

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

Reportable/Not reportable
Case Number: 2486/2024

In the matter between:

H[...] L[...] M[...]

Applicant

And

H[...] W[...] A[...]

First Respondent

**THE TAXING MASTER OF THE FREE STATE
HIGH COURT, BLOEMFONTEIN**

Second Respondent

Coram: Reinders, J

Heard: 23 August 2024

Delivered: This judgment was handed down in open court on 21 February 2025 and distributed to the parties via electronic mail communication

Summary: Common law rescission of taxation award and allocatur by the Taxing Master – condonation

ORDER

1. The application for condonation is dismissed.
 2. Each party to pay its own costs.
-
-

JUDGMENT

Reinders, J

[1] This is an application for the rescission of the taxation of a bill of costs and allocatur granted by the second respondent (the Taxing Master of the Free State High Court) on 27 November 2023 under case number A20/2022 (the allocatur). The applicant further seeks leave to oppose the said taxation and deliver a notice of opposition to the taxation as envisaged by the Uniform Rules of Court. The applicant also prays that the late delivery of this application be condoned (the condonation) with further orders in respect of costs. The Taxing Master did not oppose the aforementioned relief, but the first respondent (hereafter the respondent for ease of reference) did so. Reference to the first respondent would hereafter be “the respondent”

[2] Whilst the parties were still married, the applicant obtained a provisional protection order against the respondent. Subsequently, during November 2020 the magistrate dismissed the final protection order with costs. More than a year later in November 2021 the applicant brought an application for condonation for the late prosecution of an appeal against the court a quo’s orders (both in respect of the merit thereof and the adverse cost order). This court condoned the late prosecution of the appeal, but concluded that the magistrate did not err on the merits of the appeal or the cost order granted. Consequently, the appeal was dismissed with costs on 19 May 2023. This application emanates from the bill of costs and allocatur by the Taxing Master following upon the court order of 19 May 2023.

[3] It is common cause that the taxation of the bill of costs and subsequent allocatur which the applicant seeks to have rescinded, proceeded on an unopposed basis. The applicant has been represented by the same attorney from Pretoria (the applicant’s attorney) since the inception of litigation between the parties, with a local firm of attorneys (the correspondent attorney) appointed as mandated by the Uniform Rules of Court.

[4] The applicant in her founding affidavit states that the relief claimed in respect of a rescission of the allocatur as envisaged in her notice of motion, is premised on

the common law. These principles find applicability in the setting aside of a Taxing Master's allocator as prayed for by the applicant.¹

[5] The parties are *ad idem* regarding the legal principles in respect of both a common law rescission and the condonation being sought. I deem it apposite to deal therewith at this juncture already. These principles are trite but can be briefly highlighted as follows:

(a) As a point of departure, it has been held in *Uitenhage Transitional Local Council v. South African Revenue Service*² that condonation is not a mere formality and is not to be had "merely for the asking".

(b) An application for condonation must set out justifiable reasons for non-compliance. In *Melane v Sanlam insurance Co Ltd*³ Holmes JA stated the principle thus:

"In deciding whether sufficient cause has been shown, the basic principle is that the court has a discretion to be exercised judicially upon a consideration of all the facts and, in essence, is a matter of fairness to both sides. Among the fact usually relevant are the degree of lateness, the explanation thereof, the prospect of success, and the importance of the case. Ordinarily these facts are interrelated, they are not individually decisive, for that would be a piecemeal approach incompatible with a true discretion..."

(c) While the factors for consideration in a condonation application are inter-related, a reasonable explanation for the delay coupled with a good prospect of success may enhance the chances of the success of the application for condonation; a weak explanation, but good prospect of success and the importance of the case will allow for the granting of an application for condonation. The court is clothed with wide discretionary powers which it exercises judicially in the valuation of the relevant factors in the particular

¹ *Grunder v Grunder en Andere* 1990 (4) SA 680 (C).

² *Uitenhage Transitional Local Council v. South African Revenue Service* 2004 (1) SA 292 (SCA).

³ *Melane v Sanlam insurance Co Ltd* 1962 (4) SA 531 (A) at C-F.

matter. The interests of justice underpin the court's exercise of its discretionary powers. A good explanation without prospect of success on the merits warrants a refusal of condonation.

(d) In *Grootboom v National Prosecuting Authority and Another*⁴ the Constitutional Court confirmed the trite principles as follows:

"...It is axiomatic that condoning a party's non-compliance with the rules or directions is an indulgence. The court seized with the matter has a discretion whether to grant condonation." The court held *"It is now trite that condonation cannot be had for the mere asking. A party seeking condonation must make out a case entitling it to the court's indulgence. It must show sufficient cause. This requires a party to give a full explanation for the non-compliance with the rules or court's directions. Of great significance, the explanation must be reasonable enough to excuse the default"*⁵ and further reiterated that *"...In this court the test for determining whether condonation should be granted or refused is the interests of justice. If it is in the interests of justice that condonation be granted, it will be granted. If it is not in the interests of justice to do so, it will not be granted. The factors that are taken into account in that inquiry include:*

- (a) the length of the delay;
- (b) the explanation for, or cause for, the delay;
- (c) prospects of success for the party seeking condonation;
- (d) the importance of the issue(s) that the matter raises;
- (e) the prejudice to the other party or parties; and
- (f) the effect of the delay on the administration of justice."⁶

[6] The requirements to be met in respect of rescission in common law of a judgment by default of appearance was stated in *Storti v Nugent and Others*⁷ where

⁴ *Grootboom v National Prosecuting Authority and Another* 2014 (2) SA 68 (CC), at para [20].

⁵ At para [25].

⁶ At para [50].

⁷ *Storti v Nugent and Others* 2001(3) SA 783 (W) at 807A.

the court held that rescission under common law involves establishing “sufficient cause” which in turn involves two essential elements

- (a) the party seeking the relief must present a reasonable and acceptable explanation for his default; and
- (b) on the merits such person must have a *bona fide* defence which, *prima facie*, carries some prospects of success.

In summary thus, in order to succeed with an application for rescission an applicant must show good cause therefore (a reasonable explanation for the default), that the application is brought *bona fides* and that the *bona fide* defence *prima facie* holds prospect of success.

[7] In her founding affidavit the applicant avers that she was not in wilful default by not opposing the taxation and has a reasonable explanation for her failure to have done so timeously.

[8] According to the applicant a notice of taxation was received from the respondent’s attorney by the correspondent attorney, and duly forwarded to her attorney who gained knowledge thereof on 24 October 2023. The applicant avers that her attorney had given instructions to a typist in her employ at the time to inform an attorney and cost consultant (the cost consultant) in Bloemfontein to oppose the taxation. The typist however had failed to carry out the said instruction of the attorney. According to the applicant her attorney only became aware of the typist’s neglect on 13 February 2024, almost four months later, when a letter from the respondent’s attorney demanded payment of the allocator with a threat of execution. The applicant submits that she has a *bona fide* defence in that certain of the items in the taxed bill of costs would not have been allowed by the taxing master if she was able to duly oppose the taxation.

[9] The respondent in his opposing affidavit holds the view that the applicant did not make out a case for the relief claimed in her notice of motion. He explains that the lengthy delay of 112 days since the attorney received the notice of taxation up until when her averred knowledge that the taxation was not opposed, is demonstrative of

the attorney's negligence in pursuing the matter. The applicant thus fails to cross the first hurdle of good cause since there is clearly no reasonable explanation for the delay, so the argument goes. The respondent complains of prejudice should the court rescind the taxation and allocatur. He invited my attention to transcripts and judgments in respect of the litigious history of this matter to substantiate his view that the applicant's attorney "was incapable of managing her office files and staff correctly." The respondent annexed a letter dated 29 January 2024 which preceded the letter of 13 February 2024 in opposition to the applicant's averment that her attorney only became aware of the taxation in February.

[10] In her replying affidavit the applicant did not deny that the letter of 29 January was received, but rather explained that at the time there was extensive litigation between the parties, and her attorney was initially unsure as to which court orders the attached bill of costs and allocatur related. According to the applicant her attorney is the sole director of her firm and receives a large number of electronic mails. On a weekly basis so called "rotation meetings" are held where all the staff meet to discuss each file in the office. Her attorney had a follow-up discussion with the typist regarding the taxation and was assured by the typist that she did instruct the cost consultant to oppose the taxation. The typist has since resigned on 18 January 2024. It is further explained by the applicant that the services of the cost consultant had been employed in the past without the necessity to have communication apart from an instruction to attend to the taxation.

[11] In order to show good prospects of success in having certain items taxed down in the bill of costs, the applicant annexed to her founding affidavit as "FA 5" (FA5) an affidavit from the cost consultant ostensibly setting out the items which in her opinion could have been duly opposed in the event that the applicant had representation at the taxation before the Taxing Master. In opposing the application for condonation and the main relief, the respondent alluded thereto that the affidavit of the cost consultant had not been properly commissioned and does not constitute evidence in support of a *bona fide* defence.

[12] The commissioning of the affidavit is indeed of great concern to me. The application that served before me was bound and indexed. In the court's file FA5 comprises 5 pages. At the bottom of the fourth page, the date (29 April 2024) and signature of the deponent are affixed. The fifth and last page displays at the top the prescribed commissioning confirmation paragraph by the commissioner of oaths, which is likewise dated 29 April 2024. However, no information whatsoever (nor a signature) in respect of the commissioner of oaths appears below the deponent's signature. Bar a typed provision for the information in respect of the commissioner of oaths to be completed, the space is simply blank. The application was issued on 7 May 2024 and the respondent filed with the Registrar his notice of intention to oppose on 15 May 2024. The respondent hereafter deposed to his answering affidavit on 12 June 2024. In paragraph 4.17 thereof, he stated: "...Furthermore, the confirmatory affidavit prepared in the alleged *bona fide* defence is not even commissioned and as such cannot be relied on as evidence in support of the facts deposed to..." In her replying affidavit, deposed to on 26 June 2024, the applicant answered that the content of the paragraph is denied and "...The confirmatory affidavit was in fact duly commissioned."

[13] When the matter was heard and the respondent once again stressed that FA5 was not properly commissioned, counsel for the applicant requested to hand up the original affidavit from the bar and I acceded thereto. The original FA5 displays an official stamp of the commissioner of oaths, indicating the name, capacity and physical address of such commissioner, affixed below the prescribed taking of the oath. However, no proper explanation was tendered under oath why the original FA5 was not bound in the application that served before me. Even worse, it is inexplicable how copies of the original FA5 did not reflect the commissioner's stamp, especially since it does bear the signature of the deponent and the date. Likewise, no explanation for such anomaly was tendered under oath. Had the affidavit not been dated and signed by the deponent on the copy, it might have been speculated in favour of the applicant that the unsigned affidavit was erroneously annexed to the papers and served on the respondent. Bearing in mind the exposition of the dates as set out above, when the deponent to FA5 signed the affidavit on 29 April, a copy of the document should undoubtedly have reflected the commissioner of oaths' stamp had it been there at the time. In my view the only logical inference is that the affidavit was not signed in the

presence of the commissioner and that the latter's stamp and signature was only appended thereafter.

[14] I wish to emphasize that I do not in any way whatsoever question the integrity of counsel who appeared for the applicant. He is a respected and responsible officer of this court. I do however conclude that the cost consultant's affidavit was not properly commissioned at the time when it was appended to the applicant's founding affidavit and later served on the respondent. The applicant thus failed to place evidence before court to sustain the submission of a *bona fide* defence which carries prospects of success.

[15] Apart here from, the applicant bears the onus to prove that she has a reasonable explanation for the delay. As mentioned, the attorney puts the blame on the typist in averring that the typist failed to instruct the cost consultant. Appended to the respondent's answering affidavit is an affidavit of the typist. She states that she can neither confirm nor deny that she was given the instruction by the attorney. She confirms the rotations as explained by the applicant. I accept that the attorney has a system in place to deal with matters that she had been mandated by clients to take care of. But even accepting in favour of the applicant that the typist was indeed told by the attorney to instruct the cost consultant and the system of rotations, it is merely stated in the replying affidavit that she "...did have a follow-up discussion with her regarding the taxation... (the typist) and assured (the attorney) that she instructed the cost consultant...to oppose the taxation." No further information is given as to when such a follow up was done, and when the attorney was assured by the typist that she instructed the cost consultant. It is not even stated that the attorney had several follow-up discussions to ensure compliance with her instructions to the typist. The affidavit is mum on how the attorney hereafter followed up further to establish the progress or outcome in respect of the opposition to taxation. It is the case for the applicant that the notice was brought to her attention on 24 October 2023. The notice is clear that "...if you intend to oppose the taxation you must submit a notice of opposition within TWENTY (20) days of receipt of this notice..." This mandated an important time frame to be kept in mind by the attorney. Moreover, the explanation tendered on when exactly it came to the knowledge of the attorney that the taxation was not opposed, reveals

that there had been “extensive litigation” between the parties and an estimated four court orders were granted. In my view, and having known that the applicant had been unsuccessful in her appeal in this court, this matter was by no means insignificant and I do not view it unreasonable that the attorney ought to have kept her finger closely on the progression of the case. This responsibility ultimately remained with the attorney and not with any other employee in her firm.

[16] Counsel for the applicant pressed on me to take into account in exercising my discretion to grant condonation that no blame for any delay or failure can be attributed to the applicant herself. He relied on *Saloojee and another NNO v Minister of Community Development*⁸ in support of the submission. Indeed, I do not find that any blame can be laid at the feet of the applicant herself. However, counsel quoted the following paragraph from *Saloojee*:

“(T)his Court came to the conclusion that the delay was due entirely to the neglect of the applicant's attorney, and held that the attorney's neglect should not, in the circumstances of the case, debar the applicant, who was himself in no way to blame, from relief. I should point out, however, that it has not at any time been held that condonation will not in any circumstances be withheld if the blame lies with the attorney. There is a limit beyond which a litigant cannot escape the results of his attorney's lack of diligence or the insufficiency of the explanation tendered.”

[17] I have duly considered the factors as alluded to in the case law referred to and applied it to the facts of this matter. The over-arching consideration in exercising my discretion to grant condonation, is whether I deem it to be in the interest of justice to do so. Undoubtedly the matter is of importance to the applicant. It is however likewise important to the respondent. The matter must reach finality. Apart from the fact that the applicant did not tender a reasonable explanation for the lateness (as alluded to in respect of the lack of particularity on following up on the progression of the opposition to the taxation), it would in my view be devoid of logic to grant condonation in circumstances where I have found that the applicant does not enjoy good prospects of success in the rescission of the bill of costs as prayed for and in view of the reasons

⁸ *Saloojee and another NNO v Minister of Community Development* 1965 (2) SA 135 (A).

that I have stated. Accordingly, the application for condonation stands to be dismissed. It follows therefore that there is no application for a rescission before me for adjudication.

[19] Ordinarily costs would follow the outcome. Both parties submitted the appropriate scale for counsel's costs to be taxed, as envisaged in Rule 67A, should be scale B. I would thus have ordered the applicant to pay the costs herein. However, the respondent in opposing the application for condonation and rescission, and even in heads of argument, levelled fierce critique against the integrity of the attorney for the applicant. The opposing affidavit is replete with sketching remarks against the attorney. The applicant requested me to, in view of the aforementioned, grant a punitive cost order against the respondent. The answering affidavit was undoubtedly drafted by the attorney or counsel mandated to act on behalf of the respondent. Likewise, the heads of argument. The attack as mentioned and aggressiveness displayed. Not only is it in bad taste, but does not become responsible officers of the court. To show my displeasure therewith and in exercising my discretion, I deem an appropriate cost order to be that party pays its own costs of the application.

[20] Accordingly I make the following order:

20.1 The application for condonation is dismissed.

20.2. Each party to pay its own costs.

C REINDERS, J

Appearances:

On behalf of the Applicant

Instructed by:

Adv WJ Groenewald

ML Schoeman Attorneys

c/o MM Hattingh Inc

BLOEMFONTEIN

On behalf of the Respondent

Instructed by:

Adv C Jooste

Van Heerden & Krugel Attorneys

c/o Kramer Weihman Inc.

BLOEMFONTEIN