



**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

JUDGMENT

Not Reportable

Case no: 4314/2023

In the matter between:

MAURICE ARNOLD SHAWZIN

Applicant

And

ANTIONETTE BERYL TOLLMAN N.O

First Respondent

THE REGISTRAR OF THE COURT

Second Respondent

Coram: Miller AJ
Heard: 11 September 2025
Delivered: 10 December 2025

ORDER

1. The applicant's non-compliance with the forms and service prescribed in the Uniform Rules of Court is condoned and this application is heard as an urgent application in terms of Rule 6(12).
2. The application is dismissed with costs on the attorney and client scale, such costs to include the costs of counsel on scale B.

JUDGMENT

Miller, AJ

Introduction

- [1] The applicant, who is 91 years old, previously advanced two claims in an action against the first respondent in her capacity as executrix of a deceased estate. The matter was on trial for four days. As appears from the reasons handed down on 11 June 2024, Parker AJ granted the first respondent absolution from the instance in respect of both claims. Parker AJ also ordered the applicant to pay the first respondent's costs, including the costs of two counsel (one of whom was an experienced senior counsel) on the High Court tariff on scale C.

- [2] It is common cause that the taxation of the abovementioned costs was opposed by the applicant.
- [3] In the circumstances I describe below, the Taxing Master issued an *allocatur* in respect of the abovementioned costs order on 2 July 2025 in an amount of R1 253 428.48.
- [4] In an email dated 17 July 2025, the applicant's attorneys informed the first respondent's attorneys that the applicant intended to review the *allocatur* in terms of Rule 48.
- [5] In a letter dated 21 July 2025, the first respondent's attorney stated that the applicant had no grounds for reviewing the *allocatur* in terms Rule 48 as the bill was taxed on the basis of an agreement between the parties.
- [6] On 22 July 2025, the applicant filed a Notice to the Taxing Master to State a Case in terms of Rule 48 ("*the Rule 48 Notice*") and requested an undertaking from the first respondent to hold any execution steps in abeyance pending the outcome of his review in terms of Rule 48. The applicant stated that if the first respondent did not provide him with the requested undertaking by the close of business on 23 July 2025, the applicant would launch an urgent application to stay execution in relation to the *allocatur*.
- [7] The first respondent did not respond to the abovementioned letter.
- [8] In a response dated 11 August 2025, the Taxing Master refused the applicant's request to state a case on the basis that the parties had settled the disputes pertaining to the taxation in the Taxing Master's absence and that this meant that the applicant had not met the requirements of Rule 48 for a review of the *allocatur*. I return to this issue below.

- [9] On 25 August 2025, the first respondent's attorneys stated that the applicant had no prospects of success on review of the *allocatur* in light of the Taxing Master's abovementioned response. The first respondent demanded payment of the taxed costs by no later than the close of business on 29 August 2025 failing which the first respondent would proceed with the execution.
- [10] The applicant's next step was to launch the present urgent application in which he seeks an order setting aside any warrant of execution issued by the Registrar in relation to the *allocatur* and an order staying any execution steps in relation to the *allocatur* pending the finalization of his review in terms of Rule 48.
- [11] The timetable that the applicant imposed was very tight. The application was launched and served on 29 August 2025. The applicant required the first respondent to file her answering affidavit on 4 September 2025. The matter was set down for hearing on 8 September 2025.
- [12] The first respondent filed a detailed answering affidavit on Friday, 5 September 2025 and short further supplementary affidavits thereafter. The applicant did not file a replying affidavit in time for the application to be heard on 8 September 2025. I postponed it for hearing on 11 September 2025 with procedural directions for the filing of the replying affidavit and heads of argument.
- [13] It is common cause that the first respondent has not yet sought or obtained a warrant of execution in relation to the *allocatur*. As a result, the applicant abandoned the relief aimed at setting aside such warrant at the hearing of this application.

[14] The two main issues in this application are whether the applicant has made out a proper case for this application to be heard urgently and if so, whether he is entitled to a stay of execution in relation to the *allocatur* pending the finalization of his review in terms of Rule 48.

Urgency

[15] The applicant's case for urgency rests on the following allegations:

15.1 Execution on the *allocatur* will "*potentially*" cause him irreversible harm, including the forced sale of his assets.

15.2 Reversing the effects of a completed execution on the *allocatur* will require the applicant to resort to separate litigation – an option that is neither financially nor practically viable at his advanced age.

15.3 The applicant does not possess the sum of R1 253 428.48 in cash and, as a result, his assets, "*likely his immovable property*", will be attached and sold at a forced sale value far below their true market value. This, the applicant alleges, would cause him "*severe financial loss and emotional distress*" given his limited means, advanced age and desire to avoid burdening his estate and heirs with further litigation.

[16] Regarding his financial position, the applicant also alleges, without any elaboration or detail, that he can "*make certain arrangements to alienate assets at full value and not at forced value as per any sale in execution, or to provide security for payment in the interim*".

[17] The first respondent took the point in the answering affidavit that any urgency was self-created because of the applicant's inexplicable inaction

between the date of the Taxing Master's response (11 August 2025) and the date upon which the applicant launched this application (29 August 2025).

[18] The first respondent also alleges that she was prejudiced by the truncated timetable set for the hearing of this application.

[19] During the course of the hearing, I raised with the applicant's counsel my concern that the applicant took no steps to arrange his financial affairs between the time that Parker AJ handed down his reasons on 11 June 2024 and the time that the Master issued the *allocatur* on 2 July 2025 and that, as a result, the urgency of this application was self-created.

[20] The applicant's counsel was hard-pressed to meet this concern. Her response was that the applicant did not know the precise extent of his liability for the first respondent's costs until the *allocatur* was issued.

[21] This answer does not meet my concern as the applicant could easily, with the assistance of his attorney, have been able to make a very informed guess about the extent of his exposure to the first respondent for her costs. If this is so, the applicant could and should have arranged his affairs in a manner that enabled him to avoid the harm that he says he will suffer if he is forced to realise his assets at short notice.

[22] The applicant's difficulties in this regard are exacerbated by the fact that he has not put up facts from which I am able to assess whether he will in fact suffer the harm that he alleges or if so, the extent of such harm.

[23] As a result, I was minded to strike the application from the urgent roll a result of the applicant's self-created urgency.

[24] By a narrow margin, I have ultimately decided against doing so. This was for two reasons.

[25] First, the first respondent reversed the position she took in her answering affidavit and in the heads filed on her behalf and asked me not to strike the matter from the roll, but rather to take the self-created urgency into account in the exercise of this court's discretion whether to grant a stay on the merits.

[26] I am, of course, not bound by the first respondent's *volte face* on the question of urgency.

[27] Second, striking the matter from the roll might enable the applicant to make a fresh application to this court dealing with the same subject matter. Given that I heard full argument on the merits and a fresh application will unnecessarily take up scarce judicial resources, I have decided that justice is best served by dealing with the merits of this application.

[28] In the circumstances, I decided to hear this matter as one of urgency.

Merits

The applicant's case - founding affidavit

[29] The applicant's founding affidavit contains almost no detail of what transpired at the taxation.

[30] The applicant tersely states only that his legal team prepared objections to certain items, opposed the taxation and argued it before the Taxing Master.

- [31] The applicant then issued the Rule 48 Notice.
- [32] The applicant contends that he seeks to review the *allocatur* because it is “*shocking and simply wrong, and an execution cannot be enforced based on this vastly overstated determination of costs...*”.
- [33] The applicant then contends, once again without elaboration, that he “*...will be successful in significantly reducing the bills of costs...*” on review before this court.
- [34] As set out in the introduction, the first respondent’s position was that the jurisdictional requirements of Rule 48(1). This was because the bill was taxed by agreement, which meant that there were no items that were objected to or disallowed by the Taxing Master.
- [35] Without elaboration, the applicant merely denies that this was the position and states that the applicant did prepare a proper objection before the taxation. Mr van Niekerk, the applicant’s legal representative on the second of the two-day taxation, also denies that agreement was reached. I return to this evidence below.

The first respondent’s case

- [36] In essence, the first respondent opposes the application on the merits on three grounds.
- 36.1 First, the bill of costs was finalised by the conclusion of a comprehensive settlement agreement on the taxed costs. As a result, the jurisdictional requirements of Rule 48(1) were not met. The applicant therefore has no prospects of successfully reviewing

the *allocatur* and this court should therefore decline to exercise its discretion to stay the execution in respect of the taxed costs.

36.2 Second, that this court should exercise its discretion against the application because the urgency with which the applicant has approached the court is self-created.

36.3 Third, that the application is not a *bona fide* attempt to assert a legitimate right but rather the latest chapter in a protracted campaign of vexatious litigation aimed at harassing and frustrating the first respondent's family.

Agreement on the taxed costs and Rule 48(1)

[37] Contrary to the approach adopted by the applicant, the first respondent has set out a detailed version of what transpired at the taxation. In summary, the first respondent alleges the following:

37.1 On day 1, the taxation proceeded slowly and covered only 20 of the 475 items on the bill of costs. The Taxing Master made only three provisional rulings. These items are not included in the applicant's intended review.

37.2 To expedite matters, the Taxing Master, at the suggestion of the applicant's cost consultants, gave directions to the applicant to group his objections to the bill into "*in principle*" categories. The applicant failed to do so.

37.3 On day 2, Mr van Niekerk informed the Taxing Master that he had a mandate to settle the bill of costs informally by agreement. The

parties then spent the day meticulously negotiating a line-by-line settlement of the bill in the absence of the Taxing Master. The parties thereafter informed the Taxing Master that they had reached agreement and presented an agreed bill in the sum of R1 253 428.46 to him. The Taxing Master gave effect to the parties' agreement by signing the *allocatur*.

[38] The first respondent's version is corroborated by the reference to the agreement in the contemporaneous email of 21 July 2025 from the first respondent's attorneys to the applicant's attorneys; by the evidence of Advocate Maryna van Staden, the first respondent's specialist tax consultant; and by detailed contents of the Taxing Master's response to the Rule 48 Notice.

[39] With reference to the facts as to what transpired at the taxation, particularly the fact that the parties settled the disputes in his absence, the Taxing Master states that it is "*blatantly false and deceptive*" for the applicant to state in the Rule 48 Notice that the items that the applicant seeks to review were objected to during the taxation; that it is "*false and deceptive*" for the applicant to state that the Taxing Master *mero mutu* allowed such items and taxed the bill without considering the applicant's objections.

[40] The Taxing Master goes on to state that it follows that "... *I had no justification for interfering with the parties' agreement and thus allowed the bill to reflect the parties' agreement.*"

[41] The Taxing Master also raises a very serious concern about Mr van Niekerk. The Taxing Master stated that he found it "*unsettling and troubling*" that a legal practitioner who appeared at the taxation then requested a stated case in terms of Rule 48 on items that had been settled between the parties.

[42] The Taxing Master concludes his response by stating that, in light of the facts, the applicant's request for a stated case is "*frivolous, mischievous and vexatious.*"

[43] The first respondent submits that the applicant's review is legally incompetent because an agreed bill of costs does not constitute a "... *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*" as required by Rule 48(1).

Urgency

[44] The first respondent's contention is that the self-created urgency is a factor that I can and should take into account in the exercise of my discretion whether to grant the stay of execution that the applicant seeks.

[45] I have set out the relevant facts pertaining to urgency in the preceding section of this judgment. Nothing further needs to be added in this regard.

Lack of *bona fides* and ulterior purpose

[46] The first respondent contends that this application must not be viewed in isolation, but rather as another step in the applicant's "*protracted and disturbing campaign of harassment and vexatious conduct waged ... against the Tollman Family.*"

[47] The first respondent alleges that the applicant was disgruntled as a result of being left a gift of only R800 000.00 by the late Mr Stanley Tollman rather than being included in his will.

[48] This, according to the first respondent, sparked a tirade of abusive, harassing and threatening conduct by the applicant against the Tollman

family that has caused immense emotional distress, particularly on Mrs Tollman, who is now 92 years old.

[49] This conduct became so egregious that this court granted both an interim and a final interdict against the applicant to restrain him from such conduct.

[50] The applicant's next step was to institute action against the deceased estate to enforce "*casual agreements*" to fund all the applicant's future medical and travel expenses and pay him millions of Rands. As set out in paragraph 1 above, this court ordered absolution from the instance and granted the costs order that is the subject matter of this application.

[51] The applicant then instituted the present application, which the first respondent contends is the next step in the campaign.

The applicant's replying affidavit

[52] The predominant point of substance in the applicant's replying affidavit is that the first respondent impermissibly wants this court to make an advance ruling on whether the Rule 48 review process is sustainable or not. The applicant contends that considerations pertaining to the Rule 48 review are "*... irrelevant to the proceedings and is repetitive in nature and stands to be struck out in the event that I had an opportunity and time to bring such an application*".

[53] The applicant also contends that the Taxing Master made "*in principle*" rulings and that these are reviewable. The applicant does not support this contention with any facts.

- [54] The applicant also baldly denies that there was any settlement of the taxation. The applicant contends that the this was confirmed by Adv. Maryna van Staden and accords with the evidence of Mr van Niekerk.
- [55] The applicant goes further and accuses Adv Maryna van Staden of a “*blatant lie ... under oath*” regarding her evidence that the taxation was settled.
- [56] Mr van Niekerk filed a confirmatory affidavit to the applicant’s replying affidavit in which he alleges, *inter alia*, that Adv van Staden “... *stated to the Taxing Master that the matter had not been settled due to the fact that certain rulings had already been made by the Taxing Master.*”
- [57] The applicant also denies that his means or lack thereof has any bearing on the determination of this application.
- [58] Regarding the allegations that the applicant has waged a campaign against the Tollman family, the applicant baldly denies these allegations and alleges that the background facts play no role in applications of this nature. He deals no further with them.

Supplementary affidavits by Adv. van Staden and the Taxing Master

- [59] Adv. Van Staden denies Mr van Niekerk’s version about what she allegedly told the Taxing Master regarding the settlement of the taxation.
- [60] Adv. van Staden states that upon entering the Taxing Master’s office, she “...*explained that the bill had been settled and that the allocatur was to be taxed by agreement.*” Thereafter, the Taxing Master signed and stamped the *allocatur*.

- [61] The Taxing Master also testified that Adv van Staden did not state that the matter had not been settled due to the fact that certain rulings had already been made.
- [62] On the contrary, the Taxing Master states that upon entering his office, Adv. van Staden stated that the bill had been settled and the *allocatur* was to be taxed by agreement.

The test

- [63] An *allocatur* merely constitutes proof of the amount of a party's liability for costs. It fixes the costs at a certain amount so that execution can be levied on the judgment.¹ The *causa* for that liability is the underlying court order. As the underlying *causa* is a court order, an application for a stay of execution in relation to an *allocatur* is, strictly speaking, an application to stay the underlying court order.
- [64] As a result, the application is governed by Rule 45A of the Uniform Rules of Court, which provides that this "... court may, on application, suspend the operation and execution of any order for such period as it deems fit...".
- [65] Counsel for the applicant relied on *Standard Bank of SA Ltd v Malefane: In re Malefane v Standard Bank of SA Ltd*² as authority for the proposition that the foundational principle in South African procedural law is that a pending review of taxation constitutes an "*unequivocal and sound ground for the granting of a stay of execution*".

¹ *Mfazi v Z & Z Ngogodo Inc Attorneys* (2023/126346) [202 ZAGPJHC 985 (2 October 2024).

² [2007] 4 All SA 1059 (Tk) at para [18].

[66] Counsel for the applicant also referred me to *Dumah v Kerksdorp Town Council*³ and relied on it as authority for the proposition, consistent with the line taken by the applicant in the replying affidavit, that the mere fact that a taxation is under review justifies a stay of execution.

[67] Counsel for the first respondent relied on *Slaughter v Municipal Infrastructure Support Agent*⁴ as authority for the following three propositions regarding the test that I should apply to decide whether to stay the execution of the costs order in favour of the first respondent:

67.1 The overriding principle is that a court will only grant a stay where “*real and substantial justice*” requires it.

67.2 Determining what real and substantial justice entails involves assessing whether the applicant has a justifiable basis for challenging the underlying *causa* of the execution, which is the *allocatur* in the present case.

67.3 To make this assessment, the court is guided by the requirements for interim relief. Central to that enquiry is whether the applicant has established a *prima facie* right to have the *causa* set aside.

[68] Binns-Ward J in *Stoffberg NO v Capital Harvest (Pty) Ltd*⁵ meticulously analysed the authorities regarding the scope of the court’s discretion to order a stay of execution of a court order. His analysis has a direct bearing on the issues that divide the parties in this matter. This justifies extended references to this analysis.

³ 1951 (4) SA 519 (T) at 522A-B.

⁴ [2023] ZAGPPHC 2221.

⁵ 2021 JDR 1644 (WCC) at paras [15] – [28].

[69] Counsel before Binns-Ward J argued that Davis J's judgment in *Firm Mortgage Solutions (Pty) Ltd and Another v Absa Bank Ltd*⁶ was authority for the proposition that the court lacked any authority under rule 45A to suspend the execution of a judgment unless there was a basis to believe that there was an inherent flaw in the judgment or the 'causa' of the underlying claim.

[70] Binns-Ward J stated that it would appear that Davis J accepted that

"the basic principles for a grant of a stay in execution' were expressed in the judgment of Waglay J in Gois t/a Shakespeare's Pub v Van Zyl and Others 2011 (1) SA 148 (LC) at para 37, where the learned judge held:

The general principles for the granting of a stay in execution may therefore be summarised as follows:

- (a) *A court will grant a stay of execution where real and substantial justice requires it or where injustice would otherwise result.*
- (b) *The court will be guided by considering the factors usually applicable to interim interdicts, except where the applicant is not asserting a right, but attempting to avert injustice.*
- (c) *The court must be satisfied that:*
 - (i) *the applicant has a well-grounded apprehension that the execution is taking place at the instance of the respondent(s); and*
 - (ii) *irreparable harm will result if execution is not stayed and the applicant ultimately succeeds in establishing a clear right.*

⁶ 2014 (1) SA 168 (WCC).

- (d) *Irreparable harm will invariably result if there is a possibility that the underlying causa may ultimately be removed, ie where the underlying causa is the subject-matter of an ongoing dispute between the parties.*
- (e) *The court is not concerned with the merits of the underlying dispute - the sole enquiry is simply whether the causa is in dispute.*
(My underlining for highlighting purposes.)”⁷

[71] Binns-Ward J’s analysis of the abovementioned dictum is instructive:

“The statement of ‘general principles’ in Gois actually falls to be understood in three parts. Para (a) thereof should be read discretely from the rest, and the part of para (b) that I have underlined has to be read discretely from the rest of para (b) –(e)... The suggestion that the court’s discretion in terms of rule 45A is in any way circumscribed seems to have been grounded on a misreading of the statement in Gois. As I shall endeavour to show, it is inconsistent with higher court authority and, indeed, also most of the other jurisprudence cited in Gois. Consideration of the cited cases shows that if there is a ‘general principle’, it is that a court will be inclined to suspend the execution of a judgement if real and substantial injustice would result if it refused to do so (see para (a) in the statement in Gois).”⁸

[72] The key higher authority referred to by Binns-Ward J is *Van Rensburg and Another NNO v Naidoo and Others NNO*; *Naidoo and Others NNO v Van Rensburg NO and Others* 2011 (4) SA 149 (SCA) where Navsa JA stated that:

“[51] Apart from the provisions of Uniform Rule 45A, a court has inherent jurisdiction, in appropriate circumstances, to order a stay of execution or to suspend an order. It might, for example, stay a sale in execution or suspend an ejectment order. Such discretion must be exercised judicially. As a general rule, a court will only do so where injustice will otherwise ensue.

[52] A court will grant a stay of execution in terms of Uniform Rule 45A where the underlying causa of a judgment debt is being

⁷ At para [16].

⁸ At para [17].

disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes. As a general rule, courts acting in terms of this rule will suspend the execution of an order where real and substantial justice compels such action.'

(Footnotes omitted.)”⁹

- [73] Binns-Ward J then stated that it was clear from the context that the learned judge of appeal cited instances '*where the underlying causa of a judgment debt is being disputed, or no longer exists, or when an attempt is made to use the levying of execution for ulterior purposes*' merely as examples of where the suspension of execution might be appropriate, not as a *numerus clausus*.¹⁰

- [74] Binns-Ward J concluded his analysis with the following helpful summary of the legal position regarding stays of execution:

“The broad and unrestricting wording of rule 45A suggests that it was intended to be a restatement of the courts' common law discretionary power. The particular power is an instance of the courts' authority to regulate its own process. Being a judicial power, it falls to be exercised judicially. Its exercise will therefore be fact specific and the guiding principle will be that execution will be suspended where real and substantial justice requires that. 'Real and substantial justice' is a concept that defies precise definition, rather like 'good cause' or 'substantial reason'. It is for the court to decide on the facts of each given case whether considerations of real and substantial justice are sufficiently engaged to warrant suspending the execution of a judgment; and, if they are, on what terms any suspension it might be persuaded to allow should be granted.”

- [75] As is evident from *Stoffberg*, the bottom line is that the overriding principle is that a court will only grant a stay where “*real and substantial justice*” requires it. The court’s discretion is unfettered as regards the factors that it

⁹ At para [25].

¹⁰ At para [26].

may take into account in determining whether this is so. It is clear from our case law that these factors include, whether the taxation is under review; the requirements for interim relief; and whether the applicant has a justifiable basis for challenging the underlying *causa* of the execution.

[76] In light of the above, the applicant is not correct that he has a valid ground for a stay merely because the taxation is under review¹¹ and that I am precluded from assessing the applicant's prospects of success on review in determining, in the exercise of my discretion, whether to grant a stay of execution.

Applied

[77] I turn now to determine whether real and substantial justice requires a stay on the present facts.

[78] For the reasons that follow, I have come to the conclusion that real and substantial justice do not require a stay of execution on the present facts.

[79] First, the applicant has not, inexplicably, put up the details of his financial position. The failure to do so means that I cannot assess whether the applicant will suffer the harm he alleges that he will suffer if I do not grant

¹¹ In any event, neither *Malefane* nor *Dumah* relied upon the applicant's counsel as authority for the proposition that the applicant is entitled to the stay of execution merely because of his attempt to review the taxation of the bill of costs.

a stay. In these circumstances I cannot conclude that real and substantial justice requires a stay based upon such alleged harm.

[80] Second, the applicant has known about his liability for the costs of the failed action since June 2024. The applicant, with appropriate guidance from his attorneys, could easily have come up with a reasonably accurate estimate of the extent of such liability.

[81] On the applicant's own version, he has assets that can be sold to cover such liability.

[82] Despite this, it appears that the applicant did nothing between June 2024 and the date upon which he launched this application on 29 August 2025 to sell his assets or otherwise arrange his affairs to avoid having to realise assets at forced sale prices to cover the liability for the costs of the action.

[83] As this is the harm that the applicant seeks to avoid, the applicant could and should have taken steps to avoid it. As he did not do so, he is the author of his cause for complaint.

[84] In my view, these factors constitute sufficient grounds to dismiss the application.

[85] Third, the applicant has poor prospects of successfully reviewing the *allocatur*. This is for the reasons that follow.

[86] As stated above, the first respondent contends that the applicant has no right to review the taxation as the jurisdictional requirements of Rule 48(1) have not been met. This is because the taxation was settled and this meant that the Taxing Master did not make any “*ruling*” on any item or part of an item on the bill of costs that was objected to or *mero motu* disallow an item or part thereof.

[87] There are two issues that arise: (a) was the taxation settled by agreement and (b) if so, does Rule 48, on its proper construction, nevertheless allow a dissatisfied party to review a settled taxation.

Was the taxation settled by agreement?

[88] There is a factual dispute on the papers about whether the taxation was settled by agreement.

[89] The test to resolve factual disputes in applications for interim relief requires the court to consider the facts as set out by the applicant, together with any facts set out by the respondent which the applicant cannot dispute, and to ask whether, having regard to the inherent probabilities, the applicant should on those facts obtain final relief. If so, then the court looks at the facts in contradiction and asks whether that version casts serious doubt on the applicant’s case.¹²

¹² *Webster v Mitchell* 1948 (1) SA 1186 (W) at 1189, read with *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688D-E.

- [90] The first leg of the test must be resolved in favour of the applicant.
- [91] The key question is therefore whether the first respondent's version that the taxation was settled casts "*serious doubt*" on the applicant's contention that the taxation was not settled.
- [92] As set out above, the first respondent's version that the taxation was settled by agreement is unequivocally supported by her attorney (an officer of the court), Adv. Maryna van Staden (the cost consultant and also an officer of the court) and the Taxing Master.
- [93] In particular, the clear import of the Taxing Master's response to the applicant's Rule 48(1) notice is that he made no "*rulings*" as required by Rule 48(1).
- [94] Against this, there is only the evidence of Mr van Niekerk.
- [95] There is no evidence corroborating or supporting Mr van Niekerk's version about what transpired at the taxation and his allegations about what Adv. van Staden told the Taxing Master.
- [96] The Taxing Master is not a party to these proceedings. In that sense, the Taxing Master is impartial. As such, I have no reason at all to doubt the veracity of the Taxing Master's evidence in this application.

[97] The probabilities on the papers strongly favour the first respondent's version. Three witnesses (two of whom are officers of this court and one a civil servant) testified that the taxation was settled. It is highly improbable that all three of these witnesses colluded with each other to concoct a false version or that all three are mistaken about what transpired at the taxation. The first respondent's version is also supported by the contemporaneous correspondence.

[98] If the Taxing Master's evidence about what Adv. van Staden told him is correct, then Mr van Niekerk's evidence in this regard is false. This is a serious matter and one that, in my view, should be investigated by the Legal Practice Council. A copy of this judgment will be forwarded to the Legal Practice Council. I leave it to the Council to decide what steps, if any, should be taken to investigate these matters.

[99] For present purposes, it is clear that, at the very least, the first respondent's version about what transpired at the taxation casts a "*serious doubt*" on the applicant's version and therefore should be accepted as correct for the purposes of this application.

The proper construction of Rule 48 (1)

[100] On its proper construction¹³, Rule 48 does appear to exclude a review where the parties have resolved the taxation by agreement without the Taxing Master making any ruling on an item or part of an item objected to or *mero motu* disallowing an item or part thereof. This is supported by the following:

100.1 Where the parties have reached agreement, there is no decision by the Taxing Master to be scrutinized and potentially set aside. It is clear that Rule 48(1) requires such a decision.

100.2 Rule 48(2)(a) requires a dissatisfied party to identify in the Rule 48(1) notice the item or part thereof in respect of which the “*decision of the taxing master is sought*”.

100.3 There is logic underpinning this interpretation. If there is no decision by the taxing master to review, any successful review in these circumstances would, impermissibly, result in a judge rewriting the parties’ agreement regarding the previously agreed quantum of costs. Expressed differently, a review in these circumstances is an impermissible attempt at the behest of the dissatisfied party to renege on his or her consent to the quantum of his or her liability for costs. I can see no basis for interpreting Rule 48(1) to allow a party dissatisfied with his or her own

¹³ *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) at para 18.

agreement to the taxed costs to have a second bite at the cherry via a review in terms of Rule 48.

[101] Neither counsel referred me to any authority on this issue. My research bore no fruit. This is most probably because there are no instances where any litigant has previously attempted to backtrack on his or her agreement as to the quantum of their liability for costs via a Rule 48 review.

[102] In the circumstances, I find that Rule 48 does not, on its proper construction, permit a party to review a taxation that was settled by agreement.

[103] It follows that the applicant does not have prospects of success on review in terms of Rule 48.

Other factors

[104] In light of what I have set out above, the applicant will not be able to institute an action to recover the taxed costs for which he is liable. This is therefore not a factor in favour of a stay.

Conclusion

[105] For these reasons, I conclude that the applicant is not entitled to a stay of execution. It follows that the application on the merits must fail.

Costs

[106] The costs must follow the result. The first respondent submits that I should order the applicant to pay costs on the attorney and client scale on the basis that this application was vexatious, reckless or dishonest.

[107] I agree that the first respondent should be awarded her costs on the attorney and client scale. This is for the reasons that follow.

[108] In circumstances where the applicant's complaint is that he would have to sell assets at forced sale value to pay the amount due in terms of the *allocatur*, the applicant clearly needed to give this court a full picture of his financial position. The applicant did not do so. Indeed, the applicant put up no evidence at all about his financial position.

[109] Given the exchange of correspondence that preceded this application and the contents of the Taxing Master's response to the applicant's Rule 48(1) notice, the applicant knew that the first respondent would take the point that he had no prospects of success on review in circumstances where the taxation was settled by agreement. Despite this, the applicant did not address this in any meaningful way in the founding affidavit. It should have been clear to the applicant that this dispute of fact would cast at least a "*serious doubt*" on his case in this regard. Where it is clear that Rule 48(1) does not, on its proper construction, allow a review in these

circumstances, the applicant should have thought twice about launching this application at all.

[110] The applicant must have given a mandate to Mr van Nickerk to settle the taxation. Despite this, the applicant denied that the taxation was settled. There is therefore merit in the first respondent's submission that this application was premised on a false factual version.

[111] There also appears to me to be merit in the first respondent's submission that this application is the latest chapter in the applicant's campaign against the Tollman family.

[112] The first respondent's counsel asked for costs on scale B. I agree that this is the appropriate scale.

Order

[113] In the circumstances, I make the following Order:

113.1 The applicant's non-compliance with the forms and service prescribed in the Uniform Rules of Court is condoned and this application is heard as an urgent application in terms of Rule 6(12).

113.2 This application is dismissed with costs on the attorney and client scale, such costs to include the costs of counsel on scale B.

MILLER AJ

Acting Judge of the High Court, Cape Town

APPEARANCES

Counsel for the Applicant: Adv A Korff

Instructed by: Malan Lourens Viljoen Inc.

Counsel for the First Respondent: Adv S Fuller

Instructed by: Howard Rubenstein Attorneys