IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG LOCAL DIVISION,JOHANNESBURG)

REPUBLIC OF SOUTH AFRICA

Appeal Court Case Number: A 5070/2017

SCA Petition number : 949/2017

Court a quo case number : 13659/2004

DELETE WHICHEVER IS NOT APPLICABLE	
(1)	REPORTABLE: (YES)/NO
(2)	OF INTEREST TO OTHER JUDGES: (YES)/NO
(3)	REVISED
	DATE: 19/9/19 SIGNATURE:

In the matter between:

LESLIE GEORGE HUDSON — Appellant

and

FEDBOND NOMINEES (PTY) LTD — Respondent

JUDGMENT

BHOOLA AJ:

Introduction

[1] This is an appeal against the judgment and order of Victor J dated 6 March 2017, following leave granted on petition by the Supreme Court of Appeal.

[2] The appeal arises from an action instituted in 2004 by the appellant ("Hudson"), against the respondent ("Fedbond"), in which Hudson sought an order declaring that a judgment debt obtained by Fedbond against Dalmation Properties (Pty) Ltd ("Dalmation") as principal debtor, in the amount of R1 492.584.08, and against Hudson in the amount of R650 000, as surety for Dalmation, had been discharged.

[3] The judgment debt against Dalmation and Hudson has its origin in a loan that was obtained by Dalmation from Fedbond in May 1994 where Hudson and Trevor Giddey ("Giddey"), as the sole shareholders of Dalmation, both signed suretyship agreements in favour of Fedbond. The loan was in the sum of R1.3 million. The suretyships undertaken by Hudson and Giddey limited their liability as sureties respectively to the sum of R650 000.00 and held them jointly and severally liable as co-principal debtors *in solidum* with Dalmation.

[4] The court *a quo* dismissed Hudson's claim that the debt had been discharged and found that the referee appointed in terms of section 19*bis* (1) of the High Court Act 59 of 1959 to determine the extent of Dalmation's liability had correctly determined that there was still an outstanding debt of R 810 881.82 due by Dalmation. Accordingly, as Hudson has only paid an amount of R247 000, he was still liable to Fedbond as a surety and ancillary debtor *in solidum* with Dalmation.

History and background

[5] The loan was granted subject to registration of a mortgage bond in favour of Fedbond over Dalmation's immovable property situated at erf 738, South Germiston Extension 7 Township, Johannesburg ("the property").

[6] Dalmation defaulted on the loan and Fedlife Participation Bond Managers (Pty) Ltd and Fedbond instituted legal proceedings against Dalmation and the sureties.

On 24 February 1998 judgment was granted against Dalmation and the sureties and the property was declared executable ("the Joffe order").

[7] The relevant terms of the Joffe order obtained against Dalmation as first respondent, and Hudson and Giddey as second and third respondents, were as follows:

> *THE COURT GRANTS AN ORDER :*
>
> *1. Entering judgment in favour of the second Applicant against the First Respondent in the sum of R1 492 584.08, with interest thereon at the rate of 21.53% per annum from the 1st day of January 1998, to date of payment.*
>
> *2. Directing that the immovable property of the First Respondent, Erf 738 South Germiston Extension 7 township be declared executable.*
>
> *AS AGAINST THE SECOND RESPONDENT*
>
> *3. Entering judgment against him in the sum of R650 000.00 payable jointly and severally with the First Respondent, the one paying the other to be absolved.*
>
> *AS AGAINST THE THIRD RESPONDENT*
>
> *4. Entering judgment against him in the sum of R650 000.00, payable jointly and severally with the First Respondent, the one paying the other to be absolved.*

[8] Unbeknown to Fedbond, on 12 January 1998 (some six weeks before the Joffe order), the Transitional Local Council of Greater Germiston had obtained a judgment against Dalmation and a writ of execution in respect of the property on account of unpaid rates and taxes and other municipal charges. Fedbond became aware of the judgment when the property was being sold in execution. On 3 May 1999 it was purchased by the only bidder, Fedbond's Attorney Brian Lebos (who is since deceased), representing Upbeat Properties CC, an entity owned by one of Fedbond's directors. The purchase price was R100 000.00.

[9] Thereafter, Fedbond applied for the winding up of Dalmation. This order was granted on 18 May 1999. Phillip Berman was appointed the provisional liquidator and he took control of the affairs of Dalmation with effect from 4 June 1999. Berman subsequently approved two sale transactions in respect of the property: The sale of

the property to Fedsure Participation Mortgage Bond Managers (Pty) Ltd ("Fedsure"), which held the bond over the property, on the same terms and conditions for which it was purchased by Upbeat Properties CC; and the sale of the property to Macsteel (following negotiations in which Giddey was involved), for R2 250 000.00. Both the sales of the property from the liquidator to Fedsure and from Fedsure to Macsteel were registered in the deeds office on the same day, being 28 May 2002.

[10] At the time of the winding up order the capital debt owed by Dalmation was, according to Hudson, about R1.4 million and he enquired from Fedbond what the remaining liability of Dalmation was following the receipt of the property sale price. His belief was that at that stage Dalmation's liability, and hence his obligation as surety, had been discharged by the proceeds received from the sale of the property; payments already made to Fedbond by Dalmation's debtors; as well as payments made by Giddey in the amount of R62 500, and by himself in the amount of R247 000. Hudson avers that despite several requests Fedbond failed to provide a complete account of monies received.

[11] In February 2004 Fedbond issued a writ of execution against Hudson's moveables in terms of the Joffe order. Aggrieved by the actions of Fedbond, Hudson approached the court and obtained an order from Claasens J[1] interdicting Fedbond, Fedsure Participation Mortgage Bond Managers (Pty) Ltd and the Sheriff from executing on the Joffe order, pending the outcome of an action against Fedbond in an attempt to determine the exact outstanding amount owing by Dalmation, and accordingly his own liability as co-surety. In this action, which was instituted on 22 June 2004, Hudson sought the following relief:

> 1. An order declaring that the principal judgment and ancillary judgment had been discharged by the sum of the proceeds of the sale of the property and payments received by the defendant in reduction of the judgments;

[1] Case number 2004/6416.

2. Payment to the plaintiff of that amount which the Court may find has been overpaid by the plaintiff plus interest thereon at the rate of 15,5% per annum calculated from the date of judgment to the date of final payment;

3. An order releasing the goods belonging to the plaintiff and attached by the defendant pursuant to the principal judgment and ancillary judgment from attachment.

[12] Upon receipt of Fedbond's plea to Hudson's summons, it became clear that the parties were *ad idem* on most of the issues in dispute. They were however unable to agree on the computation of the amount which remained outstanding to Fedbond in light of the many payments that had been made. In August 2005 the ambit of the dispute was narrowed to that of an accounting exercise and the parties agreed to appoint a referee in terms of section 19*bis* (1) of the High Court Act 59 of 1959. The referee's mandate, in terms of the Basis one calculation (which had been accepted by the parties as the most conservative estimate), was to determine the remaining indebtedness of Dalmation in terms of the Joffe order. The referee's exact terms of reference were as follows:

1. Basis 1

1.1 The calculation of the present indebtedness of Dalmation Properties (Pty) Ltd ("Dalmation") pursuant to the judgment granted against Dalmation for :

1.1.1 payment of the sum of R1 492 584.08 ;

1.1.2 interest on the said sum at the rate of 21.53% per annum calculated from 1 January 1998 to date of payment;

1.1.3 costs of suit on the attorney and client scale.

1.2 In the calculation of the said indebtedness the referee shall apply Generally Accepted Accounting Principles and take account of

1.2.1 all payments made;

1.2.2 all expenses paid;

1.2.3 the interest;

1.2.4 the costs of suit.

[13] After a five year process of engagement with relevant parties, Mr. Jacob Van Der Laan ("the referee"), produced his final account and report in October 2009. His conclusion was that on the Basis one calculation, as at 28 February 2009, Dalmation remained indebted to Fedbond in the sum of R 810 881.82.

[14] Hudson amended his particulars of claim in 2012 and introduced the grounds on which he alleged that the referee had erred in preparation of his Basis one account. He averred that the referee should have found that the principal debt had been discharged. The relevant grounds can be summarized as follows:

14.1 Save for the charges due to the Deputy Sheriff in the amount of R 14 104 and taxed costs in the amount of R 5458.05 due to Attorney Lebos in respect of the application brought under case number 97/34005, the balance of the entry items listed as "additional costs incurred" totalling the sum of R 686 603.88 were incurred after the principal judgment granted on 24 February 1998 and were not recovered in terms of the proceedings under case number 97/34005 and should not have been taken into account in the determination of Dalmation's indebtedness.

14.2 The referee should have taken into account the amount of R 250 000.00 paid by Giddey on or about 20 August 2003 towards the discharge of Dalmation's indebtedness from the date of payment instead of allowing for an apportionment of the sum over the subsequent years as and when Hudson made payments in discharge of Dalmation's principal debt.

14.3 The referee should have taken into account the amounts of R 23 400.00 and R 9000.00 respectively representing rental payments by Abkins Steel in respect of the property.

14.4 The referee should have taken into account payments made by Rubber for Africa to Attorney Lebos in the amount of R 119 420.90, which should have been allocated towards the discharge of the indebtedness.

Judgment of the court *a quo*

[15] It must be noted that the judgment of the court *a quo* is a reconstruction based on notes provided by the parties, as both audio and written records of the proceedings were lost.

[16] Victor J found, with reliance on *Perdikis v Jamieson,* [2] that since Hudson was challenging the referee's report, he bore the onus of proving that the referee exercised his judgment unreasonably, irregularly or incorrectly so as to lead to a patently inequitable result.

[17] Two witnesses testified during the trial; Hudson, on behalf of the plaintiff, and the referee, on behalf of Fedbond. It is common cause that the referee conceded during his testimony that he had failed to take into account payments made by Rubber for Africa totalling R119 000, and that he committed an error in his calculation. After considering the oral evidence of both the referee and Hudson in regard to the errors in the referee's determination, Victor J held that a court could only deviate from the findings of an expert referee on narrow grounds. The learned Judge proceeded to reject Hudson's evidence and found that the referee's report does not lead to any *"patently inequitable results"* and that it cannot be found "*that his judgment is wrong"*. She accepted Basis one of the referee's determination in its entirety and without modification.

Did the court a quo err in accepting the referee's report and finding that it correctly determined the liability of Dalmation and hence the co-sureties?

[18] Hudson did not seek to impugn the report on any ground other than errors made on the part of the referee, and no challenge to his integrity or conduct was made. The essential attack is that the referee's report is flawed in a number of critical respects, which renders its acceptance without modification by the court *a quo* erroneous. More specifically Hudson claims that the referee's report is flawed in that it failed to include admitted amounts in the calculation; allowed extraneous

[2] 2002(6) SA 356 (W).

charges to be levied against Dalmation's account, allowed for interest in excess of the *duplum*, and incorrectly allocated payments to the account.

[19] It is necessary to consider each of these grounds in order to determine whether the court *a quo* erred in failing to reject the report in its original form.

Failure to include admitted amounts in the Basis one calculation

[20] Fedbond conceded in the court *a quo* that a series of payments made to Lebos by Dalmation's debtor, Rubber for Africa, stood to be credited to the Dalmation account and were not done. It is therefore common cause that the sum of R 119 420.90 was paid to Fedbond but was not taken into account by the referee. The effect of this concession is that the debt was overstated by R 292 972.31, which includes interest on the amounts totalling R 119 420.90. The outstanding principal debt, as at February 2009, should have been reflected by the referee as R 517 909.51 instead of R 810 881.82.

[21] As stated, the court *a quo* accepted the referee's report without any modification. In *Perdikis referred* to above, the error involved an amount of R30 000. The court found that as the expert had *"acted upon a materially incorrect assumption it cannot be said that he had properly performed his mandate and that he had exercised the judgment of a reasonable man. The error perpetrated was such as to lead to a patently inequitable result as the first valuation gave the appellant an entitlement of R30 000 less than that in terms of the rectified valuation."* Section 19 *bis* (1), provides that the court may:

> *"...adopt the report of any such referee, either wholly or in part, and either with or without modifications, or may remit such report for further enquiry or report or considerations by such referee, or make such other order in regard thereto as may be necessary or desirable",*

[23] The court *a quo* did not did not deal with the failure of the referee to include the Rubber for Africa payments and took the view that as long as the amount owed by Dalmation exceeded R 403 000.00, any determination over this amount was

irrelevant and that Hudson was 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. In our view the court a quo erred in taking this approach. Firstly: once the respondent conceded the Rubber for Africa point the court *a quo* should have accepted that the report was incorrect or at least that modifications to the report were necessary. Accepting the report unmodified led to a patently inequitable result because it resulted in interest being erroneously calculated at 21.53% on an inflated sum. It was admitted by Fedbond that this led to the Basis one calculation being overstated by R 292 972.31 as at February 2009. Secondly: the reduction of Dalmation's debt is relevant and determinative. The surety's obligation is that of an accessory and the sureties remain liable only to the extent that the debt of Dalmation has not been fully discharged. The reduction of Dalmation's debt to R 517 909.51 implies that Hudson and Giddey are jointly and severally liable for an amount of R 517 909.51. Hudson had already paid an amount of R 247 000.

Interest in excess of the *duplum*

[24] Fedbond's counsel conceded in heads of argument in the appeal that the referee's final determination was overstated by R 41 775.88 as a result of the *in duplum* rule not having been correctly applied. This results in a further reduction of Dalmation's liability to R476 133.63.

Incorrect allocation of payments

[25] The referee's Basis one determination states that the following accounting principles were applied: *"[c]alculation acknowledging that payments are first applied to interest and then to capital"* and *"Interest on expenditure not calculated in terms of clause 1.1.2 and 1.1.3 of the [Joffe] order".* Hudson submits that on this basis it is clear that the referee would allocate any payments received first to interest then to capital and that no interest would be calculated on the additional expenses (assuming that they were correctly taken into account). However, Hudson's schedule presented in evidence at the trial reflects that this was not the approach taken by the referee despite his express statement to this effect. Hudson's schedule

took the totals exactly from the referee's report as at May 2002 reflecting the following amounts:

Payments received: R 3 003 390.61
Accumulated interest: R 1 392 531.19
Additional costs: R 700 707.88
Cumulative capital balance: R 1 492 582.08.

[26] The referee's stated approach would mean that the payments received of R 3 003 390.61 would first be deducted from the accumulated interest then from the cumulative capital balance leaving an unallocated balance of R 118 275. 34. If this is deducted from the additional costs (assuming they have correctly been taken into account), the balance in the additional costs column should be R582 432.54 and hence no further interest should be levied. During the period August 2002 to January 2004 further payments were made to Fedbond, as correctly reflected in the referee's report, in the sum of R 406 661.29. Deducting these payments from the additional costs amount leaves a balance of R 175 771.25. Since no interest accrues on expenses, as the referee had provided, in line with the Joffe order, no further interest should have accrued on this amount. However, when an additional cost of R 5458.05 is added, the running balance, which comprises additional costs exclusively, is reflected by the referee as R 181 229.30. This would mean that even if the amounts of the additional costs have been correctly included (which Hudson disputes), the amount due is still only R 181 229.30. This is significantly less than the amount of R 810 881.62 reflecting as owing in the referee's report and accepted as correct by the court *a quo*. Even on the referee's own version his report is incorrect and overstates the amount due by some R 629 652.52. This error is material and leads to a patently incorrect result in the referee's report, and accordingly its acceptance constitutes an error on the part of the court *a quo*.

The failure to take account of Giddey's payment

[27] It is common cause that Giddey made a payment of R 250 000.00. Hudson testified that correspondence from Lebos (dated 13 September 2005) confirms that this amount was paid by Giddey into a "Fedtrust ledger account" as security to

avoid a writ being issued against him. Giddey paid R 62 500.00 towards reduction of the principal judgment and the amount still in trust was R 187 500.00. The letter from Lebos confirmed that each time Hudson paid an instalment of R 12 500.00 to Fedbond Giddey's amount was debited with a similar amount. Hudson referred to the referee's decision that he did not allocate the full amount of R 250 000.00 paid by Giddey to the Dalmation account because this amount was subject to an arrangement between Fedbond and Giddey. The referee testified to this effect and confirmed that and despite his attempts to ascertain the facts relating to the arrangement with Giddey, the latter failed to respond to his emails or telephone calls. It is common cause that Fedbond has not taken action against Giddey. [3]

[28] Hudson submits that the referee's explanation for not including Giddey's payment, which was made in August 2003, to the reduction of the Dalmation debt is at best, hearsay and that if this payment had been applied to the principal debt it would have been reduced as at February 2009 by R500 000.00 (consisting of R250 000.00 plus maximum interest thereon of R250 000.00). This would have been the correct course of action, it was submitted, even though the money appears to have been held in trust on Giddey's instructions, on the basis that Lebos's correspondence to the referee confirmed that that the payment was made to avert execution against him. As sureties Giddey and Hudson are jointly and severally liable the one paying the other to be absolved. As a result thereof notwithstanding Giddey and Lebos's arrangement in law, Giddey's full amount should have been taken into account by the referee.

[29] In this regard it must be noted that this matter came before the court *a quo* by way of trial proceedings in which the referee was called as a witness for Fedbond. The referee's evidence on this aspect was hearsay and the evidence of Hudson in this regard must be accepted. The fact that the referee was called as a witness for Fedbond also calls into question his independence.

Conclusion

[3] It should be noted that Giddey was also the liquidator of Rubber for Africa.

[30] In our view, by accepting the referee's report unmodified, even to the extent of the concession made by Fedbond, the court *a quo* erred for the reasons set out above. The referee's determination of the outstanding amount due in terms of the principal judgment is incorrect in that it fails to take account of a number of issues. The result is that the determination is patently inequitable as it holds the appellant liable for payment of a sum far in excess of Fedbond's legal entitlement. The correct remedial action, which ought to have been applied to the referee's report by the court *a quo,* is as follows:

30.1 To deduct from the Basis one calculation the amounts admittedly received by Fedbond in consequence of the admitted Rubber for Africa payments, together with interest thereon;

30.2 To deduct the amount conceded by Fedbond of R 41 775.88 as a result of the *in duplum* rule not having been applied;

30.3 Directing that all payments made in reduction of Dalmation's indebtedness must be strictly applied in accordance with the agreed basis for the calculation which is stated in the introductory portion to the Basis one calculation; and

30.4 To deduct an amount of R500 000.00 in respect of the failure to allocate the full amount of the Giddey payment (R 250 000.00 paid plus R 250 000.00 interest).

[31] We agree with Hudson's submissions that if the above accounting and legal principles are applied, far from being correct, the referee's report overstates the amount still outstanding on the Basis one calculation, rendering the report incorrect. Given the fact that Fedbond has conceded that the referee erred in two respects at least, leading to concessions on its part, it cannot be gainsaid that the overstatement of the debt by the referee leads to a patently inequitable result and that the principal debt has been fully discharged.

Order

[32] In the result, we make the following order:

1. The appeal is upheld.

2. The judgment of the court *a quo* is set aside and is substituted with the following order:

i) The judgment debt against Dalmation and the appellant has been discharged in full.

ii) Any movables belonging to the appellant that were previously attached by the respondent pursuant to the judgment against the appellant are released with immediate effect.

iii) Costs of suit.

3. The respondent is ordered to pay the costs of the appeal.

U. BHOOLA

Acting Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

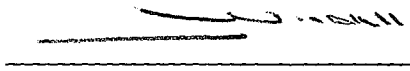
I agree

CARELSE J

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

I agree



WINDELL J

Judge of the High Court of South Africa

Gauteng Local Division, Johannesburg

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