IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

In the matter between:

Case No. 15757/2007

GRANCY PROPERTY LIMITED	First Applicant
MONTAGUE GOLDSMITH AG	Second Applicant

and

SEENA MARENA INVESTMENTS (PTY) LTD	First Respondent
DINES CHANDRA MANILAL GIHWALA	Second Respondent
LANCELOT LENONO MANALA	Third Respondent
HOFMEYR HERBSTEIN & GIHWALA INC	Fourth Respondent
DINES CHANDRA MANILAL GIHWALA NO	Fifth Respondent
SHANTI GIHWALA NO	Sixth Respondent
KANTIELAL JERAM PATEL NO	Seventh Respondent
NARENDRA GIHWALA NO	Eighth Respondent
KIRAN GIHWALA NO	Ninth Respondent

JUDGMENT DELIVERED ON 15 APRIL 2010

BINNS-WARD J:

[1] In an application launched on 5 November 2007 under case no. 15757/07, the applicants claimed various heads of relief, of which only the following need to be mentioned at this stage:

1. A declaration that the first, alternatively the second applicant is entitled to a 31% direct equity shareholding in the first respondent. (I shall hereafter refer to the first respondent, Seena Marena Investments (Pty) Ltd, as 'SMI'.)

2. An order directing the second, third and fifth respondents to render a full and proper account to the second applicant in respect of the first, alternatively the second applicant's investment in Spearhead Property Holdings Limited linked units ('the applicant's Spearhead investment') and to provide a statement of account, duly supported by all relevant vouchers, dealing with at least, but not limited to, how, when, by whom and for what purposes the first, alternatively the second applicant's funds of R4 040 250,00 deposited into the fourth respondent's First National Bank trust account between February and June 2005, were utilised by any of the said respondents or any other party.

3. An order 'that there be a debate of the said accounts and payment by the first, second, third, fifth, sixth seventh eighth and/or ninth respondents to the first, alternatively the second applicant of whatever amounts appear to be due to either of them upon such debatement'.

4. An order directing the third respondent to pay to the first, alternatively second applicant the sums of

1. R2 314 197,72 plus interest thereon from 5 December 2006; and

2. R988 416,66 plus interest thereon from 11 February 2005.

[2] By 1 April 2008, that application, to which I shall hereafter refer as 'the principal proceedings', had generated a record consisting of founding, answering and replying papers running in all to 592 pages, including annexures.

[3] On 9 March 2009, by agreement, the parties sought an order in the principal proceedings, which was granted by the Acting Judge President, and which, insofar as currently relevant, determined the relief described in para.s [1]1,[1]2, [1]3 and [1]4.2, above. The relief sought in the notice of motion, described in para. [1]2, above, was granted in terms of para. 3 of the order.

[4] A debatement of the account to be rendered is still to occur. The issues that might arise in this context are no doubt to some extent adumbrated in the papers in the principal proceedings, but in the ordinary course their actual definition would occur after the applicants have had the opportunity to consider the account rendered in compliance with the order, and to privately debate with the respondents any issues arising out of such consideration.

[5] On a date not apparent on the papers, but which can be fixed as some time before 9 April 2009, a document purporting to be an accounting as directed in terms of para. 3 of the order made on 9 March 2009 was forwarded to the applicants. It read as follows:

> **ACCOUNT BY D C M GIHWALA; L.N. MANALA & D.C.M. GIHWALA N.O. AS REQUIRED IN TERMS OF PARAGRAPH 3 OF THE DEED OF SETTLEMENT UNDER CPD CASE NO. 15757/07**
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> |---|---|---|
> | | 16th February | |
> | A | 2005 | |
> | | Paid Ngatana Properties Investments (Pty) Limited | |
> | | ("Ngatana") | R1,800,000.00 |
> | | 14th April 2005 | |
> | B | Paid Dines Gihwala Family Trust | |
> | | ("DGFT") | R1,000,000.00 |
> | C | 6th June 2005 | |
> | | Paid Ngatana | R1,240,250.00 |
> | | | R4,040,250.00 |
>
> **NOTES**
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> 1 The total amount paid by Montague Goldsmith ("MG")/ Grancy Property Limited ("Grancy") in relation to the Spearhead transaction is R3 040 250.00 and not R4 040 250.00.
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> 2 The relevant cheques are attached hereto.
>
> 3 The cheques drawn in favour of Ngatana are:

3.1 In part L.N. Manala's capital requirement to participate in the Spearhead transaction of which MG / Grancy agreed to fund 50% in terms of a loan agreement;

3.2 In part Grancy's capital requirement to acquire the 630 000 Spearhead units originally intended for Bonitas in the Spearhead transaction through Ngatana;

4 The cheque drawn in favour of DGFT was for MG's investment in the Scharrig Mining matter, which has been fully accounted for separately.

5 Seena Marena Investments (Pty) Limited ("SMI") invested R6 657 673.00 directly into Ngatana being the costs to acquire the 2,030,000 Spearhead linked units.

6 The aforesaid payments do not include the agreed R75 000.00 pre-transaction costs MG is liable for.

[6] Annexed to the aforementioned account were copies of three cheques, each of them drawn on the fourth respondent's trust account. Two of the cheques, dated 16 February 2005 and 6 June 2005, respectively, were drawn in favour of Ngatana Property Investments (Pty) Ltd ('Ngatana') in the amounts of R1 800 000,00 and R1 240 250,00, respectively. The other cheques was drawn in favour of the Dines Gihwala family Trust[1] ('the Trust') in the sum of R1 000 000,00.

[7] The applicants contend that the accounting rendered as aforesaid is inadequate. They allege that the second, third and fifth respondents have failed to comply with the order granted on 9 March 2009. In an interlocutory application brought before me the applicants now seek orders:

1. 'Declaring that the "account" rendered by the second, third and fifth respondents (annexure "GVL1" to the annexed affidavit of Gert Johannes van

[1] The fifth, sixth, seventh, eight and ninth respondents in the principal proceedings have been cited in their capacities as trustees of the Dines Gihwala Family Trust.

der Linde) in purported compliance with paragraph 3 of the order of this Honourable Court made on 9 March 2009 ("the court order") is inadequate and does not constitute compliance with the court order.

2. Directing the second, third and fifth respondents to render a due and proper account in accordance with the provisions of paragraph 3 of the court order, within 14 (fourteen) days of the date of this order.'

(The application is interlocutory because the statement and debatement of accounts aspect of the relief sought in the principal proceedings is still pending. The application is opposed because the second, third and fifth respondents say that the account which has been provided is an adequate account, which complies with the court order.)

[8] It is appropriate at the outset to rehearse briefly the principles applicable to a consideration of this type of application.

[9] In *Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Shelbourne Associates and Others; Century Associates and Others* 1986 (2) SA 623 (T), at 638F-G, Slomowitz AJ (with whom Eloff and Le Roux JJ concurred) noted 'Viewing the matter as one of principle, it seems ... that the right to receive an account is one which is distinct from the right to have it debated and then to obtain payment of any monies found to be owing. Whether an account must in law be delivered is one question. Whether it is correct is another. If an account which is bound in law to be furnished is found to be incorrect, the remedy of debatement arises, not so much from the duty to deliver it in the first instance, but from the failure to ensure its accuracy.' This statement highlights that three questions can arise: (i) the existence of a duty to account; (ii) the adequacy of an account rendered and

(iii) the correctness of an account. The correctness of an account is a question falling to be addressed at the debatement stage. It may nevertheless be convenient in a particular case to address the issues of adequacy and correctness together at debatement stage. The correctness of an account rendered may, however, conceivably not be amenable to a properly directed debate by reason of the inadequacy of the information contained in it. In such cases it will be preferable to require the amplification of an inadequate account before any debatement thereof is entertained.

[10] The general approach to be adopted in dealing with applications of this sort was set out by Holmes JA in *Doyle and Another v Fleet Motors PE (Pty) Ltd* 1971 (3) SA 760 (A). The learned judge of appeal pointed out that, different from the position in England and Wales - where detailed rules of procedure have apparently been formulated, no formally determined procedure exists in South Africa for the conduct of cases entailing claims for the statement and debatement of accounts. Holmes JA indicated (at 762F-763D) that in the absence of local rules of procedure, the following observations might be helpful:

> '1. The plaintiff should aver -
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> (a) his right to receive an account, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;
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> (b) any contractual terms or circumstances having a bearing on the account sought;
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> (c) the defendant's failure to render an account.
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> 2. On proof of the foregoing, ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitude of the account to be rendered would depend on the circumstances of each case. In some cases it might

be appropriate that vouchers or explanations be included. As to books or records, it may well be sufficient, depending on the circumstances, that they be made available for inspection by the plaintiff. The Court may define the nature of the account.

3. The Court might find it convenient to prescribe the time and procedure of the debate, with leave to the parties to approach if for further directions if need be. Ordinarily the parties should first debate the account between themselves. If they are unable to agree upon the outcome, they should, whether by pre-trial conference or otherwise, formulate a list of disputed items and issues. These could be set down for debate in Court. Judgment would be according to the Court's finding on the facts.

4. The Court may, with the consent of both parties, refer the debate to a referee in terms of sec. 19 bis (1)(b) of the Supreme Court Act, 59 of 1959.

5. If it appears from the pleadings that the plaintiff has already received an account which he avers is insufficient, the Court may enquire into and determine the issue of sufficiency, in order to decide whether to order the rendering of a proper account.

6. Where the issue of sufficiency and the element of debate appear to be correlated, the Court might, in an appropriate case, find it convenient to undertake both enquiries at one hearing, and to order payment of the amount due (if any).

7. In general the Court should not be bound to a rigid procedure, but should enjoy such measure of flexibility as practical justice may require.'

[11] Regard to these guidelines has been had in several subsequent cases including, most recently as far as I can determine, in *Brown and Others v Yebba CC t/a Remax Tricolor* 2009 (1) SA 519 (D) at para. [30]. In that matter the court determined that practical justice required that the debatement of the account that had been rendered in purported compliance with an order made earlier in the proceedings and the sufficiency of that account should take place at one hearing. In making its order the court set out directions as

to the hearing, including directions that rule 35, pertaining to discovery of documents, and rule 37, pertaining to pre-trial conferences, should apply. In regard to the pre-trial conference, the parties were directed, amongst other matters, to discuss and properly minute all the accounting items surrounding same and which fell to be debated at the hearing.

[12] The nature and adequacy of the account to be rendered in a particular case necessarily depends on the nature of the mutual relationship giving rise to the duty to account; cf. e.g. *Krige v van Dyk's Executors* 1918 AD 110. Any questions as to the adequacy of an account rendered, and as to whether and how it should be amplified or supplemented; as well as whether any dispute on the adequacy of an account should be determined separately and before the debatement stage, or together with and as part of the debatement stage, are all matters which fall to be determined having regard to the purpose for which the accounting and a debate thereof have been sought.

[13] It is accordingly necessary to consider the factual background, bearing in mind when doing so that the statement and debatement of accounts in this matter is sought because the applicants believe that it will demonstrate that a sum of money is owed to them. In the context of the settlement of some of the relief claimed in the principal proceedings, the factual background is not in material dispute. For the purpose of determining the relevant facts I have had regard to the affidavits in both the principal proceedings and in the interlocutory application.

[14] The respondents' counsel submitted that the adequacy of the accounting provided had to be viewed in the context of the accounting previously furnished to the applicants as detailed in the papers in the application giving rise to the court order made on 9 March 2009, as well as those in this application and also in case no. 10547/08 in respect of the so-called 'Scharrig investment' investment, to which I shall refer further later in this judgment.

[15] The basis for the accounting claimed was the role of Mr Dines Gihwala, who is cited as the second respondent in his personal capacity and as a director of the firm of attorneys joined as the fourth respondent[2] and as the fifth respondent in his representative capacity as a trustee of the Dines Gihwala Family Trust ('the Trust'). In all these capacities Mr Gihwala is joined on the basis that he is alleged to dealt as the applicants' agent, as it were, with the investment of what I shall for convenience refer to as 'the applicants' funds' in so-called 'linked units' in Spearhead Property Holdings Limited. As the fifth respondent, Mr Gihwala's duty to account appears to arise out of the Trust's role as an alleged joint venturer with the first applicant, represented by the second applicant, and with the third respondent in the Spearhead investment.

[16] The third respondent is Mr Lancelot Manala. The duty to account imposed on the third respondent in terms of the 9 March 2009 court order

[2] Mr Gihwala denies in his answering affidavit in the principal proceedings that he acted in the transaction in his capacity as a director of the fourth respondent. In this regard it is notable that the court order made by agreement on 9 March 2009 might reasonably be construed as indicative of an acceptance by the parties of the correctness of Mr Gihwala's denial in this regard, as the order does not impose any duty to account on the fourth respondent.

would appear to have been founded on his participation with the trustees of the Trust and the second applicant in something of the nature of a joint venture, as aforementioned, in respect of the acquisition of the Spearhead units. In terms of the joint venture arrangement, the third respondent's investment was to be funded by two loans to be advanced to him in equal amounts by the applicants and by the Trust, respectively.

[17] Some space is taken up in the papers in respect of the second respondent's contention and that of the managing director of Ngantana, Mr Iain Brodie, about the absence of any duty by SMI or Ngantana to account to the applicants. It unnecessary to deal with these contentions because the obligation to account imposed in terms of paragraph 3 of the applicable court order pertains only to the second, third and fifth respondents. That said, it would be inappropriate, having regard to the second respondent's role in dealing with the applicants' funds and the insight afforded to him as a director of SMI, to artificially limit the extent of his accounting by reason of the interpositioning of the two corporate entities in the execution of the investment on behalf of the applicants. I say this because it is evident that SMI's only business appears to be the holding of Ngatana shares[3] and it is through Ngatana that the investment scheme entered into by the applicants, the Trust and Mr Manala was to acquire and hold the Spearhead units. Similar considerations pertain in respect of the third respondent's position as a director of Ngatana.

[3] The audited financial statements of SMI for the financial year ended February 2006, which are annexed to the supporting answering affidavit of Mr Hyman Bruk in the interlocutory application suggest that the holding of equity in Ngatana is the only business of SMI. There are indications in the principal answering affidavit, deposed to by the second respondent, that SMI might subsequently have engaged in other business, but this is not material for present purposes.

[18] The Spearhead investment would appear to have arisen in the following way (it needs emphasising in this regard that my description should not be misconstrued in any way as findings of fact, or as anticipating in any manner the determination of related factual disputes that might arise between the parties at the debatement stage): Spearhead was a commercial property loan stock company,[4] listed on the Johannesburg Securities Exchange. Spearhead wished to attract black investors with the potential to add value to its assets and operations; and it wished to raise further capital. The second and third respondents enjoyed the opportunity to participate on favourable terms in the Spearhead venture. In this regard they made use of two corporate entities as vehicles. The first, Ngatana, is a black economic empowerment company established, on the idea of the third respondent, for the special purpose of taking up units in the Spearhead investment. The other is SMI, mentioned above, in which, prior to the order taken by agreement on 9 March 2009, the Trust and third respondents were each the registered holders of 50% of the issued shares. Pursuant to the order made by agreement on 9 March 2009, the first applicant holds now holds 31% of the shares in SMI, with the balance divided between the Trust and the third respondent.

[19] It had originally been contemplated that the shareholding in Ngatana would comprise SMI (40 per cent), Prescient (33 per cent) and Bonitas Medical Scheme ('Bonitas') (18 per cent) and certain other black

[4] The stock granted by Spearhead would appear to have consisted of so-called linked units, which, consistently with the explanation given at para. 86 of the second respondent's answering affidavit, I have understood to connote units comprising of ordinary shares linked with debenture shares. These units, it would seem, were publically tradable.

shareholders. Bonitas, however, decided not to participate in the investment. The opportunity to take Bonitas' place was initially offered by the second respondent to his close friend, Mr Anil Narotam, the then chief operating officer of the second applicant. It was subsequently decided however that SMI would acquire the stake that had been earmarked for Bonitas on behalf of the second applicant and that it would hold the Spearhead units for the benefit of the second applicant. The Bonitas stake of 18 per cent in Ngatana equated to 630 000 of the 3 500 000 linked units in Spearhead that Ngatana was to take up.

[20] As mentioned, it was also agreed that the second applicant and the Trust would each lend money to the third respondent to enable him to fund the capital cost of the 700 000 units (equating to 20% of the aforementioned 3,5 million units) which it was intended that Ngatana would acquire effectively on his behalf, and which would be held by him indirectly, through his shareholding in SMI. In consideration for their loans to the third respondent, the second applicant and the Trust were each to be entitled to 25 per cent of the amount by which the eventual selling price of each unit held on behalf of the third respondent exceeded R18,00.

[21] I should mention that it appears that at the time the structure of the investment was being put in place, during discussions between the second respondent and Narotam, it had not been realised by the second respondent that the stake that it had been contemplated would be taken up by Bonitas would be represented by only an 18% shareholding in Ngatana as distinct from the 40% shareholding in Ngatana to be taken up by SMI, the latter

representing the sum of the equal beneficial interests of the second and third respondents, respectively, in Ngantana. The second respondent had been under the misapprehension that the Bonitas stake in Ngatana would also be a 20% stake and thereby equal to that to be taken up indirectly by himself and the third respondent. The significance of this is that the second respondent assumed in his discussions with Narotam that any costs to be incurred by the investing parties (that is the Trust, the third respondent and the second applicant) fell to be split equally between them in direct relation to what he thought would their equal beneficial interest in the Spearhead units to be obtained by Ngatana.

[22] In his discussions with Narotam the second respondent estimated that the amount that would be required to cover the cost of the second applicant's investment in Spearhead on the basis just described would be between R3,3 and R3,5 million. That estimate appears to have taken into account not only the applicants' share of the purchase price of the units, but also the applicants' undertaking to finance half of the acquisition consideration, including costs, to be incurred by the third respondent, as well as a one third share of the transaction costs.

[23] It was contemplated that the linked units subject of the intended acquisition would be issued in two tranches of 980 000 and 2 520 000 units, respectively; and that the tranches would be issued in close succession.[5] As

[5] It appears that the tranches were provided for in terms of the subscription agreement to which SMI, Ngatana, Spearhead and Prescient Real Estate (Pty) Ltd were party. The timing of the tranches was linked to the fulfilment of certain suspensive conditions to which the subscription agrement was subject. The condition, fulfilment of which was necessary for the issue of the second tranch, appears not have occurred within the stipulated period, as a

things turned out, there was in fact a four month interval between the two tranches.

[24] The sum of R3,5 million was transferred by the second applicant into the trust account of fourth respondent attorneys on 9 February 2005 to cover the second applicant's funding obligation in respect of the intended investment. An additional amount of R540 250 was later also transferred into the fourth respondent's trust account by the second applicant. This amount was intended for investment in the Scharrig investment. The intended investment in Scharrig by the applicants was R1 million. It appears to have been believed by Narotam that the balance of R460 000 would be available from unapplied funds from the R3,5 million transfer made earlier.

[25] It was estimated that the cost of the first tranche would be R1,8 million and this amount was paid to Ngatana from the funds advanced by the second applicant, allegedly - according to the second respondent - with second applicant's knowledge and consent. Email exchanges between the second respondent and Narotam at the time tend to bear out the second respondent's version of events.

[26] It is common ground that initially the arrangements with regard to the Spearhead investment were dealt with rather informally by the protagonists, being the second and third respondents and Narotam and one, Mr Karim Mawji, on behalf of the second applicant. (Mr Mawji, the chief executive officer of the second applicant, was also, at that time, a good friend of the

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consequence of which the then still executory part of the agreement lapsed and had to be re-instated in terms of a later agreement to that effect concluded on 12 July 2005.

second respondent.) On 2 March 2005, however, Ngatana, Spearhead, SMI and Prescient Real Estate Ltd ("Prescient") concluded a written agreement, which describes itself as 'the subscription agreement'. The agreement evidences Ngatana's subscription for 3.5 million 'linked units', comprising mutually linked ordinary shares and debentures in Spearhead, at a subscription price of R15,50 per unit. This price represented a substantial discount on the allegedly then listed price of R20,00 per linked unit. In terms of the applicable arrangements, the acquisition of the linked units was being funded by way of a loan from Standard Bank equivalent to R12,75 per unit. The cash contribution required of the participants in the investment scheme was therefore R2,75 per unit, plus transaction costs.

[27] As a result of the Spearhead investment made in terms of the subscription agreement Ngatana duly acquired 3,5 million linked units. SMI has a 58% equity interest in Ngatana which equates to an indirect beneficial interest in 2 030 000 of the Spearhead units acquired by Ngatana. If regard is had to the ratio of the respective shareholdings of the parties in SMI, the latter company's indirect holding of Spearhead units represents a beneficial economic interest in the units by the Trust in 700 000 units, third respondent as to 700 000 units, and second applicant as to 630 000 units. The second applicant's 18% beneficial interest in the Spearhead investment[6] is therefore now effectively represented by the 31% equity interest which it holds in SMI.

[6] The Spearhead units were subsequently exchanged by Ngatana for linked units in the Redefine Income Fund Limited, but nothing seems to turn on that for present purposes; presumably because the significance of a different investment will become significant in the context of the contractual arrangements described only when the investment is realized.

[28] SMI's audited financial statements for the financial year ended 28 February 2006, which are included in the papers, show that the direct cost of SMI's investment in Ngatana is R6 657 673,00. Mr *Rose-Innes* SC, who appeared for the respondents submitted that it followed therefore that the actual cost per Spearhead unit was therefore R3 279 (R6 657 673,00divided by 2 030 000 units). 2 030 000 Spearhead units would represent 58% of the 3 500 000 units for which Ngatana had subscribed and therefore equates to the total number of units in which the applicants and the second and third respondents intended to acquire a beneficial interest in the sense of the agreements between Messrs Narotam, Gihwala and Manala, described earlier. Mr *Rose-Innes* contended on the basis of arithmetical extrapolation that it also followed that the second applicant's 50% contribution by way of a loan towards the third respondent's costs of his indirect acquisition of 20% of the Spearhead units (including what second respondent contends was an agreed contribution towards costs in the sum of R75 000,00) is R1 222 874,66.

[29] The second respondent contended in the answering affidavit that the account that was rendered 'clearly indicates who the payments were made to and what the purpose of such payments was'. I consider that this contention is not entirely correct.

[30] In the context of what is at issue between the parties, especially the division of costs and loan obligations, it behoves the accounting party to indicate precisely to which purposes the various payments were allocated. It is not indicated, for example, precisely what part of the R1 800 000 paid to

Ngantana on 16 February 2005 was applied in respect of 'L.N. Manala's capital requirement' and which part in respect of Grancy's so-called 'capital requirement'. The reasons why this should be dealt with expressly in the circumstances of this matter are apparent from the concerns of the applicants articulated in, for example, paragraphs 40 and 41 of the founding affidavit in the principal proceedings.

[31] It is not sufficient to expect the applicants to rely for the purposes of the account to which they are entitled on what is set out by the respondents in the answering papers in the litigation. The account provided, and not the averments set out in contesting sets of affidavits, is what is intended to provide and what should provide, the basis upon which the litigation will, if necessary, proceed to the debatement stage. If it had been intended that the averments in the answering papers in the principal proceedings provided an adequate account (which seems, in essence, to be the contention advanced by the second respondent in his answering affidavit in this interlocutory application), then one is left somewhat at a loss to understand why the respondents consented to an order requiring them to furnish a detailed account in the settlement of a relevant part of that litigation.

[32] There is much to be said for the applicants' complaint that the accounting that they have received in purported compliance with the court order is little more than a bald and insufficiently narrated recital of payments made. The allocation and appropriation of those payments, which appear to be the matters centrally relevant to the questions potentially in contention, are not dealt with meaningfully at all. In the circumstances, the comparative

reference made by the applicants' counsel to the facts in *Hansa v Dinbro Trust (Pty) Ltd* 1949 (2) SA 513 (T) is quite apposite.

[33] In that matter the client of a stockbroker demanded an accounting in respect of the buying and selling of shares that had been attended to by the stockbroker on his behalf. The stockbroker had complied with his statutory obligation to furnish his client with a broker's note in respect of each such transaction and contended that that amounted to an adequate accounting. The client however insisted on greater particularity in a letter, annexed marked 'C' to his application to court, which in material part went:

> 'From time to time our clients received from you broker's notes purporting to have bought and sold shares. Our clients now require you to give the following information to them: -
>
> *(a)* the names and addresses of the persons from whom you bought or sold the shares on our clients' behalf;
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> *(b)* the dates when such shares were bought or sold and the dates when delivery of the shares were effected to you or by you, as the case may be;
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> *(c)* the prices paid for the shares by you and the prices received for the shares by you;
>
> *(d)* the ... numbers of the share certificates received by you or delivered by you.

Millin J treated of the stockbroker's response as follows (at 516):

> 'The furnishing of broker's notes is required by law as each transaction is completed, but the broker's note itself does not purport to be an account but merely records that the broker has bought for the principal or sold on his behalf, as the case may be, a particular number of shares in named companies at a particular price with the brokerage and stamp duty. That is not an account of the transaction. A full and true account of the transaction certainly involves all the particulars which are asked for in this letter 'C' of the petition.'

The learned judge made a further remark (at 517), which bears some relevance in the context of the respondents' assertion that a perusal of the papers exchanged thus far in the course of litigation in this matter is sufficient to give the applicants all the information they might reasonably require by way of an account. He noted that it was not sufficient for the stockbroker to say 'Here are my books and here are my vouchers, you are at liberty to go through them and make up an account for yourself'.

[34] The applicants contend that paragraph 3 of the 9 March 2009 order contemplates a full accounting in respect of the application of the applicants funds in regard to the acquisition of the Spearhead units with sufficient information, including supporting vouchers where such exist, to inform the applicants of what happened to their funds and for what purposes they were applied at every level of the transaction, including any change in the nature of the investment, such as that occasioned by the substitution of units in Spearhead by units in Redefine Fund Limited. In my view this contention is well founded.

[35] I say this cognisant of the fact that there appears to have been a dispute as to whether the applicants were entitled in terms of the underlying arrangements to a shareholding in SMI and that, on the second respondent's version, they have been accorded such shareholding only by way of a settlement (without admission of liability) of the underlying dispute. Having regard to the contention of the applicants that a debatement of the account which they have claimed will demonstrate that they have unsettled monetary claims against some of the respondents, there is all the more reason for the

account to be as fully stated and vouched as possible. This will assist in the private debatement *inter partes* that should take place in order to identify the list of unresolved issues to be formulated for debatement in court. That objective appears to me to have been the inspiration of paragraph 3 of the court order made on 9 March 2009; put otherwise, it seems to provide the only objectively sensible reason for that part of the order. It is evident from the content of the papers in the principal proceedings that one of the applicants' concerns is that their funds were utilised to acquire Spearhead units for which the Trust should have made a contribution both in respect of the cost thereof and in respect of the obligation to provide loan funding for the indirect acquisition thereof on behalf of the third respondent.

[36] The account rendered gives no breakdown of the transaction costs and as to how the applicants' share of them was determined. Inasmuch as it is suggested in the papers that the applicants' share of the investment was not fully funded, there is also no indication of this in the account rendered, nor of to whom the resultant shortfall is presumably due by the applicants. These are all matters which, in my view, should reasonably be included in the explanations necessary to lend substance to a full and proper accounting in respect of the R4 040 250 in issue, in the detail prescribed by para. 3 of the court order.

[37] As mentioned, the parties are currently also engaged in litigation under a different case number concerning an investment transaction referred to as 'the Scharrig investment'. This concerned investment in a BEE company listed on the Johannesburg Securities Exchange, Scharrig Mining Limited.

This investment (in the sum of R1 million) was effected by the first applicant in terms of an agreement whereby a loan in that amount was made by the first applicant to the Trust to enable the latter to effect the investment. In return for facilitating the investment the second respondent, or his nominee would be entitled to receive 25% of any profit that the first applicant might realise on the investment. Mr *Rose-Innes* submitted that there has already been an adequate accounting to the applicants in respect of the Scharrig investment. To the extent that the applicants did not accept as much, their remedy, so contended Mr *Rose-Innes*, lay in an equivalent application to that currently before me in respect of the Spearhead investment, but under the litigation currently being pursued in case no. 10547/08.

[38] There is indeed an application pending for an accounting in respect of the Scharrig investment pending under that case number. The application was launched in July 2008. The order made in case no. 15757/07 on 9 March 2009 does not on its face in any manner bear on the matter in issue in case no. 10547/08. In his affidavit in opposition to the application to compel an accounting in respect of the Scharrig investment, a copy of which was annexed to his opposing affidavit in the interlocutory application currently before me in relation to the Spearhead investment, the second respondent averred that the matters are 'inter-related'. It seems to me that the only interrelationship between the Spearhead and the Scharrig investments is in respect of the appropriation of the applicants funds entrusted to the second respondent for the purpose of investment in these two opportunities.

[39] The second respondent was dealing with the applicants' funds in respect of the two investments during the same time period and it is evident from the email correspondence attached to the papers in the principal proceedings that there was some confusion between Mr Narotam and the second respondent as to precisely what portion of the applicants' entrusted funds was being applied for which investment. In these circumstances the respondents' contention that the two investments can and should be accounted for in discrete and hermetically sealed packages is not a practicable one.

[40] I gave earnest consideration to Mr *Rose-Innes'* contention that this was a matter in which the issue as to the adequacy of the account should be litigated and determined in the same proceedings as the debatement. There are certain features of the matter which militate in favour of that approach. I have however decided against that course, not only for the reasons discussed above, which tend to establish the inadequacy of the account in relevant respects that could readily be addressed with useful effect before a private debatement; but also because the court order, to which the parties agreed, clearly determined that the respondents were required to render a much fuller account than that which has been rendered. Policy considerations require that parties who submit by agreement to court orders should be required to comply punctiliously and completely with their obligations under such orders. To allow otherwise would, in my judgment, derogate unjustifiably from the extant court order. There is nothing in the matter which persuades me that the policy considerations to which I have referred should give way on grounds of pragmatism or convenience peculiar to the present case.

[41] The applicants' counsel asked for an order in terms of a draft that was handed in at the hearing. The draft sets out in great detail what the improved statement of account 'must (without limitation) include'. I am not inclined to give such directions. The current application was really for a declaration that the account provided by the respondents did not adequately comply with that ordered in terms of para. 3 of the order of 9 March and for a direction affording them a defined period within to remedy their default. That is the basis upon which the respondents were called upon to compile their answering papers. I am therefore prepared to grant relief only in the form in which it was sought. It will be apparent, however, from the reasons I have given that much of the particularity specified in the draft order put in by the applicants' counsel should indeed be provided in the improved account.

[42] Finally, it is necessary to mention that the second applicant, which is a company incorporated in Switzerland, is in a state of voluntary liquidation. The Swiss appointed liquidator is Mr Urs Josef Steiger. The respondents challenged the second applicant's standing to pursue this application in the context of Mr Steiger's failure to obtain local recognition of his foreign appointment as liquidator. An application by Mr Steiger, in case no. 23062/09, for an order recognising him as liquidator was enrolled for hearing in the Third Division motion court on the same date as the interlocutory application dealt with by me earlier in this judgment. The Judge President acceded to the applicants' request that Mr Steiger's application in the Third Division be transferred for hearing, together with the interlocutory application, in my court in the Fourth Division.

[43] I was unwilling to determine Mr Steiger's application without first considering a report from the Master. Counsel agreed that they would argue the interlocutory application on the basis that its determination would stand over until after Mr Steiger's application for recognition had been decided. After consideration of the Master's report, which came to hand some days after the interlocutory application had been argued, and after affording the respondent the opportunity to make any written submissions thereanent that it might wish,[7] I granted an order on 25 November 2009 in case no. 23062/09 recognising the appointment of Mr Steiger (in terms of Swiss law) as the liquidator of the second applicant within the Republic of South Africa on the terms set out in paragraphs 2-5 of the order.

[44] My ability to deliver judgment in this matter was thereafter further delayed pending the satisfaction of my request to be furnished with a copy of the letters of recognition, which should have been issued by the Master to Mr Steiger, once the latter had provided security as directed in terms of paragraph 2 of the order of 25 November. On 18 February 2010, I was furnished by the applicant's attorneys with an evenly dated certificate of appointment issued by the Master in terms of which Mr Steiger was purportedly appointed as provisional liquidator. According to the tenor of the certificate the 'appointment' was made pursuant to a provisional liquidation order supposedly made by this court on 26 November 2009. The certificate is a patent nonsense. That it could have been issued by the Master's office and accepted by the applicants' attorneys for the purpose of presentation to this court is indicative of a lamentable lack of attention to important detail by all

[7] The respondents did not avail of the afforded opportunity.

concerned. There has been no provisional liquidation order by this court. I assume that the reference to an order of that date was inspired by the order made by me on 25 November 2009, referred to earlier, which was issued by the Registrar only on 26 November 2009.

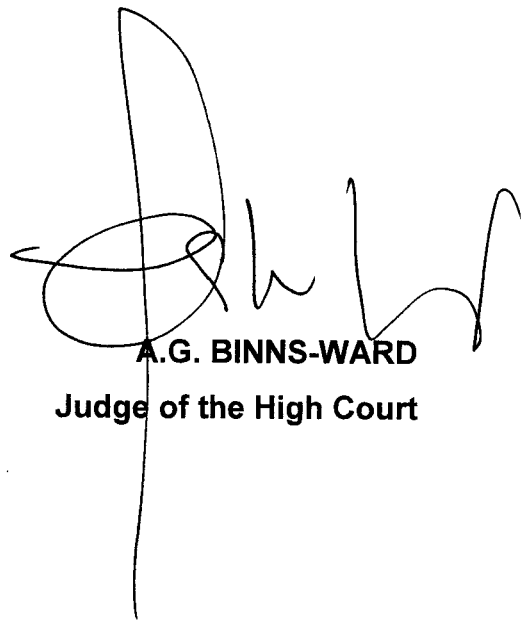
[45] Delivery of this judgment was as a result further delayed pending the submission to me of the duly drawn letter of recognition by the Master. A copy of such a letter, issued by the Master on 12 April 2010, was eventually placed before me in chambers on 13 April 2010. That disposed of the challenge to the second applicant's standing.

[46] The following order will therefore issue in case no. 15757/07:

(a) It is declared that the account (a copy of which was annexed as annexure GVL1 to the supporting affidavit of Gert Johannes van der Linde *jurat* 2 June 2009) rendered by the second, third and fifth respondents in purported compliance with paragraph 3 of the order of this Court made on 9 March 2009 is inadequate and does not constitute proper compliance with the requirements of the said order;

(b) The second, third and fifth respondents are directed to furnish the second applicant with an improved account in compliance with the requirements of the court order of 9 March 2009, construed with regard to the reasons for judgment in this application, within 15 days of the date of this order;

(c) The second, third and fifth respondents are directed to pay the second applicant's costs of suit, including the costs of two counsel; their liability in that regard to be joint and several.



A.G. BINNS-WARD
Judge of the High Court