REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

Case No.: 22916/09

Reportable: No

Of interest to other judges: No

6 Sept 2022

In the matter between:

Trevor George Norris **Applicant**

And

Nedbank Ltd **Respondent**

Judgment

Vally J

Introduction

[1] The applicant and one Mr Shulte-Brader were directors of Soba Resources (Pty) Ltd (Soba). Soba opened a current account with the respondent on 30 March 2004. On 31 January 2005 Soba borrowed R1m from the respondent. As security for the loan an immovable property owned by Soba, Erf [....] B [....] Township with Deed of Transfer No.: T [....] (property), was registered in favour of the respondent. At the same time the applicant signed an unlimited suretyship in favour of the respondent for all Soba's debts, ceded his loan account with Soba as well as his life policy with the

respondent to the respondent. Mr Schulte-Brader and another person, a Mr McEwan, too, signed sureties in favour of the respondent for the loans of Soba. On 8 March 2005 the respondent financed the purchase of a motor vehicle for and on behalf of the applicant. On 21 September 2005 the applicant opened a cheque account with the respondent and was granted an overdraft facility allowing him to draw funds even though his account may be in debit. On 13 December 2006 the respondent lent a further R100 000.00 to Soba.

[2] Soba defaulted on its obligations to re-pay the loans. The respondent issued summons in this court against Soba, the applicant, Mr Shulte-Brader and Mr McEwan for repayment of the monies lent to Soba. On 7 July 2009 the applicant wrote to the respondent indicating that he was in the process of securing a purchaser for the property, and that the proceeds of the sale would be used to settle all Soba's debts with the respondent. On 17 November 2009 Mr Schulte-Brader wrote to the respondent on behalf of all the defendants indicating that he was in the process of selling the intellectual property belonging to Soba and that the proceeds of the sale would be used to settle the debts of Soba. Nothing came of either the applicant's nor Mr Shulte-Brader's claims regarding the sale of Soba's properties. On 24 November 2009 the respondent was successful in obtaining an order against all of the defendants jointly and severally for (i) payment of R 4 537.75 plus interest at 11%, (ii) payment of R1 190 806.00 plus interest at 11%. The order also declared the property especially executable. Sometime thereafter the applicant defaulted on the repayments towards settling the debts incurred for the purchasing of the motor vehicle and for drawing on the overdraft facility.

[3] On 14 January 2010 the applicant, his co-judgment debtors and the respondent concluded a settlement agreement. The applicant agreed that he was indebted to the respondent in the amount of R4537.75 and R1 301 972.56 together with interest thereon, as well as the costs of the action. He agreed to settle the debts by 8 February 2010, and that should he fail to do so the respondent could execute on the property. On 5 February 2010 Mr Shulte-Brader wrote to the respondent indicating that the judgment debtors hoped to finalise a transaction that would allow them to settle their debt in full. This was not done by 8 March 2010, the date by which they promised to have settled the debt.

[4] In May 2010 the applicant made the following payments to the respondent: R6 000.00 on 13 May; R6 000.00 on 17 May; and R6 828.98 on 24 May. He made the following further payments to the respondent in June 2010: R15 000 on 4 June and R12 257.05 on 7 June The amounts received by the respondent in May and June were credited to the applicant's cheque account.

[5] The respondent issued summons in the Pretoria division of this court against Mr Shulte-Brader personally in 2017. In November 2017 the respondent sold the property by way of auction for R685 273.97. On 27 November 2017 the matter between the respondent and Mr Shulte-Brader was settled. The settlement took into account the sale of the property. The result is that the debt of Soba was accordingly reduced by the sale of the property and the amount received from Mr Shulte-Brader. Soba still owed R1 600 905.24 to the respondent.

[6] In the meantime, the debt of the applicant, which included that of Soba (as he was a surety), with the respondent was not relinquished. Apart from his debt as surety, he also owed the respondent for monies loaned to him through the overdraft facility and for other loans.

[7] In early March 2018 an amount of R2.7m was paid into his account bank account with the respondent. The money was from a pension fund of which the applicant was a beneficiary. On 13 March 2018 the respondent had issued and served a writ of R1 472 034.90 upon the applicant. On that same day the applicant became aware that the respondent had removed R1 471 107.78 from his account. On 19 March 2018 the Sheriff served an execution of warrant of attachment on the applicant informing him that an amount of R1 472 034.90 had been received by the Sheriff in lieu of the writ served upon him on 13 March 2018, and that R1 468 861.30 was paid into the account of the respondent's attorneys. An amount of R3 173.60 was taken by the Sheriff as payment for his fees and disbursements. This amount was paid into the Sheriff's account by the respondent.

[8] Soon thereafter the applicant's legal representative initiated correspondence between itself and the respondent's legal representative concerning the removal of the

amount from the applicant's account by the respondent. In the correspondence the applicant queried the legality of the respondent's actions and sought to convince the respondent to reverse its decision. The respondent refused to do so.

[9] More than three years later, on 15 July 2021, the applicant served the present application on the respondent.

[10] Relying on the above stated facts the applicant seeks the following relief: (i) the writ of execution be set aside for failing to comply with Rule 66 of the Uniform Rules of Court; (ii) the proceeds removed from his cheque account be returned together with interest; (iii) the respondent provide him with a full debatement of the proceeds of the sale of the property, the sale of movable items as well as the amounts received from Mr Shulte-Brader; (iv) the respondent provide his attorneys with statements on the judgment debtors' accounts; and (v) the respondent pay the costs of the application. The respondent opposes the application on the basis that (i) Rule 66 has been complied with; and (ii) the matter had in any event prescribed. It also brings a conditional counter application which asks that in the event that it is found that Rule 66 was not complied with, the setting aside of the writ be suspended for a short period, while at the same time it be authorised by this court to issue a new writ within the period of suspension.

[11] The judgment relied upon by the respondent to issue the writ was handed down on 24 November 2009. At that time Rule 66, which deals with writs of execution, provided that a writ of execution 'may not' be issued after three years from the date of judgment 'unless the debtor consents to the issue of writ or unless the judgment is revived by the court on notice to the debtor.' Neither of these conditions were met in this case. In essence, Rule 66 declared that a judgment not executed upon within three years of it being issued becomes superannuated. However, Rule 66 was amended on 28 March 2014. The amended Rule 66 now simply provides that a writ of execution 'once issued remains in force and may at any time be executed without being renewed'. The amended Rule 66 materially changed the law on the issuance of writs.

[12] The applicant's case is that the provisions of Rule 66 pre the amendment of 28 March 2014 is applicable, and therefore the judgment had been superannuated as from 23 November 2012. Since the writ was only issued on 13 March 2018 it could only be issued if he, as judgment debtor, had consented to its issuance, or if this court had revived the order. Since neither condition was met, the writ was irregularly issued. Accordingly, it has to be set aside. Once this is done, the monies taken from his account have to be refunded. The respondent contends that the amended Rule 66 is applicable.

[13] Rule 66 deals with procedure. It does not confer any right to the judgment debtor that relieves it of the burden of the judgment debt. Nor does it affect the right of the judgment creditor to issue a writ of execution. That right is obtained by the judgment. Before the amendment, Rule 66 required the judgment creditor to seek the consent of the judgment debtor, or to have the judgment revived if the writ was issued three years after the judgment was handed down. In the latter case, the general principal was that the judgment should be revived. The court would only refuse to revive a judgment if it would be futile to do so.[1] Post the amendment, the judgment creditor is free to issue the writ at any time while the judgment remains in force – 30 years – and the writ once issued itself 'remains in force and may at any time be executed without being renewed'. In the case of the old Rule 66, the judgment creditor had to undertake a procedural step of securing the judgment debtor's consent or a court order reviving the judgment. Not so in the case of the new Rule 66. Here the procedure is simplified: the writ can be issued anytime and once issued it remains valid for as long as the judgment remains extant.

[14] A change in the law that is procedural in nature is generally taken to be retrospective.[2] It is nevertheless necessary to look at whether the intention of the legislature when enacting the new law was to privilege it with retrospective effect.[3] The new Rule 66 attends to the issue of a writ in general terms. It is short and succinct.

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[1] ' (A)pplications [for revival] are as a general rule granted … the Court would not revive an old judgment like this if, on the facts before it, such revival would be futile, would only lead to useless litigation and would not give the applicant any real remedy.' *Cooper v The Van Ryn Gold Mines Estates Ltd and Mining Commissioner of Boksburg* 1908 TS 698 at 700

[2] *Curtiss v Johannesburg Municipality* 1906 TS 308 at 312;

[3] Id at 319

There is no time-bar for the issuance of a writ once judgment has been secured, and there is no requirement that the consent of the judgment debtor be acquired or that the court should revive the judgment in order to validate the writ. Those requirements have simply been removed. There is nothing in its provisions to indicate that the elimination of the requirements was not retrospective. Neither the old nor the new Rule 66 interfere with any parties' rights or obligations created by the judgment.

[15] The whole purpose of the new Rule 66 is to streamline and simplify the process of issuing a writ. This was done to ensure that as long as the judgment debt remains unsatisfied, the judgment can be implemented without burdening the judgment creditor, who had already secured the judgment, to get the consent of the judgment debtor, or for the court to be burdened with an application which 'as a general rule' it would grant. It is correct that in terms of the new Rule 66 the judgment creditor could, theoretically speaking, issue a writ that would give it 'no real remedy'. But the probability of that occurring in practice is miniscule, if not actually non-existent. In short, the new Rule 66 simply did away with a procedure that was of little, if any, practical value. It therefore has to have retrospective effect.

[16] Once it is found that the amended Rule 66 has retrospective effect then, *caedit questio*, the writ was not irregularly issued and remains valid until executed upon. The application to have it set aside has to fail. On this issue there is no need to say anything on the respondent's claims that the claim of the applicant had prescribed, or on its conditional counter-application.

[17] There is however the issues of the debatement sought by the applicant, and his claim for access to the accounts of Shulte-Brader and Soba which should be given to his attorney. As to the first issue: the applicant has no right to access the records of Mr Shulte-Brader or of Soba. In any event they would have had to be joined to this application if an order concerning their rights was to be made. Since that was not done, the application has to fail. As to the second issue: the applicant is not entitled in law to claim a 'delivery and debatement of account.'[4]

[44] Absa Bank Ltd v Janse van Rensburg 2002 (3) SA 701 (SCA) headnote at 703D

[18] In conclusion, the application fails on all three issues. There is no reason why costs should not follow the result.

[19] The following order is made:

The application is dismissed with costs.

Vally J

Dates of hearing: 21 July 2022

Date of Judgment: 6 Sep 2022

Representation

For the applicant: MV Botomane

Instructed by: Strauss de Waal Attorneys

For the respondent: J M Kilian

Instructed by: Baloyi Swart & Associates Inc