REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO:

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED.

06 March 2017

SIGNATURE DATE

CASE NO:2004/13659

In the action between:

HUDSON: LESLIE GEORGE Plaintiff

and

FEDBOND NOMINEES (PTY) LIMITED Defendant

JUDGMENT

VICTOR J

This is a reconstructed judgement from notes taken by parties during the handing down of the judgment. The parties have agreed the content and have handed me a document from which I construct this judgment. The court file was lost as well as the audio file.

[1] The principal issue for determination in this action is whether the judgment debt of Dalmation Properties (Pty) Ltd in the amount of R1 492 583.48 together with interest at the rate of 21.53% per annum from 1 January 1998 to date of payment has been discharged by the sum total of the payments received by the Defendant from the plaintiff towards the discharge of the judgment debt. The Plaintiff is Mr Hudson who together with a Mr Giddy bound themselves as sureties and co-principal debtors on behalf of the indebtedness of Dalmatian Properties (Pty) Ltd for an amount of R1 300 000.

[2] Judgment was entered against Dalmatian on 24 February 1998 following an application launched at the instance of Fedbond in amount of R1 492 584,08 plus interest at the rate of 21,53% per annum calculated from 1 January 1998 to date of final payment, an order declaring the certain property executable. At the same time an order was obtained against the Mr Giddy and the plaintiff in the sum of 'R650 000 payable jointly and severally with the First Respondent the one paying the other to be absolved'.

[3] The Plaintiff's liability in this matter was limited to a sum of R650 000.00. It is trite that the discharge of Dalmatian's liability following the payment of the indebtedness arising out of payment of the principal judgment would have had the effect of extinguishing the Plaintiff's liability to Fedbond. Obviously the indebtedness of the surety, that is the Plaintiff, is accessory in nature and is discharged where the principal debt has been discharged. See *Colonial*

Government v Edenborough and Others (1886) 4 SC 290 at 296 and *Kilburn v Tuning Fork (Pty) Ltd* 2015 (6) SA 244 (SCA)

[4] To the extent therefore that Dalmatian's liability to Fedbond is discharged the same consequences will follow for the Plaintiff provided that principal judgment and the ancillary judgment debts are discharged in total. This has not been the case.

[5] This matter has a long history and the parties have been engaged in litigation since 1997 resulting in a sequestration application being brought against the Plaintiff during 2003 for his alleged failure to satisfy the ancillary judgment entered against him in his capacity as surety and co-principal debtor. That sequestration application was not pursued to its finality and was withdrawn. Fedbond, however Fedbond continued with their claim despite not progressing the sequestration application by issuing a writ against the Plaintiff in the sum of R650 000.00 against the attachment of his movables. By this stage the plaintiff had personally paid R247 000.00 towards the satisfaction of the same judgment.

[6] The problem between the parties did not end there. The litigation continued between the parties and in August 2005 the Plaintiff and Defendant agreed to refer the calculation of Dalmatian's indebtedness in terms of section 19*bis* of the High Court Act No. 59 1959 to a referee. This was made an order of court. Section 19*bis* of the Supreme Court Act 59 of 1959 provides for the appointment of a referee to enquire and report upon, inter alia, a matter which relates wholly or in part to accounts. Mr Jappie Van der Laan, a referee was duly appointed and on 20 October 2009 he provided his final report. On 22 September 2011 the Defendant enrolled the matter for trial for hearing on 1 August 2012 on which date the following order was made by agreement between the parties – the matter was postponed *sine die*, costs reserved. The Plaintiff was ordered to amend his particulars of claim by filing a notice of intention to amend and the

defendant was ordered to amend its plea within twenty days of delivery of the amended pages.

[7] I heard the evidence of the Plaintiff. I also heard the evidence of Mr Van de Laan, the referee. The Plaintiff spent a lot of time in his testimony taking the court through each and every calculation in order to demonstrate that the referee had not come to the correct finding. That evidence dealt not only with his indebtedness but also the indebtedness of the principal debtor, Dalmatian. The Plaintiff referred to a lot of irregularities and monies that he had paid to the late Mr Lebos and he claimed that there were some underhand negotiations between the parties and used an example that Fedbond had not pursued the action against Mr Giddey who was also a surety in the Dalmatian debacle. Dalmatian was liquidated finally in 1999 and the referee had to consider all the costs and all the monies that had been paid including the interest. It was the Plaintiff's case that Mr Van der Laan had not taken all the factors into account. When Mr Van der Laan testified he proved his expertise. He took the court through all the steps that he had taken and testified that he had engaged with the parties, that he had engaged with Mr Lebos and that he had engaged with Fedbond, and had gone back to Mr Lebos with the Plaintiff. I get the impression that Mr Van de Laan has gone a long way to try and resolve the issue and the particular errors that the Plaintiff had raised.

[8] Mr Van de Laan took the court through the papers, bearing in mind that the parties had committed themselves to the referee procedure in terms of section 19 bis. It is clear that only under exceptional circumstances can the court deviate or disregard the findings of a referee.

[9] In the case of *Perdikis v Jamieson* 2002 (6) SA 356 (W) paragraph 17 Boruchowitz J stated the following:

> 'It was held in Bekker v RSA factors 1983 4 SA 568t that a valuation can only be rectified on equitable grounds where the valuer does not exercise the judgment

of a reasonable man that if his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result.'

[10] In *Wright v Wright & Another* 2015 (1) SA 262 (SCA) Majid JA stated the following in respect of the referees report: '*Unless and until it was properly imbued on the narrow grounds it stood as the courts factual findings upon adoption without modification. It was not for the First Respondent to persuade the High Court that the referee's report and the factual findings were correct. That would subvert the purpose of this section. The referee had been appointed by consent between the parties to facilitate the High Court's task of resolving the factual issues from the accounting debatement as the High Court was called upon to do. The Appellant held the duty of impugning the factual findings or to raise genuine disputes of fact. It is legally untenable to approach the matter like the Appellant did namely to treat the referee's report as it if was the Respondent's factual version which had to be attested against the Appellant's factual version. This is not the manner in which the section is to operate.'*

[11] It is the plaintiff who challenges the Referee's report and it is the plaintiff who bears the onus to demonstrate that the referee, Mr Van de Laan, exercised his judgment unreasonably, irregularly or wrongly so as to lead to a patently inequitable result. Having regard to the evidence of Mr Van de Laan and the careful calculations that he did, the procedures that he adopted after he had considered to the Plaintiff's arguments during the course of that investigation, it is clear to me that Mr Van der Laan's report does not lead to any patently inequitable results. I cannot find that his judgment is wrong. The very calculations in question are the very calculations that the court referred to the referee. It was the job of the referee. By way of example, the referee's report refers to previous correspondence; he refers to the audit report and to the terms of reference. He concluded that the Plaintiff is indebted to the Defendant in the amount of R810 881.82. That amount was reflected as owing by Dalmation as at February 2002 and it was prepared on the basis of calculation 1. The referee's analysis is set out demonstrating the various bases. Basis 1 is the most conservative calculation and favours the plaintiff.

"With reference to the Order of the Court and previous correspondence etc., I hereby issue my revised final account and report. The calculation on Basis 1 indicates that the Plaintiff is in debt to the Defendant to the amount of R810, 881.82… The calculation on Basis 2 indicates that the Plaintiff is in debt to the Defendant to the amount of R955, 017.87… The calculations for clause 3 indicate that if the Plaintiff's debt to the Defendant is reduced to the amount due by Dalmation, whenever the amount due by Dalmation is less that the amount due by the Plaintiff, the amount owing by the Plaintiff to the Defendant amounts to R498, 945.02. If no such deduction is made to the debt of the Plaintiff, the amount due by the Plaintiff to the Defendant amounts to R1,512,354.11."

The amount reflected as owing by Dalmation as at the end of February 2009 exceeds the R403 000.00 presently owed by the Plaintiff in terms of the judgment against him. The Plaintiff is in no position to place any reliance on the discharge or reduction of the amount of the principal debt owing in order to escape his own liability.

[12] No further payments have been made and interest on the principal judgment has continued to run. The current amount owing is according to the Defendant significantly higher. The Defendants make the case that because Dalmatian remains indebted to the Defendant in the amount of the principal judgment and notwithstanding that Fedbond has received payments totalling R3 410 051.90 according to the referee towards the discharge of R1 492 585.08 there is still an amount owing since the interest continues to run. According to the referee's final report, payments made towards the discharge of the principal debt, which includes rental received, amounted to only R982 929.94.

[13] Therefore I find that the Plaintiff incorrectly described the payments. The gross amount of the proceeds of the sale of the property to MacSteel and the amount of R144 621.96 which was described in the report as being for repairs and rent, there was not a debit which was to be reversed in the credit line that is line twenty seven on the basis one of the calculation. This court cannot repeat the referee's analysis in great detail but at the end of the day, it is not the duty of this court to overturn the referee's report, I can only do so on that very narrow basis to

which I have referred. In any event having regard to such testimony as Mr Van de Laan did give in relation to how he arrived at the calculations the court cannot find any patent incorrectness and therefore I cannot find as set out in Perdikis v Jamieson and in Wright that there is a patently inequitable result. The Plaintiff's claim has therefore failed.

[14] There is the question of the various costs orders that have been made throughout the litigation for example the costs were reserved on the 30th of August 2012 where the action was postponed sine die and it is the Defendant's case that those costs should follow the result in this present action and that this court should order judgment against the Plaintiff in relation to the postponement sine die costs. The parties when they have referred the matter to the referee the costs were ordered to be costs in the cause and therefore the costs should follow the result in the present application. The court is not appraised of all the various hearings but the order that I will make is that the action is dismissed with costs which shall include the postponement costs of the 1st of August 2012, as they have been fully addressed. The remaining costs shall be costs in the cause.

M VICTOR

JUDGE OF THE SOUTH GAUTENG

HIGH COURT, JOHANNESBURG

Appearances:

Plaintiff: Advocate Barry Edwards

Defendant: Advocate Jonathan Hoffman