Reportable:	**NO**
Circulate to Judges:	**NO**
Circulate to Magistrates:	**NO**
Circulate to Regional Magistrates	**NO**

IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NUMBER: M261/2014

In the matter between:-

FAMILY FINANCIAL SERVICES (PTY) LTD	1st Applicant
MOKOTEDI JOSEPH RAPETSANE	2nd Applicant
MICHAEL MOLEFE	3rd Applicant
CONNUL LIDDELL	4th Applicant
JOHAN VAN HEERDEN	5th Applicant

and

THE FAMILY FUNERAL FRIEND CO-OPERATIVE	1st Respondent
THE SHERIFF, DURBANVILLE	2nd Respondent

CORAM: MFENYANA J

This judgment was handed down electronically by circulation to the parties' representatives *via* email. The date for hand-down is deemed to be 10h00 on **21 May 2024**.

ORDER

i) The late filing of the applicants' heads of argument is condoned.

ii) The application is dismissed.

iii) The first to fifth applicants shall pay the costs of the application on a party and party scale – Scale B, jointly and severally, the one paying the other to be absolved.

JUDGMENT

MFENYANA J

[1] In this application, the applicants (FFS (Pty) Ltd and 4 Others) seek to set aside a writ of execution issued on 24

April 2019. The writ is a sequel to a bill of costs, taxed and allowed by the Taxing Master in the amount of R283 813.01

on 26 March 2015. The taxation was in favour of the Family Funeral Friend Society and Services (the Society), as applicant in those proceedings.

[2] On 23 June 2016, by the order of Hendricks J (as he then was), the Society was converted to a Co-operative (Family Funeral Friend Burial Primary Co-Operative with registration number 2016/004324/24). (the Co-Operative). The order of the Court further ordered that all the assets, liabilities, rights and obligations of the Society would from then henceforth vest in the Co-operative.

[3] On 2 February 2017, Gutta J, handed down judgment in an application brought by the applicants, to review the taxation, in particular, four items in the bill of costs. The court reviewed and set aside Item 2 of the bill, in the amount of R54 720.00. The court dismissed the application in respect of the other three items.

[4] On 24 April 2019 the first respondent caused a warrant of execution to be issued in the amount of R229 093.01, being

the difference between the amount of the *allocatur* issued by the Taxing Master, and the amount set aside on review.

[5] In July 2020 the applicant brought an urgent application seeking to set aside the writ of execution. That application was struck off the roll for want of urgency. Various other allocations ensued in September 2020 and November 2023 whereafter the matter was ultimately set down for hearing on 26 April 2024.

[6] The first respondent opposed the application. On 9 October 2019, the Taxing Master issued a new *allocatur* in the amended amount of R229 093.01.

[7] Having filed their heads of argument out of time, the applicants sought condonation for the late filing thereof. The first respondent did not oppose the application for condonation. To expedite the hearing and finalisation of the matter, I granted condonation for the late filing of the applicants' heads of argument.

[8] The applicants aver that it was incumbent on the first respondent to remit the taxed bill back to the Taxing Master

for amendment and for issuing of a new *allocatur*. They contend that in the absence of that remittal, the writ cannot be executed upon. The applicants further aver that the first respondent having failed to do this and was not permitted to give effect to the reduced bill of costs.

[9] It is further the applicants' contention that in setting aside Item 2 of the bill of costs, by implication, the Court set aside the entire *allocatur*. Thus, they contend that an attempt to proceed with execution on the 'old *allocatur'* amounts to an irregularity, is *mala fide* and ought to be visited with a punitive costs order, *de bonis propriis*.

[10] There is no dispute about the underlying *causa.* Neither is there a dispute regarding the amount of the writ. The issue only turns on whether the respondents are entitled to execute on the writ of execution without having a new *allocatur* issued by the taxing master. It is apposite at this stage to state that even that horse has bolted, in light of the *allocatur* issued by the Taxing Master on 9 October 2019.

[11] The applicants further contend because the writ was issued in the name of the Society prior to its conversion, it is a nullity and falls to be set aside on that basis as well.

[12] In opposing the application, the first respondent contends that there is no requirement in law to refer the *allocatur* back to the Taxing Master in the circumstances. In the answering affidavit, the deponent avers that the Taxing Master became *functus officio* after he/she issued the first *allocatur.* He argues that in any event, the original *allocatur* read together with the review judgment are sufficient to issue the writ.

[13] It stands to reason that the issuing of a 'new *allocatur*' by the Taxing Master on 9 October 2019, obviated the applicants' contention in that regard. However, the applicants had another string to their bow. During argument, Mr Janse van Rensburg argued on behalf of the applicants that the writ predates the new *allocatur*, and on that basis it ought to be set aside. The applicants, however, do not allege that they suffer or are likely to suffer any prejudice because of the belated *allocatur* by the Taxing Master, at the instance of the first respondent. The reason for this is not hard to

understand, and it is that there is no prejudice. Moreover, the order of Gutta J did not provide for the remittal of the

taxation to the Taxing Master. The suggestion that an order of Court had to be endorsed by the Taxing Master is equally untenable. This, in my view disposes of this issue.

[14] As regards the conversion of the Society to a Co-operative, and the substitution thereof, the first respondent relies on Rule 15(1) of the Uniform Rules of Court, which provides that proceedings shall not terminate merely on account of a change in the status of any party, unless the cause of the proceedings is extinguished.

[15] The first respondent further contends that the order of Hendricks J (as he then was), also makes provision for the continuation of legal proceedings. That is indeed so. Essentially, Hendricks J's order substituted the Co-operative for the Society. However, during argument, Mr Janse van Rensburg contended that a different interpretation should be ascribed to the order, and that it should be read to exclude legal proceedings from the 'deeming' aspects of the order. For the sake of completeness, it is necessary to iterate the

relevant part of the order. It reads:

> "any legal proceedings instituted before the conversion by or against the Society, may be continued by or against the co-operative **and any other thing** done by it in respect of the Society is deemed to have been done by or in respect of the co-operative… ." - my emphasis

[16] Counsel further argued that in terms of the order, legal proceedings ought to be continued by the Society, as they were not deemed to have been done by the Co-operative. This interpretation is untenable for various reasons as set out in the ensuing paragraph.

[17] Apart from the provision in Rule 15(1), as correctly pointed out by the first respondent, it is inconceivable that the Court could grant an order practically dissolving an entity, and in the same vein, ascribe rights and obligations to that entity after it has ceased to exist, and after vesting those rights and obligations in another entity. Such construction is not only 'unbusinesslike' but would lead to grave absurdity, having regard to the purpose and the specific background of the issue.[1] Ironically, in their heads of argument, the applicants

[1]See in this regard: *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 4 SA 593 (SCA).

aver that the warrant was issued in the name of a non-existing entity. It does not lie in the mouth of the applicants therefore, to require that legal proceedings be continued in the name of the very ‘non- existing entity’. This is indeed not the applicant’s contention, but that the first respondent ought to have substituted the Society. The fact of the matter is that this forms part of the order of Court.

[18] Having regard to the record, and the submissions made on behalf of both parties, it is clear that as long ago as October 2019, the applicants became aware that the Taxing Master had amended the *allocatur*. Further, the interjection by the applicants is cosmetic in nature, in view of the fact that the amount appearing in the impugned writ is not the same as the amount in the original *allocatur*, as it took into account the amount of the item disallowed by the Court on review. Whether the writ was issued before the *allocatur* was made is, in my view, immaterial. The fact of the matter is that the writ reflects the correct amount and is therefore unassailable. There was simply no reason for the applicants to persist with the application. It falls to be dismissed.

COSTS

[19] Costs follow the result. This is a trite principle. There is nothing in the facts of this case which warrants a deviation from this established principle. Interestingly, both parties argued for punitive costs one against the other. In the event of this Court, in the exercise of its discretion, awarding costs on a party and party scale the applicants, argued that scale A would be appropriate, while the first respondent contended for scale C. Both parties agree that the matter raises no complex issue. Despite the fact that the applicants, having initiated the proceedings neglected to set the matter down, prompting the first respondent to do so, I am of the view that this is not sufficient justification for a punitive costs order.

ORDER

[20] In the result I make the following order:

i) The late filing of the applicants' heads of argument is condoned.

ii) The application is dismissed.

iii) The first to fifth applicants shall pay the costs of the application on a party and party scale - Scale B, jointly and severally, the one paying the other to be absolved.

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S MFENYANA
JUDGE OF THE HIGH COURT
NORTH WEST DIVISION, MAHIKENG

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Date reserved:	26 April 2024
Date of judgment:	21 May 2024