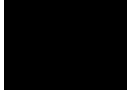




**IN THE HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION, MBOMBELA (MAIN SEAT)**

(1)	REPORTABLE: YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED.
<u>16 February 2024</u>	
DATE	SIGNATURE

CASE NUMBER: 2135/2021

In the matter between: -

EBUNDU (PTY) LTD

Applicant

and

WAYNE MICHAEL BLAKE

First Respondent

THE SHERIFF OF THE HIGH COURT: WHITE RIVER

Second Respondent

**THE TAXING MASTER: HIGH COURT OF SOUTH AFRICA
MPUMALANGA DIVISION**

Third Respondent

WDT INC ATTORNEYS

Fourth Respondent

JUDGMENT

GREYLING-COETZER AJ

Introduction

- [1] The applicant approaches this court in terms of Rule 53 and the common law for review and setting aside of the taxation by the third respondent (“the taxing master”) of the first respondent’s taxed bill of costs under case number 2914/2017 (“the preceding litigation”) and issued *allocator*. The applicant further seeks the setting aside of the writ of execution issued on the strength taxed bill of costs.

Background

- [2] The facts in this application are largely common cause.
- [3] The applicant was the plaintiff in the preceding litigation and sought relief against Willem Constantyn Janson (“Janson”) as first defendant and the first respondent as second defendant. Judgment was delivered in the preceding litigation on 18 March 2018. The applicant was granted relief against Janson, but the relief sought against the first respondent was refused.
- [4] Janson, as the unsuccessful defendant was ordered to pay the applicant’s costs. The first respondent as successful defendant was granted costs in his favor for a defined period from the date of delivery of the defendants’ plea to date of judgment being 18 March 2018. The order reads:

“the plaintiff is ordered to pay the second defendant’s costs incurred from 26 January 2018 to the date of this judgment”

The taxation

- [5] On 10 May 2019 a notice of taxation to which the untaxed bill of costs was annexed, was served on the applicant’s correspondent attorneys in Mbombela, who in turn forwarded same to the applicant’s attorneys of record on 13 May 2019, being Fluxmans Inc (“Fluxmans”). Fluxmans instructed its

costs consultant to consider the bill of costs.

- [6] The applicant did not oppose the taxation of the bill of costs. The taxation proceeded unopposed and in the applicant's absence. The *allocator* was issued on 26 June 2019.
- [7] On 31 July 2019 the first respondent, through its instructing attorneys, WDT Inc Attorneys ("WDT"), demanded payment from the applicant in the amount of R252 162.75 in line with the issued *allocator*. Some correspondence between Fluxmans and WDT followed.
- [8] On 14 August 2019, Fluxmans addressed correspondence to WDT in terms of which it raised that the Taxing Master failed to exercise his or her discretion judicially and/or apply his or her mind to the circumstances of the matter *inter alia* as the Taxing Master allowed costs beyond this period specified in the court order, the fact that the matter did not warrant senior counsel, the first respondent's case was a small part of the judgment. Therefore little preparation was necessary, improbable that costs reflected in the bill of costs was incurred by the first respondent or him alone and the costs in respect of 5 March 2018 was incurred as a result of no doing on the applicant's part, and the applicant should not reasonably be expected to pay same.
- [9] Fluxmans further contended that for, a Taxing Master to come to a fair and adequate assessment of a bill of costs, he or she ought to have the benefit of submissions from the relevant parties, which forms the subject matter of a costs order being deliberated upon. It was suggested that the matter be re-enrolled for taxation to ensure fair and adequate assessment of the bill of costs.
- [10] WDT did not respond to Fluxmans letter. Fluxmans followed up on three occasions during the months of August 2019 and September 2019. Six months passed.
- [11] On 20 March 2020 WDT again demanded payment of the taxed bill of costs.

In response, and on 21 March 2020, Fluxmans, with reference to that raised in the correspondence of 14 August 2019, asserted that the applicant will not be making payment, and any attempt to execute will be met with an application to stay the writ.

- [12] WDT responded on 24 March 2020. WDT said that it had fully complied with the taxation process, the applicant failed to enter a notice to oppose, nor did it attend the taxation proceedings. The proposal of submission of the taxed bill of costs for re-taxation was rejected on the basis that same is not appropriate in circumstances where the applicant elected not to oppose and failed to attend the proceedings. It reiterated that should the applicant be aggrieved by the bill of costs; it should follow the applicable rules of court in order to remedy such aggrievance. It restated its demand for payment, failing which execution would be proceeded with. Fourteen months passed.
- [13] On 18 May 2021 WDT again demanded payment of the taxed bill of costs. In response, and on 21 May 2021, Fluxmans denied that costs were owing on the strength of that raised on the 14th of August 2019. Fluxmans confirmed holding instructions to launch an application to set aside the taxation, which will be launched in due course. It demanded an undertaking that the first respondent would desist from instructing the Sheriff to proceed with an execution, failing which urgent relief would be sought from court pending the setting aside of the taxation.
- [14] On 28 May 2021 WDT responded, persisting with its demand for payment of the taxed costs, failing which execution will be proceeded with. On 3 June 2021 the Sheriff attended the applicant's premises for the purpose of executing a writ of execution. An amount of R256 039.93 was paid into the Sheriff's trust account on 4 June 2021. According to the applicant this was done not to satisfy the debt but to be kept in trust pending an urgent application to be instituted. The Sheriff's return of service, to the contrary, state that the attachment made on 3 June 2021 was released as full payment of the warrant was received on 04 June 2021. On 8 June 2021 the Sheriff paid over the funds

into WDT's trust account.

- [15] This application was issued in its then urgent format was issued on 10 June 2021. The application was enrolled for hearing on 22 June 2021. By agreement between the parties, Part A of the urgent application was withdrawn, WDT would hold the funds received from the sheriff in trust until finalization of Part B.
- [16] On even date, the applicant made a 'without prejudice' offer to the applicant in order to avoid further unnecessary litigation. In terms thereof they offered to accept 50% of the taxed bill of costs in full and final settlement, and that the application be withdrawn with each party paying their respective legal costs.
- [17] The first respondent during these proceedings waived his privilege in respect of such letter, the tender therefore stood.

Issues to be decided

- [18] The issues for determination in these proceedings are as follows:
- (a) Whether a party who received notice of taxation and failed to oppose and/or object, are entitled to seek review in terms of Rule 53 and common law;
 - (b) If aforesaid is answered in the affirmative, whether the applicant issued this review application without unreasonable delay;
 - (c) If found that the application was not instituted within a reasonable time, whether same should be overlooked;
 - (d) Whether the Taxing Master was "*clearly wrong*";
 - (e) Whether the writ of execution stands to be set aside.

The applicant's contentions

- [19] Although Rule 48 deals with the review of taxations, Rule 48 only applies in circumstances where the party seeking a review of the taxation appeared at the taxation and objects to certain items on the bill of costs. This, according to the applicant, does not mean that a party who was not present has no remedy. The applicant contended that an absent still has a remedy under the common law and Rule 53.
- [20] It was contended on behalf of the applicant that the applicant's failure to object, oppose or attend the taxation is irrelevant (as even on an unopposed basis) because the Taxing Master is still required to exercise a proper judicial discretion in taxing a bill of costs.
- [21] It was argued that the applicant has dealt with the delay in launching the review application. Further that the applicant sought to engage the first respondent on the matter before rushing to court. As there was no indication that the first respondent, for a considerable period, intended on proceeding with execution but failed to do so, the applicant was justified, especially in light of the correspondence by Fluxmans of 14 August 2019, to believe that the first respondent would not seriously proceed with execution. It was only clear at the time when execution proceeded, that the first respondent was insisting on recovering its costs, which was the trigger for this application.
- [22] In respect of the merits of the review, it is contended that the Taxing Master did not apply his or her mind, and failed to exercise his or her discretion judicially when taxing the bill of costs. This, according to the applicant, is a matter of general observation, in that the amounts allowed by the Taxing Master are excessive. as demonstrated by the items set out in the correspondence of 14 August 2019.
- [23] The applicant contends that, although the applicant made payment to the Sheriff, the funds have been held in trust, and the first respondent's

entitlement thereto remains a live issue. Therefore, the warrant of execution has not been carried out to finality, as the first respondent had not been paid.

- [24] On the strength of ***The National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs*** 2000 (2) SA 1 (CC)¹ it was contended that the question is whether there remains a live controversy between the parties, and as long as there is a live controversy and the outcome of the case will affect the parties, there can be no muteness.

The Respondents' contentions

- [25] The respondents argued that the applicant, at its own peril, elected not to oppose the taxation. The applicant is therefore belatedly seeking the review the taxation. This, according to the first respondent, constitutes an abuse of court process. The first respondent also contended that the applicant did not bring this application to court within a reasonable time, nor did it give a satisfactory explanation for its failure to do so. It was asserted by the first respondent that the review should have been instituted by the applicant the moment that it formed the view that it possessed grounds justifying review.
- [26] According to the first respondent, the applicant made a conscious decision after receiving the notice of taxation, and on the applicant's version, it sent the bill of costs for consideration to its costs consultant and decided not to oppose the taxation nor to attend same. Thereafter, and having received a demand for payment on 31 July 2019, the applicant still did not seek to review the taxation it bemoaned.
- [27] The founding affidavit in this application was only issued on 10 June 2021, more than twenty-four months after being served with the notice of taxation and bill of costs and twenty-three months since forming the view that the taxation ought to be set aside.

¹ par [21]

- [28] It was contended that the applicant, notwithstanding, does not seek condonation of any sorts from this court.
- [29] According to the first respondent, none of the grounds relied on demonstrate that the Taxing Master was clearly wrong. Therefore, it can simply not be said to be in the interest of justice and the doctrine of finality to allow a recalcitrant party almost two years later to challenge a taxation.
- [30] It was further averred that the applicant has not established a basis upon which it is entitled to set aside the writ of execution. Equally, that the right to set aside a writ of execution may be lost due to a delay in seeking to set same aside, and that even if a writ of execution is issued for an amount larger than the amount than what it should have the whole writ of execution will not be set aside in the absence of substantial prejudice to the debtor. Proper course is to amend the writ to the correct amount.

Review of taxation

- [31] Rule 48 is a taxation specific remedy through which provision is made for a review of a taxation. A party seeking to review a taxation should do so in terms of the provisions and Rule 48. However, in addition, a party aggrieved by an aspect of a taxation, has three further possible remedies, namely, Rule 30 (an irregular step),² an application for setting aside or rescission of the taxation at common law,³ and a general Rule 53 review.
- [32] Each of these remedies cater for specific instances, and the facts of a particular case should guide a party in employing one and not the other, or where suitable in the alternative.
- [33] Therefore, the principal remedy for review of a taxation is found in Rule 48.

² **Brenner's Service Station and Garage (Pty) Ltd v Milne and Another** 1983 (4) SA 233 (W); **Olgar v Minister of Safety and Security and Another** 2021 (4) SA 127 (ECG)

³ The term setting a side and rescission is used interchangeable without distinction in authorities on the issue. **Gründer v Gründer en Andere** 1990 (4) SA 680 (C); **Barnard v Taxing Master of the High Court SA (TPD) and Others** [2005] 2 All SA 485 (T)

For a party to invoke Rule 48 it needs to meet the jurisdictional requirements, (1) it is a party entitled to notice of taxation, (2) the party had opposed the taxation, (3) it objected to an item or part of an item, or (4) an item has been disallowed *mero motu* by the Taxing Master. Having established the jurisdictional requirements such a party may within 15 (fifteen) days after the *allocatur* by notice require the Taxing Master to state a case for the decision of a judge.

- [34] The process of taxation under Rule 48 affords the parties a procedural right to be heard before the Taxing Master and before any discretion is applied by him/her. As was held in **Gründer v Gründer en Andere** 1990 (4) SA 680 (C), the Taxing Master's *allocatur* is a quasi-judicial administrative act. Thereby he or she must hear parties or their legal representatives, and even if necessary, also evidence, and exercise a judicial discretion. It is an action in miniature. The aforesaid informed the procedure outlined in Rule 48 for seeking a review of taxation after a taxation has been conducted and an *allocator* issued.
- [35] Rule 30 would accommodate situations where taxation proceedings are tainted by an irregularity of form and not substance. Such as instances where a taxation occurred in the absence of a party who was entitled to notice, but who did not receive notice of the taxation date.
- [36] An application for setting aside or a rescission of the taxation under the common law, would be applicable in instances where notice of taxation was given, yet a party had not attended the taxation, resulting in the taxation being conducted in such party's absence. Where the setting aside of a taxation and *allocatur* are sought for default of appearance, the principles finding application is identical to those operative in the setting aside of a default judgment.⁴ The party seeking a setting aside/recission will be required to establish that it was granted in default, show good cause, provide a reasonable explanation for the default, show the application is brought on *bona fide* grounds and that it has a *bona fide* defence which prima facie hold

prospects of success.⁵ Notwithstanding compliance with the aforesaid requirements, a court still retains a discretion to be exercised judicially on a consideration of the relevant circumstances.⁶

[37] A Rule 53 review application finds general application. The Rule provides as follows:-

“(1) Save where any law otherwise provides, all proceedings to bring under review the decision or proceedings of an inferior court and of any tribunal, board or officer performing judicial, quasi-judicial or administrative functions, shall be by way of notice of motion directed and delivered by the party seeking to review such decision or proceeding to the magistrate, presiding officer or chairman of the court, tribunal or board or to the officer, as the case may be and to all other affected parties ...”

[38] A review in terms of Rule of 53 in common law, that is, a review in a broader context of procedural issues, can serve as an alternative remedy to Rule 30.⁷

[39] It was submitted on behalf of the applicant that although Rule 48 only applies in circumstances where the party seeking to review the taxation appears at the taxation and objects to certain items on the bill of costs, it does not mean that a party who was not present at the taxation has no remedies.

[40] Although I agree with this general proposition, it cannot without more, and absent further enquiry into the fact of a particular matter be instinctively accepted that such a party will have a remedy under the Rule 53 at common law. In other words, such cannot be accepted to be the position in a vacuum and devoid of considerations of the facts of a matter and the principle and other remedies available to a party to obtain a review and or setting aside.

⁵ ***Sheriff of Pretoria North East v SA Taxi Development Finance (Pty) Limited and Others*** (23904/2017) [2023] ZAGPJHC 346 (14 April 2023) par [12]

⁶ ***Colyn v Tiger Foods Industries Ltd t/a Meadow Feed Mills (Cape)*** 2003 (6) SA 1 (SCA) para 11

⁷ ***Brenner's*** (supra) Fn 1

[41] In support of the applicants contention that the applicant is entitled in terms of Rule 53 and common law to review the taxation, having not participated at its own election to review the taxation under Rule 48, the applicant placed reliance on various judgments, which are discussed hereinafter.

[42] It was argued on behalf of the applicant that in the ***Brenner's Service Station and Garage (Pty) Ltd v Milne and Another***⁸ the court held Rule 53 the be available as stated at 238E: -

"Rule 53 prescribes the procedure to be taken in review proceedings at common law and under the provision of Section 24 of the Supreme Court Act....I will assume, for the present purpose, that the taxation is reviewable under the rule on the ground that an irregularity has been committed." (own underline)

[43] In ***Brenner's*** a notice of taxation was given to the opposing party. The taxation did not proceed on the stated date, as the court file was missing. The taxation proceeded on a later date, yet no notice of the later taxation date was given to the opposing party. The bill of costs was therefore taxed in the absence of the opposing party. The court held that the opposing party was entitled to a notice of the later taxation, and absent such a notice, the taxation was irregular. It proceeded to hold that an irregular performance of a taxation qualifies within the meaning of an irregular proceeding contemplated by Rule 30(1) . It further held that even if such an irregular taxation is reviewable under Rule 53, it is cognisable under Rule 30.

[44] The court in coming to the conclusion considered Rules 48 and 53. In respect of Rule 48, the court found that it was not apposite to the facts, as the matter did not relate to a case of objection to a particular item, but to the fact that taxation took place in the absence of the opposing party. In respect of Rule 53 the court stated that quoted above.

[45] In ***Brenner's*** the opponent's wish to oppose the taxation of the bill of costs

⁸ ***Brenner's*** (supra) Fn 1

was within the knowledge of the attorney, and said attorney relying on the fact that notice has been given for the earlier taxation, and that there had been no specific agreement but merely a request that notice of the new date to be given, resolved not to give it. In the circumstances the taxation was held to be irregular.

- [46] **Brenner's** is merely authority in circumstances where a party had the clear intention to oppose and had not received notice it was entitled to. This would amount to an irregularity. The court found that a party in those circumstances will be entitled to review a taxation in terms of Rule 53 or Rule 30(1). It does not deal with whether a party who had not opposed the taxation is entitled to seek a review *post fact*. The irregularity in **Brenner's** was procedural in nature.
- [47] The applicant relied on **Gründer v Gründer en Andere** 1990 (4) SA 680 (C)⁹ where the court held that in taxing a bill of costs, a Taxing Master performs a quasi-judicial administrative act, and that the common law principles applicable to the setting aside of default judgments apply to the setting aside of a taxation conducted by a Taxing Master.
- [48] I am in agreement. Therefore, a party in default of appearance (other than in circumstances where notice of taxation was given and the party consciously elected not to participate) would be entitled to the setting aside of a Taxing Master's *allocatur*. In doing so, such a party would have to comply with the requirements set out in paragraph 36 above. It ought to be noted that the **Gründer** dealt with an argument for costs and the court did not engage on the appropriateness of a review in terms of Rule 53.
- [49] The court in **Barnard v Taxing Master of the High Court SA (TPD) and Others** [2005] 2 All SA 485 (T) came to a similar conclusion. The court found that where an applicant seeks to challenge a decision made at taxation, which such party had not attended, the applicant ought to apply for a rescission of

⁹ Fn 2

the Taxing Master's decision.

- [50] The court in **Barnard** was faced with an application directing the Taxing Master to furnish reasons why his findings on taxation should not be taken on review and why the taxed costs could not be set aside. The basis of the application was that several items appearing on the bill of costs were incorrect, and that the Taxing Master's allocated amounts, which were excessive, demonstrated that the Taxing Master did not apply his discretion by allowing these items. The court held that the applicant had not attended the taxation of the bill of costs and blamed his attorney for not informing him of the set down. The court held that the applicant ought to have followed the procedure of a rescission. As the applicant failed to adequately explain his default, the application was dismissed.
- [51] The applicant also placed reliance on **Beinash t/a Beinash and Co and Another v Renolds NO and Others** 1999 (1) SA 1094 (W), more particularly where it was held that Rule 53 would have been more appropriate and required if the contents of the bill or the manner in which it was taxed were challenged. The court was faced with an application to review the decision of the Taxing Master in circumstances where he proceeded to tax a bill of costs with the knowledge and/or in spite of the fact that an application for leave to appeal had been noted against the judgment of the court *a quo* and had not yet been disposed of at date of taxation. The court held that, although an application was styled as one of review, it was really aimed at setting aside a decision of the Taxing Master to tax the bill of costs and that Rule 53 therefore did not have to be complied with, as the rule would have been appropriate and required if the content of the bill or the manner in which it was taxed were challenged.
- [52] In **Beinash**, the taxation was opposed or attend by the applicant. The court did not consider the provisions of Rule 48, and held as it did merely in response to the objection by the respondents that Rule 53(1)(b) was not complied with. **Beinash** is distinguishable on the facts.

- [53] The applicant further relied on *Olgar v Minister of Safety and Security and Another* 2012 (4) SA 127 (ECG), more particularly where the court held that the review of taxation under Rule 48(2) could in its view not succeed, and concluded that the applicant should instead have instituted proceedings for an order setting aside the taxation.
- [54] In *Olgar*, the applicant filed a notice of opposition to the taxation, albeit that it was delivered out of time, and sought a review of the taxation in terms of Rule 48(2). It was held that as the Taxing Master had no power to condone the late filing of the notice of opposition, and if the party opposing the taxation failed to object, he is precluded from invoking a review in terms of Rule 48 in a belated attempt to attack items which were allowed. Such an applicant should instead have instituted proceedings for an order setting aside the taxation. The finding in this matter is in my view correct and not authority for seeking a review in the circumstances of this matter in terms of Rule 53.
- [55] Moreover, the authorities relied on by the applicant and first respondent in respect of the merits of the review were reviews in terms of Rule 48.
- [56] The aforesaid authorities demonstrate that where a taxation had occurred in the absence of a party entitled to notice, an application to set aside/rescind the taxation, in common law, was regarded to be the appropriate remedy to pursue. The authorities do not establish an entitlement of a party to bring a Rule 53 review, in circumstances where it received notice of taxation and did not oppose or object thereby relinquishing the opportunity to participate in the taxation.
- [57] I briefly return to the facts that must determine this application.
- [58] On 10 May 2019, the applicant was served with a notice of taxation to which the untaxed bill of costs was annexed. The applicant through Fluxmans instructed its costs consultant to consider the bill of costs. The applicant did not oppose the taxation of the bill of costs. The taxation proceeded on an

unopposed basis. In response to the demand for payment on 31 July 2019, the applicant raised its concerns in respect of the bill of costs within correspondence to WDT.

- [59] What followed was approximately 24 months of intermitted exchange of correspondence. The first respondent at the one end threatened execution and the applicant at the other threatened approaching the urgent court and an application to set aside the taxation. When at last in June 2021 the first respondent acted on his prior threats of execution, this application saw the light of day.
- [60] A party seeking to challenge a bill of costs is required to participate in the taxation proceedings as envisaged in Rule 70.¹⁰ Rule 70 further dictates how such participation should be conducted and limits objection to items not identified. The right to review a taxation is premised on such participation as set out in Rule 48. As held in **Gründer** (*supra*) the Taxing Master's *allocatur* is a quasi-judicial administrative act. By employing this participation process, the Taxing Master must hear parties or their legal representatives, and even if necessary, also evidence, and exercise a judicial discretion. It is an action in miniature.¹¹ The procedure outline in Rule 48 is in line with the doctrine of finality.
- [61] Rule 53 cannot be employed as a remedy that is always ready in aid of a party to rectify its former failure to participate at the taxation stage. Nor can it come to the assistance to a party who is not entitled to a notice of taxation for lack

¹⁰ Rule 70 (3B) (a) 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 —

(i) 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

(ii) require the party to whom notice is given, to deliver to the party giving the notice within ten (10) days after the expiry of the period in subparagraph (i), 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.

¹¹ **Gründer** (*supra*) Fn2

of opposing the main action or application. This will amount to an abuse of court process.

- [62] Having received notice, and not opposing and/or objecting at taxation stage, nor attending, by implication amounts to consent to a taxation *in absentia*. A party has to abide by its election not to participate and cannot be permitted to approbate and reprobate *ex post facto* by insisting on entering into the arena to challenge what has gone before.¹²
- [63] Having been served with a notice of taxation with the untaxed bill annexed, instructing its cost consultant to consider the bill of costs, having ultimately not opposed the taxation, the applicant relinquished the entitlement to participate in the general sense, more specifically to challenge the bill of costs. Equally it justifiably limits such a party's entitlement to challenge the conduct or decision of the Taxing Master.
- [64] To hold otherwise would lead to an absurdity and render Rule 48 nugatory.¹³
- [65] It therefore follows that the provisions of Rule 53 would find application in cases where taxation proceeded in the absence of a party who was entitled to receive notice, but did not, or where taxation was postponed to a date not communicated to such party, as in **Brenner's** case and such like situations where a right to proper notice has been infringed.
- [66] The ultimate effect of not opposing or not participating in a taxation is no different than in any other rule dictating certain processes are to be followed in terms of which a party vindicates their rights. Equally, a party's entitlement to action and vindicate its rights is justifiably limited if not exercised within a specific time, such as in the instance of prescription, or in a specific manner by failing to bring its claim within the ambit of the governing rules. An example would be where an appeal has lapsed for failure to prosecute. Notwithstanding

¹² **Joseph Sipho Dos Santos vs Liason Ntini and Others** (06/2023) [2023] SZSC 46 (22/11/2023)

¹³ Ibid

how could the prospects of success might be, if an appellant failed to act in terms of the rules and failed to persuade the court to condone its non-compliance the entitlement to pursue the appeal will be lost.

[67] As held by Justice Kampepe, writing for the majority in the Constitutional Court, remarked:-

*“Like all things in life, like the best times and the worst of times, litigation must, at some point, come to an end...”*¹⁴

[68] Returning to the circumstances in this application. With regards to the applicant’s contention that the failure to object in the taxation proceedings is not only consideration for the Taxing Master to consider I am of the view that the Taxing Master was still required to apply his or her mind and exercise his or her discretion judicially, even in the absence of the applicant’s opposition. In the absence of an objection having had the opportunity to do so, I find that the applicant’s entitlement to challenge the taxation was lost, even in circumstances where the applicant may have had good reason or grounds to do so.

[69] Dealing with irregularity in the content of a rescission application in terms of Rule 42 the Constitutional Court in Zuma (supra) stated:¹⁵

“[59] Similarly, in *Morudi*, this Court identified that the main issue for determination was whether a procedural irregularity had been committed when the order was made. The concern arose because the High Court ought to have, but did not, insist on the joinder of the interested applicants and, by failing to do so, precluded them from participating. It was because of this that this Court concluded that the High Court could not have validly granted the order without the applicants having been joined or without ensuring that they would not be prejudiced.²⁵ This Court concluded thus:

“[I]t must follow that when the High Court granted the order sought to be rescinded

¹⁴ ***Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State capture, Corruption and Fraud in the Public Sector Including Organs of State and Other*** 2021 (11) BCLR 1263 (CC) par 1

¹⁵ Para [59]-[60]

without being prepared to give audience to the applicants, it committed a procedural irregularity. The Court effectively gagged and prevented the attorney of the first three applicants – and thus these applicants themselves – from participating in the proceedings. This was no small matter. It was a serious irregularity as it denied these applicants their right of access to court.”

[60] Accordingly, this Court found that the irregularity committed by the High Court, insofar as it prevented the parties’ participation in the proceedings, satisfied the requirement of an error in rule 42(1)(a), rendering the order rescindable. Whilst that matter correctly emphasises the importance of a party’s presence, the extent to which it emphasises actual presence must not be mischaracterised. As I see it, the issue of presence or absence has little to do with actual, or physical, presence and everything to do with ensuring that proper procedure is followed so that a party can be present, and so that a party, in the event that they are precluded from participating, physically or otherwise, may be entitled to rescission in the event that an error is committed. I accept this. I do not, however, accept that litigants can be allowed to butcher, of their own will, judicial process which in all other respects has been carried out with the utmost degree of regularity, only to then, ipso facto (by that same act), plead the “absent victim”. If everything turned on actual presence, it would be entirely too easy for litigants to render void every judgment and order ever to be granted, by merely electing *absentia* (absence).”

[70] Although the above was in the context of a rescission application, the principle is equally applicable. A party having enjoyed an opportunity to participate and electing not to be present cannot post fact seek a to challenge such proceedings, which proceedings were procedurally compliant, on the strength of their absence, and thereby avoid the process they had to follow, in casu Rule 48, and force a challenge under a different rule such as Rule 53.

[71] It is accordingly found that the applicant was not entitled, considering its failure to oppose the taxation, to rely on Rule 53 review as a remedy in aid avoiding its prior conduct of electing not to participate in the taxation by employing the taxation specific review remedy provided for in Rule 48.

[72] Where a party is in default of appearance with notice and therefore failed to oppose the taxation, the appropriate remedy would be the setting aside of the decision by the Taxing Master. However, a setting aside can only flow from a

review of the Taxing Master's decision which is only open to a challenge in terms on proper grounds. As party who elects not to oppose a taxation in terms of Rule 48, is justly deprived from a review under the common law of Rule 53. Generally, where the wrong label has been attached to relief claimed, but where the *causa* relied on and the relief sought were clear, a court would entertain the merits of a matter based on the premise that the pleadings are made for the court and not the other way around.¹⁶

[73] The applicant would have been entitled, ignoring its absence at the taxation, to seek the setting aside or rescission of the taxation and *allocatur*, provided that it has adequately explained its default. There is no indication why, having been served with a notice of taxation, the applicant failed to oppose it and partake in the process.

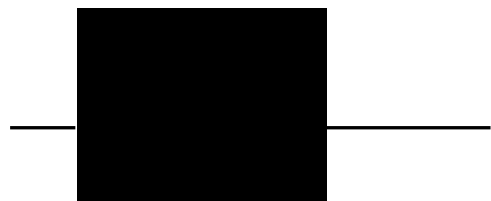
[74] Furthermore, and assuming that the default had properly been explained, the applicant's application for the purpose of setting aside falls short in its failure to demonstrate that the application was brought *bona fide*. In this respect, the chronology of events is instructive in this regard. The applicant would for want of aforesaid not be entitled to a setting aside of the taxation and *allocatur*.

[75] Having found as foresaid it is unnecessary to deal with the remaining issues identified for determination as the former is dispositive of the matter.

Order

[76] I accordingly make the following order: -

1. The application is dismissed with costs.

A black rectangular redaction box covers the signature area. A horizontal line extends from the left and right sides of the box, indicating the position of the signature.

¹⁶

Bowman NO v Da Souza Roldao 1988 (4) SA 326 (T) at 331E-I

DATE OF HEARING: 16 November 2023
DELIVERED ON: This judgment was delivered electronically by circulation to the parties' representatives by way of email and by release to SAFLII. The date and time for delivery is deemed to be at 16h00 on 16 February 2024.

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