IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 26961/2019

(1) REPORTABLE:
(2) OF INTEREST TO OTHER JUDGES:
(3) REVISED.

26/10/2022
DATE

SIGNATURE

In the matter between:

ACROW LIMITED

Registration Number: 1946/024069/06 **Applicant**

and

SOUTH MEAD (PTY) T/A MEISTER COLD STORE

Registration Number: 2011/004310/07
Respondent

In re: -

SOUTH MEAD (PTY) LTD T/A MEISTER COLD STORE

Registration Number: 1946/024069/06 **plaintiff**

and

ACROW LIMITED

Registration Number: 1946/024069/06 **Defendant**

JUDGMENT

MBONGWE J:

INTRODUCTION:

[1] This is an application wherein the applicant seeks a rescission in terms of rule 31(2)(b), alternatively, Rule 42 or further, alternatively, the setting aside of the taxation of the Respondent's bill of costs by the Taxing Master in terms of Rule 48(1). The taxation of the bill concerned had proceeded in the absence of the Applicant in the circumstances where, the applicant alleges, it had objected to items in the bill of costs and subsequently filed a notice of opposition to specified items in the bill of costs.

[2] The absence of the Applicant at the taxation of the bill was caused by an alleged failure of the Respondent to serve the relevant notice of set down of the taxation before the Taxing Master. Despite the respondent's insistence that its attorneys' costs consultants had sent an email to the applicant's attorneys to which the notice of set down was allegedly attached, the Applicant vehemently denies that it had received the email and notice of set down.

FACTUAL MATRICS / APPLICANT'S ARGUMENT

[3] Following to a successful opposition and resultant dismissal with costs of the Applicant's exception to the Respondent's particulars of claim in action proceedings, the Respondent had served a notice of taxation of the bill of costs

on the applicant. The latter objected to certain items which it highlighted on the bill of costs.

[4] The Applicant and the costs consultants of the Respondent's attorneys engaged in discussions in an attempt to reach agreement on the bill of costs without the necessity for a formal taxation. As a result of disagreements the Applicant insisted that the bill be set down for debate and taxation before the Taxing Master. The taxation of the bill took place on 17 November 2019 in the absence of the Applicant.

[5] The Applicant alleges to have had no knowledge of the date of the taxation of the bill of costs and ascribes its absence from the taxation to an alleged failure of the Respondent's attorneys or their costs consultants to serve on it the relevant notice of set down of the taxation.

[6] The Applicant became aware on 1 July 2021 that the taxation of the bill of costs had occurred when it received a letter from the Respondent's attorneys requesting payment of the taxed amount. On 7 July 2021 the Applicant wrote to the Respondent's attorneys advising that it had not been aware that the bill of costs had been taxed and enquiring how the taxation of the opposed bill could have proceeded without the notice of set down of the taxation having been served on it as required by the rules.

[7] In response, the Respondent's attorneys advised that their costs consultants, a firm of attorneys, had on 11 August 2019 sent an email attaching the relevant notice of set down of the taxation to the Applicant's attorneys. It is noted from the annexed copy of the notice of set down that the taxation of the bill of costs was indeed set down for 17 November 2019 at 09h30.

[8] The Applicant alleges to have combed the inboxes of its three email addresses in search of the alleged email and notice of set down, but could not find it. The applicant communicated this information to the Respondent's attorneys and simultaneously requested that it be furnished with confirmation of the delivery of the email to its inbox, ostensibly in the form of a 'sent', or 'received' or 'read' delivery report generated automatically in the information system from which the email was sent. The Applicant alleges to have received no such confirmation from either the Respondent's attorneys or their costs consultants.

[9] The Applicant contends that the failure to serve a notice of set down of the taxation of the bill of costs constituted an irregularity in terms of rule 30(1) of the Uniform Rules of Court. It consequently launched this application for the rescission of the taxation in terms of rule 31(2)(b) or rule 42(b) or the review thereof in terms of rule 48(1). The notice of motion dated 27 August 2021; a date that is within the 20 days' period, from the date of becoming aware of the order or alocatur, prescribed by Rule 32(2) for the launching of a rescission application.

RELIEF SOUGHT

[10] According to the prayers in the notice of motion the Applicant seeks the rescission in terms of rule 32(2) on the grounds of the alleged irregularity (failure to serve a notice of set down).

EXPANSION OF THE PREMISE OF THE RELIEF SOUGHT

[11] In its heads of arguments the Applicant appears to have widened the scope of the premise for the relief sought by the addition of an alleged error by the Taxing master, in the exercise of his quasi – judicial duty, to ensure that the Applicant had been served with the notice of set down of the taxation, prior to commencing with

the taxation of an opposed bill of costs in the absence of the opposing party. This ground points to the invocation of the rescission in terms of rule 42.

[12] The Applicant has also indicated a review of the decision of the Taxing Master in terms of rule 48(1). This would be with reference to the decisions of the taxing master to allow or disallow or *mero motu* pronounce his decision on a contested item(s) in the bill of costs in the exercise of his discretionary powers.

RESPONDENT'S CONTENTIONS

[13] Despite the failure to provide the Applicant's attorneys with the requested proof that the alleged email and notice of set down of the taxation of the bill of costs was sent to the Applicant's attorneys, the Respondent remains adamant that the email was sent to the Applicant and has invoked the deeming provisions of section 23(2) of the Electronic Communications and Transmissions Act 25 of 2002 ("the ECTA") to avert the onus or duty to provide the requested proof of emailing of the notice of set down to the Applicant's attorneys.

[14] The Respondent alleges specifically that the Applicant has failed to satisfy the requirements for a rescission in terms of rule 30(2) and that it is, in any event, not entitled on the facts to any of the jurisdictional premises it seeks to rely on for the relief sought. The Respondent seeks an order for the dismissal of the application with costs

ISSUES

[15] Prior to identifying and considering the issues in this case, I deem it necessary to make a comment or two on the avoidable necessity for the launching of this application by the mere furnishing of the easily accessible proof of emailing the notice of set down rather than to exploit a convenient avenue open to it (invoking

the provisions of the ECTA), a sheer technicality in the bigger scheme of the expense involved in this application. The applicant for its part seeks, as the main relief, a rescission or a review of the taxation. However, in paragraph 18 of the founding affidavit, the applicant abandons that relief by stating that:

> *"18 It must be noted by the Honourable Court that it is not the taxation of items in the bill as taxed by the taxing Master that is being challenged by this application, but rather the fact that the Bill were taxed in the absence of the applicant. Furthermore, it is not the Taxing Masters discretion in allowing or disallowing items that is being challenged but rather the invalid act of taxing in these circumstances."*

[16] The core determination to be made in this application is whether the email attaching the notice of set down of the taxation of the bill of costs was sent by the costs consultants of the Respondent's attorneys to and received by the Applicant's attorneys. A finding in the affirmative will render it necessary to determine the merits of the further grounds of opposition raised by the Respondent to the granting of the relief sought by the Applicant. However, the Applicant explicitly states in para 18 of the Applicant's Founding affidavit, that it is not opposed to the taxed bill of costs, a clear contradiction to seeking relief in terms of rules 42 and 48(1). A consideration of issues the determination of which will have no impact to live disputes between the parties should not be an exercise the court should be called upon to undertake. (See *JT Publishing (Pty) Ltd v Minister of Safety and Security* 1997 (3) SA 514 (CC) par 16 -18).

[17] As far as I can gather, therefore, the intrinsically connected issues for determination relate to the Applicant's allegation of irregularity in the form of the alleged failure by the Respondent to serve the notice of set down. The second leg of the determination is in respect of the veracity of the Respondent's allegation that the notice of set down concerned was sent by emailing same to the Applicant's attorneys.

SERVICE OF COURT PROCESS BY EMAIL (RULE 4A AND THE ECTA)

[18] Rule 4A of the Uniform Rules of Court provides for the exchange/service of court process by electronic means (email) to the addresses provided by the parties. However, the rule does not state how, in the event of disputed receipt of the email, as in the present matter, the emailing and receipt of emailed data ought to be proved. In this regard Rule 4A (3) merely defers to *Chapter III, Part 2 of the Electronic Communications and Transmissions Act 25 of 2002* ("the ECTA").

[19] The provisions of sections 21 – 26 of the ECTA deal with communication through transmission of data messages. Relevant in the determination in the present matter are the provisions of sections;

> "21 ***Variation by agreement between parties***
>
> *This part only applies if the parties involved in generating, sending, receiving, storing or otherwise processing data messages have not reached agreement on the issues provided therein.*
>
> *23* ***Time and place of communications, dispatch and receipt***
>
> *A data message –*

(a) used in the conclusion or performance of an agreement must be regarded as having been sent by the originator when it enters an information system outside the control ***of the originator*** *or, if the originator and addressee are in the same information system, when it* ***the messa****ge is capable of being retrieved by the addressee;*

(b) must be regarded as having been received by the addressee when the complete data message enters an information system designated or used for that purpose by the addressee and is capable of being retrieved and processed by the addressee.

26 ***Acknowledgement of receipt of data message***

(1) An acknowledgement of receipt of a data message is not necessary to give legal effect to that message.

(2) An acknowledgement of receipt may be given by -

(a) any communication by the addressee, whether automated or not; or

(b) any conduct of the addressee, sufficient to indicate to the originator that the data message has been received."

[20] There is very little case law on the aspect of emailing in our law. In the Superior Court Practice, Loggerenberg offers no comment, except to quote the provisions of the ECTA. The two cases that counsel for the parties could trace and relevant to the issue in the present matter are *Jafta v Ezemvelo KZN Wildlife* (D20407) SALC84; [2008] 10 BLLR 954 (LC) and *Wele v EFF* et al – an unreported judgment, Case 509/15 dated23ebruary 2016 (EC).

[21] The court in the *Jafta* matter had to make a comparison of the provisions of the Act with international laws to reach the conclusion that the provisions of the Act were in line with international law [87], but shed light with regards to what needs to be established for a successful compliance with the onerous requirements of the provisions of sections 23 (b), namely, proof that the email must have both entered the addressee's information system and was capable of retrieval by the addressee.

[22] In *Wele v EFF* and Others – an unreported judgment dated 23 February 2016, Case 509/15 (EC) the court, expanding of the judgment in the *Jafta* matter on the deeming provisions of sections of the Act stated the following:

> *"[21] ...the critical moment in electronic communication is when the message enters a system outside the control of the sender. Although the ECTA deems a message sent when that happens, it does not create a presumption and the addressee may deny receipt, but must then adduce sufficient evidence to shift the burden of proof to the sender to demonstrate that the email was in fact received by the addressee. [22] Absent proof that the applicant received the relevant notice transmitted to ".....@gmail .com', I am unable to find that the applicant was aware that the hearing would proceed on the day".*

[23] While section 23 of the ECTA clearly make the entry of an email in the information system of the addressee the crucial stage in the completion of the electronic transmission of mail, the provisions of the Act give no explicit indication how that entry of the email into the information system of the addressee is to be established.

[24] The Act is specific that an acknowledgement of receipt is not necessary. The deeming provisions of section 23(b) come into operation upon the complete entry of the emailed information in the system of the addressee. A point at which the email is received and therefore sense retrievable by the addressee. Whether the addressee retrieves the email or not is of no consequence to its transmission by the originator.

[25] The deemed receipt of an email can be refuted by evidence by the addressee, whereas a presumed receipt would require cogent evidence in rebuttal. The practical effect of the deeming provisions in section 23(b) is that, in the event of a denied receipt of an email that has been sent, the addressee has to explain why the email could not enter its system, for instance, the malfunctioning of its system at the time the email ought to have entered it. Thus a demonstration by the addressee that its information system was functional by, for example, demonstrating that it had received emails during the times the allegedly sent email ought to have been received, should be sufficient to refute the deemed receipt of the email and that, in terms of the *Wele* matter, effectively shifts the onus to prove that the email was received by the addressee onto the originator/sender.

[26] Without a doubt, the deeming provisions in the ECTA bring about an unconventional way of establishing a disputed fact. The general principle is that the party who makes the positive allegation carries the burden of proof thereof. This principle was enunciated by the court in *Mobil Oil Southern Africa (Pty) Ltd v Mechin* 1965 (2) SA 706 (A) at 711 in the following terms:

> "*The general principle governing the determination of the incident of onus is the Corpus Iuris: semper necessitas probandi incumbit illi qui*

(D. 22.3.21). In other words, he who seeks a remedy must prove the grounds therefor. There is, however, also another rule, namely, ei incumbit probation qui dicit non qui negat (D22.3.2.). That is to say the party who alleges, or as it is sometimes stated, the party who makes the positive allegation must prove. (cf. Kriegler v Minizter and Another 1949 (4) SA 821 (AD) at p. 828 (sic).''

[27] It is likely the appreciation of the monument of resources necessary to prove the entry of a sent email in the information system of the addressee that resulted in the creation of the deeming provisions in section 23(b).

ANALYSIS OF THE REQUIREMENTS OF SECTION 23 (a)

[28] The segmentation of the two stages completing the sending of an email is imperative in interpreting the key import of the provisions of section 23(a), being the practical process of originating/sending of an email;

"the entry of an electronically transmitted message into the system of the addressee, which demonstrates that the email fell outside the control of the originator is settled by the automatic generation of a 'sent report' in the system that was used to send the email. The report is accessible to the sender and often accessed to ascertain a successful transmission of emailed information and serves as proof in the event of disputed emailing of the information concerned. The requirements of section 23(a) are met at this stage."

[29] A '*Post Master*' report of a failed sending of the email is sent automatically to the system from which the email was sent.

[30] The sender is relieved of any burden relating to the transmission of the email upon

reaching the stage in para 27; - the stage at which the application of the deeming provisions of section 23(b) is triggered. It is misplaced to require of the sender prove the physical entry of the email into the system of the addressee. The denial of the receipt of the email has to be explained by the addressee and may be confirmed, if true, by the sender through what is stated in para 28.

[31] It is significant that the proof of emailing, to the point of the deemed entry of emailed information into the system of the addressee, can be provided by the sender to the addressee, if so requested. That is in line with the principle in *Kriegler v Minizter and Another* 1949 (4) SA 821 (AD) at p. 828 where the court stated thus:

> *"There is, however, also another rule, namely, ei incumbit probation qui dicit non qui negat (D22.3.2.). That is to say the party who alleges, or as it is sometimes stated, the party who makes the positive allegation must prove."*

[32] The provision of the '*sent report*' would mostly spare an addressee who is genuinely concerned with non-receipt of an allegedly sent email, the cost of having to bring an application of the nature in this case. Conversely, it is ill conceived for a sender of an email to refuse to provide a '*sent report*' when so requested and merely refer to the provisions of section 23(b), hoping that his assertion of emailing, without any form of proof of doing so, would trigger the application of the deeming provisions of that section. In my view, the fact that a '*sent report*', as earlier stated, satisfies all the requirements of section 23(a) and eliminates the resort to the deeming provisions of section 23(b) should make provision of that

report mandatory. The deeming provisions of section 23(b) should be spared for application in exceptional circumstances.

[33] Turning to the merits of this case, it was incompetent for the respondent to merely seek refuge in the deeming provisions of section 23(b) without first demonstrating the completion of the requirements of section 23(a) as set out above. The application of the deeming provisions of section 23(b) is not triggered by mere allegations of having sent an email, but by the production of the evidence of emailing: - automatically generated '*sent report*' following a successful transmission of emailed information. After all the required proof of the sending of the email is accessible only to the respondent and costs consultants from the system that was used to send the email. A failure to provide proof of emailing is a disproval of the Respondent's allegation that the notice of set down was emailed to the Applicant's attorneys.

FINDING

[34] I have to find in this case that neither the respondent's attorneys nor their costs consultant had emailed the notice of set down of the taxation of the bill of costs to the Applicant's attorneys as required by the rules in opposed proceedings. This failure is an irregularity in terms of rule 30 and would ordinarily entitle the Applicant to a rescission of the taxation without requiring it to establish anything beyond the irregularity.

CONCLUSION

[35] As stated earlier, a finding that the Respondent's attorneys or their costs consultants had emailed the notice of set down to the Applicant would necessitate a consideration of the Applicant's other grounds for seeking the rescission of the

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taxation. It follows that the present opposite finding renders it unnecessary do so. The application must therefore succeed on the basis of the irregularity alone.

[36] My understanding of the assertions in para 18 of the Applicant's affidavit is that the Applicant does not challenge the taxed bill, but the manner in which the Respondent had had the bill taxed in the Applicant's absence. For that reason, there will be no pronouncement or order relating to the taxed bill of costs.

COSTS

[37] It is general rule that costs follow the outcome of the proceedings. The Applicant has succeeded in proving the irregularity and is consequently entitled to the costs.

ORDER

[38] Resulting from the conclusions in this judgment, the following order is made:

1. The application succeeds on the ground of the irregularity in respect of service of the notice of set down of the taxation of the bill of costs.
2. The respondent is ordered to pay the costs on the opposed scale.

MPN MBONGWE J
JUDGE OF THE HIGH COURT
GAUTENG DIVISION, PRETORIA

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