20] On 14 July 2023, the respondent's attorneys sent an electronic mail to: ALudidi@justice.gov.za advising about the issue of warrant of execution, and the same was attached. This electronic mail with a warrant of execution was also sent to the electronic mail: MbekiS@saps.gov.za. There is no dispute concerning receipt of these emails.

[21] On 07 November 2023, the applicant's attorneys sent a letter to the respondent's attorneys dated 07 November 2023. This email was sent through the electronic mail: ALudidi@justice.gov.za. Most important in that letter are the following phrases:-

> "We acknowledge that the bill of costs has not been paid to your office, part of the reason for the delay is that the client has instructed our office to review the bill".

[21] The writer of the letter then sought to be provided with certain documents as part of expenses relating to the items on the bill of costs. Concerning the quoted phrases, it may be concluded that the notice of taxation and the bill of costs were received by the respondent's attorneys.

That letter did not contest or challenge the way the respondent was notified about taxation. It further indicated that the taxed bill of costs was received by the respondent's attorneys.

[22] That letter concludes and says:-

> "Be that as it may, client is prepared to settle the taxed bill urgently and urge your office to provide us with the above-requested information and documentation."

[23] The conclusion in that letter denotes the intention by the applicant's attorneys to settle the taxed bill of costs. This was despite the indication of an instruction to seek for review of the taxed bill of costs.

[24] Post that event, or the communication relating to the bill of costs, pre and post-taxation, the exchange of papers between the parties was per electronic mail communication.[4] I am persuaded that the applicant was duly notified about the notice of taxation but did nothing to object to the taxation or to challenge the items in the bill of costs which are in dispute.

[25] The applicant's papers even though crafted as an application for rescission consist of a challenge to the items allowed by the Taxing Master,

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[4] Applicant's application of postponement of the trial set down for hearing on 27 November 2023.

which according to the applicant, should not have been allowed. Or, contends the applicant, an amount lesser than what was allowed, should have been allowed.

[26] There is a difference between an application for the rescission of taxation and the allocatur that became a product of that taxation and an application for the review of taxation and by extension, a taxed bill of costs. The review of taxation is provided for in Rule 66(5) as follows:-

> "Any party may apply to the presiding Judge for review of any costs or expenses awarded or refused by the Registrar in taxing a bill of costs. The application must be made mutatis mutandis in accordance with the procedures which apply to applications for review of taxation by a Taxing Master of the High Court".

[27] Rule 48 regulates procedures applicable to review taxation as follows:-

> **RULE 48(1) :-**
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> "Any party dissatisfied with the ruling of the Taxing Master as to item or part an item which was objected to or disallowed *mero motu* by the Taxing Master, may within 15 days after the allocator by notice require the Taxing Master to state a case for the decision of the judge".

[28] A review of the taxed bill is only available when the party seeking the review of the taxed bill has objected to the items sought to be reviewed. In *Olgar v Minister of Safety and Security,*[5] Pickering J declined to deal with a specific objection during a review process as no objection was made to the Taxing Master's allowance at the time of taxation.

[29] I now turn to deal with whether this application meets the requirements for rescission, and whether its belated filing should be condoned. The absence or otherwise of a party in proceedings has recently been dealt with by the Constitutional Court in *Zuma v Secretary of the Judicial Commission of Inquiry into allegations of State Capture, corruption and Fraud in the Republic Section including Organs of State*.[6]

[30] In *Zuma*, the court drew a distinction between two highlights: In the first place, there is a litigant who was physically absent because he or she was not present in court on the day Judgment was sought. In the second place, there is a litigant whose absence he/she chose or elected. The court found

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[5] 2012 (4) SA 127 (ECG).

[6] (CCT 52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) (17 September 2021). Also see *Maujean t/a Audio Video Agencies v Standard Bank of South Africa Limited* 1994 (3) SA 801 (CPD)

that a litigant who elects not to participate despite knowledge of legal proceedings against him or her is not entitled to the rescission relief.

[31] The court goes further and explains the meaning of "absence" in rule 42 (1) (4) as:-

> "Exist to protect litigants whose presence was precluded, not those whose absence was elected".

[32] In this case, the applicant was in willful default. He was given sufficient notice of taxation in the form of the notice of. On his own accord, despite the reasons the applicant chose not to object to the items in the bill of costs. I agree with the reason by the court in *Joseph Sipho Dos Santos vs Liaison Ntini and Others*[7] in which the court concluded that having received notice and not opposing and or objecting at the taxation stage, nor attending, by implication amounts to consent to a taxation in absentia. On this basis alone, this application must fail.

[33] Given the view I take about the applicant's willfulness in not objecting nor attending taxation, it follows that even if I was persuaded that a case for condonation is made, I need not consider it. For the same reason, I do not

[7] [06/2023] (2023) ZSCA 46 (22/11/2023).

deal with the contentions I have rehearsed in paragraphs 10, 11 and 12 of this judgment. This, because the finding on the question of the failure to attend taxation is fatal to the application, whatever my views would have been regarding condonation.

[34] In the result, the following order issues:-

1. **This application is dismissed.**

2. **The applicant is directed to pay the respondent's costs on scale A of the amended uniform rule 67A.**

M. MHAMBI

ACTING JUDGE OF THE HIGH COURT

APPEARANCES:

Counsel for the Applicant	:	Mr. N. Zilwa
Instructed by	:	Zilwa Attorneys Mthatha

Counsel for the Respondent	:	*Mr. Y. Tsipa*
Instructed by	:	Y. Tsipa Attorneys Mthatha
Heard on	:	18 October 2024
Judgment Delivered on	:	04 March 2025