IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE, GRAHAMSTOWN)

Case No: 1134/2005

In the matter between:

SCOTT ANGLIN **APPLICANT/DEFENDANT**

And

BARRY GRANT BURCHELL **RESPONDENT/PLAINTIFF**

JUDGMENT

ROBERSON J

[1] On 22 July 2011 I dismissed with costs the applicant/defendant's application in terms of rule 45A of the Uniform Rules, to suspend execution of a judgment awarding costs to the respondent/plaintiff, which costs have been taxed by the Taxing Master.

[2] I indicated that my reasons for dismissing the application would follow, as they now do. In this judgment I shall refer to the applicant as the defendant and the respondent as the plaintiff.

BACKGROUND

[3] The application arises from ongoing litigation between the parties, which is not yet finalised. The plaintiff instituted an action against the defendant in this Court, involving five claims against the defendant. The defendant also instituted a counterclaim against the plaintiff. The trial proceeded before Crouse AJ, and judgment was delivered on 30 April 2009. The plaintiff succeeded in one of his claims, with costs, and three were dismissed with costs. There was a dispute in the fifth claim (for defamation) about whether the substantive law of the State of Nebraska or South Africa applied. This dispute was resolved in favour of the defendant and the plaintiff was ordered to pay the costs. The counterclaim was dismissed with costs. The plaintiff's application for leave to appeal against the dismissal of two of his claims and the costs order in the fifth claim, was postponed until the litigation was finalised. The trial still has to proceed on the defamation claim. The matter was enrolled for further trial on 27 September 2010 but postponed at the instance of the defendant. It was not disputed that the defendant has indicated that he will not be available until May 2012.

[4] There were several interlocutory applications in the action, resulting in various costs orders in favour of both parties. The defendant was awarded the costs of an application to separate issues, and the costs of an application to compel discovery. These costs were taxed in the total sum of R92 977.99, and paid by the plaintiff, during 2007. In Crouse AJ's judgment the defendant was awarded the wasted costs occasioned by the

postponement of the trial on 27 November 2006.

[5] On 27 July 2009 the plaintiff's attorney wrote to the defendant's attorney concerning a proposal which had been discussed that neither party tax any bill of costs until the conclusion of the trial. The letter recorded that the plaintiff was agreeable to such proposal. The defendant's attorney acknowledged receipt of this letter but no further response to the proposal was received. The defendant then proceeded to set down his bill for the wasted costs occasioned by the postponement on 27 November 2006, for taxation on 26 March 2010. These costs were taxed in the sum of R119 210.69. A review of that taxation at the defendant's instance is pending.

[6] The plaintiff brought an urgent application, which the defendant opposed, to suspend payment of those taxed costs, pending taxation of his bill of costs. This application was granted by Notshe AJ on 9 April 2010, under case number 818 of 2010.

[7] Notice of taxation of the plaintiff's bill of costs awarded to him by Crouse AJ in the claim on which he succeeded was received by the defendant's attorneys on 11 August 2010 and the costs were eventually taxed in the sum of R716 713.58 (R885 067.15 was taxed off) on 6 July 2011. The defendant intends to bring a review of this taxation. The plaintiff intends to execute for payment of these taxed costs, hence the application.

[8] The defendant's costs awarded by Crouse AJ have not yet been taxed. In view of the pending application for leave to appeal, even if the costs are taxed, the defendant is not

presently able to execute for payment of those costs.

[9] The defendant sought in this application an order as follows:

1. Ordering and directing that the forms and service provided for by the Rules of Court be dispensed with and that this matter be heard as one of urgency as contemplated by Rule of Court 6(12).
2. Ordering and directing that execution of the Writ and payment by Applicant of Respondent's taxed costs, dated 6th July 2011 be suspended and held in abeyance pending taxation of Applicant's Bills of Costs in the matter and pending Applicant being entitled to execute thereon in due course subsequent to Plaintiff's appeal process being finalised, alternatively, pending the review of Respondent's costs taxation.
3. That the costs of this application be reserved, save in the event of the Respondent opposing the granting of the relief sought herein, in which event, costs shall be sought against Respondent on an opposed basis.
4. Further and/or alternative relief.

EVIDENCE

[10] The founding affidavit in the application was deposed to by Attorney Brin Brody, and a confirmatory affidavit by the defendant was filed. Brody estimated that the defendant's costs awarded in the trial will amount to R1 500 000.00. He based his estimate on his twenty years' experience in High Court litigation, and was supported in his estimate by one Mark Bowles, a bill consultant of eighteen years' experience. Brody

anticipates that the bill will be drawn by the end of July 2011 and taxed within a month thereafter. He said he had hoped it would not be necessary to tax all the defendant's bills because the trial and application for leave to appeal were a long way off, but because of what has now transpired, he has instructed the defendant's bill consultant to draw the bills as soon as possible.

[11] Allegations were made in the founding affidavit and a supplementary affidavit about the plaintiff's financial position. It was said that, according to 2004 financial statements, the immovable properties on which the plaintiff carries on his safari business, are owned by a trust. Assets to the value of R5 million were reflected in 2006 financial statements, but they were described by Brody as "difficult to realise". According to Brody at that time the safari business was "apparently" trading at a loss. Brody went further and said that he did not know the plaintiff's present financial position. A Windeed search showed that the plaintiff does not own immovable property, and another Windeed search indicated that a claim of R64 594.00 by Nedbank against the plaintiff was written off as a bad debt, and that a notarial bond had been executed by the plaintiff in 2001 in favour of Absa Bank, as security for indebtedness of R6 million. Brody expressed the view that it was therefore clear that all the plaintiff's assets were pledged to Absa Bank and for this reason he would not be able to pay the defendant's taxed costs in due course.

[12] The plaintiff stated that he was able to meet the costs orders made in favour of the defendant, and referred to the fact that he had promptly paid the defendant's costs during

2007. He said that he owned game to a value in excess of R10 million and that the notarial bond in favour of Absa Bank was covering security for his overdraft facility of R400 000.00. At the time the bond was executed he had substantial credit facilities with Absa Bank. With regard to the money owed to Nedbank, he said that its claim was the subject of a defended action and that Nedbank had failed to credit his account with a cash deposit of R30 000.00. According to his 2010 draft financial statement, annexed to his supplementary affidavit, his profit was R3 361 599.00, and the nett book value of "property, plant and equipment" was R7 771 874.00.

[13] As already stated, the plaintiff brought an urgent application for an order suspending payment of the defendant's taxed costs, pending taxation of the plaintiff's costs. According to Brody the plaintiff argued in that application that he would experience difficulty in recovering his costs from the defendant and sought to obviate such difficulty by having his costs taxed and set off against what he owed to the defendant. According to the respondent however, this was not the only basis on which the application was brought. The further basis was that Brody had created the impression that the proposal not to tax until the trial was finalised had been accepted by the defendant. In his answering affidavit in that application Brody had denied that there was such an agreement or that an impression could have been created that there was such an agreement. However he admitted that no further correspondence had been exchanged in regard to the plaintiff's proposal. In the founding affidavit in the present application, Brody said when he received the plaintiff's taxed bill and a demand for payment of the costs, he was "erroneously" of the view that there had been an agreement not to execute

until the trial was finalised, but having perused all the correspondence and various application, realised he was mistaken.

[13] In his judgment granting the application Notshe AJ said, at paragraph [8]:

> "In this case I am of the view that the interest of justice demands that the payment of the respondent's wasted costs be suspended until the applicant has been given sufficient opportunity to tax his bill of costs against the respondent. The respondent will not be prejudiced thereby. The inconvenience that he may suffer is outweighed by the prejudice to the applicant."

Notshe AJ's order included a direction putting the plaintiff on terms to tax his costs.

[14] Brody estimates that on review the defendant's bill will be increased by at least R50 000.00, and that the plaintiff's bill will be decreased even further than it was on taxation. He expressed the view that it would be unjust to seize assets to a value in excess of what may finally be allowed on review.

[15] With regard to the review of the defendant's bill, the taxing mistress has furnished a stated case and Brody stated that he has requested the Registrar to lay the review before a judge. With regard to the review of the plaintiff's bill, Brody stated that he has requested certain invoices relating to the bill and has instructed Bowles to prepare the review urgently, and complete it on receipt of the invoices.

THE LAW

[16] Rule 45A provides as follows:

> "The court may suspend the execution of any order for such period as it may deem fit."

Erasmus Superior Court Practice at B1-330 – B1-330A, with reference to a number of decided cases, states the following:

> "As a general rule the court will grant a stay of execution where real and substantial injustice requires such a stay or, put otherwise, where injustice will otherwise be done. Thus the court will grant a stay of execution where the underlying *causa* of the judgment debt is being disputed or no longer exists, or when an attempt is made to use for ulterior purposes the machinery relating to the levying of execution. It has been held that, in particular circumstances, the court could, in the determination of the factors to be taken into account in the exercise of its discretion under this rule, borrow from the requirements for the granting of an interim interdict, namely that the applicant must show (a) that the right which is the subject of the main action and which he or she seeks to protect by reason of the interim relief is only *prima facie* established though open to some doubt; (b) that if the right is only *prima facie* established, there is a well-grounded apprehension of irreparable harm to the applicant if the interim relief is not granted and he or she ultimately succeeds in the establishing of his or her right; (c) that the balance of convenience favours the granting of interim relief; (d) that the applicant has no other satisfactory remedy."

SUSPENSION PENDING TAXATION AND ENTITLEMENT TO EXECUTE

[17] I am not of the view that Notshe AJ's judgment was, as was submitted on behalf of the defendant, authority for granting this application. The circumstances before Notshe AJ were different from the present case, in two respects. Firstly the plaintiff was under the impression that bills would not be taxed until finalisation of the trial (this was a very reasonable belief in view of the defendant's lack of response to his proposal); and secondly, the plaintiff's costs which he sought to have taxed were not the subject of an application for leave to appeal. Once they were taxed, he could execute.

[18] In the present case there is no such impression of an agreement not to tax. I have difficulty in understanding how Brody and the defendant could have forgotten about the

very firm denial of such an agreement as recently as March 2010. The plaintiff's bill was first presented in August 2010, and it must have been clear then that the plaintiff, having been told in no uncertain terms that there was no agreement not to tax, intended to execute after taxation. The defendant did nothing at that stage to have his bills taxed. It is more probable that he did nothing because the costs orders in his favour were subject to an application for leave to appeal. Even if the defendant were granted the indulgence to tax his bills, it is not known if he will ever be able to execute, or if able to execute, when. At his own instance, the trial will not resume until 2012. If leave to appeal is granted to the plaintiff, more time will pass before the appeal is heard. Whatever the decision on the defamation claim, either party may apply for leave to appeal against that decision. There is therefore a lot of future uncertainty.

[19] I am not of the view that the defendant has established that the plaintiff will not be able to pay the defendant's costs if they ever become due. Brody's averment to that effect is based to some extent on what the plaintiff's financial position might have been years ago, and speculation about his present financial position. The plaintiff answered the averments in some detail and in my view his evidence was not untenable. The fact that he paid the defendant's costs in the sum of R92 977.99 is in his favour.

[20] In considering whether real and substantial justice requires a stay of execution, as well as the requirements of an interim interdict, it is useful to compare the circumstances of this case to cases where execution was suspended.

[21] In *Whitfield v van Aarde* 1993 (1) SA 332 (ECD), the plaintiff was ordered to pay the wasted costs occasioned by a postponement of the trial. The defendant taxed his bill and issued a writ of execution. The plaintiff had no attachable movable assets (he was indigent) and the defendant attached the plaintiff's right of action and intended to sell it in execution. The defendant's motive in attaching the plaintiff's right of action was not to satisfy the judgment in his favour, but to put an end to the litigation. Nepgen J said at 339H-I:

> "The true position is that the respondent is attempting to make use of a process of the Court, which is designed to enable him to obtain satisfaction of the judgment for costs granted in his favour, for the purpose of putting an end to the litigation against him and for that purpose only. His purpose is therefore an ulterior one."

A further consideration which Nepgen J took into account in exercising his discretion in favour of the plaintiff, was that the trial was set to resume in two months time and that the defendant would suffer no substantial prejudice if execution was stayed, whereas the plaintiff would suffer very substantial prejudice if execution was not stayed.

[22] In *Erasmus v Sentraalwes Koöperasie Beperk* [1997] 4 All SA 303 (O), the applicant had paid a substantial amount towards the judgment debt in favour of the respondent, and had instituted action against the respondent for payment of an amount which may have extinguished or reduced the amount owing by him to the respondent. The pleadings had closed and the action had been set down for trial in less than two months' time.

[23] In *Road Accident Fund v Strydom* 2001 (1) SA 292 CPD, the respondent had

obtained judgment against the applicant for an amount as compensation for injuries, as well as costs up to a certain date, and the respondent was ordered to pay the applicant's costs incurred after that date. The respondent was granted leave to appeal against the judgment. The applicant made an interim payment to the respondent and by agreement withheld an amount to cover the costs order in its favour. The respondent in due course withdrew the appeal and tendered the wasted costs. The applicant drew its bills of costs but they were not taxed. The respondent's attorneys then indicated that they were proceeding to issue a writ of execution for the balance of the judgment debt and interest. In exercising his discretion in favour of the applicant, Immerman AJ was satisfied, *inter alia*, that an injustice would be done to the applicant by way of irreparable harm being caused to it if execution for the full balance of the judgment debt and costs were to take place, because the respondent would probably not be able to satisfy the costs orders made in the applicant's favour.

[24] Circumstances where a court will exercise its discretion and grant a suspension of execution are of course not restricted to those in the above three cases. However they afford a useful comparison to the present case. It has not been shown that the plaintiff has an ulterior motive in proceeding to execute. He was the one in the first place who proposed that taxation of all costs orders be held in abeyance pending finalisation of the trial. The defendant has not succeeded in showing that the plaintiff will not be able to satisfy any costs order, if and when it becomes due. There is a lot of uncertainty about when the trial will resume and be completed, and whether or not the defendant will ever be able to execute on his costs orders.

[25] In these circumstances, under the main prayer seeking suspension of execution, I was not of the view that an injustice would be done if the plaintiff were to execute. The *causa* of the costs order is not challenged, only the amount. The defendant has not shown that he will suffer irreparable harm if he pays now. He has not said that he cannot pay, whether by way of cash or the sale of assets. He said nothing in his affidavit about his financial position. He has not shown that he will not be able to recover from the plaintiff if and when he is entitled to. The plaintiff has a judgment in his favour and is entitled to execute. In the totality of the circumstances and especially the future uncertainty and the anticipated delay in completing the trial, including an appeal, I am of the view that the balance of convenience actually favours the plaintiff.

SUSPENSION PENDING REVIEWS OF TAXATION

[26] The fear expressed by Brody in his founding affidavit is that if the defendant is successful in his reviews of taxation, assets may unnecessarily be seized. Again the defendant's financial position is of relevance here, about which he has said nothing. When the Sheriff executes a writ, he first has to demand payment and only if no payment is received may he proceed to attach and remove property (Rule 45 (3)). The defendant has not said that he would not be able to pay the Sheriff. He has also not said that if assets are attached, he will be prejudiced. It was submitted on his behalf that his business activities would be adversely affected if he had to pay the debt, but there was no evidence to this effect. He did not show that if he overpaid (if he is successful in the reviews), he would not be able to recover the overpayment from the plaintiff.

[27] It was submitted on behalf of the defendant that I am bound by the decision in *Standard Bank of South Africa Ltd and another v Malefane and another: In Re Malefane v Standard Bank of South Africa Ltd and another* 2007 (4) SA 461 (Tk), unless I am persuaded that it is wrong. In that case a costs order had been made against the applicant in favour of the respondent bank. The respondent's bill of costs was taxed, and a writ was issued and delivered to the Sheriff. The applicant gave notice to the Registrar in terms of rule 48(2) to state a case for review of certain items in the bill of costs. The Sheriff attached some of the applicant's movable property. The applicant brought an application for a stay of execution pending finalisation of the review of taxation. In confirming the rule *nisi* which had been issued, Luthuli AJ said the following at page 466 paragraph [18]:

> "The fact that a review of taxation is pending constitutes a good ground for ordering a stay of execution (see *Dumah v Klerksdorp Town Council* 1951 (4) SA 519 (T) at 522A-B). The review of taxation would not affect the liability for costs but the amount of costs payable. The seizure of assets which may be found after the review of taxation to be unnecessarily valuable, would constitute an injustice in this case (see *Dumah's* case at 522B-C)."

It appears from this extract that Luthuli AJ relied on the decision in *Dumah* as authority for his statement that a pending review of taxation is a good ground for ordering a stay of execution.

[28] In *Dumah*, the appellant had obtained judgment against the respondent in the Magistrate's Court. His bill of costs had been taxed, a warrant of execution had been issued and certain assets of the respondent had been attached. In another matter, the

respondent had obtained judgment in the Supreme Court against the appellant, but its bill of costs had not yet been taxed at the time the warrant of execution had been issued. The respondent applied in the Magistrate's Court for a stay of execution pending taxation of its costs in the Supreme Court, which costs when taxed would by far exceed those taxed by the appellant. The respondent alleged that the appellant had no visible assets and that if it paid the appellant's costs, it would not be able to recover anything from him. The respondent also tendered security for the appellant's costs. The respondent's application was granted in the Magistrate's Court and the appellant unsuccessfully appealed this decision.

[29] The respondent had to show "good cause" in the Magistrate's Court, in order to succeed with its application. In considering "good cause", Price J said at 522:

> "Good cause would in my opinion be any fact or circumstance that would make it just or equitable as between the parties that execution should be stayed"

At 522A-C (the passages referred to by Luthuli AJ) Price J continued as follows:

> "It has been held that where a review of taxation was pending, that fact constituted good grounds for ordering a stay of execution – see *Stent and Pretoria Printing Works Ltd v Roos* 1909 T.S. 1057. In giving judgment Mason, J., said
>
> > "I am satisfied so far as I can be satisfied on general principles, that the Court has power to see that injustice shall not be done, pending the decision of this question of review."
>
> The review of taxation would not have affected the liability for costs, but only the amount of costs payable. Mason, J., apparently considered that a seizure of assets which might be found after the review of taxation, to be unnecessarily valuable would constitute an injustice, which afforded sufficient ground for the relief sought."

[30] Luthuli AJ's reliance on *Dumah* was therefore effectively a reliance on *Stent*. In *Stent*, the respondent had obtained a judgment against the applicants and had taxed his bill. The applicants sought a stay of execution on the grounds that they had given notice to review the taxation. Mason J was not satisfied that a notice of review operated in the same way as a notice of appeal, but said (as quoted above) that the Court had the power to see that injustice should not be done pending the decision on review. In my view, this is not the same as stating in general that execution pending review of taxation constitutes an injustice. Nowhere in his judgment did Mason J express the view, as was attributed to him by Price J, that he considered that a seizure of assets which might be found to be unnecessarily valuable after a review of taxation, would constitute an injustice.

[31] At 1055 Mason J said the following (I believe it is necessary to quote at some length in order to illustrate my view that Mason J was not making a general statement):

> "Now if any prejudice were likely to be done to the execution creditor, and if the review were capable of being decided within two or three days, I think the Court ought only to exercise its discretion by staying the execution for those few days until the question of review was decided, because it is of course right that the judgment debtor should know what he has to pay. But those are not quite the facts of the present case. Although the bill was taxed on the 9th, the review has only been set down for the 23rd, and the respondent in the present matter fears, so his counsel states – and one may say on the bare facts, apart from the question of *bona fides*, that he has some cause for fearing – that the review may not be decided this term, and that the whole matter will be hung up until next March. Apart from all question of *bona fides*, and in these circumstances, I am only prepared to exercise my discretion to such an extent as will give the applicants an opportunity of having the taxation reviewed, and, so far as I can judge, without prejudice to the respondent's existing rights. He has offered, if necessary, to give security, if he may issue the writ, or to consent to execution being stayed if security be given by the applicants. I propose practically embodying that offer in the judgment which I shall give. I shall order that execution be stayed until 3 o'clock P.M. on Wednesday next. If before that time the applicants give security

> to the satisfaction of the registrar for the due payment of the costs of the judgment, then the execution shall be stayed until the decision of the Court upon review of those costs. If the applicants shall not find security, the plaintiff may then forthwith execute for the costs, upon giving security *de restituendo*, pending such decision. If the review is decided on Wednesday, this order will fall away altogether."

[32] In my view *Stent* does not preclude a Court from considering all the circumstances of a particular case, in deciding whether or not to suspend execution pending a review of taxation. In relying on *Stent*, if Luthuli AJ purported to say that in all circumstances, execution while a review of taxation was pending constituted an injustice, then I respectfully disagree.

[33] I was also referred to the judgment in *Bestbier v Jackson and another* 1986 (3) SA 482 WLD. In that case the applicant (plaintiff) had been ordered to pay the costs of a postponement of the trial. The respondents (defendants) taxed their bill of costs and their attorney instructed the Sheriff to attach the applicant's interest in his cause of action against the respondents. The applicant obtained an order condoning his failure timeously to note a review of taxation. The applicant applied to stay the sale in execution pending the review of taxation. In his judgment Coetzee DJP said at 484G-H:

> "The suspicion which one has, and which is a very strong one, is that this is simply a further attempt to harass the applicant to the point of making it impossible for him to proceed with his cause of action. One gathers sufficient material for this inference from the mere fact that no other property of the applicant became the subject of the attachment, at a time when he was financially apparently illiquid, and that this particular cause of action, by special instructions, was then so attached."

At 485 F Coetzee DJP said:

> "It is perfectly obvious that justice requires that this review of taxation be

> proceeded with, or at least that the applicant be given an opportunity to proceed with it, and that, pending that, this rather harassing sale in execution of his very cause of action in that action, be stayed."

The circumstances in *Bestbier* are patently different from those in the present case. No ulterior motive or harasssment is alleged in this application.

[34] While I have a discretion to suspend execution pending review of taxation, in the totality of the circumstances, I am not of the view that execution would result in an injustice.

[35] For the above reasons, I dismissed the application with costs.

J.M. ROBERSON
JUDGE OF THE HIGH COURT

Appearances:

Applicant/Defendant: Adv. S.H. Cole, instructed by Wheeldon, Rushmere & Cole,

Grahamstown.

Respondent/Plaintiff: Adv. E.A.S. Ford SC, instructed by Borman & Botha,

Grahamstown.

Date heard: 21 July 2011.

Order delivered: on 22 July 2011

Reasons: on 25 July 2011.