

**IN THE HIGH COURT OF SOUTH AFRICA
KWAZULU-NATAL DIVISION, PIETERMARITZBURG**

Case no: **7789/2019P**

In the matter between:

WILLIAM NORMAN DODD N.O.

FIRST APPLICANT

AMELIA TERBLANCHE N.O.

SECOND APPLICANT

CHANEL CATHERINE TERBLANCHE

THIRD APPLICANT

ROBERT CHARLES DODD

FOURTH APPLICANT

and

DAVID MICHAEL BARRY DUFF

RESPONDENT

Coram: Mossop J

Heard: 1 August 2024

Delivered: 7 August 2024

ORDER

The following order is granted:

1. The respondent's application for condonation for the late delivery of his heads of argument is refused with costs on the attorney and client scale.
2. The taxing master's allocatur under case number 7789/2019P, dated 5 July 2021, is set aside.
3. The bill of costs under case number 7789/2019P prepared by the respondent's legal representatives is referred to the taxing master for taxation as an opposed taxation.
4. The writ of execution issued by the respondent's legal representatives on 9 September 2022 based upon the allocatur referred to in paragraph 2 hereof is set aside.
5. The respondent shall pay the applicants' costs of the application on an attorney and client scale.

JUDGMENT

MOSSOP J:

Introduction

[1] The sale of certain immovable property to the Geelhout Property Trust (the Trust) by the respondent has brought about a slew of legal proceedings between the parties.¹ In prior litigation, the precise details of which I am unaware, the Trust was unsuccessful in an application that was heard by Masipa J and was, as a consequence, ordered to pay the respondent's costs (the order).² The respondent

¹ In addition to this application, there is a main action also brought under case number 7789/2021P, an interlocutory application in terms of Uniform rule 24 under the same case number, and an application for declaratory relief under case number 15817/2023P.

² The judgment was delivered on 3 December 2020.

accordingly caused a bill of costs to be drawn up (the bill of costs), to be taxed³ and a writ of execution to be issued (the writ). What was intended to be attached by the writ was the trust account of the Trust's current attorney for it was believed, erroneously, that within that trust account was money being held on behalf of the Trust. This turned out not to be the case, but what ultimately transpired was that the bank that was served with the writ froze all the bank accounts of the Trust's current attorney, including his business account and his personal account. That hiatus appears to have been resolved and nothing more need be said about it.

[2] The applicants in this application are all trustees of the Trust and they seek to set aside the allocatur on the taxed bill of costs. I shall also refer to them, collectively, as the Trust. The amount allowed by the taxing master on taxation came to R104 389.69. The Trust also seeks to set aside the writ prepared by the respondent's legal representative on the strength of the taxing master's allocatur.

[3] The application was opposed by the respondent and eventually found its way onto the opposed motion roll before me.

Condonation

[4] Before dealing with the substance of the matter, it is, unfortunately, necessary to deal with an application for condonation brought by the respondent. The application relates to the failure to deliver the respondent's heads of argument timeously.

[5] Because the matter is on the opposed motion roll, heads of argument are required to be filed by the parties. The Practice Directives of this division regulate the delivery of heads of argument in opposed motions. Practice directive 9.4.1 applies and it reads as follows:

'The following practice direction is in force in regard to opposed motions both in Pietermaritzburg and Durban:

³ The taxation occurred on 5 July 2021.

9.4.1 The party requesting allocation of any matter to the opposed roll shall, in compliance with directive 9.2 above, deliver concise heads of argument (which shall be no longer than five pages ("the short heads")) and not less than fourteen clear court days before the hearing all other parties to the opposed hearing shall do likewise. The heads should indicate the issues, the essence of the party's contention on each point and the authorities sought to be relied upon. The parties may deliver fuller, more comprehensive heads of argument provided these are delivered simultaneously with the short heads. Except in exceptional circumstances, and on good cause shown, the parties will not be permitted to deliver additional heads of argument...'

[6] The Trust has complied with this practice directive. The respondent has not. The respondent's attorney has acknowledged that the heads of argument were not timeously delivered and has, accordingly, brought an application for condonation for that failure and has personally deposed to the affidavit filed with that application. In that affidavit, the respondent's attorney states, in summary, that:

(a) The heads of argument were due 14 days before the opposed motion was argued;

(b) The respondent was thus required to deliver his heads of argument on 18 July 2024;

(c) The heads of argument were delivered on 22 July 2024, and were thus delivered a mere four days late;

(d) No prejudice has been occasioned by the late delivery of the respondent's heads of argument; and

(e) There was no negligence on his part that caused any of the foregoing.

[7] I am afraid that I cannot agree with any of these submissions. I consider each of them sequentially.

[8] It appears that the respondent's attorney has not carefully considered the wording of practice directive 9.4.1. It does not state that the respondent's heads of argument are due 14 days before the opposed motion is to be heard. It states that the heads must be delivered 'not less than fourteen clear court days before the hearing' (underlining added). There is a vast difference between what the respondent's attorney says the practice directive states and what it does state.

[9] The failure to appreciate what practice directive 9.4.1 states causes a difficulty with the respondent's attorney's next submission. The matter was enrolled for argument on 1 August 2024. If one calculates 14 clear court days prior to that date, it is evident that the respondent's heads of argument were not due on 18 July 2024, as contended for by him, but were due on 11 July 2024.

[10] A further difficulty that I have is that contrary to what the respondent's attorney states, the respondent's heads of argument were not delivered on 22 July 2024. That may have been the date upon which they were served on the Trust's attorney. But the Uniform Rules of Court defines 'deliver' as meaning to:

'... serve copies on all parties and file the original with the registrar'.

I did not receive the respondent's heads of argument on 22 July 2024. I received them on the afternoon of 29 July 2024, when they were hand delivered by a representative of the respondent's attorneys to my chambers. I accepted them only because they were accompanied by a condonation application. Why should the heads of argument only be delivered to the court a week after they were served on the applicant's attorneys? No explanation for this is proffered by the respondent's attorney. It follows that the respondent's heads of argument were not delivered four days late, but 12 days late.

[11] What is absolutely astounding is the submission by the respondent's attorney that no prejudice has been occasioned by the failure to timeously deliver the heads of argument. The delivery of heads of argument is primarily intended to assist the court in preparing itself for the argument that is to be heard. This fact has simply been ignored by the respondent's attorney. He merely submits that the Trust's

attorney has not been prejudiced. No reference has been made to any possible prejudice that may have been caused to the court. The court's workload is unrelenting and does not give it lengthy periods of time to consider matters that come before it. Concise heads of argument serve the purpose of sharpening the court's focus and assisting its preparation in the limited time that it has. For the court to enjoy the full benefit of heads of argument, they must be timeously delivered, in accordance with the time periods laid out in the practice directive. It is of no assistance to the court to do as the respondent's attorney has done. Prejudice has accordingly been occasioned to the court.

[12] In explaining why the heads of argument were not timeously delivered, the respondent's attorney states that he proposed to his local correspondent in Pietermaritzburg (he is a Durban based attorney) that the numerous matters between the Trust and the respondent alluded to in the introduction to this judgment be consolidated, or at least set down to be heard on the same day. This he did on 17 April 2024. That could not, however, be achieved without heads of argument first being prepared. The respondent's attorney continues and explains that over the period from 19 June 2024 to 22 July 2024 (the period between 17 April and 19 June 2024 simply being glossed over) he busied himself with:

'... preparing the Heads of Argument in the Allocatur, Declaratory and Rule 24 applications to enable the filing of all the Heads of Argument to seek the consolidation.'

Strangely, the respondent's attorney states that he expected the consolidation of the various matters to:

'... overtake the need to deal with this matter immediately.'

How this could realistically be expected in the absence of heads of argument is not explained.

[13] Due to pressure of work, the respondent's attorney states further that he was not able to complete the heads of argument and they were only completed on 22

July 2024. As a sop to this explanation, he states, finally, that he is a sole practitioner and was therefore not able to delegate any work to another attorney in his firm.

[14] None of which is satisfactory, or acceptable. If an attorney lacks the capacity to deal with matters in the high court and is not familiar with the Uniform Rules of Court or the practice directives of this division, then he has no place litigating before this court. This court has exacting standards and they are jealously enforced. Those standards will be maintained. Those who cannot meet those standards should either bring themselves up to that standard immediately or litigate elsewhere where a premium is not placed on excellence.

[15] As a general proposition, the correct approach when evaluating a condonation application is to consider the interests of justice. This was confirmed in *Van Wyk v Unitas Hospital and Another (Open Democratic Advice Centre as Amicus Curiae)*,⁴ where the Constitutional Court expressed itself as follows on the issue of condonation:

‘This court has held that the standard for considering an application for condonation is the interests of justice. Whether it is in the interests of justice to grant condonation depends on the facts and circumstances of each case. Factors that are relevant to this enquiry include but are not limited to the nature of the relief sought, the extent and cause of the delay, the effect of the delay on the administration of justice and other litigants, the reasonableness of the explanation for the delay, the importance of the issue to be raised in the intended appeal and the prospects of success.’
(Footnote omitted.)

[16] The Constitutional Court went on to say that:

‘An applicant for condonation must give a full explanation for the delay. In addition, the explanation must cover the entire period of delay. And, what is more, the explanation given must be reasonable.’⁵

⁴ *Van Wyk v Unitas Hospital and another (Open Democratic Advice Centre as Amicus Curiae)* [2007] ZACC 24; 2008 (2) SA 472 (CC) para 20.

⁵ *Ibid* para 22.

[17] As to what should appear in a condonation application, in *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others*,⁶ the court observed that:

‘The mere listing of significant events which took place during the period in question without an explanation for the time that lapsed between these events does not place a court in a position properly to assess the explanation for the delay. This amounts to nothing more than a recordal of the dates relevant to the processing of a dispute or application, as the case may be.’

It follows that the seeking and obtaining of condonation is not a mere formality, a fact that the respondent’s attorney has, at least, acknowledged.⁷

[18] Having regard to these principles, and the contents of the affidavit delivered by the respondent’s attorney, it appears to me that it is not in the interests of justice to grant condonation. The reasons advanced by the respondent’s attorney are uninspiring. Indeed, the reasons that appear in his affidavit are precisely the type of reasons why condonation is ordinarily not granted: a failure to account for all the time that has elapsed, a failure to bring the application at the first available opportunity, general vagueness and unexplained lethargy. In my view, no case has been made out for condonation to be granted. The application for condonation is consequently refused with costs.

[19] It brings me no pleasure to find and comment as I have but the conduct evidenced in this matter is happening ever more frequently in this division, where there has been a noticeable decline in standards. Practice directives are routinely ignored by legal practitioners and the rules that permit the orderly adjudication of matters are viewed as being unimportant. This must not be permitted to continue.

⁶ *Independent Municipal and Allied Trade Union on behalf of Zungu v SA Local Government Bargaining Council and others* (2010) 31 ILJ 1413 (LC) para 13.

⁷ *Uitenhage Transitional Local Council v South African Revenue Service* 2004 (1) SA 292 (SCA) para 6.

[20] By rights, the matter should then have been adjourned to permit compliance with the practice directive to occur. But in my view, there is an obvious and simple resolution to the dispute between the parties and the Trust will be prejudiced by a further adjournment. I therefore decided to hear the matter.

The merits of the application

[21] In bringing this application, the Trust invokes the provisions of Uniform rules 70(3B) and 70(4). Uniform rule 70(3B) reads as follows:

‘(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.

(b) For the purposes of this subrule, the days from 16 December to 15 January, both inclusive, must not be counted in the time allowed for inspecting documents or notes pertaining to any item on a bill of costs or the giving of a written notice to oppose.’

[22] Uniform rule 70(4) reads as follows:

‘(4) The taxing master shall not proceed with the taxation of any bill of costs unless he or she is satisfied that the party liable to pay the costs has received –

(a) due notice in terms of subrule (3B); and

(b) not less than 10 days' notice of the date, time and place of such taxation and that he or she is entitled to be present thereat: Provided that such notice shall not be necessary –

(i) if the party liable to pay the costs has consented in writing to taxation in his or her absence;

(ii) if the party liable to pay the costs failed to give notice of intention to oppose in terms of subrule (3B); or

(iii) for the taxation of writ and post-writ bills:

Provided further that, if any party fails to appear after having given the notice to oppose in terms of subrule (3B)(a)(ii), the taxation may proceed in their absence.'

[23] The applicant contends that it complied with Uniform rule 70(3B) and that the respondent did not comply with the provisions of Uniform rule 70(4).

[24] Armed with the order, the attorneys who previously acted for the respondent (the respondent's erstwhile attorneys), caused the respondent's bill of costs to be prepared and sent it to the Trust's erstwhile attorney in conformity with the provisions of Uniform rule 70(3B). The bill of costs was accompanied by a notice of taxation, which advised the Trust that:

(a) It had a period of 10 days within which to inspect the documents referred to in the bill of costs; and

(b) It then had a further 10 days to submit to the respondent's legal representative its objections to any items in the bill of costs with which they did not agree.

[25] The notice of taxation did not contain a date for the taxation. That is entirely regular. If the taxation was to be opposed, the party seeking the taxation acquires a

date for the taxation from the taxing master and serves a notice of set down on the party opposing the taxation. If the taxation is not opposed, the party seeking the taxation advises the taxing master of this and requests the bill to be taxed without notice to the other party.

[26] The respondent's notice of taxation and bill of costs were served on the Trust's erstwhile attorney on 30 April 2021. Applying the time periods referred to in Uniform rule 70(3B), the Trust's objections, if any, were due, at the latest, by 28 May 2021.

[27] It is not apparent if the Trust took advantage of the entitlement to inspect the documents. It seems unlikely that it did so. But what is certain is that, in compliance with the provisions of Uniform rule 70(3B), a notice of intention to oppose the taxation was prepared by the Trust's erstwhile attorney, as was a list of objections to some of the items in the bill of costs. The Trust's notice to oppose the taxation is dated 28 May 2021. The list of objections is found in a five-page document that accompanied the notice of opposition. That document reveals that the amount in respect of which objection was made totalled R48 577.33, a substantial portion of the amount that was eventually allowed by the taxing master. These two documents were served by the Trust's erstwhile attorney by email on the respondent's erstwhile attorneys on 28 May 2021 at 11h33 in the morning. They were thus delivered timeously.

[28] The effect of this was that the taxation became an opposed taxation. The taxing master should have been so advised, at least by the respondent's erstwhile attorneys. But that did not happen. Instead, on 2 June 2021, the respondent's erstwhile attorneys wrote to the taxing master and stated, *inter alia*:

'2. Please note that we have served the bill on 30 April 2021 and have received no opposition or objections to the bill which was due by 28 May 2021.

3. Kindly attend to tax the bill.'

[29] That, of course, was incorrect. The Trust had done what was asked of it and had notified the respondent's erstwhile attorneys of its opposition and its objections. How had the respondent's erstwhile attorneys not realised this? The answer is not entirely clear. The respondent's erstwhile attorneys have not provided an affidavit explaining what occurred. But the Trust came into possession of a letter that the respondent's erstwhile attorneys had written to the respondent.⁸ The letter is dated 19 August 2021. Its content is important, and it is therefore quoted in full:

'1. I refer to the taxation of the bill herein.

2. I had demanded payment and was in the process of doing a Writ when I received the following e-mail from Franci Leppan's office who were the bills consultant instructed by Applicant's attorneys to oppose our bill.

3. Unfortunately whilst she has proof of having e-mailed the objections to us, we had for some reason or other not received same and this could be for any number of reasons as on several occasions where we were also without power.

4. In any event we will have to withdraw the taxed bill, meet with Franci Leppan and tax the bill after having dealt with each other and every one of their objections as per the opposition attached hereto.

5. We are accordingly attending to the taxation of the bill.'

[30] While it remains unclear why the respondent's erstwhile attorneys did not receive the Trust's documents opposing the taxation and setting out its objections to the bill of costs, it is apparent that the respondent's erstwhile attorneys did not dispute that those documents had been timeously sent to it and that the Trust's erstwhile attorney had proof of this. It was not disputed that these documents had been timeously and properly delivered.

⁸ The Trust apparently acquired a copy of the letter from the respondent's erstwhile attorneys. No objection was raised by the respondent to its production.

[31] The respondent's erstwhile attorneys may possibly have been at fault regarding the instruction that they gave the taxing master on 2 June 2021. It is difficult to determine that fact conclusively on the evidence before me. There is, perhaps, a suspicion of culpability that adheres to their conduct. But what the respondent's erstwhile attorneys proposed to the respondent to remedy the matter cannot be faulted. What was proposed was the clear and obvious solution to the problem. The *allocatur* had to be set aside and the taxation conducted as an opposed taxation. Moreover, it was a process that the respondent's erstwhile attorneys should have driven. Had this happened, I am confident that this matter would not now be before me.

[32] But unfortunately, this was not done. Why this was not done may be found in the respondent's answering affidavit. It is not disputed that the letter of 19 August 2021 was sent by the respondent's erstwhile attorneys to the respondent (it was attached to the founding affidavit in this application, marked as annexure 'FA6'). The respondent states with regard thereto that:

'Annexure FA6 disclosed an opinion by [respondent's attorney's name redacted] with reference to the retaxing of the Bill of Costs and is not an "agreement" by any stretch of the imagination. I did not furnish [respondent's attorney's name redacted] with instructions to suspend the *Allocatur* as suggested by the Applicants.'

[33] The respondent, for reasons best known to him, apparently did not give his attorneys instructions to proceed as they had suggested. And thus, the initial error was compounded. Instead of following the advice given to him by his erstwhile attorneys, it appears that the respondent terminated their mandate and the services of the attorneys currently representing the respondent were engaged. The new attorneys, acting on the strength of the *allocatur*, then issued the writ and the unfortunate chain of events previously described then occurred.

[34] Eventually, on 13 November 2023, this application was brought. The relief sought is the following:

‘1. That the Taxing Master’s allocatur dated 5 July 2021 be and is hereby uplifted and the bill of costs is referred to the taxing master for taxation.

2. The writ of execution issued on 09 September 2022 in relation to the allocatur be and is hereby set aside.

3. The costs of this application are to be paid by the Respondent on an attorney and client scale.’

[35] The respondent opposes the relief sought. He advances several grounds as justifying his opposition:

(a) The Trust’s attorney had no authority to act for them in these proceedings. He submits that the document put up by the Trust to establish that authority only authorised the bringing of action and not application proceedings and, moreover, was only signed by two of the four trustees of the Trust;

(b) Too much time has elapsed since the taxation of the bill of costs. He submits that the Trust ought to have taken steps earlier to set aside the taxation, if that was their intention;

(c) The Trust’s notice of opposition to the taxation is ‘irrelevant’ as its legal representative did not attend the taxation; and

(d) There was an agreement between the parties that led to what is referred to as a ‘compromise agreement’ (the compromise agreement). The compromise agreement was apparently concluded on 24 February 2023 and precludes the Trust from setting aside the allocatur.

[36] I turn now to consider the defences raised.

[37] On the first point raised, namely that the Trust’s present attorney has no authority to represent it, my attention is attracted to a resolution of the Trust, dated 8 November 2019, attached to the founding affidavit, which reads as follows:

‘1. The Trustees agree to institute an action and motion Court proceedings against David Michael Barry Duff in respect of the purchase of the Farm Geelhout Boom No. 982.

2. William Norman Dodd is authorized to instruct attorneys and depose to affidavits and provide said attorneys with the necessary instructions to give effect to the decision taken in paragraph 1 above.’

The resolution clearly contemplates action and motion proceedings and not just an action.

[38] There has, in any event, been no formal challenge brought by the respondent in terms of Uniform rule 7.⁹ If the Trust’s attorney’s authority was being challenged that rule should have been used but was not.¹⁰ A resolution of directors is sufficient to establish authority in an instance where a company is involved in litigation.¹¹ I can see no reason why that should not apply to a resolution of trustees of a trust.

[39] The parties have been litigating against each other for several years and the point of a lack of authority has never previously been taken by the respondent. The litigation now before me is merely a continuation of the original litigation – even the same case number is employed. Finally, the resolution put up is not just signed by two of the Trust’s trustees, as the respondent alleges: it appears that the respondent has not taken notice of the second page of the resolution. Had he done so, he would have realised that all four trustees signed the resolution. In my view, the resolution is sufficient to establish the authority of the Trust’s attorney to act for it.

⁹ Uniform rule 7(1) reads as follows:

‘Subject to the provisions of sub-rules (2) and (3) a power of attorney to act need not be filed, but the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.’

¹⁰ *ANC Umvoti Council Caucus and others v Umvoti Municipality* 2010 (3) SA 31 (KZP) para 28

¹¹ *Poolquip Industries (Pty) Ltd v Griffin and another* 1978 (4) SA 353 (W).

[40] The second point taken by the respondent relates to the time that it has taken for this application to be launched. It was launched on 13 November 2023 and the bill of costs was taxed on 5 July 2021. Ms Nako, who appears for the Trust, explained that after the taxation, the taxed bill of costs was never served on the Trust. Things simply went quiet. The next thing that happened was the attachment of the Trust's attorney's bank accounts. There was a delay while the relevant file was located but the delay has not been excessive.

[41] The respondent has not suggested that there is any legal impediment to the relief claimed by the Trust, merely that too much time has elapsed. An explanation has been provided by the Trust for this, which I consider reasonable. The point cannot be sustained.

[42] The third point raised by the respondent is difficult to understand. It appears to be that the list of objections compiled by the Trust is irrelevant in the face of the fact that its legal representative failed to attend the taxation. If I have understood the point correctly, it seems to me to be nonsensical. The notice of taxation is attached to the papers. It does not indicate when the taxation will occur, for the reasons previously explained. Instead, it states that the respondent 'intends' submitting the attached bill of costs to the taxing master. The Trust would therefore not have known when the taxation would occur. After delivering its notice of opposition it should then have been advised by the respondent of the date of the taxation. That did not occur. The Trust's erstwhile attorney would not have had any idea when the taxation would occur and their failure to attend cannot be ascribed to any default on their part. The Trust's objections were formulated and delivered and they ought to have been heard by the taxing master. This defence is accordingly without merit.

[43] The final defence raised by the respondent is the conclusion of the 'compromise agreement'. In his answering affidavit, the respondent stated as follows:

'On or about 24 February 2023 my present legal representative [respondent's attorney's name redacted] reached a 'COMPROMISE AGREEMENT' with [Trust's current attorney's name redacted].'

The Trust denies that this happened.

[44] The respondent goes on to explain what was agreed upon. I regard this as a significant part of the answering affidavit, and I thus quote this portion of it fully:

‘29. On the same date [Trust’s attorney’s name redacted] and my Attorney [respondent’s attorney’s name redacted] spoke on the telephone to seek a resolution of the matter. Agreement was reached with reference to the resolution of the matter verbally between [Trust’s attorney’s name redacted] and [respondent’s attorney’s name redacted] as follows:

29.1 The prior unpaid cost order in favour of Applicants [the Trust] which had not been taxed yet, estimated to be R35,000.00 (THIRTY FIVE THOUSAND RANDS) will be deducted from the amount due in terms of the *Allocatur* and writ pending the taxation of the estimated R35,000.00 costs or agreement on those costs.

29.2 The capital claim of R104,389.69 plus interest there on from 5 July 2021 at the rate of 7% per annum less the R35,000.00 stakeholder amount equated to a balance of **R86,701.55** (hereinafter ‘the COMPROMISE DEBT).

29.3 [Trust’s attorney’s name redacted] will call upon the Applicants to arrange for the judgement debt as reflected in the Warrant of Execution served on [Trust’s attorney’s name redacted] (the execution of the *Allocatur*), together with the Sheriff fees for the attachment, to be paid by the Applicants in order to facilitate the release of the attachment of the Trust Account of [Trust’s attorney’s name redacted]’

[45] There is a disconnect between this evidence and what the respondent’s attorney stated in a letter sent to the Trust’s current attorney on 27 February 2023, three days after the compromise agreement was allegedly concluded. It is, unfortunately, necessary to quote quite liberally from that letter:

'We further confirm that during the said telephonic discussion you referred to a cost order in the matter in favour of yourself and that you approximate that a sum of approximately R35,000 in (sic) due to your firm in respect of that cost order.

In order to assist you, in response to your letter of 24 February 2023, please urgently dispatch to our offices and copy my personal assistant on mxx@xxxxxxxx.co.za [email address redacted], a copy of the Order of Court in terms of which costs are payable to [Trust's attorney's name redacted] so that we are in a position to take instructions on your request to set off or retain a sum of approximately R35,000.00 in relation to that cost order.

Also kindly confirm as a matter of urgency whether or not you will let us have the itemised bill of costs in respect of the cost order today in order to inspect same and determine whether the costs can be agreed whether same must be referred to taxation.

Lastly, we confirm that we undertake to immediately release the attachment of your trust account against payment of the execution debt.'

[46] From this it is evident that no compromise agreement was concluded. There was no agreement on the value of the untaxed costs nor was there an agreement that they could be offset against the value of the allocatur. That might be agreed upon in the future after instructions were taken by the respondent's attorney. It is not clear whether the reference to 'the itemised bill of costs' refers to the bill of costs that had already been taxed or to the costs order granted in favour of the Trust, that had not yet been taxed. If it is a reference to the latter, it serves merely to reinforce the notion that the R35 000 had not been agreed to by the respondent. If it is a reference to the former, it demonstrates that the Trust still objected to the allocatur.

[47] I am therefore satisfied that the compromise agreement was not concluded. All the defences to the relief claimed by the Trust have therefore failed.

[48] A taxed bill of costs may be set aside by a court¹² on the same basis as a default judgment may be rescinded.¹³ It is thus not necessary to review the decision of the taxing master.¹⁴ After addressing me on the condonation application, and after I heard argument from Ms Nako on the merits of the matter, Mr Houston, who appeared for the respondent, indicated that the respondent would not make any further submissions, save for certain submissions on the issue of costs. Ms Nako had already asked for costs on a punitive scale and Mr Houston sought to persuade me that they should not be awarded on that scale.

[49] The common-sense approach to resolving the matter was that initially identified by the respondent's erstwhile attorneys in 2021. The taxation was always going to be opposed by the Trust. The Trust has never compromised its position in that regard and the taxation must therefore proceed on an opposed basis. The respondent resisted the Trust's application only to bend the knee at the last possible moment. The relief claimed by the Trust is virtually identical to that proposed to the respondent by his erstwhile attorneys in 2021. That was perfectly sensible advice. The respondent chose not to follow the advice. He was entitled to choose to ignore it but with choices come consequences. The consequence of him unnecessarily opposing this matter is a punitive costs order, which in my view should be ordered in this instance.

Order

[50] I accordingly grant the following order:

1. The respondent's application for condonation for the late delivery of his heads of argument is refused with costs on the attorney and client scale.

¹² *Sheriff of Pretoria North East v SA Taxi Development Finance (Pty) Limited and others* [2023] ZAGPJHC 346; *Tommy's Used Spares CC t/a Tommy's Auto Parts v Attorneys Anand-Nepaul and another* [2020] ZAGPJHC 269.

¹³ The requirements to rescind a judgment at common law are that an applicant must show good cause, by providing a reasonable explanation for the default, the application must be brought in good faith and a bona fide defence that has prospects of success must be disclosed. Even if there has been compliance with these requirements, a court retains a discretion, to be exercised judicially, on a consideration of the relevant circumstances: *Turnerland Manufacturing (Pty) Ltd v Taxing Master, Western Cape High Court and another* 2024 (1) SA 518 (WCC) paras 46-49; *Gründer v Gründer en andere* 1990 (4) SA 680 (C); *Interactive Trading 115 CC and another v South African Securitisation Programme and others* 2019 (5) SA 174 (LP).

2. The taxing master's allocatur under case number 7789/2019P, dated 5 July 2021, is set aside.

3. The bill of costs under case number 7789/2019P prepared by the respondent's legal representatives is referred to the taxing master for taxation as an opposed taxation.

4. The writ of execution issued by the respondent's legal representatives on 9 September 2022 based upon the allocatur referred to in paragraph 2 hereof is set aside.

5. The respondent shall pay the applicants' costs of the application on an attorney and client scale.

MOSSOP J

APPEARANCES

Counsel for the Trust : Ms N. Nako

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