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

REPORTABLE

CASE NO. 10547/2008

In the matter between:

MONTAGUE GOLDSMITH	**FIRST APPLICANT**
GRANCY PROPERTY LTD	**SECOND APPLICANT**

AND

DINES GIHWALA	**FIRST RESPONDENT**
DINES GIHWALA	**SECOND RESPONDENT**
SHANTI GIHWALA N.O.	**THIRD RESPONDENT**
KANTIELAL JERAM PATEL N.O.	**FOURTH RESPONDENT**
NARENDRA GIHWALA N.O.	**FIFTH RESPONDENT**
KIRAN GIHWALA N.O.	**SIXTH RESPONDENT**
HOFMEYER HERBSTEIN & GIHWALA INC	**SEVENTH RESPONDENT**

Coram	:	**DLODLO, J**
Judgment by	:	**DLODLO, J**
For the Applicant	:	**ADV. P. HODES (SC)** **ADV. JPV McNALLY (JHB COUNSEL)**
Instructed by	:	WEBBER WENTZEL 10 Fricker Road Illovo Boulevard JOHANNESBURG (REF. G. Van der Linde/V. Moshovich) TEL. NO. 011 530 5000 C/o Webber Wentzel 15th Floor, convention Towers Heerengracht Foreshore CAPE TOWN (REF. A. Magerman

For the Respondents	:	**ADV. L.A. ROSE-INNES (SC)**
Instructed	:	MAURICE PHILLIPS WISENBERG 20th Floor 2 Long Street CAPE TOWN (REF. M. Phillips) TEL. NO. 021 419 7115
Date(s) of Hearing	:	**11 MAY 2010**
Judgment delivered on	:	**18 JUNE 2010**

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JUDGMENT DELIVERED ON 18 JUNE 2010

DLODLO, J

[1] The Applicants are Montague Goldsmith AG in liquidation ("MG" in liquidation) and Grancy Property Ltd ("Grancy"). The Applicants will be referred to as "the Applicants or MG" without distinguishing between the two. I am told to note upfront that MG, after instituting this application,

went into voluntary liquidation and that a Mr. Josef Steiger ("Mr. Steiger") was appointed as liquidator. The Applicants seek an order to the effect that the First Respondent (Mr. Gihwala), the Second Respondent (Mr. Gihwala) in his capacity as trustee of the Dines Gihwala Family Trust ("DGFT") and the Seventh Respondent ("Hofmeyers") (now incorporated in DLA Cliffe Dekker Hofmeyer Inc) be required to render a full and proper account to the Applicants in respect of an investment in Scharrig Mining Ltd ("Scharrig Investment"). The Scharrig investment is described in some detail in the papers. It suffices for present purposes to mention that the Scharrig investment refers to an opportunity introduced to MG by Mr. Gihwala in terms of which MG would invest in Scharrig, a JSE listed company which provides mining services to the coal mining industry. The opportunity arose out of a black economic empowerment initiative in terms of which a BEE consortium was formed to acquire shares in Scharrig at a very favourable price. I set out infra the background to the investment opportunity. The application is being resisted by Mr. Gihwala and Hofmeyers. Mr. Hodes SC (assisted by Mr. McNally) and Mr. Rose-Innes SC appeared on behalf of the Applicants and the Respondents respectively.

BACKGROUND

[2] During March and April 2005, MG (in liquidation) and Gihwala were involved in negotiations relating to a possible investment in Scharrig Mining Limited, a South African company listed on the JSE Limited ("the JSE"). MG (in liquidation) was initially interested in entering into an investment partnership with Interactive Capital (Pty) Ltd ("Interactive Capital") jointly to invest in Scharrig. At the relevant time, Gihwala was

a director and the Chairperson of Interactive Capital. To this end, a meeting was held in Zurich, Switzerland on 11 March 2005 between Mr. Narotam, who was an employee of MG (in liquidation) at the time, and Avram Levy ("Mr. Levy"), who represented Interactive Capital. A copy of the "Memorandum" drafted by Mr. Narotam subsequent to the meeting is annexed in the Founding Affidavit and marked "FA3". Subsequent to the meeting with Mr. Levy, Mr. Mawji had certain reservations about the offer that was finally made by Interactive Capital to MG (in liquidation). His primary concern in relation to the Interactive Capital offer was that the proposed transaction would require MG (in liquidation) to make a significant capital contribution and in addition, that Interactive Capital's final proposal materially departed from their original proposal as understood by Mr. Mawji. Furthermore, Interactive Capital's proposal entailed that MG (in liquidation) would invest significant funds in a transaction over which MG would not, ultimately, have any control. According to Mr. Mawji he informed Mr. Narotam of his concern in this regard. Mr. Narotam concurred, and MG (in liquidation) decided not to pursue the Interactive Capital investment opportunity. An e-mail to Mr. Levy was written on 23 March 2005 to inform him of this. A copy of this e-mail is annexed to the Founding papers and marked "FA4".

[3] Mr. Gihwala subsequently approached MG with his own independent offer. To this end, Mr. Gihwala sent an e-mail to Mr. Narotam on 6 April 2005 to which he attached electronic copies of the document entitled "Scharrig Mining Limited Investment Memorandum – April 2005" ("the Scharrig Investment Memorandum") and other related information. A copy of this e-mail and the attached Scharrig Investment Memorandum is

annexed to the Founding papers and marked "FA5". This is set out in the Scharrig Investment Memorandum as follows:

"1.3 The discount is attributable to the introduction of a black economic empowered consortium and as a result of a trading statement released by the Company indicating an increase in earnings and headline earnings of between 160% and 170%.

1.4 The composition of the investment consortium, by economic value, is approximately as follows:

1.4.1 .....

1.4.2 .....

1.4.3 Interactive Capital consortium, (Gihwala, Levy, Brett) and David Bronze:

1/3rd.....

.....

3.1.1 An SPV will be formed, the ordinary shares will be owned by the Sam Jonah Family consortium and Mr. DCM Gihwala consortium.

3.1.2

.....

3.1.3 .....

3.1.4 The funders or funding entity shall also be granted the right to borrow the SML script held by the SPV on an indefinite basis, subject to an annual charge of 1% of the value of the borrowed script to be levied by the SPV."

At the time, Mr. Gihwala's offer was more attractive to MG (in liquidation) than the Interactive Capital offer because the former required a much smaller capital outlay. Moreover, what Mr. Gihwala was proposing was a much simpler and ostensibly more transparent

partnership structure. Mr. Gihwala also indicated to MG (in liquidation), at the time, that there would be a subsequent opportunity to acquire further shares in Scharrig at an attractive purchase consideration of R2.25 per share plus a notional interest charge.

[4] The option to acquire Scharrig shares at a "locked-in" price as alluded to by Mr. Gihwala, was considered by MG (in liquidation) to be a lucrative prospect because it was anticipated at the time that the Scharrig share price would increase in the future. The terms of the option referred to above, were embodied in an announcement on the JSE's Stock Exchange News Service ("SENS") dated 22 April 2008 which is entitled *"Schamin – Announcement Relating To A Black Economic Empowerment ("BEE)"* ("the Scharrig press release"), a copy of which has been annexed to the Founding papers and marked "FA6". The relevant portion of the announcement reads as follows:

"In addition, the BEE consortium has been granted an option to acquire a further 34.38 million shares in the company from companies and trusts associated with Mr. Theunis Scharrighuisen ("the option"). The option can be exercised in whole or in part by the BEE consortium on or before 22 July 2005 at a price per share of 225 cents plus 0.043 cents per day from 22 April 2005 until the date the option is exercised ("option price"). Should the option be exercised and result in the BEE consortium acquiring 35% or more of the shares in Schamin, an offer to minorities will be made at the option price in terms of the SRP Code on Mergers and Takeovers."

Telephonic discussions relating to Mr. Gihwala's offer ensued between MG (in liquidation), represented by Mr. Narotam, and Mr. Gihwala and,

with Mr. Mawji's approval, it was agreed that MG (in liquidation) would accept Mr. Gihwala's offer to participate in the Scharrig investment. Mr. Gihwala had indicated that he would invest R1 million in the Scharrig investment, and MG decided to contribute the same amount. This was confirmed in an e-mail, dated 13 April 2005, a copy of which is annexed to the Founding papers and marked "FA7". In this e-mail Mr. Narotam informed Mr. Gihwala that MG (in liquidation) wanted to join him in the investment and would also contribute R1 million. The relevant e-mail reads as follows:

"I refer to our telephonic discussion relating to joining you in your investment in the Scharrig Mining Limited deal and wish to confirm that we will invest an amount of R1 million. We hereby authorize you to utilize R1 million from the available funds you hold on our behalf for this investment..."

It is important to note that, by this time, Mr.Gihwala had already held funds in the trust account of Hofmeyer (the Seventh Respondent), on behalf of MG, which were intended for other investments. For practical reasons, Mr. Narotam, on behalf of MG (in liquidation), therefore authorized Mr. Gihwala to utilize some of those funds for the Scharrig investment.

[5] It is important to understand the circumstances surrounding the transaction discussed above. At the time, once discussions with Interactive were ended, Mr. Gihwala was MG's (in liquidation) sole point of contact in South Africa in relation to the Scharrig investment. In essence, the relative informality of the business relationship was attributable to the close personal and professional relationship which

existed and was built up among Mr.G Gihwala, Mr. Narotam and Mr. Mawji. MG (in liquidation) relied totally on Mr. Gihwala to effect the Scharrig investment and to keep MG (in liquidation) informed of relevant events relating to the Scharrig investment. In the circumstances, a relationship of confidence and trust between Mr. Gihwala and MG (in liquidation) was essential and it was on this basis that Mr. Ghiwala was authorized to utilize R1 million from the available funds held on MG's (in liquidation) behalf in the Seventh Respondent's trust account for purposes of executing the Scharrig investment. A copy of a cheque dated 14 April 2005 drawn in favour of the DGFT in the amount of R1 million is annexed and marked "FA8". The cheque evidences the transfer of funds held in trust by the Seventh Respondent on behalf of MG (in liquidation) to the DGFT.

[6] At the time, it was not clear whether Mr. Gihwala was acting in his personal capacity, as representative of the Seventh Respondent or as an authorized trustee of the DGFT in making the subsequent investment in Scharrig on MG's (in liquidation) behalf. An e-mail dated 18 November 2005 by Mr. Gihwala to Mr. Narotam, a copy of which is annexed to the Founding papers and marked "FA9" sheds some light on the arrangement and provides as follows:

"The shares are in SPV controlled by me. Whoever buys the shares will receive a declaration of trust from me to the effect that it/he/she is the beneficial owner of the shares."

The uncertainties regarding Mr. Gihwala's role notwithstanding, in whatsoever capacity he was acting, it was clear that Mr. Gihwala executed the Scharrig investment with MG as a partner *en commandite.*

Mr. Gihwala disputes the alleged partnership though. It was further accepted that Mr. Gihwala would hold the Scharrig shares on MG's (the beneficial owner) behalf in a Special Purpose Vehicle ("SPV") and that MG (in liquidation) was, for all intents and purposes, Mr. Gihwala's investment partner. Moreover, it was within both Mr. Gihwala and MG's (in liquidation) awareness, given the prevailing circumstances discussed in greater detail above, that Mr. Gihwala owed various fiduciary duties and was accountable to MG in respect of its investment in Scharrig.

[7] The existence of the partnership relationship between MG and Mr. Gihwala is reflected in the Excel spreadsheets e-mailed by Mr. Narotam to Mr. Gihwala on 4 August 2005 and 24 October 2005 respectively, copies of which are annexed to the Founding papers marked "FA10" and "FA11". Both these spreadsheets are headed by the description "Scharrig Mining Limited – Share Partnership With Dines Gihwala". Moreover, in an e-mail dated 3 August 2005, Mr. Narotam also stated that MG (in liquidation) and Mr. Gihwala *"collectively own 2 263 240 shares in Sharmin [Scharrig Mining]"*. This characterization was not objected to by Mr. Gihwala at the time. The partnership character and understanding is also evidenced in the notes by Mr. Narotam dated 27 July 2005 annexed and marked "FA13". In the alternative it is suggested in the papers that Mr. Gihwala at least acted in a fiduciary capacity as agent of MG and thus owed MG a duty to account to it for the investments undertaken. As stated above, Mr. Gihwala's original offer to MG (in liquidation) to invest in Scharrig also alluded to an opportunity which was a part of the terms of the underlying Scharrig shares at a pre-determined subscription price of R2.25. Indeed, the Scharrig press release

explicitly states that the BEE consortium had an option to acquire a further 34 million shares at R2.25.

[8] During June 2005 Mr. Gihwala informed that the further opportunity to invest in Scharrig shares had now become available in line with the option mentioned above. MG (in liquidation) therefore decided to contribute a further R10 million towards this further investment. On 16 June 2005 the aforesaid amount of R10 million was transferred to Hofmeyer's (the Seventh Respondent) trust account. A debit advice dated 20 June 2005 a copy of which is annexed to the Founding papers and marked "FA14", evidences such transfer. The reason for the payment is recorded in this debit advice as "*Investment into Scharrig Mining Ltd*". The subsequent further investment of R10 million by MG in Scharrig was a direct consequence of the option to acquire additional shares coupled to the original offer. Accordingly, Mr. Gihwala's use of the funds subsequently made available to him for purposes of making an additional investment on MG's behalf in Scharrig was intrinsically governed by the same relationship between him and MG as that relating to the earlier R1 million investment. Moreover, the subsequent further investment by MG of R10 million in Scharrig was thus complementary to the existing transaction.

[9] The terms of MG's (in liquidation) participation in this continuing investment opportunity was confirmed in an e-mail from Mr. Narotam to Mr. Gihwala, dated 28 June 2005, a copy of which is annexed to the Founding papers and marked "FA15". The aforesaid e-mail reads as follows:

"We have authorized the release of the R10m transferred to Hofmeyer to Dines Gihwala Family Trust for the purchase of Scharrig Mining shares at R2.25 each on our agreed profit share arrangement...". MG (in liquidation) expected Mr. Gihwala as its partner in an ongoing profit share arrangement, to utilize the R10 million in respect of the Scharrig investment with the good faith expected from a partner, and to account for the use of all the funds entrusted to him. Moreover, it was understood by MG (in liquidation) that Mr. Gihwala would use the R10 million that was transferred to Hofmeyer's (the Seventh Respondent) trust account for the exclusive purpose of making a further investment in Scharrig. To this end, the reason for the aforesaid transfer of funds to the Seventh Respondent's trust account was recorded as "Investment into Scharrig Mining Ltd". Following the transfer of these funds, MG (in liquidation) in good faith assumed that Mr. Gihwala had, as he was required to do, invested the funds in Scharrig.

[10] However, Mr. Gihwala without explanation and contrary to MG's (in liquidation) wishes apparently never invested the R10 million in Scharrig and subsequently failed properly to account to MG in respect of the R10 million that had been transferred to Hofmeyer's trust account or any transaction in Scharrig which was concluded by Mr. Gihwala or in which Mr. Gihwala was involved. On 28 August 2005, Mr. Narotam informed the Second Applicant's administrators per an e-mail that the R10 million *"is being returned today as it was not required."* According to the Applicants Mr. Gihwala failed to account for the interest that must have accrued on such a substantial amount of money over the period 16 June 2005 to 11 August 2005. It is evident in Mr. Narotam's e-mail of 3

August 2005 that Mr. Gihwala was requested to let MG (in liquidation) *"have an update on the return of the R10 million together with the interest earned."* In a subsequent e-mail dated 15 August 2005 ("FA17" to the Founding papers) Mr. Narotam again requested Mr. Gihwala to *"advise the amount of interest earned on the R10 million reimbursed"* the previous week.

[11] With regard to the R1 million investment it is evident from Mr. Narotam's e-mail dated 3 August 2005 that he informed Mr. Gihwala that MG wished to exit the Scharrig investment "at the earliest available opportunity". In reply to this, and contemporaneous with his e-mail dated 4 August 2005, Mr. Gihwala sent a further e-mail, also dated 4 August 2005 to Mr. Narotam where he set out his calculations regarding the profit from the investment. A copy of this e-mail is annexed to the Founding papers and is marked "FA18". The calculations referred to above are criticized by the Applicants and are described as *"not clear and do not purport to reflect the actual financial position as at the stage when MG exited the transaction"*. Of course Mr. Gihwala contends otherwise. It is clear from Mr. Narotam's e-mail of 23 March 2006, Mr. Narotam informed Adriana Lecoultre, Petra Mayrhofer and Silvia Mathis, from the Second Applicant's administrators, on 23 March 2006 in an e-mail annexed to the Founding papers and marked "FA19", to expect "R2,7m from D. Gihwala" in respect of the "return of investment in Scharrig plus profits". Mr. Narotam referred in this regard to the initial investment of R1 million by MG in Scharrig. On or about 29 March 2006 MG received the amount of R2 764 118.24 ostensibly as return on the R1 million investment in Scharrig. This amount arose exclusively from the R1

million that was initially invested and did not contain an element of interest or return relating to the subsequent R10 million investment.

[12] According to the Founding papers in early 2007 MG's (in liquidation) Attorneys were instructed to demand a full and proper account from Mr. Gihwala. Annexure "FA20" to the Founding papers (written on 5 February 2007) is a letter to Mr. Gihwala from Webber Wentzel Attorneys demanding certain information and copies of documentation pertaining to explanation with regard to the R10 million as well as transaction trail relative thereto. It is common cause that Mr. Gihwala responded as can be seen in Annexure "FA2". This annexure *inter alia* reads:

".....It is not clear on what legal basis your client demands the information and records. .....You are requested to clarify the basis for the demand so that the demand may receive proper consideration. ..... Our client denies any form of partnership."

It is needless to mention that the writing generated further correspondence between the parties.

ISSUE FOR DETERMINATION

[13] Although there is some dispute on the papers as to the nature of the relationship between the parties to the Scharrig investment, there is no dispute that MG (in liquidation) has the right to receive an account and that Mr. Gihwala accepts the duty to account to MG (in liquidation). The account would be required to deal adequately with the receipt, application, growth, use and repayment of two amounts placed by MG (in liquidation) in Mr. Gihwala's hands for purposes of the Scharrig

investment. The first amount was the sum of R1 million, paid over by MG (in liquidation) on 9 February 2005 and the second was the sum of R10 million paid on 16 June 2005. Moreover, the amounts of R1 million and R10 million paid by MG (in liquidation) for investment in Scharrig were channeled through Hofmeyers' trust account. As such, Hofmeyers assumed a duty to account for the receipt and the disbursement of the aforesaid funds. Again, MG's right to receive an account and Hofmeyers' duty to account for such receipt and disbursement is not disputed. In both cases, Mr. Gihwala and Hofmeyers contend that they have properly discharged their duty to account to MG (in liquidation) and it is accordingly the issue of whether they have fully and properly accounted to MG (in liquidation) that requires determination by this Court.

LEGAL PRINCIPLES: DUTY TO ACCOUNT

[14] An accounting requires the party drawing the account to explain what was done with the monies entrusted to him and to do so in a manner that serves to justify his actions and conduct in respect of those monies. It is not sufficient for such a party merely to state mechanically what payments were made out of the funds being accounted for. He must ensure that the account includes not only an explanation of how the monies were applied, but also an explanation of their ultimate fate, with reference to any and all transactions carried out with the said monies, or the proceeds from time to time of any investments made therewith. A proper accounting should also include all documentation evidencing the various transactions referred to in the account. See: ***Hansa v Dinbro Trust (Pty) Ltd*** 1949 (2) SA 513 (T) at 516; ***Doyle & Another v Fleet Motors PE (Pty) Ltd*** 1971 (3) SA 760 (A) at 762 H-767 H; ***Counter***

Trade Establishment (Pty) Ltd v EBN Trading (Pty) Ltd 1995 (1) SA 762 (N) at 770 C-G.

Trade Establishment (Pty) Ltd v EBN Trading (Pty) Ltd 1995 (1) SA 762 (N) at 770 C-G.

[15] In ***Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Shelbourne Associates and Others; Century Associates and Others*** 1986 (2) SA 623 (T) at 638 F-G Slomowitz AJ (with whom Eloff and Le Roux JJ concurred) noted *'Viewing the matter as one of principle, it seems to me 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 correct, 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.'*

Indeed Binns-Ward J in ***Grancy Property Limited and Another vs Seema Marena Investments (Pty) Ltd and Others*** (an as yet unreported Western Cape High Court Case Number 15757/2007- Judgment delivered on 15 April 2010) reinstated the legal position in this regard as follows:

"[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."

DISCUSSIONS

[16] Mr. Rose-Innes SC prefixed his submissions by making a very important concession, namely that the Respondents do not dispute that the Applicants are entitled to an accounting in respect of their participation in the Scharrig investment but he then proceeded to contend that the Applicants have in fact some years ago, received a full and proper accounting and payment of whatever amounts were due to them. He contended that an agreed sum of One million rand (R1 000 000.00) made available by the Applicants for the Scharrig investment was utilized for that purpose and that at the Applicants' request their interest in the Scharrig investment was realized and the sum of Two million seven hundred and sixty four thousand one hundred and eighteen rand and twenty four cents (R2 764 118.24) was paid to them on 17 March 2006. Mr. Rose-Innes emphasized that this sum of money was arrived at by agreement with the Applicants after a full accounting. According to Mr. Rose-Innes' submissions a further amount of Ten million rand (R10 000 000.00) which the Applicants had made available for the possible acquisition of further option shares in Scharrig was returned to the Applicants on 8 August 2005 when the opportunity did not materialize and that further the agreed sum of Fifty thousand rand (R50 000.00) was paid to the Applicants on 18 April 2006 in respect of interest which had been earned on that capital amount (R10 000 000.00). Therefore, in Mr. Rose-Innes' submissions the Applicants have received a full and proper accounting in respect of the Scharrig investment and payment of such

amounts as were due to them. He reiterated and emphasized that the accounting of the amounts paid to the Applicants were done by agreement with them. Before concluding on this aspect Mr. Rose-Innes pointed out that the Applicants received a very handsome return on their investment pursuant to the agreed accounting and determination.

[17] I shall later on fully deal with Mr. Rose-Innes' submissions in this Judgment. It is also of importance to note that in Mr. Rose-Innes' submission material disputes of fact are apparent in the papers. The truth is that where disputes of fact arise in motion proceedings, the final relief may be granted if the facts averred in the Applicant's Affidavits which have been admitted by the Respondent together with the facts alleged by the Respondent, justify such an order. In certain instances the denial by a Respondent may not give rise to a real, genuine or *bona fide* dispute of fact. There may also be exceptions to this rule, for example, where the allegations or denials by the Respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. See: ***Plascon Evans Paints Ltd v Van Riebeeck paints (Pty) Ltd*** 1984 (3) SA 623 (A) at 634 E-635 C. Relying on ***Doyle & Another v Fleet Motors PE (Pty) Ltd*** and certain other cases *supra* at 762 F – 763 F-G, Mr. Rose-Innes contended that a clear distinction must be drawn between a failure to render an account at all and a claim that an account which has been rendered is insufficient because these are distinct causes of action supported by different allegations. I have also been referred to ***Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Shelbourne Associates and Others; Century Associates and Others*** *supra*; ***Brown and Others v Gebba CC t/a Remax Tricolor*** 2009 (1) SA

519 (D) at para 30. It is necessary that I refer briefly to the various paragraphs in these cases relied on by Mr.Rose-Innes. Indeed in ***Video Parktown North (Pty) Ltd v Paramount Pictures Corporation; Shelbourne Associates and Others; Century Associates and Others*** *supra* Slomowitz AJ stated the following at page 638 F-G"

"*Viewing the matter as one of principle, it seems to me 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 correct, 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. That being so, there is in my judgment no reason why a claim for an account alone, as distinct from the debatement of that account, may not be the subject matter of a separate suit which is brought by way of a motion proceedings.*"

As mentioned above Mr. Rose-Innes SC also relied on the following exposition made by Levinsohn DJP in ***Brown and Another v Yebba CC t/a Remax Tricolor*** *supra* at 525 paragraph [30]:

"*the action for an account and the debatement thereof is well recognized in our law, the leading case being Doyle and Another v Fleet Street Motors PE (Pty) Ltd 1971 (3) SA 760 (A). At 763 Holmes JA made the following pertinent observations:*

'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.'"*

Before dealing any further with submissions, it is appropriate that one has regard to the relevant circumstances which governed the relationship between the parties.

RELATIONSHIP BETWEEN MG AND MR. GIHWALA

[18] At all times, MG (in liquidation) was totally reliant on Mr. Gihwala to effect the Scharrig investment and to keep MG informed of relevant events relating thereto. When the investment was first discussed and implemented, MG (in liquidation) was represented by Mr. Narotam, who was a long-standing personal friend of Mr. Gihwala. Since then, the relationship between Mr. Narotam and MG has broken down and Mr. Narotam left MG's (in liquidation) employment in September 2006. Mr. Narotam and Mr. Gihwala remained friends, and Mr. Narotam has filed an affidavit in support of Mr. Gihwala's opposition to the present application. The relationship between Mr. Mawji (the then CEO of MG and the deponent to the Founding affidavit) and Mr. Narotam has broken down. As a result, MG (in liquidation) was isolated from the investment transactions undertaken by Mr. Gihwala and became wholly and completely reliant on Mr. Gihwala for a detailed and accurate account. Whether the relationship between MG (in liquidation) and Mr. Gihwala was one of partnership (as alleged by the Applicants) or one of agency (as alleged by Mr. Gihwala), it is an undisputed fact that MG (in liquidation) was entirely reliant upon Mr. Gihwala to keep it informed of the initial application of the funds transferred into Hofmeyers' trust account, and of

the ultimate fate of those funds and the investment or investments to which they were applied.

[19] The nature of the relationship between the parties was such that MG was utterly reliant upon Mr. Gihwala for all and any information about the use and application of the funds. MG (in liquidation) was entirely remote from the transaction and had absolutely no insight into the details thereof, beyond what was told to him by Mr. Gihwala. As stated above, the accounting which is sought by the Applicants relates to two (2) amounts, one (1) of One million rand (R1 000 000.00) and the other of Ten million rand (R10 000 000.00), transferred by the Applicants to Mr. Gihwala for investment in Scharrig. The first amount of One million rand (R1 000 000.00) was taken from an amount of Three and a half million rand (3.5 000 000.00) transferred by MG to Hofmeyers' trust account on or about 9 February 2005. The amount had originally been transferred for purposes of the Spearhead investment, but it was agreed between the parties that One million rand (R1 000 000.00) thereof would be utilized for purposes of MG's investment in Scharrig. Pursuant to MG authorizing Mr. Gihwala to utilize the One million rand (R1 000 000.00) aforesaid, Mr. Ghiwala arranged for a cheque in that amount to be drawn on Hofmeyers' trust account in favour of the DGFT on 14 April 2005. Thereafter, the Applicants were given no insight whatsoever as to the application or fate of the One million rand (R1 000 000.00) investment. It is not disputed that MG (in liquidation) instructed Mr. Gihwala on 3 August 2005 that MG (in liquidation) wished to exit the Scharrig investment "at the earliest available opportunity". Yet it is nowhere stated when (or indeed whether) Mr. Gihwala in fact realized MG's investment. An amount, calculated on

the basis set out in Annexure "DG7" to the Answering Affidavit, was paid to MG (in liquidation) on 17 March 2006. The nature and acceptability of Annexure "DG7" as a full and proper account by Mr. Gihwala to MG (in liquidation) in respect of the investment of One million rand (R1 000 000.00) is dealt with below.

[20] At the time that MG (in liquidation) was first informed about the opportunity to invest in Scharrig, Mr. Gihwala informed MG that there would be a subsequent opportunity to invest further in Scharrig as a result of an option available to the BEE consortium to acquire further Scharrig shares in the future at a "locked-in" price. MG (in liquidation) states that Mr. Gihwala informed it in June 2005 that *"the further opportunity to invest in Scharrig shares had now become available in line with the option mentioned above"*. Pursuant to that advice, MG (in liquidation) transferred an amount of Ten million rand (R10 000 000.00) to the Hofmeyer trust account on 16 June 2005. Mr. Gihwala states that *"he does not recall"* having advised MG (in liquidation) that the further opportunity had become available. On his version, MG (in liquidation) transferred the amount in the mere hope that it might be able to increase its stake, but it turned out that no such opportunity was available. It, however, remains undisputed that MG (in liquidation) transferred the funds for *"investment into Scharrig Mining Ltd"*, the funds were received into Hofmeyers' trust account on 16 June 2005, and the first MG (in liquidation) heard about these funds thereafter was on 8 August 2005 when it was informed that the Ten million rand (R10 000 000.00) *"is being returned today as it was not required."*

Once again, MG (in liquidation) was afforded no insight whatsoever into the application and fate of its Ten million rand (R10 000 000.00), despite the fact that it was wholly reliant on Mr. Gihwala to deal with its funds on its behalf and in its best interests. The "account" allegedly given to MG (in liquidation) by Mr. Gihwala in respect of the Ten million rand (R10 000 000.00) is dealt with below.

THE ACCOUNTING

[21] As submitted by Mr. Rose-Innes SC it is Mr. Gihwala's case that a full and proper accounting has already been provided to the Applicants. In relation to the One million rand (R1 000 000.00) investment Mr. Gihwala relies on Annexure "DG7". In relation to the Ten million rand (R10 000 000.00) investment, reliance is placed on Annexure "DG6" which is qualified by averments about an agreement concluded between Mr. Gihwala and Mr. Narotam in about mid-April 2006 in terms of which Mr. Narotam agreed to accept an amount of Fifty thousand rand R50 000.00) in full and final settlement of the interest payable on the Ten million rand (R10 000 000.00). I find it obligatory for purposes of this Judgment to set out *infra* both Annexures "DG7" and "DG6" in that order.

"DG7" - SCHARRIG MINING LIMITED SHARE PARTNERSHIP WITH DINES GIHWALA

Assumptions Loan from Standard Bank 1374352 shares @ 2.34)	 R 3 215 983.68
Interest rate	R 0.11
Amount invested (888 888 shares @ 2.25) Number of shares acquired	R 2 000 000.00 R 2 263 240.00
Indicative placement price	R 5.75
MG EXITS AT R5.75: INTEREST PAYABLE FOR 12 MONTHS	
Sale proceeds	R13 013 630.00
Bank loan	R 3 215 983.68
Interest for 12 months + commitment fee)	R 40 1997.96

Estimated taxation	R 2 761 333.07
Net proceeds	**R 6 634 315.29**
MG share	R 3 317 157.65
MG investment	R 1 000 000.00
MG profit before priority interest	**R 2 317 157.65**
Priority interest @ 10.5% for 12 months	R 105 000.00
Net profit on investment	**R 2 212 157.65**
DG share on MG profit	R 553 039.41
Net MG profit after tax	**R 1 659 118.24**
Estimated tax calculation Sale proceeds Cost of investment Initial investment Bank interest Priority interest Profit Company tax @ 29% STC @ 12.5%	 R 13 013 630.00 R 5 215 983.68 R 401 997.96 R 105 000.00 **R 5 722 981.64** R 7 290 648.36 R 2 114 288.02 R 5 176 360.34 R 647 045.04 R 2 761 333.07
MG proceeds Initial investment Priority interest MG Profit Total proceeds Check diff	 R 1 000 000.00 R 105 000.00 R 1 659 118.24 R 2 764 118.24 R 2 764 118.24 R 0.00

"DG6" – **SEENA MARENA INVESTMENTS: INV (R0015109)**
INV ITO SECT 78 (2A)
IN TERMS OF ATTORNEYS ACT 53 OF 1979

PEOPLE'S BANK – CLIENTS (SEC 78 (2)A) C0000909

DATE	DETAILS	REF.	EXTRA	DEBIT	CREDIT	BALANCE
	Balance B/F					R 0.00
08 AUG 2005	Investment interest adjustment	T910311			R 78 256.58	
08 AUG 2005	Withdraw investment: 50015109	T910311		R10 078 256.58		
22 JUN 2005	Deposited investment: 50015109	T1123			R5 000 000.00	
22 JUN 2005	Deposited investment: 50015109	T1121			R5 000 000.00	

[22] Mr. Hodes SC in his submissions was very critical of Annexure "DG7" and he submitted that on its very face, it is a speculative document predicting a probable scenario based on various assumptions and estimates. In his submission, Annexure "DG7" is patently not an account based on actual documented events. Mr. Hodes SC drew it to the attention of the Court that the facial appearance of Annexure "DG7" is explained by the following facts, namely, that on Mr. Gihwala's own version it was a document prepared in advance of any actual transactions, by Mr. Narotam (on behalf of MG) and not by Mr. Gihwala, which was "agreed" between Mr. Narotam and Mr. Gihwala. Mr. Hodes SC submitted that Annexure "DG7" cannot constitute an account which must at the very least record actual transactions, as supported by the various vouchers generated by such transactions. In this regard Mr. Hodes SC referred me

to ***Doyle & Another v Fleet Motors PE (Pty) Ltd*** *supra*. This indeed remains a powerful submission which, in my view, cannot be faulted as it talks to the well established legal principle in this regard. One would have expected that a full and proper accounting in relation to the One million rand (R1 000 000.00) investment would inter alia include:

(a) Details of the precise number, cost per equity instrument (excluding costs) and time of purchase of equity instruments in Scharrig or any other investments which were acquired with the amount on behalf of the Applicants;

(b) Details as to whose direct and indirect economic interests the Scharrig equity instruments were acquired for;

(c) Details of the amount, source and costs of any financing received in relation to each Scharrig equity instrument;

(d) Full details of any encumbrances which apply in respect of the acquired Scharrig equity instrument;

(e) Full details of any costs, taxes and the like which fall to be deducted from the return due to MG generated by the Scharrig investment;

(f) All vouchers supporting all of the above, including copies of all relevant agreements and certificates evidencing or constituting the Scharrig equity instruments or any other instruments acquired with the amount.

ACCOUNT: TEN MILLION RAND (R10 MILLION)

[23] In relation to the above sum of money paid by MG (in liquidation) to Mr. Gihwala, Mr. Hodes SC submitted that there are two (2) separate and distinct features in respect of which a proper accounting must be furnished. The first relates to the alleged unavailability of any further shares being available to MG (in liquidation) pursuant to the option. The

second feature relates to the detail of the use to which the Ten million rand (R10 000 000.00) was put between the time it was received by Mr. Gihwala and the time it was returned to MG (in liquidation). We now know from the papers that in regard to what Mr. Hodes SC has termed "first feature", that Mr. Gihwala avers that he did not use the Ten million rand (R10 000 000.00) to invest in Scharrig despite the fact that he explicitly requested the funds only a few days earlier specifically for that purpose. Certainly it would not be said to be too onerous an expectation on the part of MG (in liquidation), to have expected an explanation from him why the opportunity could not be taken up and why, in the circumstances, the funds were transferred out of the Hofmeyer trust account at all. With regard to what Mr. Hodes SC has termed "the second feature", one would expect of Mr. Gihwala to provide a full and detailed account of how the monies were used while they were under his curatorship, and account properly for the return that was (or must have been) generated by whatever use the monies were in fact put to.

[24] According to Mr. Gihwala the Ten million rand (R10 000 000.00) was not used by him. That alone does impose an obligation on him to account for failure to utilize the funds. Mr. Hodes SC is correct in contending that to the extent that the Ten million rand (R10 000 000.00) was placed on account with the People's Bank, Mr. Gihwala must necessarily explain why that was done and particularly why the monies were invested in the name of Seena Marena Investments (Pty) Ltd. It is so that it is pointed out in the Replying papers that "DG6" to the Answering Affidavit reveals that the account into which the monies were paid was an interest bearing account contemplated under section 78 (2A) of the Attorneys Act, 1979.

In terms of that section Mr. Gihwala was obliged to deposit the funds in the name of the Applicants and not in the name of SMI. In Mr. Hodes SC's submission Mr. Gihwala must account in full detail with supporting vouchers for any interest that was earned while the monies were so invested and must also account for any costs or other deductions by which the amount due to MG (in liquidation) was reduced prior to it being returned to MG (in liquidation). According to Mr. Hodes SC Mr. Gihwala must make full disclosure of any tax in fact paid by any entity resulting from MG's deposit of Ten million rand (R10 000 000.00) into the Hofmeyer trust account, together with supporting vouchers. I cannot understand why Mr. Gihwala cannot account in the manner that MG (in liquidation) wants. I mean, if they want supporting documents and/or vouchers that must certainly be supplied to them.

ACCOUNT: HOFMEYERS; TRUST ACCOUNT

[25] For purposes of this subtopic it is necessary to set out *infra* the contents of Annexure "DG5".

"DG5" – SEENA MARENA INVESTMENTS (50015109) →(C0000909) SEENA MARENA INVESTMENTS (PTY) LTD DCM/TAURIN MANAGEMENT PROPERTY

DATE	DETAILS	REF.	EXTRA	DEBIT	CREDIT	BALANCE
	Balance B/F					R 0.00
11 FEB 2005	Received direct deposit – Taurin Management Property	92614			R 3 500 000.00	R3 500 000.00
16 FEB 2005	Payment: Ngatana Prop (Pty) Ltd – amount due			R 1 800 000.00		R 1 700 000.00
APR 2005	Payment: Dines Gihwal Family Trust			R 1 000 000.00		-R 700 000.00

16 MAY 2005	Received Direct Deposit–Taurin Management	106980			R 540 250.00	R 1 240 250.00
06 JUN 2005	Payment: Ngatana Prop Inv (Pty) Ltd			R 1 240 250.00		R 0.00
20 JUN 2005	Direct deposit: Taurin Management Prop Anstalt	112086			R 10 000 000.00	R10 000 000.00
22 JUN 2005	Investment: HHG/SEENA MARENA/SEC 78(2 A)			R 5 000 000.00		R 5 000 000.00
22 JUN 2005	Investment: HHG/SEENA MARENA/SEC 78(2 A)			R 5 000 000.00		R 0.00
08 AUG 2005	Received People's Bank Seena Marena Inv–Close Investment	120544			R 10 078 256.58	R10 078 256.58
08 AUG 2005	Payment: University Stellenbosch			R 21 073.92		R10 057 182.66
08 AUG 2005	Dines Gihwala Family Trust			R 57 182.66		R10 000 000.00
10 AUG 2005	Paid: Taurin Management Anstalt	120967		R 10 000 000.00		R 0.00
17 MAR 2006	Received Dines Gihwala Family Trust – Seena Marena Investments	155136			R 2 764 118.24	R 2 794 118.24
29 MAR 2006	Paid: Foreign Exchange amount paid to Switzerland (DG) – FX IB63S01179 ZAR2764118.24	157037		R 2 764 118.24		R 0.00
30 MAR 2006	FX IB63S0111179 Taurin Management Bank Charges Foreign Exchange Trf to Switzerland...	157038		R 600.00		R 600.00

30 MAR 2006	FX IB63S0111179 Taurin Management Bank Charges Foreign Exchange Trf to Switzerland...	157038		R 90.00		R 690.00
04 APR 2006	Received Dines Gihwala Family Trust – Seena Marena Investments	158952			R 50 000.00	-R 49 310.00
18 APR	Foreign Exchange: IB64100922 ZAR 50 00.(sic) 1 0000-Switzerland	161087		R 50 000.00		R 690.00
	Business Balance					
	Trust Balance					R 0.00
	Holding Trust					R 0.00
	Investment Balance					R 0.00
	Investment Account					R00 15109.00

In regard to Hofmeyers' duty to account for the monies placed by MG in its trust account, it is contended on behalf of the Applicants that it is not sufficient merely to provide the trust ledger which is annexed to the Answering Affidavit as "DG5". Various entries in "DG5" relating to the amounts paid by MG (in liquidation) require explanation according to the Applicants. Once more the Applicants insist that supporting vouchers must be provided. The examples given in this regard are that Mr. Gihwala must explain why the Seventy eight thousand two hundred and fifty six rand and fifty eight cents (R78 256.58) allegedly earned as interest on the Ten million rand (R10 000 000.00) was paid to "University of Stellenbosch" and to "DGFT" and why no part of the amount

appears to have been used to offset any tax liability alleged in the Answering Affidavit. Indeed the fact of the matter, all things being equal, any interest accruing on the funds would accrue to its owner MG (in liquidation) and would remain governed by the tax regime applicable to MG (in liquidation). Strangely, the Answering papers contain no evidence of any tax which the DGFT or SMI became liable for. The Applicants correctly require an explanation for the very fact that funds were unvested in an account under SMI's name even though they in fact belonged to MG (in liquidation).

OBSERVATION

[26] It is common cause in the papers that Mr. Narotam is a friend of Mr. Gihwala's and that their friendship existed even before the transactions between the Applicants and the Respondents were concluded. The fact of the matter though is that Mr. Narotam was an employee of the Applicants at the time these monies were invested. It remains concerning though that what purports to be statements accounting or purporting to be accounting to the Applicants was drawn up by Mr. Narotam. The Applicants are correctly concerned that probably Mr. Narotam may have compromised the interests of his employers by agreeing to be the draftsman of these documents. These are presented by Mr. Gihwala as agreed accounting records. Questions would naturally come to the mind whether or not Mr. Narotam had at his disposal supporting documentation at a time he prepared these accounts. However, there is no need in the instant matter to make any determination in this regard, save to mention that the concerns raised by the Applicants have some legitimacy.

[27] The accounting Mr. Rose-Innes referred to (set out *supra* as Annexures) although it represents the usual way of accounting, remains more than bold and insufficient recital of *inter alia* payments made. As I mentioned above, the Applicants remain entitled to have sight of the source and/or supporting documents. Annexures "DG7" and "DG6" may be likened to a "brokers note" dealt with in ***Hansa v Dinbro Trust (Pty) Ltd*** 1949 (2) SA 513 (T) at 516. In the latter regard Millin J remarked that:

"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."

Full accounting must necessarily mean an accounting that deals exhaustively with the application of the Applicants' funds in regard to the acquisition or non-acquisition of contemplated shares including sufficient information as to supporting vouchers (where they exist). The purpose must always be to sufficiently inform the Applicants of what really 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. See: ***Montague Goldsmith AG in Liquidation & Another v Dines Chandra Manilal Gihwala and Others*** *supra* (an as yet unreported Western Cape High Court case). It is my considered opinion that the Applicants have made out a compelling case and that the order sought is deserved. Binns-Ward J of this division in the above ***Montague***

Goldsmith AG in Liquidation and Another v Dines Chandra Manilal Gihwala and Others case correctly stated that 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. In his view 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. Seeing that the Applicants in the instant matter also pray for an order that debatement of the account needs to take place, the views expressed by Binns-Ward J are compellingly applicable in this matter as well.

[28] In the circumstances I make the following order:

(a) It is ordered that the First, the Second and the Seventh Respondents shall within fourteen (14) days from the date of this order render a full and proper account to the Applicants in respect of the First Applicant (MG in liquidation), alternatively the Second Applicants' investment in Scharrig Mining Limited ("the Scharrig investment") and shall 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 Applicants' funds of:

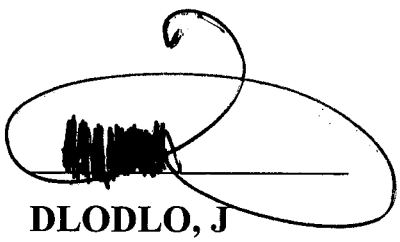
(i) One million rands (R1 000 000.00), which were held in trust by the Seventh Respondent on behalf of the First Applicant (MG in liquidation), alternatively the Second Applicant in the Seventh Respondent's First National Bank trust account number

51331425227 from 9 February 2005 upto and until 14 April 2005 and subsequently dispersed, and

(ii) Ten million rands (R10 000 000.00) which were transferred to the Seventh Respondent's aforesaid trust account on 16 June 2005 and subsequently returned to the First Applicant (MG in liquidation), alternatively Second Applicant on 11 August 2005, were utilized by any of the said Respondents, their assigns or agents, or any other party;

(b) It is ordered that there be a debate of the said accounts and payment by the First, Second to Sixth and/or the Seventh Respondents to the First Applicant (MG in liquidation), alternatively the Second Applicant of whatsoever amounts appear to be due to either of them upon such debatement;

(c) It is ordered that the First, the Second and the Seventh Respondents shall pay jointly and severally, the one paying the other to be absolved, the Applicants' costs of suit herein on a scale as between Attorney and own client.



DLODLO, J