REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
LIMPOPO DIVISION, POLOKWANE

CASE NO: 4114/2016

(1)	REPORTABLE: YES/NO
(2)	OF INTEREST TO THE JUDGES: YES/NO
(3)	REVISED.
DATE............	SIGNATURE:.............

In the matter between:

CAREL FREDERIK DE JAGER **FIRST APPLICANT**

JOHANNES JACOBUS FREDERIK PEYPER **SECOND APPLICANT**

And

ROBYNNE ZEVENSTER NO **FIRST RESPONDENT**

THE TAXING MASTER POLOKWANE **SECOND RESPONDENT**

JUDGEMENT

KGANYAGO J

[1] On 22nd May 2017, the first respondent served the applicants with a Rule 35(1), (6), (8) and (10) notice. On 11th August 2017 the first respondent served the applicants with an application to compel further discovery in terms of Rule 35(1) and the said application was set down to be heard on 24th October 2017. The applicants complied with the first respondent's Rule 35(1) notice before the date of hearing. On 24th October 2017 the first respondent withdrew his application to compel and the matter was removed from the roll with the applicants been ordered to pay the costs of the application.

[2] The first respondent proceeded to draft his bill of costs to be taxed by the second respondent. The first respondent's bill was duly served on the applicants' attorneys. In terms of the notice of taxation served on the applicants' attorneys, the applicants were supposed to notify the first respondent within 20 days of receipt of the notice should they wish to oppose the first respondent's bill of costs failing which the first respondent would set the matter down for taxation without further notice on the applicants. The applicants did not notify the first respondents of their intention to oppose and the first respondent proceeded to set the matter for taxation before the second respondent without further notice on the applicants.

[3] The applicants have submitted that on receipt of the first respondent's bill, due to an oversight they referred the first respondent's bill of costs to their correspondent in Pretoria. The applicants further submit that the confusion was as a result of the fact that there was also a litigation between the parties in the High Court in Pretoria. It is the applicants' contention that their intention was to oppose the first respondent's bill of costs.

[4] The applicants have submitted that the first respondent in his bill of costs has stated "that the bill of costs was for fees and expenses payable by the plaintiff as per settlement agreement signed by the defendant on 1st August 2017." It is the applicants' contention that the first respondent had falsely created an impression to the second respondent that the parties have agreed to the items as set out in the bill of costs. The applicants submit that should the second respondent not have laboured under the wrong impression, he would have perused the court file more carefully, and would have noted that a large number of the items in the bill of costs were for costs for which an order had not been granted.

[5] According to the applicants, items 1 to 22 of the first respondent's bill of costs are not covered by the court order of the 24th October 2017. Further the applicants' dispute that the alleged unsigned document allegedly attached to the first respondent's bill of costs purportedly made by the applicants' attorney of record Mr van Staden consenting to the bill in the amount of R16 115.66 was drafted and signed by Mr van Staden. It is the applicants' contention that the first respondent had deliberately misled the second respondent to have allowed the bill of costs based upon a material misrepresentation.

[6] The applicants submit that during October/November 2018 the sheriff of court visited the applicants with a writ of execution for the collection of the amount of the taxed costs. That led to the applicants attorneys on 5th November 2018 addressing a letter to the first respondent's attorneys requesting the first respondent to abandon and/or withdraw the bill of costs and led the bill be presented to the second respondent for re-taxation, failing which they held instructions to institute an application and have the taxation set aside. The

parties could not agree on a solution to the matter, and during May/June 2019 the sheriff of court again visited the applicants and made an attachment.

[7] Again the applicants' attorneys addressed a letter to the first respondent's attorneys requesting them to abandon or withdraw the taxed bill of costs and present the correct bill of costs for taxation, and again threatening the first respondent with a court application. The first respondent's attorneys in reply informed the applicants' attorneys that it was abandoning items 1 to 22 and that the remainder of the items have been correctly taxed, and further that the writ was issued for the correct items, and that the applicants should pay the costs in which case the attachment will be uplifted. It is the applicants' contention that the first respondent cannot unilaterally decide that, although admitting that the bill was erroneously taxed, and proceed to issue a writ for items he regards to be correctly taxed. That led to applicants instituting the current application seeking orders that the taxation presented before the Taxing Master for the Limpopo Division of the High Court of South Africa Polokwane be set aside, and that the allocator's dated 3rd September 2018 be set aside.

[8] The first respondent is opposing the applicants' application. The first respondent in his answering affidavit has submitted that reference to settlement agreement in their bill of costs was a bona fide oversight by the costs consultant who prepared the account. The first respondent avers that the reference to settlement agreement in their bill of costs did not influence the Taxing Master's discretion as that did not determine the nature and scale of the fees. The first respondent further submitted that he had already abandoned the amounts which he is not entitled to, and that the remaining

items have not been questioned individually by the applicants. The first respondent denies that it had presented to the Taxing Master an alleged unsigned document purportedly made by the applicants' attorneys consenting to the bill in the amount of R16 115.66.

[9] It is the first respondent's contention that of 21st January 2019 his attorneys wrote a letter to the applicants' attorneys notifying them that he had abandoned the part of the costs that he was not entitled to, and that his claim was only limited to the costs of the application to compel which costs amounted to R16 115.65. The first respondent submitted that on 1st July 2019 the applicants' attorneys responded stating that they reject the proposal and that the whole of the taxation should be withdrawn. The first respondent denies that he has unilaterally decided on which amount is correct on his bill, but that The Taxing Master has already considered each and every item and have determined them to be due and payable. It is the first respondent's contention that the review application could have been avoided and curtailed had the applicants been willing to provide an offer in respects of the costs.

[10] This court is called upon to determine whether the taxation of costs by the second respondent should be set aside, and also whether the allocator's dated 3rd September 2018 be set aside. The first respondent's taxation was taxed in the absence of the applicants. In *Grunder v Grunder*[1] it was held that common law principles applicable to the setting aside of default judgment apply also to the setting aside of the Taxing Master's allocator.

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[1] 1990 (4) SA 680 (C)

[11] In *Colyn v Tiger Food Industries LTD t/a Meadow Feed Mills (Cape)*[2] Jones AJA said:

> "I turn now to the relief under the common law. In order to succeed an applicant for rescission of judgment taken against him by default must show good cause…With that as the underlying approach the Courts generally expect an applicant to show good cause (a) by giving a reasonable explanation of his default; by showing that his application is made bona fide; and (c) by showing that he has a bona fide defence to the plaintiff's claim which prima facie has some prospects of success."

[12] The applicants' explanation for the default to attend taxation is that on receipt of the first respondent's notice of intention to attend taxation, they by oversight send that notification to their correspondent in Pretoria where the parties were having another pending matter. The applicants have also attached a letter addressed to their correspondent in Pretoria giving them instructions to oppose the taxation. That in my view, shows that from the beginning it was the applicants' intention to oppose the first respondent's bill of costs. I am therefore satisfied that the applicants' explanation for their default is reasonable.

[13] Turning to the second requirement, whether the applicants' application is bona fide, the applicants became aware of the default taxation during November 2018. That prompted their attorneys to address a letter to the first respondent's attorneys on 5th November 2018. In that letter their attorneys requested the first respondent to either withdraw or abandon the taxed bill failing which they held instructions to bring an application to set aside the bill of costs. On 21st January 2019 the first respondent's attorneys responded to the applicants attorneys conceding to items 1 to 22 and stating that those

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[2] 2003 (6) SA 1 (SCA) at para 11

items were included in the first respondent bill of costs by oversight by their costs consultant and they apologised for the unintentional bona fide error that has occurred. The first respondent's attorneys proposed that the matter be settled on the basis that items 1 to 22 be taxed off and it be deferred until the whole matter was finalised. The first respondent's attorneys even attached a redrafted bill of costs which excluded items 1 to 22.

[14] The applicants' attorneys did not respond to the first respondent's settlement proposal and that led to the first respondent's attorneys re-issuing the writ of execution during April 2019 on the revised bill of costs. The writ of execution was executed on 17th May 2019, and that led to the applicants' attorneys addressing a letter to the first respondent's attorneys on 5th June 2019 still repeating what they have already stated in their letter of 5th November 2018. This time the applicants' attorneys gave the first respondent an ultimatum until 12h00 on Thursday 6th June 2019 failing which they threatened to approach court to have the taxation set aside. The first respondent's attorneys responded on 6th June 2019 still suggesting that the matter be settled on the basis of the revised bill of costs and further informed the applicants' attorneys that they were ready for the intended court application by the applicants. The applicants only instituted their application on 7th August 2019.

[15] The applicants instituted their application seven months after their initial threat to do that. There is no reasonable explanation given as to why it took them seven months to institute their application if they were indeed serious about setting aside the taxation of the first respondent's bill of costs. They only acted when they realised that the first respondent had re-issued the writ of execution. In my view, the applicants' application is not genuine and bona

fide, but is meant to frustrate the first respondent from recovering his costs. The applicants have therefore failed to satisfy the second requirement for the setting aside of a default taxation.

[16] Turning to the third requirement, that the applicants must show that they are having a bona fide defence to first respondent's claim which prima facie has a prospects of success. The applicants in their application are complaining about items 1 to 22 which they have stated that they were not covered by the court order. The first respondent has conceded to that, has abandoned those items in dispute in full and even submitted a revised bill of costs that exclude the items disputed. The applicants did not state what was the problem with the remainder of the other items on the first respondent's bill of costs. It was incumbent upon the applicants to have clearly stated what was the issue with the remainder of the items on the first respondent's bill of costs since when the applicants instituted this application, they were already aware that the first respondent has abandoned items 1 to 22 which they complained about.

[17] It is trite that the court must be satisfied that the Taxing Master was clearly wrong before it will interfere with the ruling made by him/her and not that the court differs with the approach of the Taxing Master in taxing the bill, unless the Taxing Master's view of the matter differs so materially from its own that it should be held to vitiate his own. (*See President of RSA v Gauteng Lions Rugby Union*[3]). As I have already pointed out in paragraph 16 above, the applicants have failed to state what was the problem with the remainder of the first respondent's bill of costs as taxed by the second respondent to enable

[3] 2002 (2) SA 64 (CC) at 73C-D)

this court to determine whether the second respondent was clearly wrong in his approach of taxing the bill.

[18] Even though the heading of the first respondent's bill of costs has stated as per "settlement agreement", the second respondent would not have merely rubber stamped that. He is duty bound to ensure that the bill is in accordance with the required tariff. Therefore, it was upon the applicants to have shown which items on the remainder of the bill was disputed and on what basis, but they have failed to do so.

[18] The applicants in their founding affidavit have also stated that the first respondent had attached an unsigned document purportedly made by the applicants' attorneys of record Mr van Staden. The impression created is that the first respondent had obtained taxation by default through fraud. However, that document was not attached to their application to substantiate their claim. Therefore, that submission will be treated as hearsay without any probative value. This court is satisfied that the applicants have failed to meet the requirements for setting aside of a default taxation. The applicants' application therefore stand to fail.

[19] In the result I make the following order

19.1 The applicants' application is dismissed with costs

KGANYAGO J

JUDGE OF THE HIGH COURT OF SOUTH AFRICA, LIMPOPO DIVISION, POLOKWANE

APPEARANCES:

Counsel for the applicants	**: Adv IA Van Den Ende**
Instructed by	**: Espag Magwai Attorneys**
Counsel for the first respondent	**: Adv M Bresler**
Instructed by	**: Le Roux Inc**
Date heard	**: 18th August 2018**
Electronically delivered on	**: 13th September 2021**