REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO 2005/8980

(1) REPORTABLE: Yes
(2) OF INTEREST TO OTHER JUDGES: Yes
(3) REVISED.

7 December 2012
.....
DATE

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SIGNATURE

In the matter between

WRIGHT, WILLIAM ROBERT **APPLICANT**

and

WRIGHT, ALEC PETER **FIRST RESPONDENT**

WRIGHT METALS CC **SECOND RESPONDENT**

J U D G M E N T

KATHREE-SETILOANE J:

[1] On 16 April 2005, the applicant Mr William Robert Wright instituted proceedings out of this Court for a declaratory order that there was a partnership between him and the first respondent, Mr Alec Peter Wright.

[2] On 16 September 2005, Satchwell J granted an order declaring *inter alia* that:

(a) a partnership existed between the applicant and the first respondent from March 1989 and that at the time of the order, the partnership was still in existence;

(b) the partnership was dissolved;

(c) the business conducted by the second respondent, Wright Metals CC, formed part of the business conducted in partnership by the applicant and the first respondent.

(d) the first respondent was ordered to provide an accounting of the partnership business from March 1989 to date of dissolution of the partnership by no later than 30 October 2005; and

(e) The account be debated and that any amount found due to the applicant was to be paid by the first respondent.

[3] The applicant and the first respondent attempted, on various occasions, to resolve the dispute but were unable to do so. In an effort to finally resolve the matter, they agreed that the first respondent's indebtedness, if any, to the applicant be determined by a referee in terms of s 19*bis* of the Supreme Court Act, 59 of 1959 ("the Act").

[4] *On* 24 May 2011 a court order was obtained for such a referral. Pursuant to the order, the parties agreed that Desmond Snyman, of the firm Burn Reynolds & Co, be appointed by the South African Institute of Chartered Accountants as the referee. Mr Desmond Snyman ("the referee") delivered his report on 22 March 2012. He concludes, on page 31 of the report, that the first respondent is indebted to the applicant in the amount of R1 085 000 as at 30 April 2006. The applicant consequently seeks an order, *inter alia,* that the referee's report be adopted and that the first respondent be ordered to pay the applicant an amount of R1 085 000 together with interest thereon at 15.5% per annum calculated from 1 May 2006 to date of payment.

[5] The first respondent opposes the application. He rejects the findings of the referee as being unfounded on the basis that the figures contained in the report are biased and manifestly unjust in light of the detailed documents which were submitted to the referee prior to his final finding. He then seeks by way of a counter-application an order, *inter alia*, referring the application to trial for a determination on the question of whether the referee's report should be rejected in whole or in part.

[6] Section 19*bis* of the Act makes provision for the referral of particular matters for investigation by a referee. It provides:

"(1) In any civil proceedings any court of a provincial or local division may, with the consent of the parties, refer –

(a) any matter which requires extensive examination of documents or scientific, technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or
(b) any matter which relates wholly or in part to accounts; or
(c) any other matter arising in such proceedings,
for enquiry and report to a referee, and 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 consideration by such referee, or make such other order in regard thereto as may be necessary or desirable.

(2) Any such report or any part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in the civil proceedings in question.

(3) Any such referee shall for the purpose of such enquiry have such powers and shall conduct the enquiry in such manner as may be prescribed by a special order of court or by rules of court."

[7] Section 19*bis* of the Act allows a court, with the consent of the parties, to refer a matter contemplated in subsections 1(a) to (c) including any matter which relates wholly or in part to accounts, as in this case, for enquiry and report to a referee (*LTA Construction Ltd v Minister of Public Works and Land Affairs* 1992 (1) SA 837 (C) at 847 D-I, 854 G-H). The court is not obliged to ratify a referee's report. It may take any of the following steps:

(a) adopt the report wholly or in part with or without modifications; or
(b) remit the report for further enquiry or report or consideration by the referee; or
(c) make such other order as may be necessary or desirable.

The power of the court, in terms of s 19*bis*(1)(c) of the Act, to make such other order 'as may be necessary or desirable' would, in my view, include the power to set aside the findings of the referee if they are patently unreasonable, irregular or wrong.

[8] Only once a referee's report is adopted by the court wholly or in part, with or without modifications will it have the effect of a finding by the court in the civil proceedings in question. The referee will for purposes of the inquiry have the powers, and must conduct the inquiry in the manner, prescribed by a special order of court or the rules of court.

[9] Mr Bester, for the applicant, submits that a court is bound by the findings of a referee contemplated in s 19*bis* unless it can be found that the conclusions arrived at by the referee were unreasonable, irregular or wrong. He finds support for this submission in the matter of *Estate Young v Estate Young* 1917 NPD 244, which dealt with the predecessor to s 19*bis* in the old provincial Natal statute, namely the Arbitration Act of 1898. A comparison of the wording of s 19*bis* of the Act with the corresponding provisions of the earlier (Natal) Arbitration Act of 1898[1], and the (Transvaal) Arbitration

[1] Part III of the (Natal) Arbitration Act, 24 of 1898 provided:

Ordinance of 1904[2] reveals that s 19*bis* is almost verbatim a re-promulgation of the Natal and Transvaal statutory provisions, save for s 25 of the (Natal) Arbitration Act of 1898 which provided that:

" *21. Subject to the Rules of Court and any right to have particular cases tried by a jury, the Court may refer any questions arising in any cause or matter (other than criminal proceeding by the Crown) for enquiry or report to any official or special referee or officer of the Court.*

22. The report of any official or special referee or officer of the Court may be adopted wholly or partially by the Court, and with or without such amendments as to the Court may seem meet, and when so adopted, may be enforced as a judgment to the same effect; or the Court may remit the report for further consideration, or make such other order thereon as may be just.

23. In any cause or matter (other than a criminal proceeding by the Crown):

(a) If all the parties interested who are not under disability consent; or
(b) If the cause or matters requires any prolonged examination of documents or any scientific, technical, or local investigation which cannot, in the opinion of the Court, conveniently be made before a jury, or conducted by the Court through its ordinary officers;
(c) If the question in dispute consists wholly or in part of matters of account (A);

the Court may at any time order the whole cause or matter, or any question or issue of fact arising therein, to be tried before a special referee or arbitrator agreed on by the parties or, failing agreement, appointed by the Court, or before any official referee or officer of the Court appointed by the Court.

24. In all cases of reference to an officer of the Court or to an official or special referee or arbitrator under an order of the Court in any cause or matter, the official or special referee shall be deemed to be an officer of the Court, and they, or any such officer of the Court, shall have such authority, and shall conduct the reference in such manner as may be prescribed by any special order, or by Rules of Court.

25. The report or award of any officer of the Court, official or special referee, or arbitrator, on any such reference shall, unless set aside by the Court, be equivalent to the verdict of a jury.

26. The remuneration to be paid to any officer of the Court, official or special referee, or arbitrator, to whom any matter is referred under order of the Court, shall be determined by order of the Court or by Rules of the Court.

27. The report or award of any officer of the Court or official or special referee or arbitrator may, upon motion by any party, after due notice to the other parties, be made a judgment of the Court.

28. The Court shall, as to the references under order of the Court, have all the powers which are by this Act conferred on the Court as to references by consent out of Court (B)."

[2] The (Transvaal) Arbitration Ordinance of 1904 provided:

***19**(1) Subject to the Rules of Court the Court or Judge may refer any question arising in any cause or matter (other than a criminal proceeding) for enquiry or report to any official or special referee or officer of the Court.*

(2) The report of an official or special referee or officer of the Court may be adopted wholly or partially by the Court or a Judge and with or without such amendments as may to the Court or Judge seem meet and if so adopted may be enforced by a judgment or order to the same effect or the Court or a Judge mat remit the report for further consideration or make such other order thereon as may be just.

***20.** In any cause or matter (other than a criminal proceeding);*

(a) If all the parties interested who are not under disability consent; or

"the report or award of any officer of the court, official or special referee, or arbitrator, on any such references shall unless set aside by the Court, be equivalent to the verdict of the jury."

[10] In 1959 the Supreme Court Act, and the rules promulgated thereunder, consolidated the procedure across the several high courts operating in the various provinces of the then Union of South Africa. In 1965 the Arbitration Act, 42 of 1965 ("the Arbitration Act") was promulgated, consolidating the laws relating to arbitrations across the provinces. At the same time, the provincial arbitration statutes operating in the four provinces were repealed. These arbitration statutes had provided specifically for the provincial or local divisions of the high court to appoint a referee to investigate certain matters. A similar provision was not included in the Arbitration Act. However, a year earlier in 1964, by virtue of s 40 of the General Law Amendment Act, 80 of 1964, an analogous provision had been inserted as s 19*bis* in the Act[3].

(b) If the cause or matter requires any prolonged examination of documents or any scientific, technical or local investigation which cannot in the opinion of a Court or Judge conveniently be conducted by the Court though its ordinary officers; or

(c) If the question in dispute consists wholly or in part of matters of account; the Court or Judge may at any time order the whole cause or matter or any question or issue of fact arising therein to be tried before an official or special referee or arbitrator agreed on by the parties or failing agreement before any official referee or officer of the Court appointed by the Court.

***21.**(1) In all cases of reference to an officer of the Court or to an official or special referee or arbitrator under an order of Court or Judge in any cause or matter the official or special referee or arbitrator shall be deemed to be an of the Court and shall have such authority and shall conduct the reference in such manner as may be prescribed by Rules of Court and subject thereto as the Court or a judge may direct.*

(2) The report or award of any official or special referee or arbitrator or officer of the Court on any such reference shall unless set aside by the Court or a Judge be equivalent to a finding of fact by the Court.

(3) The remuneration to be paid to any official or special referee or arbitrator or officer of the Court to whom any matter is referred by order of the Court to whom any matter is referred by order of the Court or a Judge shall be determined by the Court or a Judge or by the Rules of Court.

***22.** The report or award of any officer of the Court or official or special referee or arbitrator may upon motion by any party after due notice to the other parties be made a judgment or order of the Court.*

***23.** The Court or a Judge shall as to references under order of the Court or a Judge have all the powers which are by this Ordinance conferred on the Court or a Judge as to references by consent out of Court."*

[3] Section 19*bis* also covers to some extent the same ground as the English RSC Ord 36 (See the Supreme Court Practice 1993 I 620-630). The English rule is, however, wider in scope. Whilst under s19*bis*(1) the court may refer a matter for enquiry and report to a referee with the consent of the parties, the English rule confers the right upon the plaintiff on his own initiative

[11] The (Natal) Arbitration Act of 1898 provided that the report of a referee shall be equivalent to the verdict of a jury (i.e. a finding of fact) unless set aside by the court. In considering the meaning of the report being the equivalent to the verdict of a jury, the Full Bench in *Estate Young* (at 253) referred with approval to Union *Government v Wilkinson and Caroll* 1916 AD 123 where Innes CJ observed (at 127):

"The principles which should guide the Court in dealing with the verdict of a jury in a civil case are well recognised. It cannot re-try the suit. The decision upon all matters of fact – and the existence of the negligence in such matter – is for the jury. And their conclusion cannot be set aside merely because the Court may not upon a perusal of the record agree with it, but only if it is such as reasonable men could not properly have arrived at... And we should only be so justified if the conclusions arrived at were wholly unreasonable."

[12] The Court in *Estate Young* (at 253) also referred to the earlier decision, of *Chaffer and Tassie v Richards* 1905 NLR 207, where Bale CJ accepted the findings of the referee, who was an architect and engineer, *in toto*. Bale CJ "was very emphatic as to the limited extent to which the Court will give effect to the criticisms of the findings of a referee on matters of fact sent to him for determination". Bale CJ stated thus (at 216-217):

"Now I take it that when the Court refers questions of fact to an arbitrator, [acting as a referee], *it would be extremely slow to interfere with his finding; it would be even more slow to interfere with the findings of an expert arbitrator* [acting as a referee] *on questions of fact than it would be to interfere with the decisions of a Magistrate upon questions of fact, or with the decisions of a jury on questions of fact. We know that in England and here the Courts are slow to interfere with the findings*

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to commence proceedings in the Chancery and Queen's Bench Divisions as 'official referees' business' without the need for an order of the court. In addition, the court in the Chancery and Queen's Bench Divisions has the power to transfer proceedings to be dealt with as 'official referees' business either on the application of the party or on its own motion. In England a matter may be referred to an official referee for enquiry and report or the whole matter may be transferred to him. In the latter case, the court of the Official Referee has the same jurisdiction, powers and duties as a judge (RSC Ord 36 r4 (*Erasmus, Superior Court Practice*, at A1-38C).

of a jury upon questions of fact, if the Courts are satisfied upon the evidence that the conclusions arrived at are not unreasonable.
We have held over and over again that we would not interfere with the decisions of Magistrates on questions of fact unless satisfied that they had been influenced by improper motives or unless the findings are egregiously wrong."

[13] The Court in *Estate Young* added (at 254):

"In my own judgment I said that if it had been possible to show that there was no evidence to support the findings of the arbitrator [acting as referee], *or that the evidence was such as to make those findings perverse or absurd, this Court would have been warranted in overturning them.*

...

I think therefore that the question for us to determine is not whether we should have come to the same conclusions on the evidence as the Master, but whether his [the referee's] *conclusions are such as a reasonable man could not properly have arrived at."*

[14] Mr Bester, on behalf of the applicant, also referred the Court to the matters of *Perdikis v Jamieson* 2002(6) SA 356 (W) at 363 B-C and *Bekker v RSA Factors* 1983 (4) SA 569 (T) at 573 E-F, both of which dealt with the question of whether an expert valuator's report (as opposed to an arbitrator's decision), which is patently incorrect or manifestly unjust may be rectified on equitable grounds. The Court in *Perdikis* (at para 7 and 8) citing *Bekker* (at 573 E-F) found that a valuation can be rectified:

"...on equitable grounds where the valuer does not exercise the judgment of a reasonable man that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result."

[15] It is significant, in this regard, that an arbitrator, as contemplated in the Arbitration Act, fulfils a quasi-judicial function whereas a valuator is required only to make a factual finding. Similarly a referee, appointed in terms s19*bis* of the Act, is required only to make a factual finding. A referee, unlike an arbitrator, does not exercise a judicial or quasi-judicial function. Accordingly,

the grounds upon which the award of an arbitrator and the report of a referee may be challenged differ significantly. In this regard, a report of a referee as contemplated in s19*bis* may be set aside if his or her judgment is exercised unreasonably, irregularly or wrongly, whilst the award of an arbitrator, appointed in terms of the Abitration Act, may only be set aside on the limited basis as provided for in s 33 of the Arbitration Act, which include that an arbitrator has misconducted himself in relation to his duties as an arbitrator; or has committed a gross irregularity in the conduct of the proceedings; or has exceeded his powers; or that the award was improperly attained.

[16] The test applied for rectification of an expert valuator's report, which is akin to that of a referee's report accords with the test applied in *Estate Young* and *Chaffer*, albeit that the jury system has been discontinued in South Africa. A referee's report, as contemplated in s19*bis* the Act, is a finding of an expert appointed by the Court to investigate and provide a report of his or her findings to the Court on questions of fact. A court should, therefore, be "extremely slow" to interfere with these findings unless it can be shown that the findings are so unreasonable, irregular or wrong, so as to lead to a patently inequitable result.

[17] The applicant contends that a court will be bound by the findings of the referee, unless it can be shown that the report should be set aside on the grounds that it is patently unreasonable, irregular or incorrect. He furthermore contends that that even if a real dispute of fact is found to exist in relation to the findings of the referee, the question as to whether the report should be adopted in whole or in part, by the court, cannot be referred to oral evidence or trial. I disagree.

[18] The court is afforded a wide discretion in terms of s 19*bis* of the Act. It may adopt any one of the courses provided for in the section. It may adopt the report of the referee either wholly or in part, and either with or without modifications, or it may remit the report for further inquiry or report or consideration by the referee, or make such other order, in regard to the report, as may be necessary or desirable. The power of the court in the latter

instance would, in my view, include the power to set aside the report if it is patently unreasonable, irregular or incorrect, or refer the report or aspects thereof to oral evidence or trial, if a real dispute of fact, as envisaged in *Room Hire Co (Pty)(Ltd) v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163, can be shown to exist. The court may, therefore, adopt any one of the said courses it deems 'necessary or desirable'. The court may, however, only refer the question of whether to adopt the report or not to oral evidence or trial, if a real dispute of fact is shown to exist in relation to findings of the referee.

[19] As observed by the Court in *Gasa v Singh No* 2009 JDR 0649 (KZD) at para 14-15, the purpose of referring a matter to a referee in terms of s 19*(bis)*:

"...[I]s that either where there are highly technical aspects where the assistance of a neutral expert is required or where the bulk of the documentation is such that a referee can streamline the process, the report of the referee would not only assist the court but help to limit the length of the proceedings by highlighting (through its analysis of the documents or the factual situation relating to the accounts) exactly which aspects or incidents or transactions are in dispute between the parties. The report of the referee does not bind the court but assists it by in essence summarising the results of the referee's investigations.

...In the present matter for instance the referee would be able in her report (as already foreshadowed in the opinion of senior counsel) to pinpoint the incidents or transactions on which she relies for coming to the conclusion that the Trust was or was not the alter ego of the applicant. It is then a straightforward matter for the parties to ascertain which specific areas of the report or which incidents or transactions are in dispute and for a hearing to proceed on those aspects only. Without the report of the referee a great deal of unnecessary evidence may be led as well as extensive discovery having to be made with the consequent exchange of documents before the issues in dispute become clear. The normal Rule 37 procedures in this context are rather cumbersome and would not be of the same assistance in resolving issues and delineating the areas of dispute in relation to the significance or otherwise of particular transactions. Similarly pleadings containing as they do only the factual framework and legal conclusions relied upon are also not of

great assistance. The report of the referee however, if properly compiled, will focus on those transactions that are pertinent."

The Referee's Report

[20] I turn now to the referee's report. The referee sets out the methodology followed in compiling his report at pages 1 and 2 of the report as follows:

'A preliminary meeting attended by the attorneys for the applicant and defence as well as their expert witnesses was held on 19 October 2011. It was agreed that the expert witnesses for each party would complete and submit to the Referee their findings and supporting documents…

My findings are based on these files, documents and reports thereon prepared by expert witnesses.

MA – expert witness acting for WRW has prepared adjusted financial statements for the Partnership. These adjustments appear to be based on where inadequate documentation has been provided for expenditure claimed against the partnership business, where expenditure of a personal nature or not related to the Partnership business has been included in the expenses of the Partnership, and any other expenses which are not adequately explained and accepted as expenses against the Partnership income.

JT – expert witness acting for APW, has prepared adjusted financial statements from documentation and presumably explanations given by APW, their accountants and AAW, the wife of APW who it appears dealt with the administration and bookkeeping function of the Partnership.

Each year, or period of a year where this is applicable, is dealt with separately and an adjustment account prepared for each year or period. The basis will be the adjusted statements as prepared by MA and this compared against the statement and documents denying these desired adjustments by JT.

Where amounts are not disputed, or are immaterial, these have been accepted as correct. A review of the general ledger transactions and supporting documentation has also been done. The nature of a review does not constitute an audit. The findings

below are based on the schedules and documentation provided by MA and JT. There are certain instances where I have included amounts not included in the schedule of adjustments by MA or JT. The reasons for this is the evidence of the accounting records as supplied by JT and MA.

Based on my review of the documentation provided, my view is that only a forensic audit may, and this should be emphasised, that it only may possibly provide an accurate assessment of the results. For accounting records to be an accurate reflection of the business activity, these records should reflect the entry by entry events as it occurs in the business. The nature and amount of 'Year end' entries processed, the number of cash cheques directly allocated to cost of sales with no supporting documents and other evidence, indicates a substantial amount of activity that was not recorded as it occurred in the business. An audit conducted in terms of 'International Standards on Auditing' would in any event result in a qualified opinion.

[21] The referee sets out his findings in respect of the financial years 2001 to 2006. He concludes that the first respondent is indebted to the applicant in the amount of R1 085 000 as at 30 April 2006. He provides the following explanation for arriving at this conclusion:

"From my review of the submissions made by MA, JT and the accounting records as supplied by them, WR Wright has been prejudiced by amounts included in the accounting records which have not been recorded in those records in a manner that is appropriate for a Partnership business and the inferred Partnership business of the CC on a 50% each basis.

In addition, there are numerous direct transfers to the bank account of APW, as well as a large number of cash cheques not supported by appropriate documentation. APW and it appears his wife, AAW had direct control of all bank transactions.

An extract from Section 56(1) of the Close Corporation Act 69 of 1984 is as follows:-

> *(d) records containing entries from day to day of all cash received and paid out, in sufficient detail to enable the nature of the transactions and, except in the case of cash sales, the names of the parties to the transactions to be identified.*

(e) Records of all goods purchased and sold on credit, and services received and rendered on credit, in sufficient detail to enable the nature of those goods or services and the parties to the transactions to be identified.

The above has not been adhered to while the Partnership was operating as a CC. Given the number of cash cheques and electronic fund transfers ostensibly charged to purchases with the deemed VAT input claims made thereon, the proposed settlement amount is justifiable. The quantity and amount of cash cheques started increasing from the 2002 financial year, and showed an increase in each subsequent year. My view is that this was done in order to dilute the income stream of the Partnership business.

My finding is an amount R1 085 000-00 (one million and eighty five thousand rand) for the Applicant, Mr WR Wright. This is the capital amount before any 'more' interest."

[22] The applicant submits that there is no reason for the Court to either reject or modify any part of the referee's report, and that the factual findings of the referee, in relation to the first respondent's liability on the debatement of the account, should be adopted. As indicated, the respondent opposes the application for the report to be adopted by way of a counter-application in which a range of alternative relief is sought, including that the question of whether the referee's report should be adopted in whole or in part be referred to trial.

[23] Having regard to the approach adopted by the Courts to applications of this nature, I am of the view that in order for the first respondent to succeed in opposing the adoption of the referee's report, it is required to show that the referee's report is so unreasonable, irregular or wrong as to lead to a patently inequitable result, alternatively that a real dispute of fact exists in relation to the findings made by the referee in his report, such as to justify a referral to oral evidence or trial.

[24] The first respondent seeks by way of a counter-application to have the matter referred to trial in order for a decision to be made as to whether the

report should be rejected in whole or in part. He seeks in the alternative for the matter to be referred to oral evidence on the following issues which relate to the financial years of assessment between 2000 and 2006 regarding:

(i) Whether or not the sales and cost of sales as rejected by the referee in his report were business related expenses?
(ii) Whether or not the telephone and office expenditure as rejected by the referee in his report were business related expenses?
(iii) Whether or not the petty cash expenditure as rejected by the referee in his report was a business related expense?
(iv) Whether or not the salaries as rejected by the referee in his report were business related expenses?
(v) Whether or not the valuation taken into account by Burt Reynolds & Company at net asset value of the business was a fair and reasonable method?
(vi) Whether the gross profit percentages used by the referee were fair and reasonable?
(vii) Whether the capital account adjustments as incorporated in the referee's report are correct?

Further alternatively, the first respondent seeks an order remitting the report to the referee for further enquiry or report or consideration in relation to the specific questions set out above. The seven issues raised in the counterclaim for reconsideration or referral to oral evidence can be categorised into three groups:

(i) complaints that expenditure has not been taken into account as business related expenses (cost of sales, petty cash, telephone and salaries);
(ii) complaints that the evaluation of net assets and the gross profit margins were not fair and reasonable; and
(iii) complaints that the adjustments on the capital account are not correct.

[25] The first respondent alleges in his answering affidavit (which serves as both the answer to the main application, and the affidavit in support of the counter-application) that after consultation with his appointed chartered accountant, Mr Jacques Theron ("Mr Theron"), it was brought to his attention that the referee's report "is in fact incorrect and should be discarded". The first respondent then relies on the affidavit of Mr Theron for the grounds raised in his counter-application.

[26] Mr Theron, having practised as chartered accountant for a period of eight years, deposes to the affidavit in his capacity as an expert, despite having failed to with the requisites of Rule 39 of the Uniform Rules of Court. He alleges that he was called upon by the first respondent to look at all the financial information of the second respondent between the period 1 March 2000 to April 2006. Effectively, the purpose of his appointment was to ascertain what the net profit yielded for each financial year of the second respondent was. Thereafter a summation of the net profit for each year had to be made in order to determine the net profit for the entire period.

[27] Mr Theron states that pursuant to his mandate being completed, the information derived from his investigation was submitted to the referee. After a few months, the referee delivered a draft report to him for consideration and feedback. The draft report contained a number of discrepancies, which he brought to the attention of the referee. The referee submitted his final report to him in March 2012. After considering the report he found that the discrepancies and accuracies remained, despite having brought them to the attention of the referee.

[28] Mr Theron attaches to his affidavit "his response" to each calculation made by the referee in his report. An analysis of Mr Theron's response, under cover of a letter containing short comment, reveals that it consists of a list of cross-referenced statements in respect of whether Mr Theron agrees or disagrees with a particular entry in the referee's report. The upshot of this letter is that the referee's report is purportedly incorrect in relation to the issues raised in the letter such as sales and cost of sales, petty cash,

telephone and office equipment, salaries and the valuation of the business. However, no substantiation is provided thus making it impossible for the Court to determine the basis upon which the report is challenged to be patently incorrect or wrong or, for that matter, whether a real dispute of fact is shown to exist or not in relation to the findings of the referee on these issues.

[29] In respect of the complaint relating to the exclusion of certain alleged expenses, Mr Theron states that the referee's explanation for the rejection that the expenses were not proven, is false since "every request that was made ...was complied with". Quite apart from the fact that there is once again a complete lack of detail, the statement is legally and logically unsustainable as was pointed out by the applicant in reply: *"It is not axiomatic that whatever documents the first respondent produces constitutes proof of the alleged expense".*

[30] Mr Theron alleges that the rejected telephone expenses were "in fact" made for business purposes. Once again no detail is provided for this factual conclusion. The applicant as well as his accountant, Mr O'Hara, point out in reply that Mr Theron does not have personal knowledge of this statement as the accounts were in the name of the first respondent. This notwithstanding, no replying affidavit in the counter-application was delivered, by the first respondent, in reply to the applicant's contentions.

[31] Mr Theron contends that the excluded alleged petty cash expenditure was in fact incurred as he produced purchases and slips that were submitted to the referee. Again, not a single fact is divulged upon which this statement is based, and again the applicant points out that Mr Theron does not have personal knowledge in relation to what these expenses were incurred for.

[32] As to the contention in respect of salaries, the only reference to it is a statement contained in Mr Theron's letter of response (Annexure "JT1") which reads: "*The excessive salary declared for Mrs A.A. Wright to reduce the tax effect on Mr A.P. Wright was written back*". This statement does not deal at all with any alleged salaries that were incorrectly excluded by the referee in his

report. The same is true for the evaluation of the business. Annexure "JT1" simply contains the statement that Mr Theron *"felt it fair to value at Nett Asset Value as the business was liquidated and clearly not a going concern"*. I am of the view that this is an insufficient basis to contend, that the referee was so wrong as to have led to a patently inequitable result or, that a real dispute of fact exists in relation to the findings of the referee in respect of these issues.

[33] The issue of gross profits, although raised as an issue for referral to oral evidence or reconsideration by the referee is not addressed at all in the affidavits in support of the counter-application. It can thus hardly be contended that a real dispute of fact exists in relation to the findings of the referee in respect of this issue.

[34] In relation to the issue of the cost of sales, Mr Theron contends that the referee should not have rejected certain weight-bridge purchases as business expenses because the nature of the expenses was explained to him in detail. Mr O' Hara, the accountant, who assisted the applicant in presenting evidence to the referee, points out in reply that the amounts disallowed by the referee were not supported by vouchers. The applicant, in turn, points out in reply that the expenses were not rejected because the referee did not understand the nature of the expenses, but rather that the expenses were rejected because the specific expenses could not be substantiated.

[35] Mr Theron contends that the source of funds in the capital account adjustment had been proved because he submitted the capital/loan account entries. The applicant, as well as Mr O'Hara, point out in reply that the accounts are not source documents but merely book entries, of which Mr Theron has no personal knowledge and no basis upon which he can stand in for the veracity thereof. Again, in my opinion, the first respondent has failed to show that a real dispute of fact exists in relation to the findings of the referee in respect of these issues.

[36] Accordingly, I am of the view that there are no real factual disputes, whatsoever, in relation to findings of the referee that warrant a referral to:

(a) trial on the question of whether the referee's report should be rejected or adopted in whole or part; or

(b) oral evidence on the issues raised in the counterclaim.

[37] As to the further alternative prayer that the issues raised in the counterclaim be remitted to the referee for reconsideration, Mr Alli, on behalf of the first respondent, made it quite clear during argument that little will be achieved by doing so, and accordingly abandoned the relief sought by the first respondent in that respect. This underscores my view that the respondent's counter-application serves no purpose other than seeking to avoid the consequences of the findings of the referee. The counter-application accordingly falls to be dismissed.

[38] The first respondent has, likewise, failed to produce any evidence which demonstrates that the referee's report is unreasonable, irregular or wrong, so as to lead to a patently inequitable result. I am thus unable to reject the referee's report either in whole or in part.

[39] In the result, I make the following order:

(1) The counter-application is dismissed.

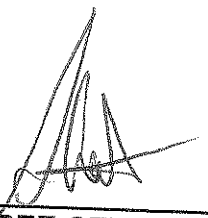
(2) The first respondent is ordered to pay the costs of the counter-application.

(3) The report of the referee, Mr Desmond Snyman, appointed in terms of s 19*bis* of the Supreme Court Act, 59 of 1959 is adopted without modifications.

(4) The first respondent is ordered to pay the applicant an amount of R1 085 000 together with interest thereon at 15.5% per annum calculated from 1 May 2006 to date of payment.

(5) The first respondent is ordered to pay the applicant's costs of the enquiry before the referee, including fees of the applicant's legal representatives, witness fees of witnesses who testified on his behalf in the enquiry, witness fees of experts and qualifying expenses of experts.

(6) The first respondent is ordered to pay the costs of the application.



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JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

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APPLICANT'S ATTORNEYS:	Halse, Haveman & Lloyd
COUNSEL FOR THE RESPONDENTS:	Mr N Alli
RESPONDENTS' ATTORNEYS:	Stan Fanaroff & Associates
DATES OF HEARING:	29 August 2012
DATE OF JUDGMENT:	7 December 2012