HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)

Not reportable

Not of interest to other Judges

CASE NO: 50948/2011

In the matter between:

30/6/2016

ANITA HELENA NEL Applicant

and

ADV. NORMAN DAVIS SC N.O. First Respondent
ANDRIES DE BRUYN Second Respondent

J U D G M E N T

MAKGOKA, J

[1] This is an opposed application. The applicant (Ms Nel) initially sought an order reviewing and setting aside a report made to this Court by the first respondent (the referee), pursuant to s 19*bis* of the Supreme Court Act 59 of 1959, and substituting it with an order in certain terms, to which I shall refer shortly. The referee had been appointed to oversee the debatement of accounts between Ms Nel and the second respondent (Mr de Bruyn), following the dissolution of a partnership between them. In his report, the referee made a finding that Ms Nel is not entitled to the benefit of a starting capital or value of a certain immovable property. She is aggrieved with that finding.

[2] In prayer 2.1 of her notice of motion, Ms Nel had sought an order that she is entitled to the sole proceeds of two immovable properties which belonged to the partnership. In prayer 2.2 she sought, in the alternative, an order that she is entitled to the value of the properties as at 21 April 2006, before the properties' net proceeds are shared on a 50% basis. For the sake of completeness, the notice of motion reads as follows:

'1. That the decision of the first respondent be reviewed and set aside;

2. That (the) court substitutes the order of the first respondent with the following:

2.1 The applicant is entitled to the sole proceeds of the portion 284 (a portion of portion 12) of the Farm The Willows 340, JR, Gauteng, Willow Glen, Pretoria and Plot 474 Glenmore, Kwazulu-Natal;

2.2 In the alternative to 2.1 that the applicant is entitled to the Value of the aforesaid properties as at 21 April 2006 before the properties' net proceeds are shared on a 50% basis;

2.3 The applicant and the second respondent share the net proceeds of the properties on a 50% basis;

2.4 Any donation tax payable by the applicant are costs of the property;

2.5 The second respondent must pay the transfer duty, if any, in the respect of acquiring an interest in the properties;

3. In the alternative to prayer 2, cancellation of the settlement agreement is confirmed;

4. That the applicant be granted leave to withdraw her notice of withdrawal under case number 3483/13.'

[3] In his revised written submissions, Mr *Davies*, counsel for Ms Nel, abandoned the relief sought in prayers 2.1, 2.3, 2.4, 2.5, 3 and 4. Counsel narrowed the relief to the alternative prayer in prayer 2.2 of the notice of motion, as set out above, in terms of which Ms Nel asserts that she is entitled to the value of the two properties as at 21 April 2006, before the properties' net proceeds are shared on a 50% basis. The relief sought by Ms Nel is opposed by Mr de Bruyn who also has launched a counter-

application for the adoption of the referee's report in its totality, without any modifications. The referee is not taking part in the present application, and abides the decision of this Court.

[4] Ms Nel and Mr de Bruyn are former business partners. In terms of an agreement reached during the debatement of the accounts, the partnership between the parties endured for the period 1 January 2005 to 11 February 2013. The parties held membership and business interests in a number of entities, including Woodlyn Steel & Pipes CC, ADB Builders Yard CC, and Plant Hire Ltd, L&H Beleggings CC and Platinum Mile Investment 405 (Pty) Ltd. They entered into a written partnership agreement on 21 April 2006, in terms of which it was recorded and agreed that each held a 50% interest in four immovable properties. Only two of those properties are relevant for the present purposes: the Glenmore property in Kwazulu-Natal and the Willows property in Gauteng, Pretoria. The properties were registered in the name of Ms Nel. In terms of the agreement, she undertook not to deal with any of the properties without the written consent of Mr de Bruyn. The genesis of the dispute between the parties is clause 4 of the partnership agreement. It reads as follows:

'Die Eerste Party (Mr de Bruyn) en Tweede party (Ms Nel) onderneem om by die verkoop van die eiendomme 'n verrekeningstaat op te stel of te laast opstel vir die doel om die belang van elke party in die netto opbrings te betaal.'

[5] The business relationship between the parties broke down, resulting in litigation between the parties in this Court. Mr de Bruyn instituted action against Ms Nel in 2011 under case number 50948/2011, while the latter instituted action against Mr de Bruyn in 2013 under case number 3483/2013. Mr de Bruyn's case was settled on 8 February 2013, on the following terms:

1. That all disputes, claims and outstanding litigation between them were settled including (the) applicant's action under Case No. 3483/13;
2. They acknowledged that they had a partnership in the properties;
3. Each party held a 50% interest in the partnership and hence a 50% interest in both of the properties;
4. That the partnership is dissolved;

5. That there be a rendering and debating of accounts to determine each party's financial interest in respect of its 50% interest;
6. That the debating of the accounts should be referred to a senior counsel as a referee, whose finding shall be final and binding without any recourse to any appeal;
7. All outstanding litigation or enquiries would be withdrawn;
8. That the agreement may be made an order of court.

[6] On 11 February 2011 the settlement agreement of the parties referred to above, was made an order of this Court. The partnership was dissolved and the parties had to render accounts and debate them before the referee, who was appointed in terms of s 19*bis*[1] to referee the debatement of accounts by the parties arising from the dissolution of their partnership. The relevant parts of s 19*bis* read as follows:

'1. In any civil proceedings any court of a provincial or local division may, with the consent of the parties, refer-
(a) ...
(b) Any matter which relates wholly 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 if it were a finding by the court in a 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] The referee had to determine the net value or interests of the Glenmore and Willows properties for the determination of the parties' respective interests in the two properties at the dissolution of the partnership. The parties agreed that the minimum value of the Willows property was R6,2 million. As to the value of that property at the commencement of the partnership, Ms Nel contended that its value was R5,4 million,

[1] The section has since been replaced by s 38 of the Superior Courts Act 10 of 2013.

which she said, constituted her contribution to the partnership with a 'starting value' in that amount. It was submitted on her behalf that the contribution of the Willows property should be retained as a 'starting capital' contribution before any division of partnership interest or assets taking place. In other words, the submission to the referee was that the value of the Willows property would be deemed to be a starting value, and that at the dissolution of the partnership, such value should be deducted prior to the determination of the 'net proceeds'.

[8] In his report to the Court, the referee found that there was no indication of an intention of the parties that the Willows property was to be retained by Ms Nel and merely placed at the partnership's disposal for use. The referee noted that both the Glenmore and Willows properties had been treated on the same footing, both in terms of how they were contributed to the partnership, and how they were treated during the existence of the partnership. He therefore found no basis to conclude that the Willows property was to be treated differently from the Glenmore property at the date of dissolution of the partnership. Furthermore, said the referee, there was no retention claimed by Ms Nel on the starting value of the Willows property at any given stage.

[9] The other consideration which the referee took into account was that the partnership agreement was concluded subsequent to the agreed starting date of the partnership, and no mention was made in the agreement of 'starting values' being accorded to Ms Nel. On the contrary, noted the referee, Ms Nel conceded in the agreement that the plaintiff had 50% interest in the immovable properties. The 'net proceeds' referred to in the agreement, according to the referee, referred to the value after satisfaction of the bonds registered against the property, which were in existence at the time and of which both parties were aware. Also, according to the referee, the 'net proceeds', in the context of the agreement, referred to the proceeds derived from the sale of the property, and not a recalculation of partnership interests by way of liquidation.

[10] The referee also referred to the applicable law with regard to how the contributions by partners at the dissolution of the partnership should be dealt with.

He noted the contention on behalf of Mr de Bruyn that at common law, each partner must contribute to the partnership, which contribution need not be in the form of assets. He further noted, with reference to the relevant case law, that a distinction should be made between circumstances where a property formed part of partnership assets or has merely been made available for use by the partnership. The referee further considered the contention on behalf of Mr de Bruyn that because his contribution was not monetary, it would be impossible for him to determine the exact amount of each party's contribution made during the existence of the partnership. Again, he made reference to the applicable case law such as *Fink v Fink* 1945 WLD 226 (*Fink*); *Isaacs v Isaacs* 1949 (1) SA 952 (C) (*Isaacs*); *Herman v Faclier* 1949 (4) SA 377 (C); *V (also known as L) v De Wet NO* 1953 (1) SA 612 (O).

[11] The referee made the following findings in respect of Ms Nel's claim to the 'starting value' in respect of the Willows property:

'[D]efendant had not during the existence of the partnership deemed a significant contribution to have been made by the property "from her own pocket." Had this been so, one would have expected her to have raised the issue of either R5,4 million or at the very least the R1,25 million at the time of the agreement of 21 April 2006 or at any subsequent stage, the latest of such stage of course then being the settlement agreement dated 11 February 2013. This was not done.'

[12] Ms Nel joins issue with these findings, and seeks to persuade this Court not to adopt the portion of the referee's report in respect of the Willows property, on the basis that the referee should have found that that she was entitled to be awarded the supposed starting capital contribution, before the sharing of the partnership profits on a 50% basis. On her behalf, Mr. *Davies* attacked the report of the referee primarily on the ground that the referee committed an error of law in interpreting the partnership agreement. It was contended that the referee failed to apply the trite principle that in the liquidation of a partnership, a partner is entitled to the return of his or her capital investment before the division of the partnership profits are shared in the applicable ratio.

[13] Counsel contended that on the basis of common law, and the intention of parties as to be inferred from the partnership agreement, Ms Nel ought to have been awarded the starting capital value, or the initial capital contribution, before there was distribution of the partnership net proceeds. Counsel relied on *Robson v Theron* 1978 (1) SA 841 (A) for the above contention. The essence of counsel's argument can therefore be summed up as follows. The referee erred in law in not explicitly addressing the question of start-up capital in the context of a partnership agreement, and in overlooking the common law position that the contribution of the Willows property should be compensated as Ms Nel's capital contribution. Counsel was at pains to point out that there is nothing in the partnership agreement which gainsays Ms Nel's expectation, which is a natural consequence of the partnership agreement.

[14] To consider the contention in a proper legal context, it is prudent to refer briefly to the nature of a partnership. Over 100 years ago, this court, accepting Pothier's[2] formulation of the essentialia of a partnership, said the following in *Joubert v Tarry* 1915 TPD 277 at 280-1:

'First that each of the partners bring something into the partnership, or binds himself to bring something into it whether it be money, or his labour of skill. The second essential is that the business should be carried on for the joint benefit of both parties. The third is that the object should be to make profit. Finally the contract between the parties should be a legitimate contract ... where all these four essentials are present, in the absence of something showing that the contract between the parties is not an agreement of partnership; the Court must come to the conclusion that it is a partnership.

[15] In *Pezzutto v Dreyer* 1992 (3) SA 379 (A) at 390 it was confirmed that where the above four requirements are found to be present, a court would find that a partnership has been established, unless such a conclusion is negativated by a contrary intention disclosed on a correct construction of the agreement between the parties. It was also there held that the contribution by each partner need not be of the same character, quantity or a value. Each partner must contribute something 'appreciable' i.e something of commercial value, although such contribution need not be capable of exact pecuniary assessment, as for example where a partner

[2] Pothier: *A Treatise on the Contract of Partnership* (Tudor's translation)

contributes his labour or skill. See also *Bester v Van Niekerk* 1960 (2) SA 779 (A) at 783H – 784A; *Purdon v Muller* 1961 (2) SA 211 (A) at 218 B-D; *Standard General Insurance Co v Hennop* 1954 (4) SA 560 (A) 565A; *The Commissioner of Taxes* 1958 (1) PH T4 (SR); *Loots v Niewenhuizen en 'n ander* 1997 (1) SA 351 (T) at 367H-J.

[16] The other important principle in respect of partnerships is this. Where it is impossible to say that one partner contributed more than the other, the partners are entitled to share equally in the profits and in the assets of the business which have been acquired by the use of partnership funds. See *Fink* at 242. In *Isaacs* the following was said at 961:

'It is clear law that on dissolution each party gets a proportionate share of the assets according to his or her contribution, and it is only when their respective contributions were equal or it is impossible to say that one has contributed more than the other than they share equally.'

[17] It seems to me that there is no dispute as to whether the parties are entitled to share the partnership assets equally at the dissolution of the partnership. The issue is what constitutes the value to be shared. According to Ms Nel, the sharing should occur after she had been allocated what she says is the 'starting value' of the property. The referee made this point in in his report:

'During the debate it appears that the defendant (Ms Nel) was in agreement that it was impossible or impractical to attempt to make a specific determination as to the value of each party's contributions during the existence of the partnership and that the division should simply be a 50/50 division of the assets (subject of course to the defendant's contention regarding the starting value of the property...'

[18] Essentially, the contention on behalf of Ms Nel is that factors such as skill, labour and knowledge as contributions are irrelevant, and only a financial contribution which can be proved, should be taken into account. I do not agree. That conceptualization is at odds with the authorities on our law of partnership, as explained above.

[19] It is common cause that Mr de Bruyn contributed time, knowledge, skill and labour to develop and improve the properties. This was considered by the referee, and he concluded that since Mr de Bruyn's contribution could not be quantified in monetary terms, it was impossible for him to determine the respective partners' contributions. I find nothing wrong with the reasoning adopted by the referee. By nature of the latter contribution, it is not possible to determine the monetary value of the partners' contribution, and in particular, that of Mr de Bruyn. In fact, during the debatement of the account the parties acknowledged this fact.

[20] I turn now to briefly consider whether in all circumstances the Court should adopt the referee's report, either in whole or with any modification. In *Wright v Wright* 2015 (1) SA 262 (SCA) the Supreme Court of Appeal authoritatively set out how a challenge to a referee's factual findings in his or her report is to be approached. At para 8, the Court endorsed the High Court's finding 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. At para 10, the Court explained the position of a referee under s 19bis as follows:

'The position of a referee under s 19*bis* is ...similar to that of an expert valuator who only makes factual findings but dissimilar to that of an arbitrator who fulfils a quasi-judicial function within the parameters of the Arbitration Act 42 of 1965. In this regard the dictum of Boruchowitz J in *Perdikis v Jamieson* is apposite:

"It was held in *Bekker v RSA Factors* 1983 (4) SA 568 (T) 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."

This is also the position in respect of the referee's report – it can only be impugned on these narrow grounds.'

[21] In the present case, it was contended on behalf of Ms Nel that for the referee to reach the conclusion he did, he had to interpret the partnership agreement, and such exercise involved a matter of law, and not of fact. Thus, argued counsel, the attack falls within the narrow grounds set out in *Wright* as being 'wrong', on which basis this Court should not adopt the portion of the report with which Ms Nel is

aggrieved. I accept, without deciding, that the referee had to consider a point of law as argued by Mr *Davies*. I do not find anything 'wrong' with how the referee considered the matter. I have, earlier in the judgment, referred to instances where the referee considered the relevant case law, which, in my view, he correctly applied to the facts of the case.

[22] To my mind, Ms Nel's insurmountable difficulty has always been the common cause fact that Mr de Bruyn contributed labour and skill to improve and develop the property. Even if it is accepted that that the referee was wrong in rejecting Ms Nel's claim to the 'starting value', it is immaterial, and nothing turns on that aspect, as the contribution of Mr de Bruyn, which is common cause, cannot not be determined in monetary terms. That is where authorities like *Fink* and *Isaacs* become relevant. The result would still be that because it is impossible to determine both partners' contributions, the partners have to share the partnership assets and profits equally.

[23] I accept that the referee was probably wrong in his reasoning that because the 'starting value' in respect of the Willows property has never been claimed by Ms Nel in any of the agreements concluded between the parties, it could therefore not be claimed in any subsequent dissolution of the partnership. It is correct, as argued by Mr *Davies*, with reference to *Robson v Theron*, that failure to deal with a particular partnership asset or liability by way of contract by no means excludes the operation of the *actio pro socio* and the proper liquidation of the partnership assets and dividends. However, that case is distinguishable from the present one because the principle in that case would be applicable where the contributions of all partners can be determined, whereas in the present case that is not possible. It follows that the application should be dismissed, and the counter-application should be granted.

[24] With regard to costs, counsel for Mr de Bruyn, Mr *Vermeulen*, urged me to order costs against Ms Nel on a punitive scale of attorney and client. This aspect was canvassed in the answering affidavit, and in the written submissions on behalf of Mr de Bruyn. It was argued that the application is *mala fide*. This was premised on the fact that she had accepted that there was a partnership, and that the proceeds had to be shared equally, and that she entered into a settlement agreement and

accepted all processes in terms of that agreement. 'All of a sudden' it was argued, and only after receiving the valuation report in respect of the Willows property, which did not suit her, she launched the present application in order to prolong her obligation to comply with the decisions in the referee's report. Obviously, for the duration of the delay, she would be benefitting from the property.

[25] The ordinary rule is that the successful party is awarded costs as between party and party. See *Valkin v Daggafontein Mines Ltd* 1960 (2) SA 507 (W) at 516; *AA Alloy Foundry (Pty) v Titaco Projects (Pty) Ltd* 2000 (2) SA 639 para 20. A costs order on an attorney and client scale is an extra-ordinary one which should not be easily resorted to, and only when by reason of special considerations, arising either from the circumstances which gave rise to the action or from the conduct of a party, should a court in a particular case deem it just, to ensure that the other party is not out of pocket in respect of the expense caused to it by the litigation. See *Nel v Waterberg Landbouwers Ko-operatiewe Vereneging* 1946 AD 597 AT 607; and *Waar v Louw* 1977 (3) SA 297(O) at 303).

[26] As such, the order should not be granted lightly, as courts look upon such orders with disfavour and are loath to penalize a person who has exercised a right to obtain a judicial decision on any complaint such party may have. See *Van Wyk v Millington* 1948 (1) SA 1205 (C) at 1215; *Moosa v Lalloo* 1957 (4) SA 207 (D); *De Goede v Venter* 1959 (3) SA 959 (O) at 963; *Cape Town Municipality v LF Boshoff Investments (Pty) Ltd* 1969 (2) SA 256 (C) at 272G-H.

[27] In the present case, I agree with the submissions on behalf of Mr de Bruyn. What is more, when one has regard to the prayers in the notice of motion, Ms Nel, without any reasonable basis, sought to extricate herself from all the agreements she had entered into, including the one which was made an order of this Court. In the introduction to this judgment, I referred in full, the orders that she sought. Those prayers were, wisely, in my view, abandoned by her counsel, Mr *Davies*, in the written submissions on her behalf. Mr *Davies* apparently came into the matter late, and to his credit, he forthwith advised Ms Nel to abandon the hopeless prayers sought in the notice of motion.

[28] In addition, the founding affidavit is replete with irrelevant matter, like the Promotion of Administrative Justice Act (PAJA), which is clearly not applicable here. She also placed in issue, the existence of a partnership, despite the fact that she had conceded to that in a written agreement. That, in my view, is a clear manifestation of *mala fides*. I am therefore satisfied that to mark this Court's approval, Ms Nel should be ordered to pay the costs of the application on a scale as between attorney and client.

[29] In the result the following order is made:

1. The application is dismissed with costs, such costs to be paid by the applicant on a scale as between attorney and client;
2. The counter-application is granted with costs;
3. The report of the referee, Norman Davis SC, under case number 50948/2011, is adopted in whole, without any modifications, in terms of sections 19*bis*(1)(c) of the Supreme Court Act 59 of 1959, read, to the extent necessary, with section 38 of the Superior Courts Act 10 of 2013.

Tati Makgoka

T.M. Makgoka
Judge of the High Court

Date of judgment:	30 ~~29~~ June 2016
For the Applicant:	Adv. SW Davies
Instructed by:	Dempster McKinnon Attorneys
	Barnard & Patel Attorneys, Pretoria
For the Second Respondent:	Adv. PJ Vermeulen
Instructed by:	JPA Venter Attorneys, Pretoria

No appearance for the first Respondent