IN THE HIGH COURT OF SOUTH AFRICA

LIMPOPO DIVISION, POLOKWANE

CASE NO: 1326/2014

(1)	REPORTABLE: ~~YES~~/NO
(2)	OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3)	REVISED: ~~YES~~/NO

30/09/2024 [redacted]

Date Signature

In the matter between:

MASWENENG ATTORNEYS	**1st**	**APPLICANT**
JAN TSHEPO GOLOLO	**2nd**	**APPLICANT**

And

MAKWELA M.P. ATTORNEYS	**1st**	**RESPONDENT**
THE TAXING MASTER	**2nd**	**RESPONDENT**
THE ROAD ACCIDENT FUND	**3rd**	**RESPONDENT**

In re:

JAN TSHEPO GOLOLO **PLAINTIFF**

AND

THE ROAD ACCIDENT FUND **DEFENDANT**

JUDGMENT

NGOBENI AJ:

INTRODUCTION

[1] The first applicant is a firm of attorneys duly established as such, and conducts business at 476 King's Highway, office 08, 3rd Floor, Lynnwood, Pretoria, Gauteng Province.

[2] The second applicant is Jan Tshepo Gololo, an adult male person represented throughout the main legal proceedings between the parties by the first applicant, with his address for purposes of the current proceedings as c/o 476 King Highway, Office 08, 3 Floor, Lynwood, Pretoria, Gauteng Province.

[3] The first respondent is Makwela MP Attorneys, a firm of attorneys duly registered in terms of the laws of the Republic of South Africa, practicing as such at office 14 Block B, 89 Biccard street, Polokwane.

[4] The second respondent is the Taxing Master of the High Court of South Africa, Limpopo Division, Polokwane (taxing master).

[5] The third respondent is the Road Accident Fund (RAF), a juristic person established in terms of section 2 of the Road Accident Fund Act 56 of 1996, with its business address at 38 Ida Street, Menlo Park, Pretoria, Gauteng.

PURPOSE OF THE APPLICATION

[6] The applicants firstly seek an order for condonation for the late filing of its application for the default taxation order that was granted in favour of the first respondent on 19 October 2016 by the taxing master, to be rescinded and set aside, alternatively that the said taxation order be reviewed and/or set aside (review for easy reference).

SUMMARY OF THE BACKGROUND FACTS

[7] On or about 23 March 2015 the second applicant appointed the first applicant to assist him with a claim against the third respondent, being the Road Accident Fund. Mafori Lesufi Attorneys had already issued summons against the third respondent on 02 September 2014 out of this court under case number 1326/2014.

[8] The first respondent was appointed by the applicants or at least by the first applicant to act as a correspondent attorney in this court for the claim of the second applicant against RAF. The first respondent would under no circumstances be requested to draw pleadings or notices but only to serve and receive documents on behalf of the applicants. The main action was set down for trial on 18 April 2016, and judgment was granted in favour of the second applicant.

[9] The first respondent then submitted a bill of costs for the amount of R116 775-50 to the applicants, and the applicants found it to be too excessive. The submission by the applicants is that the bill of costs contained fatal inaccuracies. The first respondent subsequently applied that the bill of costs be taxed as they were not in agreement about the bill of costs with the applicants. The bill of costs was then taxed to the amount of R73 519-85. The first respondent, seeing that the taxed bill of costs was not paid, issued a letter of demand for the latter amount which was sent and received by the applicants on 26 October 2016.

[10] The first applicant enquired from the first respondent about proof of service of the notice of taxation, and the first respondent has to date failed to furnish the first applicant with the notice of taxation. The court was told that besides these proceedings in which the applicants seek the rescission or review of the taxed bill of costs by the taxing master, there is also pending action

proceedings with regard to the same taxed bill of costs under case number 903/17.

APPLICATION FOR CONDONATION

[11] The applicants acknowledge that the application for rescission or review of the taxed bill of costs by the taxing master was filed out of time, and therefore necessary for the applicants to firstly bring an application for condonation of the late filing of the application for rescission, alternatively the review application. I will revert to the issue of condonation later.

RESCISSION OR REVIEW APPLICATION

[12] It must be clearly understood that I'm at this stage not dealing with the rescission or review application that is before court, because I have to deal with the condonation application first. I'm just mentioning what the law states with regard to rescission and review applications for the sake of context. The 1st respondent in its submissions submitted that the application that is before court could have been brought in terms of Rule 53 of the Uniform Rules of Court (Rules) or Rule 48.

[13] I will not quote the two Rules verbatim at this stage, but I will in a summary manner state what each of the Rules state. Rule 48 deals with Review

of Taxation, and states that any party who is 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.

[14] The taxing master is also required to supply a report to each party involved in the case with regard to his/her decision in allowing or disallowing an item. It is clear from the summary that I have given of Rule 48 that it is applicable to the parties who have been present when the taxing master taxed the bill of costs. It is common cause that in this case when the bill of costs was taxed the applicants were not present, and therefore the provisions of Rule 48 do not find application in this case.

[15] That is in line with the reportable decision in ***Ebundu (Pty) Ltd and Blake & Others***[1], to which I was referred to by the 1st respondent, where jurisdictional requirements relating to the application of Rule 48, were clearly set out on paragraph 33 of the judgment, and I'm satisfied that Rule 48 does not find application in these proceedings as the applicants were not present when the taxing master taxed the bill of costs.

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[1] (Case number 2135/2021) [2024] ZAMPMHC (16 February 2024).

[16] I now turn to deal with provisions of Rule 53. Rule 53 deals with review of decisions or proceedings of any inferior court, tribunal, board or officer performing judicial, quasi-judicial or administrative functions. The 1st respondent submitted that this application by the applicants should have been brought in terms of Rule 53 of the Uniform Rules of Court, because for the court to be able to rescind or set aside the *allocatur,* the court must be placed in the same position as the taxing master, with regard to the evidence that was presented before him/her at the time when the bill of costs was taxed. The further submission is that the court cannot be in that position unless the court is presented with such evidence.

[17] Rule 53 reads as follows:

'53 Reviews

(1) Save where any other law otherwise provides, all proceedings to bring under review the decision or proceedings of any 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 proceedings to the magistrate, presiding officer or chairperson of the court, tribunal or board or to the officer, as the case may be, and to all other parties affected-

(a) Calling upon such persons to show cause why such decision or proceedings should not be reviewed and corrected or set aside, and

(b) Calling upon the magistrate, presiding officer, chairperson or officer, as the case may be, to dispatch, within 15 days after receipt of the notice of motion, to the registrar the record of such proceedings sought to be corrected or set aside, together with such reasons as the magistrate, presiding officer, chairperson or officer, as the case may be is by law required or desires to give or make, and to notify the applicant that such magistrate, presiding officer, chairperson or officer, as the case may be has done so.

2. *The notice of motion shall set out the decision or proceedings sought to be reviewed and shall be supported by affidavit setting out the grounds and the facts and circumstances upon which applicant relies to have the decision or proceedings set aside or corrected.*

3. *The registrar shall make available to the applicant the record despatched as aforesaid upon such terms as the registrar thinks appropriate to ensure its safety, and the applicant shall thereupon cause copies of such portions of the record as may be necessary for the purposes of the review to be made and shall furnish the registrar with two copies and each of the other parties with one copy thereof, in each case certified by the applicant* as true copies. The costs of transcription, if any, shall be borne by the applicant and shall be costs in the cause.

4. … '

[18] I'm quoting the provisions of Rule 53 to a large extent, so that it can be understood, when taking into consideration the submissions of the 1st respondent, that it is not the case of the applicants that they are asking specifically for the record of proceedings relating to the decision of the taxing master. I am however mindful of the fact that the applicants in the alternative are praying for the review and/or setting aside of the decision by the taxing master.

[19] I agree with the 1st respondent that indeed for the court to review an administrative action, it must have records of the proceedings that led to that decision, and of course a record of that decision. In my view the case of ***Murray and Others NNO v Ntombela and Others***[2] dealt fully with how the courts should approach or deal with an application in terms of Rule 53.

[20] In ***Grunder v Grunder and Others***[3], the court held that the taxing master's allocator is a quasi-judicial administrative act: he must hear parties or their legal representatives (and if needs be also evidence) and exercise a judicial discretion. I have highlighted above that in the main the application by the applicants is for rescission of an award by the taxing master.

[21] The requirements for rescission of a judgment is that the applicant must (i) give a reasonable explanation for his default, (ii) his application must be

[2] (792/2022) [2024] ZASCA 24; [2024] 2 All SA 342 (SCA); 2024 (4) SA 95 (SCA) (14 March 2024).
[3] 1990 (4) SA 680 (C),

bona fide and not be made with the intent to delay the opposite parties' claim and (iii) he must show that he has a bona fide defense to the opposite parties' claim.

[22] In ***Barnard v Taxing Master of the High Court SA (TPD) and Others***[4], it was held that where a party seeks to challenge a decision that was made at taxation which was taken in its absence, such application must be brought in the form of a rescission application. The *Ebundu* decision, *supra*, states exactly that. I have stated that the condonation application must be dealt with first as a matter of procedure, and I revert to that.

APPLICABLE LAW

[23] Rule 27(3) states that the court may, on good cause shown, condone any non-compliance with these Rules.

[24] In ***Brummer v Gorfil Brothers Investments (Pty) Ltd and Others***[5] the Constitutional Court held that condonation must be granted if it is in the interests of justice to do so, and if there is an existence of prospects of success.

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[4] [2005] 2 All SA 485 (T).

[5] *(CCT 45/99) [2000] ZACC3; 2000 (50 BCLR 465; 2000 (2) SA 837 (CC) (30 March 2000); Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and Development Company Ltd & others* [2013] ZASCA 5; [2013] 2 All SA 251 (SCA); S v Mantsha 2008 JOL 22468 (SCA).

In determining whether the interests of justice permit the granting of condonation, the following factors were clearly set down in *Brummer, supra,* as:

(i) The interests of justice must be determined by reference to all relevant factors including the nature of the relief sought,

(ii) The extent and cause of the delay,

(iii) The nature and cause of any other defect in respect of which condonation is sought,

(iv) The effect on the administration of justice,

(v) Prejudice and the reasonableness of the applicant's explanation for the delay or defect.

[25] The same court in ***Grootboom v National Prosecuting Authority and Another***[6] in considering the aspect of condonation quoted with approval the above factors from the case of *Brummer, supra*. The court clearly and unequivocally stated that it is now axiomatic that the granting or refusal of condonation is a matter of judicial discretion. It involves a value judgment by the court seized with a matter based on the facts of that particular case.

[26] A condonation application is regarded by some as an application that is brought for procedural and compliance sake, which can be granted easily by the court, hence it was important for the Constitutional Court to impress that

[6] (CCT 08/13) [2013] ZACC 37; 2014 (2) SA 68 (CC); 2014 (1) BCLR 65 (CC); [2014] 1 BLLR 1 (CC); (2014) 35 ILJ 121 (CC) (21 October 2013); *Mulaudzi v Old Mutual Life Assurance Company* [2017] ZASCA 88[2017] 3 All SA 520 (SCA);2017 (6) SA 90 SA 90 (SCA).

condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence, hence a requirement that a full explanation must be given[7].

APPLICATION OF THE LAW TO THE FACTS

[27] The explanation given by the applicants in the case at hand, for the late filing of the rescission application is that they were not provided with proof of notice of set down for taxation. The first applicant states in its founding affidavit that on or about 26 October 2016, it received a letter of demand for a taxed bill of costs.

[28] The court can safely say the first applicant has at least been aware of the taxed bill of costs as at 26 October 2016. In my view having known that there was such a taxed bill of costs, which even led to the 1st respondent issuing summons against the applicants, was an opportune time to challenge the taxed bill of costs.

[29] The extent of the delay before the taxed bill of costs could be challenged is almost one year. The explanation by the applicants as already outlined above is that they were waiting for proof of service for notice of taxation from the first respondent. The court had the benefit of seeing the annexures numbered MP3

[7] Grootboom case, *supra*, footnote 1,

and MP4. On the face of these documents I can see that the notice of taxation that was sent to the 1st applicant was according to these reports delivered to one L.J. Jonas Mahlaela on 16 September 2016 at 09h07.

[30] The first respondent referred the court to a document marked MAS 11 which shows that a parcel bearing the same registration number as MP3 and MP4 was collected on 02 August 2017 at 12h30. I'm unable to say much on the document, as I suppose, will have to be explained for one to understand better as to what the position is. It was highlighted however that there are action proceedings which are pending on the facts of this case, in which I believe issues will be fully ventilated there.

[31] The applicants waited for almost the whole year before they could challenge the taxed bill of costs. In the face of the documents that I have quoted, being MP3 and MP4 I see no prospects of success on the explanation that the applicants waited for the notice of taxation from the first respondent. That information could be obtained from the court file, as rightly stated by the first respondent.

[32] In ***Mtshali N.O. and Others v Buffalo Conservation 97 (Pty) Ltd***[8] and ***Dengetenge Holdings (Pty) Ltd v Southern Sphere Mining and***

[8] (250/2017) [2017] ZASCA 127 (29 September 2017)

Development Company & others[9], the Supreme Court of Appeal impressed on the factors to be considered when faced with a condonation application, which I have already quoted from the *Grootboom's* case, *supra.*

[33] I find that the explanation by the 1st applicant, in the light of what I have just highlighted makes the explanation for seeking condonation by the applicants to fall short of making out a case for condonation, on the basis that there are no prospects of success. The court can still grant condonation if it is satisfied that the interests of justice requires that, as was the test in ***Bertie van Zyl (Pty) Ltd & another v Minister for Safety & Security & others***[10] The court can of course grant condonation even though there are no prospects of success if the matter before it raises a matter of importance.

[34] I did not find that this case raises a matter of importance, or that the interests of justice requires that condonation be granted. That simply means that the court cannot proceed to hear the application for the rescission of the award by the taxing master or alternatively the review of the *allocatur.*

ORDER

[35] In the result the following order is granted:

1. The application for condonation is dismissed with costs.

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[9] [2013] ZASCA 5; [2013] 2 All SA 251 (SCA).

[10] [2009] JOL 23540 (CC); [2009] ZACC 11 (CC); 2009 (10) BCLR 978 (CC).

[redacted]

J.T. NGOBENI

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

<u>Appearances</u>

Counsel for the 1st and 2nd Applicants	: Advocate F.M. Masweneng
Instructed by	: Masweneng Attorneys
Counsel for the 1st Respondent	: Mr. K.C. Makhafola
Instructed by	: Makhafola Inc.
Counsel for the 2nd & 3rd Respondents	: No Appearances
Date of the hearing	: 16 August 2024
Date of judgment	: 30 September 2024

Judgment transmitted electronically