REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(LIMPOPO DIVISION, POLOKWANE)

(1) REPORTABLE: YES/NO
(2) OF INTEREST TO THE JUDGES: YES/NO
(3) REVISED.

Date: 14/4/2023

Signature: [redacted]

CASE №: **HCAA07/2022**

In the matter between:

SMIT EN MAREE ATTORNEYS **APPELLANT**

V

MAREE VD BERG ATTORNEYS **RESPONDENT**

Heard : **21 October 2022**
Delivered : **14 April 2023 by circulation to the parties' legal representatives**
Coram : **Kganyago J et al. Ledwaba AJ Diamond AJ**

JUDGMENT

G J DIAMOND AJ:

[1] This appeal came before us after the Supreme Court of Appeal granted leave, on 28 April 2022, to the Appellant to appeal against a judgement of the court *a quo,* to the full court of this Division, and this appeal was heard on 21 October 2022.

[2] On or about 5 October 2020 the Respondent filed an application in the court *a quo* to set aside the warrant of execution issued out by the Appellant in a certain case, case number 2737/2019. The Appellant filed an answering affidavit. The Respondent did not file a replying affidavit and it is not clear when the application was heard but judgement was delivered by Muller J, on the 24 November 2021. The court a quo granted the order, and the warrant of execution was set aside.

[3] The background facts to this order are somewhat convoluted.

[4] Mr. E Smit ("Smit") and Mr D Maree ("Maree") practised as partners in the firm of attorneys known as Smit and Maree for a period of 24 years.

[5] They agreed to terminate the partnership agreement and this termination agreement was reached at 16:00 on 9 October 2018.

[6] Mr D Maree subsequently entered into a partnership agreement with one Mr J van den Berg, and Maree and van den Berg started to practice

in partnership under the name and style of MareevdBerg Attorneys (the Respondent in this appeal), while Smit continued to practice under the name and style of Smit and Maree Attorneys (the Appellant in this Appeal).

[7] Mr Smit and Mr Maree are also the members of a Close Corporation, the Close Corporation being the owner of a building from which both Smit & Maree and MareevdBerg still practice from, what can naturally be assumed, different offices within the same building.

[8] Shortly after the dissolution of the partnership, Maree took notice of the fact that some of his clients were still depositing money in the trust account of Smit & Maree, and that Smit & Maree debited an "admin fee" against such payments. A dispute developed as to whether Smit & Maree was entitled to debit this "admin fee", and MareevdBerg filed an urgent application (the "Initial Urgent Application") to interdict Smit & Maree from retaining the trust monies of clients of Maree.

[9] The court that heard the Initial Urgent Application, determined on 30 May 2019, that the application was not urgent and struck the application from the roll and ruled that MareevdBerg shall pay the costs of the application. MareevdBerg also laid a complaint against Smit & Maree at LPC, regarding the same conduct.

[10] Smit & Maree subsequently agreed to pay all amounts received by him from clients of Maree, including the so-called "admin fee" debits, to MareevdBerg. Smit made it clear in the letter, dated 6 June 2019, in which he agreed to pay the monies to MareevdBerg, that he did so without admitting liability and only for the purpose of keeping peace in future between MareevdBerg and Smit & Maree.

[11] The necessity to prosecute the Initial Urgent Application consequently fell away.

[12] Smit & Maree presented a bill of costs, pursuant to the cost order of 30 May 2019, to be taxed. The taxation took place on 28 November 2019 and the bill of costs was taxed in the amount of R 11 869.15.

[13] MareevdBerg received a letter from Smit & Maree, on 3 December 2019, that is, it seems, 5 days after the Bill of Costs was taxed, reading as follows:

"RE: YOURSELF // SMIT & MAREE ATTORNEYS

We attach herewith the taxed bill of costs for your attention.

We are prepared to waive the costs but to (sic) *the condition that your Mr Dawid Maree personally attend a meeting with our Mr Smit in person before 13 December 2019.*

Yours faithfully

E Smit"

[14] This appeal revolves all around the interpretation, and the effect of the letter referred to in the previous paragraph.

[15] It is common cause that the meeting that Smit set as a "condition" for him to be prepared to waive the costs, took place on 12 December 2019.

[16] Smit & Maree issued a warrant of execution, on 29 July 2020 to recover the Bill of Costs, that were taxed on 28 November 2019.

[17] In an application filed on 5 October 2020, MareevdBerg applied to have this warrant of execution to be set aside by the court. In this application, MareevdBerg places the facts referred to in paragraphs [4 – [16] above before the court.

[18] Smit & Maree opposed this application and filed an answering affidavit.

[19] Smit & Maree provided further factual context beyond what MareevdBerg placed before the court and this factual context is the following: Smit & Maree attached a letter dated 17 May 2019, addressed to MareevdBerg. In this letter, dated 17 May 2019, which was written by

Smit & Maree after it had received the Initial Urgent Application, Smit & Maree's grounds of opposition to the Initial Urgent Application are set out, and they allowed MareevdBerg the opportunity to withdraw their application. This letter records several issues, some of which relate to the dissolution agreement of the two erstwhile partners, amongst others recording that parties agreed that *"Mr Andries Linde an auditor be appointed to resolve all disputes between them, (not in court) if any*".

[20] MareevdBerg responded in a letter dated 17 May 2019, stating in no uncertain terms that their firm intended to proceed with the application.

[21] Smit & Maree wrote a letter, dated 11 November 2019, which letter creates the impression that that letter reacts to a letter of MareevdBerg dated 8 November 2019.[1] In the letter of 11 November 2019, Smit & Mare proposes once again that MareevdBerg (presumably intending that it shall be Maree), shall meet with Smit, "to settle your hatred against our Mr Smit"), and Smit & Maree added that he would arrange that the arbitrator, Mr. Andries Linde shall be present. Maree responded in no uncertain terms, in a letter dated 12 November 2019, that he was

[1] The letter of 8 November 2019 was not placed before the Court.

not willing to attend such a meeting since the arbitrator, Mr Linde could play no role to settle a case of "*so-called hatred*".

[22] Smit and Maree also quoted several correspondences between the parties, in his answering affidavit, dating after 12 December 2019, to which I will refer later on in this judgement.

[23] As mentioned above, the court a quo ruled in favour of MareevdBerg, and it is against this ruling and order that Smit & Maree now files this appeal.

[24] I wish to point out, at the outset, that the state of the record that was placed before the Appeal Court, leaves a lot to be desired. Some of the grounds of appeal that the Appellant refers to, relate to certain paragraphs in passages of the original judgement, that are not part of the record. Judging by the content of these grounds of appeal, I do not think that it will in the end make any difference to the outcome of the appeal. It is unfortunate however, that this judgement will not be able to deal with its ground of appeal to the extent that would otherwise have been possible.

[25] The Notice of Appeal is also a somewhat confused document. It categorises the grounds of appeal three categories, firstly two grounds

which it calls to be "in limine", secondly four grounds of appeal which it categorises under the heading "merits" and lastly five grounds of appeal which it categorises as "legal grounds". It is, for various reasons doubtful whether these distinctions are meaningful within the context of this appeal.

[26] The second "point in limine" of the Notice of Appeal, deals with a similar point *in limine* raised in the answering affidavit[2], in which the Appellant submitted that the sheriff who "directly handle the execution process" should have been joined as a further Respondent in the application. Since this was not done, so the argument went, the Respondent failed to join a necessary party having an interest in the application, and for this reason, the application should be dismissed.

[27] I have no hesitation to dismiss this ground of appeal. The rule requiring that a person should be joined of necessity, as a Respondent, has been stated and applied on several occasions[3], and the rule is simple: a person is a necessary party in proceedings if the order that the court is going to make cannot be sustained or carried into effect without

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[2] P. 33 Record.
[3] Amalgamated Engineering Union v Minister of Labour 1949 (3) SA 637 (A).

prejudicing such an affected person. This prejudice relates to a legal prejudice, and not merely a financial prejudice[4].

[28] The sheriff of court is an officer of court which carries court orders into effect by way of an instruction, a writ, issued by the Registrar of Court. The sheriff receives such an instruction and must execute the writ, by virtue of him/her being a special officer of court for that purpose. If, due to an order, such an instruction (writ) is set aside (as is prayed for in this application), then the instruction to execute lapses. It is impossible to conceive of any reason why the mere lapsing of such an instruction would cause any legal prejudice to the sheriff. All that is expected of the sheriff in such circumstances, is not to execute the writ. Absent special circumstances perhaps, such a situation cannot legally prejudice the sheriff in any way.

[29] The first point in limine of the notice of appeal relates to a similar point in limine set out in the answering affidavit: the Appellant submits that the application to set the warrant of execution aside, is premature since the underlying order for costs in favour of the Appellant has not been set aside, and still remains in force.

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[4] Hartland Implemente (Edms) Bpk v Enal Eiendomme BK 2002 (3) SA 653 (NC).

[30] I am convinced that this ground of appeal should also be dismissed, for the reasons that follow.

[31] It was ruled in LE ROUX v YSKOR LANDGOED (EDMS) BPK EN ANDERE[5] that:[6]

> *(a) The execution of the writ of execution can therefore be suspended if the debt underlying the judgment is contested by the judgment debtor. Examples of this are where execution of a maintenance order is suspended pending an action or application for setting aside the order or reduction of the amount payable (Williams v Carrick 1938 TPD 147 and Graham v Graham 1950 (1) SA 655 (T) or where execution of a costs order is suspended pending review of the assessment (Stent & Pretoria Printing Works v Roos 1909 TS 1054));*
>
> *(b) The writ of execution may be set aside:*
>
> *(i) if the debt and sentence are discharged by payment, compensatio, novatio, delegatio or cession. (Lawson v*

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[5] 1984 (4) SA 252 (T).

[6] What follows is my translation of the following from the YSKOR judgment P. 257 C – H:
(a) Die uitvoering van die eksekusielasbrief kan dus opgeskort word as die skuld wat die vonnis ten grondslag lê aangeveg word deur die vonnisskuldenaar. Voorbeelde hiervan is waar eksekusie van 'n onderhoudsbevel opgehef word hangende 'n aksie of aansoek vir tersydestelling van die bevel of vermindering van die bedrag betaalbaar (Williams v Carrick 1938 TPD 147 en Graham v Graham 1950 (1) SA 655 (T) of waar eksekusie van 'n kostebevel opgehef word hangende hersiening van die taksasie (Stent & Pretoria Printing Works v Roos 1909 TS 1054));
(b) Die eksekusielasbrief kan tersyde gestel word: (i) as die skuld en vonnis gedelg word deur betaling, compensatio, novatio, delegatio of cessie. (Lawson v Stevens 1906 TS 481; Mahomed v Ebrahim 1911 CPD 29; Trust Bank of Africa Ltd v Dhooma 1970 (3) SA 304 (N); Desai v Inman & Co 1971 (1) SA 43 (N), Skjelbred's Rederi A/S and Others v Hartless (Pty) Ltd 1982 (2) SA 710 (A) en Ras se saak supra); (ii) waar die vonnis nie seker is nie, vir sover dit slegs na die beslissing van 'n verdere regsprobleem of - probleme vasgestel kan word (De Crespigny v De Crespigny 1959 (1) SA 149 (N)); (iii) Waar die lasbrief nie in ooreenstemming met die vonnis is nie. (Goldstuck v Mappin and Webb Ltd 1927 TPD 723; Sachs v Katz 1955 (1) SA 67 (T)); (iv) waar die vonnis waarop die lasbrief gebaseer is, tersyde gestel word (Standard Bank of SA Ltd v Peyper & Fourie 1924 CPD 118; Jasmat and Another v Bhana 1951 (2) SA 496 (T)); (v) waar 'n verkeerde persoon daarin genoem word as gedingsparty (Xakana v Elliot Brothers (Queenstown) (Pty) Ltd 1967 (4) SA 724 (E)).

Stevens 1906 TS 481; Mahomed v Ebrahim 1911 CPD 29; Trust Bank of Africa Ltd v Dhooma 1970 (3) SA 304 (N); Desai v Inman & Co 1971 (1) SA 43 (N), Skjelbred's Rederi A /S and Others v Hartless F (Pty) Ltd 1982 (2) SA 710 (A) and Ras' case supra);

(ii) where the sentence is not certain, in so far as it is only to be finally determined after the ruling of a further legal problem or problems (De Crespigny v De Crespigny 1959 (1) SA 149 (N) G);

(iii) Where the warrant is inconsistent with the sentence. (Goldstuck v Mappin and Webb Ltd 1927 TPD 723; Sachs v Katz 1955 (1) SA 67 (T));

(iv) where the judgment on which the warrant is based is set aside (Standard Bank of SA Ltd v Peyper & Fourie 1924 CPD 118; Jasmat H and Another v Bhana 1951 (2) SA 496 (T));

(v) where a wrong person is named therein as a party (Xakana v Elliot Brothers (Queenstown) (Pty) Ltd 1967 (4) SA 724 (E)).

[32] The abovementioned judgement consequently contemplates two different instances that the applicant, when it feels aggrieved by a warrant of execution. Firstly, a party can apply for the suspension of the warrant in the circumstances mentioned in paragraph (a) of the above quoted portion of the judgement. Secondly, a party can apply for the setting aside of a warrant in circumstances[7] mentioned in paragraph (b) of the above quoted portion of the judgement.

[7] The court stated that the circumstances did not necessarily constitute an exhaustive list.

[33] The ground of appeal, styled as the "*first point in limine*" is consequently based on an understanding of the Respondent in his founding affidavit in the court *a quo*, viz, that the case of the Respondent is based on paragraph (a) of the judgement cited in paragraph 31 above.

[34] I have no hesitation to conclude that such an understanding of the case of the Respondent in the court *a quo*, is wrong. It is beyond doubt clear that the Respondent in the court a quo does not attack, in any way, the order for costs granted against the Respondent in the Initial Urgent Application. The case of the Respondent in the court a quo was brought under the rubric of paragraph (b)(i) of the judgement cited above, thus entitling them to apply for the setting aside of the warrant.

[35] The case of the Respondent is that an agreement was reached between the Appellant and the Respondent, to the effect that should Mr Maree and Mr Smit have a meeting as was proposed by Mr Smit of the Appellant, then the order for costs in favour of the Appellant, would at the very least, have become unenforceable or even compromised. Hence, the correctness and the validity of the initial call on which the warrant of execution is based, is not attacked by the Respondent.

[36] There can consequently be no basis to have expected the Respondent to first apply for the rescission of the cost order prior to the application

to set the warrant of execution aside. This ground of appeal is therefore dismissed.

[37] What remains to be decided in this the appeal, relates to the grounds of appeal set out under "merits" and "legal grounds", all of which relate to the content and meaning of the letter sent by the Appellant to the Respondent, dated 3 December 2019[8], and the subsequent meeting between Mr Maree and Mr Smit did take place.

[38] It was the case of the Respondent in the court *a quo*, that the letter of 3 December 2019 constituted an offer by the Appellant, upon which the Respondent acted in that Mr Maree attended the meeting proposed by the Appellant on 12 December 2019, after which an agreement[9] came into being between the Appellant and the Respondent, to the effect that the Respondent would not be indebted to the Appellant anymore, since the Appellant would have "waived" the order for costs in his favour.

[39] The argument of the Appellant, on the contrary, was that the letter of the 3rd of December 2019 was[10] *"... not to waive any cost, but rather to*

[8] Referred to in paragraph [13], above.
[9] Paragraph 4.15 of the founding affidavit.
[10] Par 7, answering affidavit, P. 35.

make peace with the Applicants and if settled to waive the cost ex gratia solely for the purpose of having peace with them."

[40] The Appellant argues that since the acrimonious relationship between the parties continued after the meeting of 12 December 2019, that no peace was achieved between the Appellant and the Respondent and that no agreement came into being between the parties and that for that reason, the Appellant cannot be regarded as having waived the order for costs in his favour and that the application of the Respondent should have been dismissed. All of the grounds of appeal under "merits" and "legal grounds" revolve around this difference of interpretation between the appellant and respondent I will, in what follows deal with these grounds of appeal below.

[41] The letter of 3 December 2019, states as follows"

"RE: YOURSELF // SMIT & MAREE ATTORNEYS

We attach herewith the taxed bill of costs for your attention.

We are prepared to waive the costs but to (sic) *the condition that your Mr Dawid Maree personally attend a meeting with our Mr Smit in person before 13 December 2019.*

Yours faithfully

E Smit "

[42] The above letter refers to the waiver of rights on certain conditions.

[43] With regard to the use of both "waiver" and "condition", Christie and Bradfield[11] (hereinafter referred as to Christie) , sound the following words of caution:

with regard to the word "condition" the author's state

"*This part of the law is much bedevilled by semantics.*"[12]

and with regard to 'waiver", the authors state the following as an introduction under the heading *"Variation and discharge by agreement - the nature of waiver"*:[13]

"This section finds a place in the chapter on variation and discharge because waiver of rights conferred by the terms of a contract inevitably results in a variation of that contract, and waiver of all such rights may result in the discharge of the contract. But, as will be seen, the water has been muddied by our habit of using the word "waiver" and its synonyms in the context of a right conferred by law, such as the right to rescind for misrepresentation. This habit has muddied the water because waiver of right conferred by the terms of a contract should logically be regarded as a donation which, like any other donation, requires acceptance to be effective, whereas waiver of the right conferred by law does not require acceptance, and the courts have not

[11] Christie, R. H., and Bradfield GB. "Christie's The Law of Contract in South Africa 6 ed (2011) Lexis Nexis." *South Africa*.
[12] On P. 137.
[13] On P. 453.

always drawn this distinction. As a result, the proposition that waiver is always unilateral and does not require acceptance has some support. The proposition should be resisted, not for the sterile reason of maintaining doctrinal purity, but for the practical reason of doing justice in those rare cases where a party has good reason for not accepting the unilateral variation or discharge of his contact by waiver.

[44] In general, it can be stated that waiver of a right previously acquired by way of contract (I will refer to this type of waiver as "contractual waiver"), cannot take place unilaterally, while waiver of a right acquired from a source other than a previous contract, can be waived unilaterally by the person holding the right. In addition, before it can be said that contractual waiver has taken place, quite an onerous onus rests upon the person alleging such contractual waiver, to prove that there was indeed contractual waiver. This is so because there is a presumption, and in some instances even a strong presumption, against contractual waiver.

[45] When discussing the term "condition", the authors state that the term can be used with four meanings in mind, firstly with the meaning that the word condition shall refer to the promise dependent upon a past or present fact[14], as in instances where a contract is concluded on "condition" that, for instance, the borehole on the farm yields at least a

[14] In Afrikaans called a "veronderstelling".

minimum amount of water. The second meaning of "condition" is that of a modal clause, that is instances where a certain benefit in terms of the contract is bestowed on one of the parties, on "condition" that such a party shall give something or shall or not do something. In such an instance there is no intention by either of the contracting parties to suspend operation of the contract. The third meaning of the word "condition" refers to instances where the parties make the commencement or continued operation of the contract dependent on a future uncertain event that may or may not take place.[15] Should any of the parties have complete control over the occurrence of the event, then such a "condition", is nothing but a term of the contract,[16] which term can be enforced by the parties to the contract. The fourth meaning of the word "condition" is that it simply refers to a term of the contract, such as where a contract simply stipulates that it is a condition of the contract that the purchase price in contract of sale shall be a certain amount. Clearly, in such an instance the word "condition" is used simply intended to mean to be a term of the contract.

[46] Dealing with the concept of waiver, the writers highlight the ramifications of contractual waiver, as opposed to the waiver of the right which a

[15] From which should be distinguished a mere time clause, such as instances where certain that a particular event shall occur, but the date on which it will occur is not certain.
[16] P. 140.

person obtained from sources other than an earlier contact, for instance a right conferred by law, or a right to execute a court order. Different requirements govern the two distinct instances of waiver.

[47] The question therefore is, when the Appellant referred to his willingness to "waive" the cost order on "condition" that a meeting take place, what exactly did he have in mind?

[48] In my view, it was clear that the term "condition" used by the Appellant, could not have meant anything other than to be a term of the agreement (that is if this letter is construed to mean an offer which would have become a contract when acted upon[17]). No other meaning can make sense within the context of the circumstances. The "condition" to which the letter refers, does not relate to the existence of a past or present fact, nor to the occurrence of a future event, over which none of the parties would have any control.

[49] In my view, the "waiver" referred to in the letter, can only refer to the waiver of a right which the Appellant acquired by way of a court order, that is, it is not contractual waiver. It would, in my opinion, be wrong to

[17] This aspect is discussed further in the judgment.

adjudicate the question as to the meaning of this "waiver" from the perspective of the requirements for contractual waiver.

[50] The Appellant submits that the court *a quo* did not take the contents of a letter dated 21 January 2020 written by the Appellant to the Respondent in consideration. In this letter, written almost 6 weeks after the meeting proposed in the letter of three December 2019 took place, the Appellant wrote a letter to the Respondent in which he tried to clarify what its intention was with his letter dated 3 December 2019. Apart from this, the Appellant also provides an explanation[18] of what its intention was at the date of the conclusion of the agreement, in the answering affidavit.

[51] To these attempts, the court *a quo* apparently ruled "*What Mr Smit is thinking is irrelevant, but what he has done is relevant*"[19]. The Appellant submits that the court a quo erred in this regard.

[18] Par 7, answering affidavit, P. 34 of the record.
[19] This court assumes that the statement in the record is correct, since this part of the judgement of the court a quo does not form part of the record.

[52] I cannot agree with the Appellant. What the court *a quo* did was simply to restate the often relied upon judgement of Wessels JA in SAR & H v National Bank of SA Ltd[20] , in which he stated:

> *"The law does not concern itself with the working of the minds of parties to a contract, but with the external manifestation of the minds. Even therefore if from a philosophical standpoint the minds of the parties do not meet, yet, if by their acts their minds seemed to have met, the law will, where fraud is not alleged, look to their acts and assume that the minds did meet and that they contracted in accordance with what the parties purport to accept as a record of their agreement. This is the only practical way in which courts of law can determine the terms of the contract."* [21]

[53] In fact, it goes even further than this. The Supreme Court of Appeal, reconfirmed a long line of authorities, in Van Aardt v Galway[22], that evidence to prove what the intention of a party to an agreement was at date of conclusion of the agreement, is inadmissible. The intention of parties can and should be inferred only from the actions of the parties[23].

[54] Clearly therefore, the court *a quo* did not err in this regard.

[55] What remains therefore, is to interpret the sequence of events up until the letter of 12 December 2019, to establish whether that sequence of

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[20] 1924 AD 704.
[21] This court is alive to the debate surrounding this judgement, but there can be no doubt that the judgement was correct given the context of the judgement – see Christie P. 25.
[22] 2012 (2) Par 9.
[23] Which actions could of course include the recording of the agreement in a written deed, which was not done in this case.

events testifies to a contract having been reached between the parties to the effect as is alleged by the Respondent. If so, the Appeal should be dismissed. If not, the appeal should be upheld.

[56] Counsel for the Appellant advanced arguments, it must be said, with great vigour and conviction, all of which relate to the assessment of contractual waiver. In my view, this is not a case of contractual waiver, since the waiver in question is the waiver of the previous cost order, the source of which is not a previous agreement between the parties.

[57] Neither can it be said, in my view, that there was a simple unilateral waiver of the cost order by the Appellant. The Appellant makes it clear in his letter of 3 December 2019, that he is prepared to "waive the costs" should Maree be willing to attend a meeting with Smit before 13 December 2019.

[58] In my view, the correct approach *in casu* would be to ask whether an agreement between the Appellant and the Respondent pursuant to the letter of the appellant dated 3 December 2019 came into being, to the effect that once the meeting as is contemplated in that letter between Smit and Maree has taken place, then in that instance the Appellant would have "waived the costs".

[59] Such an agreement, within the context, would be nothing other than a novation of the Appellant's previous right to costs in terms of cost order.

[60] In my view, the facts *in casu* are a classical example of what Christie calls to be conditional novation[24]. In such instances, once the "condition" has been met, the old right passes into history and the question of whether it was novated is of little relevance.

[61] The Appellant argues that he intended to settle various legal disputes with the Respondent by way of the meeting of 12 December 2019. Among those are very specific dispute regarding an advocate, Mr Marc Schnehage, an issue regarding the current partner of Maree (who was previously candidate attorney at Smit & Maree). All this, the Appellant tries to substantiate by way of reference to correspondence that took place after 12 December 2019.

[62] The Respondent on the other hand argues that the content of the letter of 3 December 2019 is clear, *viz*, that once the meeting proposed by the Appellant in that letter took place, then the costs are waived as is stated in that letter.

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[24] P. 467

[63] The question therefore is how would a normal person in the shoes of Maree have understood the contents of the letter of the 3rd of December 2019? At that stage, none of the considerations relied upon by the Appellant in communication after 12 December 2019 had been communicated to Maree as being part of the "condition" set by the Appellant.

[64] In fact, by 11 November 2019, the Appellant had made its intention clear, viz, that he wished to discuss the alleged "hatred" of Maree towards Smit, in a meeting. When the Appellant tried to arrange that the arbitrator shall be present at the meeting, Maree indicated, in a letter dated 12 December 2019, that an arbitrator does not have any role to play in such a meeting since the subject matter to be discussed was of a personal nature, being the relationship between two persons.

[65] This request for the meeting was repeated in the letter of 3 December 2019, however, at this time the insistence that the arbitrator should be present at the meeting, was dropped. All that the Appellant required was that Maree shall attend a meeting with Smit.

[66] In my view, any reasonable person in the shoes of Maree would have concluded that the meeting which had to take place before the 13 December 2019, was intended to discuss the alleged feelings of

"hatred" of Maree towards Smit. The Appellant had, by that stage, not set any further requirements or conditions such as that agreements pertaining to certain issues and legal disputes between the parties should be reached at the meeting, before the appellant would be prepared to waive the costs. To incorporate the content of the correspondence and communications between the parties post 12 December 2019, as forming part of the content of the agreement reached and performed by the parties by 12 December 2019, would be to suggest that a contract between two parties can pick up new content after the date of formation of a contract (and even as, in this instance performance in terms of this contract), as the relationship between the parties rolls along. Such an approach would clearly be contrary to well established contract theory and the overwhelming wealth of authority pertaining to contract formation and the way in which the content of a contract should be established.

[67] The court *a quo* ruled in the judgement of the application for leave to appeal that the letter of 3 December 2019 together with the meeting of 12 December 2019, was nothing other than a *pactum de non petendo*, meaning that because the meeting set by the Appellant as a condition for the waiver did take place, that the Appellant is now precluded from enforcing the order for costs in his favour. The question can be asked

whether the agreement reached by Appellant and Respondent was a *pactum de non petendo* or whether it was an agreement that would extinguish the underlying debt completely.

[68] The practical difference is important. In the instance of a *pactum de non petendo* the underlying debt remains alive but cannot be enforced. It can however be set off against any future indebtedness which the Appellant would have towards the Respondent. If the agreement of 3rd December 2019, considered with the meeting that took place on 12 December 2019, extinguished the underlying debt, then such a set off will of course not be possible.

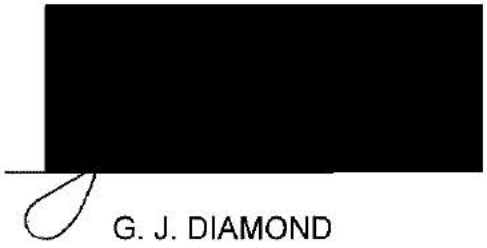
[69] It is, strictly spoken, not necessary to adjudicate in this appeal whether the agreement which resulted from the letter of 3 December 2019, was indeed a *pactum de non petendo* or a full compromise of the right of the Appellant to the costs. In both instances, the court *a quo* would have been correct to set the warrant aside.

[70] For all the above reasons, I am of the view that the appeal should be dismissed with costs.

I make the following order: -

[1] The appeal is dismissed.

[2] The Appellant is to pay the costs of the appeal of the Respondent.

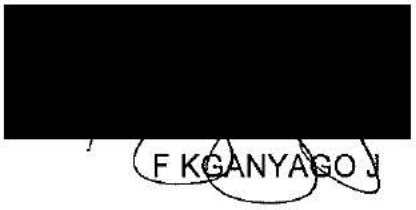


G. J. DIAMOND

ACTING JUDGE OF

THE HIGH COURT

I concur,

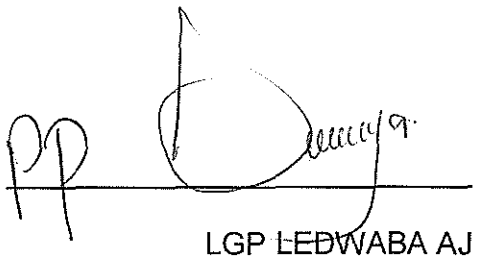


F KGANYAGO J

JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

I concur,



LGP LEDWABA AJ

ACTING JUDGE OF THE HIGH COURT

LIMPOPO DIVISION: POLOKWANE

APPEARANCES:

HEARD ON	: 21 October 2022
JUDGMENT DELIVERED ON	: This judgment was handed down electronically by circulation to the parties' representatives by email. The date and time for hand-down of the judgment is deemed to be 14 April 2023 at 13:00
For the Appellant	: Adv. M B Monyemoratho
Instructed by	: Smit & Maree Attorneys
For the Respondent	: Adv. M S Schnehage
Instructed by	: Maree van der Berg Attorneys