



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Case Number: 3379/2020

In the matter of:

TIMAC AGRO SOUTH AFRICA (PTY) LTD

Applicant/Plaintiff

and

THEUNIS LODEWYK ADRIAAN NEL

Respondent/Defendant

CORAM: NAIDOO, J

HEARD ON: 6 OCTOBER 2022

DELIVERED ON: 22 MARCH 2023

JUDGMENT – STAY OF EXECUTION AND CONDONATION

- [1] This is an application by the applicant/plaintiff (plaintiff) for the stay of execution (the stay application), in terms of Rule 45A, in respect of taxed *allocatus* by the taxing mistress of this Division and for condonation in respect of the late filing of the Notice of Review in

terms of Uniform Rule 48(1). The application is opposed by the respondent/defendant (defendant), who also filed a counter application, in which he sought the striking off of the plaintiff's review application, for non-compliance with Rule 48(2)(b), and of paragraphs 18, 24 and 25 of the plaintiff's supporting affidavit in the stay application, on the basis that they constitute inadmissible hearsay evidence. The defendant had prior to that filed a Notice in terms of Uniform Rule 30A in terms of which he sought an order striking out the plaintiff's Notice of Review for non-compliance with Uniform Rule 48. Adv (Mr) DD Swart represented the applicant, and Attorney Mr HSL du Plessis, the respondent.

[2] The plaintiff sought an order in the following terms:

- (a) That the execution upon the taxed *allocatus* dated 26 January 2022 against the applicant be stayed and/or suspended pending the final determination of the action and conditional counterclaim, alternatively, pending the adjudication of the application to review the taxed *allocatus* dated 26 January 2022;
- (b) That condonation is granted for the late delivery of a notice in terms of Rule 48(1) of the Uniform Rule of Court;
- (c) That the respondent be ordered to pay the costs of this application only if it is opposed;
- (d) Further and/or alternative relief.

[3] The defendant sought relief, in his counter-application, in the following terms:

“1.1 The applicant failed to comply with the provisions of Rule 48(1) and 48(2)(b);

1.2 That the applicant's application for review of the taxation be struck;

- 1.3 That the testimony contained in paragraphs 18, 24 and 25 of the applicant's supporting affidavit constitute (sic) hearsay evidence and accordingly inadmissible evidence;
- 1.4 That the content of these paragraphs 18, 24 and 25 are accordingly irrelevant;
- 1.5 That paragraphs 18, 24 and 25 are accordingly struck from the applicant's supporting affidavit;
- 1.6 That the applicant be ordered to pay the costs of this counter application, only if it is opposed by it;
- 1.7 further and/or alternative relief".

[4] Although the defendant initially took issue with the authority of the deponent to the plaintiff's Founding Affidavit, by the time the matter was heard, Mr Du Plessis confirmed that the defendant had abandoned this issue. The parties agreed that the main application and the counter application would be heard together.

[5] The plaintiff does business in the agricultural sector and the defendant purchased agricultural products from the plaintiff. The latter issued summons against defendant for payment of the amount of R1 398 220.25, together with interest and costs, in respect of fertiliser which the defendant purchased from the plaintiff. The main claim is based on a written agreement entered into between the parties, with an alternative claim based on unjust enrichment. In defending the action, the defendant raises defences relating to non-compliance with the National Credit Act 34 of 2005 (NCA). The defendant also filed a counterclaim, which

was opposed by the plaintiff. The latter also took exception thereto. After the defendant's plea was filed, the plaintiff applied for summary judgment, which the defendant opposed.

- [6] At the hearing of the summary judgment application and exception to the counterclaim, the defendant raised a point *in limine* and the court ruled in his favour regarding the lack of jurisdiction of the High Court to hear a summary judgment application arising from a credit agreement governed by the NCA. In respect of costs, the court ordered that *"The Applicant/Plaintiff to pay the costs of the case to date on an attorney-and-client scale"*. The plaintiff lodged an appeal against the whole of that judgment but shortly before the appeal was heard, the Supreme Court of Appeal (SCA) handed down a judgment, which, in effect, overturned the judgment delivered by this court in relation to jurisdiction.
- [7] As a result, the parties agreed on an amended order, which in effect meant that the matter would proceed in the High Court. The costs order agreed on was the following: *"The Applicant/Plaintiff is to pay on an attorney-and-client scale the wasted costs of the Respondent/Defendant in the application for summary judgment and the exception to date of the judgment"*. The costs of the appeal were reserved for later determination. The defendant set down its Bills of Costs for taxation on 26 January 2022, which the plaintiff opposed. The plaintiff claims that it was largely unsuccessful in its opposition and the Taxing Mistress endorsed her *allocatur* on each Bill. The amounts of the *allocaturs* were Thirty Nine Thousand Two Hundred and Forty Rand and Sixty Two Cents (R39 240.62) and One Hundred and Fifty Six Thousand Five Hundred and Eighty

One Rand and Thirty Eight Cents (R156 581.38) respectively. The plaintiff thereafter consulted with a taxing consultant to obtain an opinion on the prospects of success of reviewing the taxation.

- [8] Subsequent to the taxation and on 27 January 2022, the defendant's attorneys demanded payment from the plaintiff. The plaintiff responded by asking the defendant to allow it Twenty (20) days to consider its position and, if necessary, prepare an application to review the taxation. The plaintiff also indicated that should it decide not to pursue a review of the taxation and decides to abide by the taxed *allocatur*, the plaintiff's liability to the defendant would be extinguished by operation of a set-off. Thereafter, a number of letters flowed between the legal representatives of the parties, the end result being that on 2 March 2022, the defendant did not agree with the plaintiff's assertion that set-off will apply and clearly declined the extension requested by the plaintiff. The defendant indicated that he will proceed to issue a warrant of execution.
- [9] On 3 March 2022, the plaintiff instructed its legal representatives to prepare the application for review of the taxation. In order to do so, the plaintiff's legal representatives required to consult with the taxing consultants. Such consultations took place with the Pretoria-based consultant and the Bloemfontein-based consultant on 9 March 2022 and 15 March 2022, respectively. Thereafter the Notice to Review the taxation was prepared and filed on 15 March 2022. It is common cause that in terms of Uniform Rule 48, which regulates the procedure for the review of taxation, the plaintiff's notice was filed some nineteen (19) days outside the 15-day period prescribed by the Rule.

[10] The relevant provisions of Uniform Rule 48 read as follows:

- (1) Any party dissatisfied 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 15 days after the *allocatur* by notice require the taxing master to state a case for the decision of a judge.
- (2) The notice referred to in subrule (1) must —
 - (a) identify each item or part of an item in respect of which the decision of the taxing master is sought to be reviewed;
 - (b) contain the allegation that each such item or part thereof was objected to at the taxation by the dissatisfied party, or that it was disallowed *mero motu* by the taxing master;
 - (c) contain the grounds of objection relied upon by the dissatisfied party at the taxation, but not argument in support thereof; and
 - (d) contain any finding of fact which the dissatisfied party contends the taxing master has made and which the dissatisfied party intends to challenge, stating the ground of such challenge, but not argument in support thereof.

[11] Uniform Rule 30A reads:

notice given pursuant thereto, or with an order or direction made by a court or in a judicial case management process referred to in rule 37A, any other party may notify the defaulting party that he or she intends, after the lapse of 10 days from the date of delivery of such notification, to apply for an order —

- (a) that such rule, notice, request, order or direction be complied with; or
- (b) that the claim or defence be struck out.

- (2) Where a party fails to comply within the period of 10 days contemplated in subrule (1), application may on notice be made to the court and the court may make such order thereon as it deems fit.

[12] I pause to note that the defendant's Rule 30A Notice was served on the plaintiff on 16 March 2022 at 15h25. The plaintiff's Notice to Review was served on the defendant on 15 March 2022 at 14h02,

and the current application in terms of Rule 45A was served on the defendant on 16 March 2022 at 14h27. The Rule 30A Notice appears to have been served in reaction to the plaintiff's Notice to Review, and was served on the plaintiff an hour after the Rule 45A Notice was served on the defendant. I also point out that this court is called upon to adjudicate this application and decide whether the plaintiff has made out a case for the relief it claims, which I set out earlier in this judgment. As correctly conceded by both parties, this court is not required to deal with the merits of the matter, nor of the review of taxation. It would, in fact be inappropriate for this court to delve into the merits, especially of the review application, as that matter should appropriately be dealt with by the judge before whom the review application serves, in the event of the application being granted. That said, it may be necessary, in assessing prospects of success in the further litigation, to mention the merits to some extent. I will deal with this aspect later.

- [13] I deal firstly with the application for condonation for the late filing of the review application. With regard to the explanation in a condonation application (as in the present matter), for failure to comply with the Rules of Court timeously, it is well settled in our law that the applicant is required to give a full and candid explanation in this regard. The remarks of the court in *Melane v Santam Insurance Co Ltd 1962(4) SA 531 (A)*, regarding the test for granting condonation, made more than 60 years ago, are still relevant today:

"In deciding whether sufficient cause has been shown, the basic principle is that the Court has a discretion, to be exercised judicially upon a consideration of all the facts, and in essence it is a matter of fairness to both sides. Among

the facts usually relevant are the degree of lateness, the explanation therefor, the prospects of success and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, save of course that if there are no prospects of success there would be no point in granting condonation. Any attempt to formulate a rule of thumb would only serve to harden the arteries of what should be a flexible discretion. What is needed is an objective conspectus of all the facts. Thus a slight delay and a good explanation may help to compensate prospects which are not strong. Or the importance of the issue and strong prospects of success may tend to compensate for a long delay. And the respondent's interests in finality must not be overlooked."

- [14] A similar view was held in the matter of *United Plant Hire (Pty) Ltd v Hills* 1990 (1) SA 717 (A) at 720 E-G, where the court stated the position succinctly as follows:

"It is well settled that, in considering applications for condonation, the Court has a discretion to be exercised judicially upon a consideration of all the facts; and that in essence it is a question of fairness to both sides. In this enquiry, relevant considerations may include the degree of non-compliance with the relevant Rules, the explanation therefore, the prospects of success on appeal, the importance of the case, the respondent's interest in the finality of his judgment, the convenience of the Court, and the avoidance of unnecessary delay in the administration of justice. The list is not exhaustive. These factors are not individually decisive but are interrelated and must be weighed one against the other; thus a slight delay and a good explanation may help to compensate for prospects of success which are not strong".

- [15] As I indicated earlier, it is common cause that the plaintiff served and filed the Notice of Review of Taxation 19 days late. I have set out the chronology of events leading to the filing of the Notice of Review, which chronology is not in dispute. The defendant took issue with the content of some of the plaintiff's averments, which I

shall mention where necessary. In his counter-application, the defendant seeks to strike out paragraphs 18, 24 and 25 of the plaintiff's Founding Affidavit on the basis that they constitute inadmissible hearsay evidence. These are the paragraphs in which the plaintiff explains that part of the delay in filing the Review Notice was due to the necessity of having to consult with two firms of taxing consultants, who were not immediately available and were available only on 9th and 15th March 2022, respectively. This was confirmed in a confirmatory affidavit by Mr Heymans, the attorney involved in the matter. The defendant complains that the tax consultants were not named, nor were confirmatory affidavits filed by them. The taxing consultants were named in paragraph 24, one of the paragraphs that the defendant seeks to strike out.

- [16] In my view, this criticism is misplaced, as hearsay evidence is defined in section 3(1) of the Law of Evidence Amendment Act 45 of 1988 as oral or written evidence, the probative value of which depends upon the credibility of a person other than the person giving such evidence. In this case Mr Heymans is a director in the firm of attorneys representing the plaintiff and confirms the explanation for the delay tendered in the plaintiff's Founding Affidavit. The truth and probative value of the explanation depends on Mr Heymans' credibility and not on that of the taxing consultants. In any event, the plaintiff was required to give a full and candid explanation for the delay, and that is the purpose for which the explanation in paragraphs 18, 24 and 25 was tendered. In my view, the said paragraphs do not fall to be struck out.

- [17] I indicated earlier that while this court is not required to enter into the merits of the matter in a condonation application, one of the

factors for a court to take into account in considering whether to grant condonation is the prospects of success. The plaintiff asserts, amongst other complaints, that while it was ordered to pay only wasted costs in respect of the summary judgment application and the exception to the counterclaim, the taxing mistress granted all costs, which was not in terms of the court order. The plaintiff also asserts that the reserved costs of 26 February 2022, when the exception and summary judgment application were postponed for hearing, were not unreserved but were nevertheless allowed by the taxing mistress. The defendant alleges in his Answering Affidavit that the plaintiff had, in terms of the court order dated 30 August 2021, waived the exception and summary judgment application and tendered costs on an attorney and client scale.

- [18] It was, however, revealed in Reply, that there was correspondence between the parties in September 2021, in which the plaintiff indicated to the defendant that it withdraws its exception and tenders the costs in respect thereof. It further indicated that it granted leave to the defendant to defend the action as it was not pursuing the summary judgment application, and the costs in respect thereof could be costs in the cause, alternatively adjudicated at the hearing of the trial. The defendant's response indicates that he was not opposed to the plaintiff's proposal, indicating that a bill of costs in respect of the exception will be prepared and sent to the plaintiff so they could reach agreement in respect thereof, before taxation. With regard to the costs of the summary judgment application, the defendant insisted that such be argued during the trial.

- [19] The defendant's response indicates that he accepted that the court order of 30 August 2021 (which amended the earlier order dated 3 May 2021) excluded the costs of the summary judgment application. It appears to me that only the wasted costs in respect of the exception ought to have been the subject of the Bills of Costs. The Bills of Costs which were taxed clearly include the costs of the summary judgment application. On that basis it would appear that the plaintiff has an arguable case and has reasonable prospects of success in respect of the review of the taxation.
- [20] In a condonation application, this court is obliged to consider the reasonableness and adequacy of the explanation for the delay, in conjunction with other factors, such as the prospects of success, in making an order that would achieve fairness to both parties. The explanation tendered by the plaintiff for the delay, which has been fully set out earlier in this judgment is, to my mind, reasonable. The delay is not an inordinate one, and acceptable in the circumstances, and the application for review would be important in this matter, for it could result in the amount payable by the plaintiff to the defendant being reduced or extinguished. The benefit for the defendant is that whatever indebtedness to the plaintiff the latter can prove, will be reduced, if the plaintiff can prove set-off. I am satisfied, therefore that an order granting condonation to the plaintiff for the late filing of the Notice of Review of Taxation will not only be fair to both parties, but will also be in the interests of justice.
- [21] I turn now to deal with the application for suspension of the execution of the amount based on the taxed *allocaturs*. Uniform Rule 45A states that "The court may, on application, suspend the operation

and execution of any order for such period as it may deem fit..." it is common cause in this matter that execution will be suspended where the underlying *causa* is in dispute. The plaintiff has placed in dispute the correctness of the *allocaturs* issued by the taxing mistress, for the reasons I have set out above. The defendant seeks in his Rule 30A notice to have the plaintiff's Notice to Review struck out on the basis that it did not file such notice within the time period prescribed in Rule 48(1) and that it did not object to the disputed items at the taxation of the Bills.

[22] As indicated earlier, the Rule 30A notice was filed in response to the plaintiff's Notice to Review, an hour after the plaintiff filed the current application. The plaintiff in my view, sought to review the taxation and applied for a stay of execution as well as condonation for the late filing of the Notice to Review and indicated such intention before the Rule 30 A notice was filed. The alleged non-compliance with Rule 48 is not for this court to adjudicate, as the merits thereof falls within the purview of the judge adjudicating the review. Similarly, the set-off claimed by the plaintiff falls outside of this court's ambit. The merits thereof will be decided by the court ultimately hearing the trial of this matter. However, in order for that court to properly do so, the issue of the taxing mistress' *allocaturs* must be resolved, unless the plaintiff decides not to pursue the review.

[23] For the purposes of this application, my view is that the execution based on the *allocaturs* should be stayed in order to afford the plaintiff the opportunity to review the taxation. The interests of justice dictate that such a course will bring a fair and equitable result to bear on the action in this matter. As I indicated earlier, I am satisfied that

the explanation tendered by the plaintiff for the late delivery of the Notice to Review the taxation is reasonable and acceptable.

[24] I turn to deal with the defendants' counter application. For the reasons set out above, the relief sought by the defendant, for the striking of the plaintiff's Review Application must fail. Similarly, I have dealt with the prayer for the striking out of paragraphs 18, 24 and 25 of the plaintiff's Founding Affidavit in this application, on the basis that the contents thereof constitute inadmissible hearsay evidence. I have set out the reasons why these paragraphs do not amount to hearsay evidence and are accordingly admissible.

[25] In the circumstances I make the following order:

- 25.1 The plaintiff's application for condonation for the late filing of the Notice of Review of Taxation is granted;
- 25.2 The plaintiff's application to stay/suspend the execution based on the taxed *allocatus* dated 26 January 2022, pending the final determination of the action, alternatively the application to review the taxation dated 26 January 2022, is granted;
- 25.3 The defendant's counter-application is dismissed;
- 25.4 The costs of this application in terms of Rule 45A and the defendant's counter-application are to be paid by the defendant;

25.5 In the event that the plaintiff does not pursue the review of the taxation, the costs in relation to the review, if any, stand over for determination by the court hearing the matter to finality, or by agreement between the parties.

S NAIDOO J

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