



**IN THE HIGH COURT OF SOUTH AFRICA
[EASTERN CAPE DIVISION: MTHATHA]**

CASE NO. 1165/2021

In the matter between:

MINISTER OF POLICE

Applicant

and

NOMANDELA PIYEYE

Respondent

JUDGMENT

JOLWANA J

[1] This judgment concerns a rescission application subsequent to the taxation of a bill of costs and the allocation of an *allocatur* by the Taxing Master in circumstances in which applicant's attorneys were not in attendance during the taxation.

[2] The backdrop to the rescission application is that the respondent instituted action proceedings claiming delictual damages against the applicant arising from the respondent's unlawful arrest and detention. On different occasions as the matter meandered through the civil trial roll, numerous costs orders were issued against the applicant until the matter was amicably settled between the parties. On 20 March 2024 respondent's attorneys served a bill of costs on the state attorney, the applicant's legal representatives at the time. That bill of costs was taxed on an

unopposed basis as the state attorney, having been duly served with the notice of taxation, failed to serve and file a notice of opposition thereto.

[3] In an affidavit deposed to by Mr Nqiwa who was the attorney who handled that matter, the applicant contends that he was not in wilful default in not opposing the taxation of the bill of costs and in so doing placed the following facts before court. The applicant together with the office of the state attorney took a resolution that all bills of costs should be opposed after it was noticed that in most cases exorbitant bills of costs were drawn for attendances which were not reasonably incurred. However, because of the high volume of work that the office of the state attorney is experiencing, some of the bills of costs do fall through the cracks in that they do not get outsourced timeously to the state attorney's costs consultants. The bill of costs in this matter was one of the bills of costs that fell through the cracks. A notice to oppose was not delivered as a result of which the bill of costs in question was taxed on an unopposed basis.

[4] It was only on 25 October 2024 that it came to the attention of Mr Nqiwa for the first time that the bill of costs had since been taxed when it was served on their offices. The taxed bill of costs contained items which were allowed by the Taxing Master, but which he was of the opinion that they should not have been allowed. Various examples of those items are set out in the founding affidavit in which the applicant makes the point that they should not have been allowed. In other words, the issues that would have been set out in the applicant's notice of objection and the contentions that would have been made before the Taxing Master had applicant's attorneys opposed the taxation of that bill of costs are set out in the founding affidavit.

[5] Finally, the applicant seeks condonation for not making this application soon after the taxed bill of costs was served. In this regard Mr Nqiwa says that his office receives a huge volume of bills of costs and it takes them some time to deal with them. In this case it took them a week to get to the bill of costs in question and consider it. It was after a full consideration that it was concluded that the said bill of costs was exorbitant with items that should not have been allowed by the Taxing Master having been allowed. An instruction was therefore given to the state attorney by the applicant to challenge it.

[6] On 5 November 2024 a decision was taken by a committee at the state attorney's office to outsource this matter to the applicant's current attorneys of record. On 6 November 2024 an instruction was therefore sent to the applicant's current attorneys of record to institute an application for the rescission of the *allocatur*. On 13 November 2024 applicant's attorneys sent a letter to the respondent's attorneys proposing a re-taxation of the bill of costs. On 24 January 2025 the respondent's attorneys responded to the re-taxation proposal and indicated that their client had not acceded to the applicant's proposal.

[7] It was therefore contended that the applicant was not derelict in not applying for the rescission of the *allocatur* timeously. They were also delayed by the respondent's attorneys who themselves contributed to the delay by not timeously responding to the re-taxation proposal. To the extent that condonation for the delay in instituting the rescission application was considered necessary, the applicant says that this Court should grant it as the respondent would not be prejudiced if it were granted and it would be in the interests of justice to do so. It only became necessary to launch this application after it became clear that the respondent's attorneys were not amenable to the re-taxation of the bill of costs after they rejected the re-taxation proposal.

[8] In the answering affidavit deposed to by the respondent's attorney the respondent contends, in the first instance, that the Taxing Master should have been joined as a co-respondent. This is because the *allocatur* sought to be rescinded was made by the Taxing Master in the exercise of a discretion. It is the exercise of that discretion which was being challenged without the person who exercised it being cited. The Taxing Master is the decision maker who is best placed to provide the court with an explanation on how he or she exercised his or her discretion. The Taxing Master therefore has a substantial interest in the outcome of this application, so contended the respondent.

[9] The other point raised by the respondent is that where only certain items of the *allocatur* were challenged the applicant should have utilised the review remedy provided for in Rule 48 of the Uniform Rules of Court instead of seeking the rescission of the entire *allocatur*.

[10] The respondent's case on the merits of the rescission application is that this being a common law rescission application the applicant was required to furnish a reasonable explanation for the default or its failure to oppose the bill of costs. Furthermore, the applicant was required to show that he has a bona fide defence which has some prospects of success.

[11] With regard to the first requirement the respondent contends that the applicant has not provided a reasonable and satisfactory explanation for his failure to oppose the bill of costs. The applicant has not provided an explanation that is sufficient for the court to appreciate how the default came to be and assess the applicant's conduct. The applicant has not explained how the bill of costs was dealt with from the date it was served at state attorney on 20 March 2024 to the date of taxation,

some six months later on 24 October 2024. Therefore, the applicant has not shown that he was not in wilful default. Furthermore, the applicant has not shown that he has prospects of success as there is no merit to the challenge on the Taxing Master's *allocatur*. Other than the applicant expressing his view about how the Taxing Master should have exercised his or her discretion there is no suggestion that in respect of any item, the Taxing Master could not have reasonably exercised the discretion in the manner in which he or she actually exercised it.

[12] The last issue is that of the applicant's conditional application for condonation for the late filing of the rescission application. The rescission application was instituted on 12 February 2025, more than three months since the applicant was served with the taxed bill of costs on 25 October 2024. While the applicant's current attorneys of record were instructed on 6 November 2024, the rescission application was only issued more than three months later from the date of the instruction. The respondent contends that these significant delays have not been explained. The letter of the applicant's attorneys in which they proposed a re-taxation was sent on 13 November 2024 giving the respondent five days within which to indicate their attitude to the proposed re-taxation. No response was received from the respondent's attorneys until 24 January 2025 and by that date the applicant had still not instituted the rescission application, thus ignoring the deadline they themselves set for the respondent. Even after the re-taxation proposal was rejected on 24 January 2025 the applicant still did not do anything until 12 February 2025, almost three weeks later when the rescission application papers were issued. Even worse, the founding affidavit was deposed to on 4 February 2025, only for the application to be issued just over a week later. None of these recurring delays were explained.

[13] The applicant's replying affidavit suggests, for the first time, that the notice of taxation never came to Mr Nqiwa's attention and that he only saw it for the first time on 25 October 2024 after the bill of costs had already been taxed. I understand him to be saying that when the notice of taxation was served on 20 March 2024, it was not brought to his attention as the person who was dealing with this matter at the office of the state attorney and therefore the default in opposing it was not wilful. No such averment was made in the founding affidavit. Furthermore, nothing is said at all about the person who received the notice of taxation and signed for it. That person is conspicuous by his or her silence on the face of an averment by Mr Nqiwa, in reply I might add, that the said notice of taxation was never brought to his attention.

[14] On the facts as briefly summarised above, I turn now to the assessment of the merits of the application. In doing so I first deal with the issue relating to the non-joinder of the Taxing Master. It is difficult to understand the respondent's assertion that the applicant should have joined Taxing Master in this application. The difficulty with this assertion is that there is no basis set out why it is alleged that because the Taxing Master was a decision maker therefore the Taxing Master has a substantial interest. The nature of the substantial interest in circumstances in which the Taxing Master has discharged his responsibility in relation thereto and is for all intents and purposes *functus officio* is not explained nor is the nature of the prejudice that he may suffer set out. The further equally incomprehensible assertion is that the applicant should have used the review procedure set out in Rule 48¹.

¹ Uniform Rule 48(1) of the Uniform Rules of Court provides:

Any party dissatisfied with the ruling of the taxing master as to any item or part of an item which was objected to or disallowed *mero motu* by the taxing master, may within 15 days after the allocatur by notice require the taxing master to state a case for the decision of a judge.

[15] It is apparent from Rule 48 itself that it applies only to a situation in which any item or part of an item was objected to or disallowed by the Taxing Master. This application is certainly not about any item that was objected to or any disallowed item, but it is about the rescission of the entire *allocatur* on the basis that the bill of costs was taxed on an unopposed basis as earlier indicated. The nature of the function performed by the Taxing Master in taxing a bill of costs and the applicable legal position is as set out in *Grunder*². In the headnote thereof the following is said:

“The Taxing Master’s *allocatur* is a quasi-judicial administrative act: he must hear parties or their legal representatives (and if need be, also evidence) and exercise a judicial discretion. Inasmuch as proceedings before the Taxing Master constitute an action in miniature, common law principles applicable to the setting aside of default judgments apply also to the setting aside of the Taxing Master’s *allocatur*. An order as to costs cannot be enforced without the Taxing Master’s quantification thereof, and a quantification done in the absence of one of the litigants ought to be open to challenge on the same basis as are default judgments.”

[16] The issue of the applicability or otherwise of Rule 48 where a litigant seeks the setting aside of an *allocatur* was considered by Pickering J who, after considering numerous authorities on rule 48 including *Grunder*, said:

“Having regard to these authorities the proposed review of taxation under Rule 48 (2) could, in my view, never succeed. The applicant should instead have instituted proceedings for an order setting aside the taxation.”

This is exactly what the applicant has done in seeking the rescission of the *allocatur*. Therefore, the respondent’s contention that the applicant should have sought relief under Rule 48 cannot be correct.

[17]. The applicant’s explanation for its failure to oppose the bill of costs is simply that due to high workload the bill of costs in this matter fell through the cracks. It is

² *Grunder v Grunder en Andere* 1990 (4) SA 680 (C).

further averred that a notice to oppose the bill of costs was not delivered timeously. However, there is no averment as to when the state attorney received the bill of costs and by when was the applicant required to file its notice to oppose and when that notice to oppose was eventually filed or that it was never filed. What is suggested in the founding affidavit is that it was not delivered timeously which suggests late delivery. Even the said notice to oppose which was allegedly not delivered timeously is not annexed to the founding affidavit. This is the basis on which as far as the wilful default is concerned, the rescission of the *allocatur* is sought.

[18] With regard to the requirement of good cause, all that the applicant says is that it was only on 25 October 2024 that it came to their attention, for the first time, that the bill of costs had since been taxed when it was served on the state attorney's offices. There is also an indication that they were not given a notice of set down. What the applicant does not say is that having failed to file a notice to oppose the bill of costs in which they would have listed all the items to which the applicant objected, what is it that entitled them to be served with a notice of set down. This is besides the fact that in the notice of taxation it is specifically stated that if the applicant failed to file a notice to oppose within the 20 day period specified therein the bill of costs would be submitted to the Taxing Master for taxation without further notice. In the founding affidavit the procedure followed by the respondent in the service of the notice of taxation, the form used, what it said or did not say are not challenged at all. All the applicant does on the issue of good cause is to express its views on why certain items in the bill of costs should not have been allowed by the Taxing Master.

[19] The legal position regarding rescission applications at common law has, to the extent that it needed further clarification or elaboration, been restated by the Constitutional Court in *Zuma*³ where the court said:

“... Mr Zuma pleads rescission on the basis of the common law, in terms of which an applicant is required to prove that there is “sufficient” or “good cause” to warrant rescission. “Good cause” depends on whether the common law requirements for rescission are met, which requirements were espoused by the erstwhile Appellate Division in *Chetty*, and affirmed in numerous subsequent cases, including by this Court, in *Fick*. In that matter, this Court expressed the common law requirements thus-

“the requirements for rescission of a default judgment are twofold. First, the applicant must furnish a reasonable and satisfactory explanation for its default. Second, it must show that on the merits it has a bona fide defence which prima facie carries some prospect of success. Proof of these requirements is taken as showing that there is sufficient cause for an order to be rescinded. A failure to meet one of them may result in refusal of the request to rescind.”

Thus, the existing common law test is simple: both requirements must be met. Mr Zuma must establish that he had a reasonable and satisfactory explanation for his failure to oppose these proceedings, and that he has a bona fide case that carries some prospects of success.”

[20] Therefore, the crisp issue before this Court is whether on the facts alleged by the applicant as gleaned from the founding affidavit, the applicant has provided a reasonable and satisfactory explanation for not doing anything at all from the time the notice of taxation was served up to the time it was taxed on 24 October 2024, more than seven months later. Where one would have expected to see the applicant’s explanation for the delay, what is found is no more than the applicant’s factual conclusion that the bill of costs fell through the cracks. This is done without

³ *Zuma v Secretary of the Judicial Commission of Inquiry into Allegations of State Capture, Corruption and Fraud in the Public Sector Including Organs of State and Others* (CCT52/21) [2021] ZACC 28; 2021 (11) BCLR 1263 (CC) at para 71.

any factual averments about what might have happened to the notice of taxation after it was served as a result of which it *fell through the cracks* as alleged. There is no attempt at all to explain to the court the process flow and how the matter fell through the cracks, not to mention what is even actually meant by the phrase “*some of the bills fall through the cracks*”. Nothing is said at all about the person who received the notice of taxation and signed for it. Nothing is said about what that person should have done and why he or she did not do it and what ultimately happened to the notice of taxation, if anything.

[21] The applicant, one would have thought, would have explained their process flow and how any of the staff members failed to follow an established protocol or standard operating procedures from the time any court process is received to the time it is acted upon. How their diarising systems were followed or not followed and what would have led to the disregard of existing internal court process management protocol. There is not even a feeble attempt at providing a reasonable explanation for the default in filing a notice to oppose the bill of costs. Ordinarily that should be the end of the matter because as indicated in *Zuma* above, both requirements must be met. Even on good cause, the applicant's case is simply that it was only on 25 October 2024 that they became aware that the bill of costs served on 20 March 2024 had since been taxed. This, without even a vain attempt at explaining what happened between the 20 March 2024 and the 25 October 2024 as I said earlier.

[22] This is important because under the heading dealing with the applicant's condonation application for the late filing of the rescission application, the applicant asserts that the taxed bill of costs was considered and a view was taken that it was exorbitant. The applicant then goes to its refrain that because of the high workload it takes them some time to deal with the matters that come before them. A decision

was taken only 5 November 2024 to outsource the matter to the applicant's current firm of attorneys. On 6 November 2024 an instruction was given to their attorneys to launch this rescission application. Only about a week later on 13 November 2024 did the applicant's attorneys write a letter requesting the respondent's attorneys to agree to a re-taxation. In that letter which the applicant's attorneys themselves called a courtesy letter, they gave the respondent's attorneys five days within which to respond.

[23] Five days passed without the respondent's attorneys responding or making any contact with the applicant's attorneys. However, nothing was done about that letter or non-response to it by the applicant's attorneys for almost the whole of November 2024, the whole of December 2024 and also the whole of January 2025. The applicant's attorneys only served this application on the respondent's attorneys on 12 February 2025 after it was signed more than two weeks earlier on 27 January 2025. None of these delays are explained in the founding affidavit. There is even an attempt to shift some of the blame to the respondent's attorneys for only responding on 24 January 2025 to the applicant's letter dated 13 November 2024 in which the applicant's attorneys gave the respondent's attorneys five days within which to respond. However, nowhere do they explain why nothing was done for about three months after the five day deadline had elapsed.

[24] Without more, the applicant claims that it would be in the interests of justice for the unexplained and even inexplicable delay to be condoned. It is unclear how the interests of justice could be served by a rescission of an *allocatur* that the applicant became aware of on 25 October 2024 which was then only sought to be rescinded more than three months later with no explanation for that delay. This is especially so in circumstances in which the applicant themselves were served with the notice of

taxation on 20 March 2024 a few weeks shy of a year to the date on which the rescission application was instituted. It is trite that an applicant for condonation must make a clean breast of it by being candid to the court as to the circumstances that led to the delay as condonation is not there for the asking.

[25] The applicant's reliance on *Steenkamp*⁴ about the interests of justice being an important consideration on a court's exercise of its discretion to grant a condonation is correct as a general proposition. However, there must be a proper factual basis for the court to exercise its discretion and assess where the interests of justice lie. The applicant's own inexplicable conduct throughout, right from the date on which the notice of taxation was received to the time they became aware that the bill of costs had since been taxed all the way up to this application being moved almost a year later indicate that it would not be in the interests of justice to grant the condonation application. This is so because the interests of justice must also include a consideration of a reasonable and satisfactory explanation for the default and the delay. What one finds is no more than nebulous phrases being thrown around like things falling through the cracks, interests of justice, tax payers money needing to be saved with absolutely no substance about what actually happened leading to the rescission application and the condonation application becoming necessary.

[26] The applicant's merits in the proposed re-taxation are themselves hanging by a thread. I say so because in the founding affidavit there is no suggestion that the Taxing Master improperly exercised his discretion in any way, not to mention the fact that the word "discretion" does not appear anywhere in the founding affidavit. To the extent that the applicant tries to bolster its fortunes by seeking to rely on the invoice of LMD Psychological Services and Assessments which makes reference to an

⁴ Steenkamp and Others v Edcon Limited 2019 (7) BCLR 826 (CC).

assessment for a RAF claim, that seems to me to be an opportunistic reliance on what appears to be no more than a typographical error in that specific invoice. I say so because in the taxed bill of costs at various items reference is made to clinical assessment for a medico-legal report. It is not the applicant's case that the respondent was never referred to any expert for a clinical assessment, that the applicant never received any report relating to any assessment or even worse, that there is another self-standing invoice which was also allowed in addition to the one that makes reference to RAF.

[27] In terms of Rule 70(2) of the Uniform Rules of Court the Taxing Master may, at the taxation of any bill of costs, call for such books, documents, papers or accounts as in his opinion are necessary to enable him properly to determine any matter arising from such taxation. There is no basis for any assumption that the applicant seems to be making that the Taxing Master would not have called for the correct invoice in this regard or seen the reference to RAF for what it was, a typographical error that need not have resulted in the taxation being postponed. I am singling out the issue of the reference having been made to a RAF related assessment in the relevant invoice by the relevant expert to illustrate the point that the Taxing Master not only has a wide discretion but is empowered to call for any document in his consideration of any item in the exercise of her or his discretion. When one looks at the taxed bill of costs, there is nothing to suggest that the Taxing Master simply rubber stamped the bill of costs without applying his mind to the taxation process. On the contrary, there seems to have been a painstaking consideration of each item with allowances, disallowances and reduction of fees charged as the Taxing Master considered appropriate on each item.

[28] The suggestion that the Taxing Master might not have exercised his discretion properly is without any factual basis and therefore speculative. In any event, it was the applicant's attorneys themselves who inexplicably ignored if not spurned the opportunity to oppose the bill of costs over a period of time and to indicate the items that they found objectionable and the reasons therefor. The applicant has failed to show that in going ahead to tax the bill of costs in the absence of opposition the Taxing Master did not comply with any procedural rule of taxation. Therefore, the applicant's prospects of success are almost non-existent. It follows that the applicant's application in its entirety must fail.

[29] The respondent has asked for costs on a punitive scale. However, I do not think that this is a case in which attorney and client costs are warranted. While the handling of this matter both at the office of the state attorney and by the applicant's current attorneys of record leaves much to be desired, this is not an appropriate case for a punitive order of costs which, I might add, should be granted for the most egregious of cases.

[30] In the result the following order shall issue:

1. The application is dismissed with costs on scale B.
2. The applicant is ordered to pay the costs reserved on 25 February 2025.

M.S. JOLWANA

JUDGE OF THE HIGH COURT

Appearances:

Attorney for the applicant : H. Zilwa

Instructed by : Zilwa Attorneys

Mthatha

Counsel for the respondent: S.X. Mapoma SC

Instructed by : VV Msindo & Associates Inc.

Mthatha

Date heard : 28 May 2026

Date delivered : 20 August 2026