REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION PRETORIA)

Case No: 53078/2018

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: YES / NO.
(2) OF INTEREST TO OTHER JUDGES: YES / NO.
(3) REVISED.

DATE 2021/06/23

SIGNATURE

In the Matter between:

Daniel Peach	**Applicant**
and	
Simon Molefe Pitje	**1st Respondent**
Station Commissioner South African Police	
Service, Brooklyn	**2nd Respondent**
The Sheriff/Deputy Sheriff Pretoria South East	**3rd Respondent**
The Taxing Master, Gauteng Division of	

The High Court **4th Respondent**

JUDGMENT

Maumela J.

1. This case came before court in the opposed motion roll. In it, the applicant seeks relief which is twofold as contained in the Notice of Motion under Part A and Part B. This Court granted an order in terms of Part A on 13 August 2018 and reserved costs of Part A pending the outcome of Part B.[1]

2. The First Respondent has enrolled the matter for an argument on costs prior to Part B having been finalized. In essence, in its Notice of Motion, the Applicant seeks *inter alia* the following:
   2.1. that execution be stayed and/or suspended pending the rescission application under Part B;
   2.2. that the allocator under case number: 58022/2017 dated 7 June 2018 be set aside and that a new allocator be drafted by the First Respondent's attorney of record.[2]
   2.3. That the First Respondent's attorney of record pay the costs of the application as costs *de bonis propriis, alternatively* that the First Respondent pay the costs of the application on the scale as between attorney and client.

COMMON CAUSE ISSUES.

3. The following facts are common cause between the parties:
   3.1. that this Court granted Part A of the application (for the stay of execution) on 13 August 2018;
   3.2. that Part B of the application has not been finalized and
   3.3. that costs were reserved pending the finalization of Part B.

4. The Applicant states that a reading of the First Respondent's practice note and heads of argument, gives an impression that he enrolled the matter for an argument on costs only. He views that any argument on the costs will be premature and irregular as Part B of the application

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[1] See Court Order dated 13 August 2018 on paginated pages 156 – 157.
[2]. See Notice of Motion on paginated pages 2 – 3.

is still pending before this Court.

5. He argues that this Court is *functus officio,* regarding the Court Order dated 13 August 2018, as no rescission application has been brought in respect thereof; neither has the application been withdrawn by the Applicant. On that basis, the Applicant submits that the First Respondent's Application for Costs should be dismissed with costs on a punitive scale. In his Practice Note and Heads of Argument, the First Respondent alleged that the application is academic. The Applicant made the point that the First Respondent attempted to introduce further documents before court in its Heads of Argument by referring to various annexures. However, no annexures were attached to the First Respondent's Heads of Argument. The documents are not confirmed under oath and therefore any mention of such documents should not be taken into regard by the court.

6. The First Respondent alleges that it delivered a Notice of Abandonment of Writ of execution on 31 August 2018, and that this application is purely academic. Applicant submits that the Notice of Abandonment only concerns the relief under Part A and that the *allocator* dated 7 June 2018, still stands until realization of the relief sought under Part B. On the 3rd of August 2018, the Applicant issued Part A/Part B on an urgent basis. Part A sought the suspension/staying of the execution of the writ, Part B being the return date relating to an application for rescission, alternatively for the review of the allocator granted to the 1st Respondent. On the 3rd of August 2018, an urgent application was granted in favour of the 1st Respondent which had the effect of suspending the execution of the writ of execution. In that regard, the 9th of October 2018 was set as the return date. On the 13th of September 2018, the 1st Respondent served opposing papers. The Applicant failed to enrol the matter for the 9th of October 2018; (the return date), neither was there any appearance for the Applicant. On the 14th of August 2019, the Respondent enrolled this matter for a consideration of the costs.

THE ISSUES.

7. The Applicant contended that the matter is still pending and that therefore the *rule nisi* is still alive. He argued that on that basis, any consideration of costs is premature. The 1st Respondent argued that the *rule nisi* has lapsed and that he is therefore entitled to seek costs

on a scale as between attorney and client.

8. The Applicant submitted that failure to enrol the matter was due to a clerical error at his attorney's office. He makes the point that the 1st Respondent was armed with a cost order and a taxed bill of costs but still, he did not pursue the warrant of execution. Instead the 1st Respondent sent "Annexure Y" to the Applicant. "Annexure Y" is a letter by the 1st Respondent in which he notifies the Applicant that he shall file his Heads of Argument and shall enrol the matter for hearing on the opposed motion roll.

9. The Applicant argued that the *rule nisi* is still alive in that it was revived when the 1st Applicant sent Annexure "Y" to him. He submitted that the application for costs be struck of the roll with costs.

PART B: RESCISSION AND REVIEW APPLICATION.

10. The First Respondent obtained a costs order against the Applicant by virtue of an urgent spoliation application issued by the First Respondent on 30 October 2017 under case number: 58022/2017. The Applicant was ordered to restore the First Respondent to an undisturbed occupation of the Applicant's premises. The Applicant has subsequently obtained an eviction order under case number.: 65026/2018 on 19 September 2019.

11. The Applicant pointed out that while armed with a cost order; the First Respondent obtained an impugned *allocator* by virtue of the following:
    11.1. the First Respondent failed to give notice of its intention to tax as prescribed in terms of Rule 70B;[3]
    11.2. The First Respondent's Attorney of record served a purported Notice of Intention to Tax on its own client, the First Respondent;[4]
    11.3. The First Respondent and its attorney of record misled the taxing master by virtue of the above, further by stating that the bill of cost was settled;[5]

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[3]. Rule 70(3B) prescribes that a party who has been awarded an order for costs shall, **by notice** in accordance with Form 26 apply for taxation.
[4]. See Annexure "FA6" - Notice of Intention to Tax on paginated pages 40 and 41.
[5]. See Annexure "FA6" – Taxed *allocator* on paginated page 48.

12. The Applicant stated that the First Respondent's fraudulent actions are evident from the signatures of the First Respondent and his attorney of record on the *allocator*.[6] Rule 70(4) provides that the taxing master shall not proceed with taxation of any bill of costs unless he or she is satisfied that the party liable for costs has received due notice in terms of Rule 70(3B). The Applicant also charges that the First Respondent in concert with his attorney of record represented to the taxing master that the bill of costs was settled, whereas in fact that bill of cost has not been served on him, (the Applicant).

13. The Applicant points out that it is for that reason that he instituted this application in terms of Rule 42(1)(a) and 53 to have the *allocator* reviewed and set aside under Part B. The *allocator* was erroneously taxed in the absence of the Applicant by the taxing master by virtue of the First Respondent's attorney of record and/or the First Respondent misrepresentations.

14. The Applicant stated that he was prejudiced by an excessive and inflated *allocator,* without having had the opportunity to oppose the bill of costs. He pointed out that this kind of approach defeats the very objective of taxation. He makes the point that the purpose of taxation is to determine the reasonable charges and disbursement the successful party can fairly claim from the unsuccessful party.[7] He submits that should the Court find that the *allocator* was erroneously granted, it should without further enquiry rescind the *allocator*.[8]

15. It is trite that where notice to a party concerning proceedings was required but was not sent, Courts are inclined to grant a rescission. The fact that taxation of the bill of costs proceeded in the absence of the Applicant's legal representative, coupled with the irregularities as set out above, justifies the Court in setting aside the taxation done on 7 June 2018 as well as the subsequent allocator.[9]

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6. See First Respondent's Answering Affidavit paragraph 7.6 on paginated page 89.
7. See Erasmus, Superior Court Practice, Rule 70, D1 – 779.
8. See *Tshabalala v Peer* 1979 (4) SA 27 (T) at 30D; *Rossiter v Nedbank Ltd* (unreported, SCA case no 96/2014 dated 1 December 2015) at paragraph 16.
9. *J.A. Le Roux Attorneys v Madaza* 2017 JDR 0303 (ECM) at 8.

16. The Applicant contended that if it were not for the misrepresentations by the First Respondent's attorney of record and/or First Respondent itself, the Taxing Master would not have made the *allocator.* The First Respondent has failed to produce evidence to show that a proper notice of the bill of costs was given to the Applicant; and that the Applicant is not entitled to the relief sought under Part B. The First Respondent also conceded to the Applicant's right to the relief sought under Part B, however, any rescission of a taxed *allocator* must be granted by court and therefore the application can never be academic.[10]

17. Given the fact the taxed *allocator,* (being a process conducted by attorneys and cost consultants) was obtained by the misrepresentations of the First Respondent's attorney of record and with the First Respondent, it justifies the awarding of costs as *de bonis propriis* against the First Respondent's attorney of record, *alternatively* costs on attorney and client scale.

18. On the strength of its letter dated 9 October 2019[11], the Respondent extended the *rule nisi* by calling for the Applicant's replying affidavit. In that way, the *rule nisi* was extended by agreement between the parties. The Applicant furthermore stated that no rescission application or any application for discharge was brought by the Respondent subsequent to 9 October 2018. The Applicant submitted that should the court find that the *rule nisi* has lapsed, the court should revive the rule, alternatively, and grant the Applicant leave to launch an application in terms of Rule 27(4) to revive the *rule nisi.*

19. On the basis of the above, the Court finds that the Applicant proved that he has shown good cause for the rescission of the *allocator.* Consequently, the court grants an order in and seek that an order be granted in terms of Part B.

20. Having heard counsel and having read the papers filed of record, the following order is hereby made:

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[10] See Annexure "LP5" to First Respondent's Answering Affidavit on paginated page 113.

[11]. See Annexure Y of the First Respondent's Heads of Argument.

20.1. The *rule nisi* issued by this Court on 13 June 2018 by my brother Justice Baqwa is hereby revived;

20.2. The said *rule nisi* so revived in terms of paragraph 1 above, is hereby extended pending the finalisation of PART B on the main application under case number 53078/2019;

20.3. The Applicant is hereby directed to enrol the application under PART B of the application under case number 53078/2019 within 60 days from date of this order and

20.4. Costs of the Applicants application in terms of Rule 27(4), including costs reserved under Part A be reserved pending the finalization of the of the application under Part B.

T.A. Maumela.
Judge of the High Court of South Africa.