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

**Case No. 15757/07**

In the matter between:

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| **GRANCY PROPERTY LIMITED** | First Applicant |
| **MONTAGUE GOLDSMITH AG** | Second Applicant |
| and | |
| **SEENA MARINA 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 N O** | Fifth Respondent |
| **SHANTI GIHWALA N O** | Sixth Respondent |
| **KANTIELAL JERAM PATEL N O** | Seventh Respondent |
| **NARENDA GIHWALA N O** | Eighth Respondent |
| **KIRAN GIHWALA N O** | Ninth Respondent |

**Case No. 10547/08**

In the matter between:

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| **GRANCY PROPERTY LIMITED** | First Applicant |
| **MONTAGUE GOLDSMITH AG** | Second Applicant |
| and | |
| **DINES GIHWALA** | First Respondent |
| **DINES GIHWALA N O** | Second Respondent |
| **SHANTI GIHWALA N O** | Third Respondent |
| **KANTIELAL JERAM PATEL N O** | Fourth Respondent |
| **NARENDA GIHWALA N O** | Fifth Respondent |
| **KIRAN GIHWALA N O** | Sixth Respondent |
| **HOFMEYR HERBSTEIN & GIHWALA INC** | Seventh Respondent |

**JUDGEMENT DELIVERED ON 10 DECEMBER 2012**

1. There are before me separate but inter-related applications and counter applications in terms of Rule 6(11) relating to the statements and debate of accounts. The first application relating to the Spearhead Investment is an application brought by the second, third and fifth respondents and a counter-application brought by the applicants in case no. 15757/07. The second application, relating to the Scharrig Investments, is an application brought by the applicants and a counter-application brought by the first to the sixth respondents in case no. 10547/08. In terms of a court order, these applications and counter applications were consolidated and enrolled for hearing on 1st and 2nd November 2011.

2. Both of the above matters dealt with overseas persons who had decided to make monetary investments in South Africa.

3. The factual background of the two applications and their counterparts is found in the principal proceedings, the judgement of Binns-Ward J and the judgement of Dlodlo J. In addition, the two sets of heads of argument set those facts out.

4. Mr. P. Hodes assisted by Mr. J. McNally appears on behalf of the applicants and Mr. L. Rose-Innes appears on behalf of the respondents.

5. Our law recognises a cause of action based on a claim to an account, the debate thereof and payment of such money as may be found to be due. The real object of such claim is to obtain payment of an amount which the applicants believe is due to them.

6. In both the Spearhead and the Scharrig matters, the applicants adopted the usual approach. They sought the furnishing of an adequate account, followed by the debate thereof.

7. Binns-Ward J gave judgement in the Spearhead application on the 15th April 2010. The learned judge found that in all the circumstances what the respondents had rendered was inadequate and that the second, third and fifth respondents were directed to furnish the second applicant with an improved account within 15 days of the order.

8. Dlodlo J gave judgement in the Scharrig application on the 18th June 2010. The learned judge found that the accounting that had been rendered was inadequate and inter-alia ordered that the first, second [illegible] the seventh respondents shall within fourteen (14) days 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").
The respondents handed over further documentation pursuant to the order. However, the applicants have at all material times queried that the accounting by the respondents has not been adequate.

9. THE PROPER APPROACH AHEAD

There is in South Africa, no prescribed procedure for what is referred to as a "statement and debatement of account". In *Doyle and Another v Fleet Market Motors (Pty) Ltd.* 1971 (3) SA 760 (AD) at 762E the then appeal court stated in the absence of such a procedure ***"the following general observations might be helpful".***

***"1. The plaintiff should aver –***

***(a) his right to receive an amount, and the basis of such right, whether by contract or by fiduciary relationship or otherwise;***

***(b) any contractual terms or circumstances having a bearing on the account sought;***

***(c) the defendant's failure to render an account.***

***2. On proof of the aforegoing, ordinarily the Court would in the first instance order only the rendering of an account within a specified time. The degree or amplitutde 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. Judgement 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 section 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."*

10. In the Doyle case, reference was made to the procedure which exists in England to regulate an accounting (see Halsbury's Laws of England (5th Edition) 2009 vol. 12 paras. 1524 – 1527. The procedure includes, inter-alia, the following features:

10.1 The accounting party must make out his account;

10.2 Any party who contests that the account is erroneous or inaccurate must give written notice of his objections, specifying the respects in which the account is inaccurate and stating the grounds on which the contention is made.

10.3 The Court has the power to give directions regarding the taking of an account or the conduct of an enquiry.

11. I do have sympathy for the applicants on a reading of paragraph 20 of the heads of argument.

"(20. The history of the Spearhead and Scharrig proceedings is a long and unhappy one. The litigation between the applicants and the respondents has given rise to four applications prior to the present set of applications and has involved a settlement agreement, two judgements and three court orders. Despite these, over the course of four years, the applicants and the respondents are still no closer to resolving their dispute as to whether the respondents have furnished full and proper accounts and to what extent the respondents are indebted to the applicants").

12.1 Despite what I have said above, I agree with the submission of Mr. Rose-Innes that in relation to the procedure ahead, that the applicants have adopted an unconventional approach suggesting that an interrogation process take place in a two stage enquiry in relation to the adequacy and accuracy of the accounts. The applicants' case goes one step further by setting out that applicants will not be obliged to submit to questioning during the "adequacy" stage of the respondents' accounts. I have no doubt the applicants wish to cross-examine Mr. Dines Gihwala, who is the second respondent in case no. 15757/07 and is the first respondent in case no. 10547/08. Indeed Mr Gihwala was the principal person who arranged where the money was to be sent and how it was dealt with. This all means that the applicants would most likely have had all the answers they wanted before the trials begins.

12.2 In any event I have not been referred to any authority by Mr. Hodes (nor have I been able to find same that is consistent with the manner of claiming the relief that applicants want).

13. In my view the Spearhead and Scharrig accounts are ready to be debated.

14. In the circumstances I agree with the order sought by the respondents, namely;

1. Directing that the applicants and the second, third and fifth respondents (in case no. 15757/07) and the applicants and the first, second (in his capacity as trustee of the Dines Gihwala Family Trust) and seventh respondent now incorporated in DLA Cliffe Dekker Hofmeyer Inc. (in case no. 10547/08), debate the account furnished by the second, third, fifth and seventh respondents, pursuant to the orders of this court granted on 9th March 2009, 15th April 2010 and 18th June 2010 in the manner set out hereunder:

1.1 the applicants must give the respondents written notice of any objections they may have to the account ("the written notice");

1.2 the written notice must:

1.2.1 identify which items of the account the applicants contend are incorrect, setting out the grounds upon which such contention is made and indicating what the correct nature of the item (including the amount) should be;

1.2.2 identify in what other respects, if any, the applicants contend the account is inaccurate, setting out the grounds upon which such contention is made;

1.2.3 specify whether the applicants contend that the respondents have received more than they are entitled to in accordance with the account, setting out the amount in question, whence the funds were received, and how the amount alleged is calculated and arrived at;

1.2.4 specify whether the applicants contend that they are entitled to the payment of any amount and, if so, what that amount is and how it is calculated and arrived at;

1.3 after receipt of the written notice the parties will debate the correctness of the account;

1.4 as to the debate referred to in paragraph 1.3:

1.4.1 it will be in Cape Town on a date and at a venue to be agreed;

1.4.2 it will be presided over by an independent chairperson, to be agreed, who will have the power to oversee the proper and orderly conduct of the debate but will have no further power;

1.4.3 the parties, their legal representatives and their accountants are to be present at the debate;

1.4.4 for the avoidance of doubt, the debate will take the form of a consideration and debate by the parties of the aspects raised by the applicants in their written notice, but will not involve the leading of evidence or the cross-examination of witnesses;

1.4.5 the debate will be recorded and transcribed;

1.4.6 the parties will, on an interim basis each bear one-half costs of the debate (including the costs of the venue, recorders, transcribers and the chairperson), which costs will ultimately be costs in the cause of the debatement;

1.5 if the parties are unable to agree on the outcome of the debate:

1.5.1 they will formulate a minute of disputed items and issues;

1.5.2 the matter will be set down for debate and adjudication before this Court;

1.5.3 the further proceedings before this Court will be in accordance with the Uniform Rules of Court.

**CONCLUSION**

An order is granted in terms of the respondents' notice of application in the second Spearhead rule 6(11) application and the respondents' notice of counter-application in the Scharrig rule 6(11) application. The applicants' counter-application in the second Spearhead rule 6(11) application and their notice of application in the Scharrig rule 6(11) application is dismissed with costs.

McDougall AJ