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

Reportable/Not reportable

Case number: 4685/2023

In the matter between:

THABO MOSES MOFOKENG	**1st APPLICANT**
MABATHO MOFOKENG	**2nd APPLICANT**

and

THE TAXING MASTER OF THE FREE STATE HIGH COURT	**1st RESPONDENT**
THE RIDGE BODY CORPORATE	**2nd RESPONDENT**
THE TRUSTEES OF THE RIDGE BODY CORPORATE	**3rd RESPONDENT**
THE NATIONAL REAL ESTATE (PTY) LTD	**4th RESPONDENT**

Coram: Loubser J
Heard: 25 July 2024
Delivered: 5 November 2024

Summary: Taxation award and allocatur made by the Taxing Master after Notice to Oppose items on Bill of Costs filed late – whether a ground for rescission of the allocatur

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ORDER

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1. The application for rescission and setting aside of the allocatur made by the Taxing Master on 29 April 2024 under case number 4685/2023, is dismissed.

2. The Applicants to pay the costs of the 2nd, 3rd and 4th Respondents on the party and party scale, including the fees of counsel on scale B.

JUDGMENT

LOUBSER J

[1] The Applicants made application in this Court "that the taxation award, the allocatur, made by the taxing master on 29 April 2024 and dated 29 April 2024 in respect of Symington and De Kok Attorneys fees and disbursements under case number 4685/2023, be rescinded and set aside". Secondly, they pray that there be no order as to costs unless any Respondent opposes the application. They pray that any opposing party be ordered to pay the costs of the Applicants, including the costs of counsel on scale C.

[2] The 1st Applicant is a practicing advocate at the Cape Town Bar, and the 2nd Applicant is his wife. They issued summons against the 2nd, 3rd and 4th Respondents during September 2023, claiming for damages they allegedly suffered at the hands of the Respondents. An exception was taken against the particulars of claim, which exception was upheld by Hefer, AJ on 1 March 2024. He granted the plaintiffs leave to amend their particulars of claim within 21 days of the Court order, and ordered them to pay the costs of the exception on a party and party scale.

[3] It is in relation to this order of costs that the Respondents served a Notice of Taxation in terms of Rule 70(3B) on the Applicants on 18 March 2024. The Notice was accompanied by a Bill of Costs, and it set down the taxation of the Bill of Costs for 29 April 2024 at 9h45 in the morning. In the Notice the Applicants were given 20 days after receipt of the Notice of Taxation within which to file a Notice of Intention to Oppose the taxation, together with a list of all the items on the Bill of Costs to which they object, and a brief summary of the reasons for such objections, alternatively to attach the marked Bill of Costs indicating the items in dispute.

[4] In the Notice of Taxation the Applicants were further informed that should they fail to file their Notice of Intention to Oppose within the time specified, the Bill of Costs will be submitted to the taxing master for taxation on the specified date without further notice. They were also informed that if they do give Notice of Intention to Oppose within the specified time, they may object at the taxation to the items specified in their Notice of

Opposition.

[5] It is common cause on the papers before the Court that the 20 days within which the Applicants could file their Notice to Oppose together with a list of all the items to which they object, expired on 18 April 2024 without them having filed the required Notice. They only filed their Notice to Oppose together with the list of objections and the reasons therefore, on the morning of 29 April 2024 when the taxation was about to begin. The Applicants were represented by their Bloemfontein based attorney at the venue for the taxation. As the taxing master has no power to condone the late filing of the Notice of Opposition,[1] the attorney requested the taxing master and the attorneys appearing for the Respondents for a postponement of the taxation proceedings to a later date. The taxing master then indicated to the attorney of the Applicants that a postponement would be granted if the attorneys for the Respondents would agree to the postponement. At 14h00 that afternoon and after receiving instructions, the attorneys for the Respondents refused to agree to a postponement. The taxation proceedings then commenced on an unopposed basis with the attorney of the Applicants still in attendance. The taxing master resolved that, since the Notice of Opposition was filed late, the attorney for Applicants would not participate in the proceedings, which would be considered to have been held in the Applicants' absentia.

[6] The Applicants now seek the rescission and the setting aside of the allocatur eventually issued by the taxing master (1st Respondent). The application is made on the basis that the late filing of the Notice of Opposition was not willful, and that a number of items in the allocatur were erroneously sought and erroneously granted. To demonstrate that the late filing was not willful, the Applicants provided an explanation which they contend is a reasonable and acceptable explanation for the lateness. In contending as such, it is obvious that the Applicants are relying on the provisions of Rule 42, which provides, *inter alia*, that a court may rescind an order or judgement erroneously sought or erroneously granted in the absence of any party affected thereby. Which appears to be equally obvious, is that Rule 42 deals with judgments and orders of Courts of law. This is despite the view expressed[2] that the taxing master is, in a sense, a court. In my view, the relief sought by the Applicants ought not to be for a rescission and a setting aside in terms of Rule 42, but rather for a review and a setting aside of the taxing master's decision not to postpone and for a review of certain items allowed in the allocatur. For the review of

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[1] Olgar v Minister of Safety & Security 2012(4) SA 127 (ECG)

[2] By Van Loggerenberg, Superior Court Practice, 2nd Edition, in his commentary on Rule 70(2), page D1-782

certain items allowed in the allocatur, the Applicants should rather have made use of Rule 48, which provides for a decision of a judge on review in chambers.

[7] Be it as it may, I propose to deal with the application as it stands before the Court in order to bring finality to the issues raised by the Applicants. As mentioned earlier, they have offered an explanation for the late filing of their Notice to Oppose. This was apparently to comply with the requirement set in Rule 31(2)(b) that the Court may, upon good cause shown, set aside a default judgment.

[8] The explanation of the Applicants to show such good cause, consist of the following: The Applicants say in their founding affidavit that the 2nd Applicant fell sick on 26 March 2024, whereafter she was booked off sick until 28 March 2024. They appended a copy of the medical certificate to this effect. The 1st Applicant says that he had to nurse the 2nd Applicant until the first week of April 2024. On 3 April 2024 their baby boy also fell sick, and they had to nurse him at home until 9 April 2024. A medical certificate dated 8 April 2024 is appended to confirm his sickness. On 10 April 2024 the other child of the Applicants became terribly sick, they say. She was bedridden and missed school for two weeks until 19 April 2024. Again the Applicants produced a medical certificate showing that the child was unfit for school from 10 April 2024 until 19 April 2024.

[9] The 1st Applicant further says that his attorney of record was also not in good health during the week of 18 April 2024. He consulted a doctor on 18 April 2024, who booked him off until 25 April 2024. A medical certificate is appended confirming same. Eventually, the attorney was booked of until 28 April 2024. The taxation was set down for the next day, 29 April 2024.

[10] According to the 1st Applicant, his family was so severely plagued by sickness as from the date they received the Notice of Taxation on 18 March 2024 up to the date that they had to file the Notice of Opposition on 18 April 2024, that he even had to turn down briefs during that period.

[11] While it may be so that the Applicants found themselves in a predicament from 26 March 2024 to 18 April 2024, there is no explanation offered for the period 18 March 2024 to 26 March 2024. In addition, there is no explanation whatsoever why their attorney in Bloemfontein could not have attended to the preparation and filing of the Notice of Opposition during the period they were unable to do so. On their own version, he only became ill during the week of 18 April 2024. That was after the Notice of Opposition became due on 18 April 2024.

[12] In such circumstances this Court cannot find that the Applicants have provided a reasonable and acceptable explanation for their default. They have therefore not shown good cause for a rescission and the setting aside of the allocatur.

[13] The Applicants further indicated a number of items in the Bill of Costs provided by the Attorneys for the Respondent with which they do not agree. They submit that they have a good prospect of successfully objecting to those items should rescission be granted. It is to be noted that the taxing master did tax off or disallowed some of the items presented by the attorneys, and that all the items were not simply agreed to. This leaves the strong impression that the Taxing Master was satisfied that the items allowed were allowed in accordance with the law. In the premises, it cannot be said that the Applicants would necessarily have good prospects of success in a second round of taxation.

[14] More importantly, this Court cannot set aside the whole allocatur where only certain items of the total are challenged. This underlines the Court's view that the Applicants should rather have followed the route of Rule 48 to obtain a review of the ruling of the taxing master on the items that they wish to dispute. The present application is, after all, an application for rescission and not for the setting aside of the taxing master's ruling on certain items.

[15] Lastly, the Applicants are challenging the authority of the Respondent's attorney to oppose the application for rescission, since there is no indication in the answering affidavit that he was authorised by the Respondents to do so. In my view, this contention is without merit, since the firm of attorneys in question have represented the Respondent throughout all the proceedings leading to this application for rescission. In addition, the 2nd and 3rd Respondents have filed a Special Power of Attorney two days before the hearing of the application. In this document they confirm that the attorney is and was duly authorised to oppose the rescission application.

[16] The application can therefore not succeed. As for costs, I can find no reason why the general rule that costs follow the outcome, should not apply. The following order is made:

1. The application for rescission and setting aside of the allocatur made by the Taxing Master on 29 April 2024 under case number 4685/2023, is dismissed.
2. The Applicants to pay the costs of the 2nd, 3rd and 4th Respondents on the party and party scale, including the fees of counsel on scale B.

[redacted]

P.J. LOUBSER, J

For the Applicant: Adv. T. M. Mofokeng

Instructed by: Modisenyane Attorneys Inc, Bloemfontein

For the 2^{nd},3^{rd} & 4^{th} Respondent: Adv. W. A. Van Aswegen

Instructed by: Symington and De Kok Attorneys, Bloemfontein