REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO**: 12/31738**

(1) REPORTABLE: NO / YES
(2) OF INTEREST TO OTHER JUDGES: NO / YES
(3) REVISED.

…… ……

MOOSA T AJ **06/12/2022**

In the matter between:

DE JAGER, SANDRA LILIAN Plaintiff

and

HEYMAN, ALAN CYRIL Defendant

ORDER

Having:

(a) Heard counsel for the parties; and

(b) Considered the matter,

IT IS ORDERED:

1. the amended report of the referee, Mr Henry Robert Walton, dated 28 April 2017 is adopted:

    1.1. wholly;

    1.2. without modification.

as envisioned in Section 38(1) of the Superior Courts Act, No. 10 of 2013, with specific reference to paragraphs 119 – 122, thereof;

2. The Defendant is ordered to pay to the Plaintiff;

    2.1. the sum of R8 348 818.00 (Eight million three hundred and forty-eight thousand eight hundred and eighteen Rand) (“the capital sum”);

    2.2. interest on the capital sum:

        2.2.1. a *tempore mora*;

        2.2.2. at the prescribed rate of interest of 10.25 % per annum;

2.2.3. calculated:

2.2.3.1. from 28 April 2017 being the date of the initial report of the referee;

2.2.3.2. to date of final payment;

2.3. costs of suit, including:

2.3.1. the costs of the referee;

2.3.2. the costs of senior counsel;

3. With reference to claims which were still pending on 20 February 2017 as envisaged in paragraph 4.2 of the order in this action dated 22 November 2016:

3.1. the net fee after:

(a) recoupment of disbursements

(b) accounting for value added tax,

shall be apportioned between the parties as follows:

3.1.1. 40% to the Plaintiff;

3.1.2. 60% to the Defendant;

3.2. the overhead costs per annum to be recouped from the fee as contemplated in paragraph 3.1 (a) and (b) *supra*, shall:

3.2.1. be calculated per file:

3.2.1.1. at the rates reflected below;

3.2.1.2. employing the base figure of 2016;

escalated by the average annual inflation rate per annum for the years following 2016, as reflected in the table hereunder:

Year	**Inflation**	**Amount**
2012	5.75%	3124
2013	5.77%	3304
2014	6.12%	3507
2015	4.51%	3665
2016	6.59%	3906
2017	5.18%	4108
2018	4.50%	4293
2019	4.10%	4469
2020	3.20%	4652
2021	4.60%	4801

3.2.2. be apportioned between the parties as follows:

3.2.2.1. 40% to the Plaintiff;

3.2.2.2. 60% to the Defendant;

3.2.3. in order to facilitate ease of calculation will be:

3.2.3.1. calculated on the basis that no adjustments will be made for the month in which the Road Accident Fund payment was received;

3.2.3.2. performed on an annual basis;

3.3. payments thus calculated shall be paid to the party entitled to such payment within two months of receipt of the payment from the Road Accident Fund.

JUDGEMENT

MOOSA AJ

Nature of the dispute and litigation history

1. The matter started as an application by the present Plaintiff as Applicant against the current Defendant as Respondent to declare the business relationship between the Plaintiff who is a duly admitted attorney and the Defendant also a duly admitted attorney, from August 2000 to be a partnership and that the conditions of the verbal

agreement between the parties as varied from time to time, relating to their partnership be confirmed.

2. The Plaintiff practises as a sole practitioner under the name and style of *"De Jager-Du Plessis"*

3. The Defendant who specializes in Road Accident Fund, (" RAF") and personal injury claims has since March 2012 practised for his own account under the name and style of "*Heyman Attorneys".*

4. During or about August 2000 the parties entered into an agreement whereby they would run a RAF practice, which would also include personal injury claims.

5. This arrangement was never reduced to writing, the essence of the arrangement was that the Plaintiff would supply the infrastructure and concomitant overhead costs to run the practise, while the Defendant would contribute his specific skill and experience to the practise.

6. The parties agreed on a split of fees earned on these matters for their respective contributions to the practise, this agreement was varied three times in terms of overhead responsibility, funding of disbursement and fee split between the parties, first in September 2005, then in February 2007 and finally in March 2010.

7. The parties are *ad idem* about the contents of the variations of the aforementioned fee sharing arrangements albeit that they were not reduced to writing

8. The relationship between the parties having deteriorated, In July 2011 the Defendant informed the Plaintiff of his intention to terminate the relationship on 31 March 2012. On 28 February 2012 the Defendant vacated the premises and transferred a significant part of the RAF practise to his new premises.

9. Between the period 2013 and 2018 the parties entered into protracted litigation, regarding inter alia, costs incurred by the joint practise, the apportionment of payments received from the RAF since the inception of the arrangement and apportionment of future fees to be earned in matters transferred by the Defendant to his new premises.

10. In terms of a court order granted by Francis J, dated 24 October 2014. [1] This action therefore premised on the basis that the notice of motion in the original application be deemed to be a simple summons, the Plaintiff having delivered a declaration to which the Defendant pleaded, raising several special pleas.

11. On 19 February 2015, the Plaintiff filed a notice of amendment in terms of Rule 28 amending her declaration.[2]

12. On 9 October 2015, the Defendant filed his special pleas and plea.[3]

[1] CaseLines 074-4 -12
[2] CaseLines 034-1-7
[3] CaseLines 030-1 - 22

13. The matter was set down for trial in November 2016 and Mojapelo DJP ordered that by agreement between the parties that a referee be appointed in terms of the provisions of Section 23 of the Superior Courts Act of 2013 to compile a report, such order setting out the specific requirements and terms of the mandate to the referee ("The appointment order").[4]

14. The litigation process continued and despite case management, the parties were unable to settle the matter. Following a further interlocutory application disputing the referees report on 7 August 2018 Wright J, ordered that the application be dismissed and specifically that; "the *matter be continued on the pleading as they are or as it may be amended"*.[5]

15. The Defendant raises two issues for the consideration of this court:

15.1. That the special pleas of the Defendant in this action remain alive, notwithstanding the consensual granting of the appointment order and that the order of Wright J is suggestive that the merits of the matter are resurrected and thereby still require adjudication.

15.2. That the Defendant resists the adoption of the court appointed referee's report on the basis that the report does not coincide with the views of the expert of the Defendant.

[4] CaseLines 074-14
[5] CaseLines 074-21

Special Pleas

16. Merits and quantum in a patrimonial damages claim are inextricably linked and it is a logistical nightmare and costly exercise for a Plaintiff to simultaneously prepare a matter on the quantum, especially when merits are disputed or there is a real possibility that a Plaintiff will not succeed on the merits. In doing so, a Plaintiff risks putting the cart before the horse and opens itself to unnecessary wasted costs.

17. On 14 November 2016, approximately one week prior to the appointment order the Defendants attorney Mr Ian Allis transmitted an email [6] to the plaintiff, copying all parties and their counsel.

18. The import of this email was to motivate for an appointment of a referee to consider if any, the quantum liability of the Defendant to the Plaintiff, not for the referee to consider the merits of the matter.

19. The appointment order granted by Mojapelo DJP on 22 November 2016[7] therefore resulted from the motivation of Mr Allis for the appointment of a court appointed referee to consider the quantum of liability, if any that the Defendant may have to the Plaintiff.

[6] CaseLines 078-16, item 2 of the schedule to the Plaintiff's supplementary discovery affidavit, CaseLines 028-328
[7] CaseLines 074- 14 -17

20. There is not the slightest suggestion from the wording of the appointment order that merits remain disputed, in fact the appointment order clearly confirms that a fee sharing arrangement existed between the parties and goes on further to instruct the referee on the different timelines, fee split percentages and specific direction of the methodology to be used for the calculation of any financial liability that the Defendant may have to the Plaintiff.

21. Further the Defendant consented to the appointment order being granted. The contention that the merits of the matter are still alive at this stage are simply opportunistic and *mala fide.*

22. Following the Plaintiff amending her declaration, the Defendant wished to raise the point that the Plaintiff had abandoned a part of her claim viz; that a partnership existed between the parties.

23. That in amending her claim to that of a fee sharing arrangement, read with the Defendant's understanding of the import of the Wright J order the matter would then be *res judicata.*

24. The Defendant had almost four years from the date of the appointment order to raise such a plea of estoppel and did not do so, ***In Body Corporate of 22 West Road South v Ergold Property Number 8 CC***[8], Burochowitz J correctly held;

[8] Body Corporate of 22 West Road South v Ergold Property Number 8 CC 2014 JDR 2258 (GJ) pg. 6

"The act of abandonment is of a unilateral nature and operates ex nunc and not ex tunc. It precludes the party who has abandoned its rights under the judgement from enforcing the judgement but the judgement still remains in existence with all its intended legal consequences.

The opposite party need not accept such abandonment. It was open to the defendant to accept the abandonment, which it did do in the present case. Had the defendant accepted the abandonment it would have been precluded from raising a plea of res judicata".

25. The merits having already being conceded at the time of the appointment order and the specials pleas accordingly having no moment.

Referee's report/s

26. On the question of the evaluation of the quantum of damages in this matter two reports were filed;

26.1. The amended report of the court appointed referee, Mr Henry Robert Walton, dated 28 April 2017. ("The Referee's report")[9]

26.2. The Defendant filed a notice in terms of rule 36(9)(b) dated 15 July 2020 attaching the report of his expert Mr Shalom Golovey ("The Golovey report").[10]

[9] CaseLines 033 -45 – The Referee's Report
[10] CaseLines 033-272-283 – The Golovey Report

27. Mr Walton has emigrated to The Republic of Cyprus and accordingly testified via video link. He testified at length and took the court through the report and confirmed that his report was based and formulated on the directions of the appointment order, save for one aspect, Viz the application of the Referee's discretion in relation to the apportionment of overheads during the period that the Defendant practised as Heyman attorneys from the period 2012, this is discussed more fully hereunder.

28. The Defendants did not call Mr Golovey to testify and criticised the Referees report on three core bases, deriving these conclusions from the Golovey report;

(a) <u>That the report was based on an accrual basis vs a cash basis.</u>

29. Save for this assertion, the Defendant lead no evidence that the Referees report was based on an accrual basis as alleged.

30. The Referee confirmed that his calculations were based strictly on a cash received basis as per the instructions of the appointment order.

31. The Referee testified that he downloaded every single transaction in the respective attorney's Trust account and books, whereafter he was able to identify:

31.1. Cash transactions

31.2. Payments received from the RAF

31.3. All payments made to the Defendant and by the Defendant

31.4. Lastly, he looked at the overheads.

32. That he was able to determine a cash movement from the parties respective Trust accounts and this allowed the Referee to determine that he was working with cash and only cash.

33. This criticism therefore being devoid of any merit.

(b) <u>That the apportionment of overheads was incorrect.</u>

34. The Defendant criticised the Referees report for the fact that the Referee apportioned overheads amongst the all then current files (paragraph 74 the Referees report).[11]

[11] CaseLines 033-15, paragraph 74

35. The Referee testified that after 2012 he had no real numbers to work with and he had to be fair, his approach was that the Plaintiff should not be entitled to income without carrying her share of the expenses.

36. He then applied a cost accounting principle, whereby he would allocate a cost per file in respect of both parties.

37. That he considered that a file stopped carrying costs when the matter ended, gets paid up or is withdrawn, essentially when there is no possibility of that file earning an income.

38. Between the period 2012 to the time that the Referee's report was generated the Defendants practise generated Twenty-three million Rand and therefore an asset was created.

39. The Referee testified that he had no discretion as to how the population and allocation of fees was made, no discretion as to what to recognize what happens in the Trust accounts or how the overheads up to 2012 were calculated.

40. In the allocation of overheads post the 2012 period the Referee applied his discretion and the concept of natural justice and applied something that was fair and equitable, thereby decreasing what would be owing to the Plaintiff.

41. The Defendants contended that the overheads of the Defendant post the 2012 period in fact extinguished the Plaintiffs entire claim, this allegation was not substantiated with an objection to the Referees methodology used or with a calculation to dispute this.

42. In the absence of any reasonable explanation and computation to support the Defendants above contention, this criticism must also fail

(c) <u>That the Plaintiff was not entitled to fees after the termination</u>

43. Paragraphs 3.4 and 4 of the appointment order makes specific provision for the Plaintiffs entitlement to fees with reference to the post – termination period, the Plaintiff:

43.1. was entitled to share in the fees;

43.2. would receive 40% of the fees;

43.3. was liable to suffer a deduction of 40 % of the overheads of the Defendant's practice.[12]

[12] CaseLines 074-15-16

44. The Referee's calculations therefore accord with the instruction emanating from the appointment letter.

45. The Golovey report makes the assertion that the Plaintiff is not entitled to share in the fees earned after the termination of the common practice, on the basis that she did not share in the overheads of the Defendants practice.

46. Save for this criticism, the Golovey report completely ignores the appointment order, does not substantiate that the Referees report is unreasonable, irregular, wrong or inequitable, this criticism therefore also devoid of merit.

Section 38

47. Section 38(1) provides:

"38 Reference of particular matters for investigation by referee

(1) The constitutional court and, in any civil proceedings, any Division may, with the consent of the parties, refer-

(a) Any matter which requires extensive examination of documents or a scientific technical or local investigation which in the opinion of the court cannot be conveniently conducted by it; or

(b) Any matter which relates wholly or in part to accounts; or

(c) Any other matter arising in such proceedings,

for enquiry and report to a referee appointed by the parties, and the court may adopt the report of any referee, either wholly or in part, and may remit such report for further enquiry or report or consideration by such referee, or make such other order in regard thereto as may be necessary or desirable"

48. In the matter of Wright vs Wright and Another, Kathree-Setiloane J held:

1.1 *"[16] The test applied for rectification of an expert valuator's report which is akin to that of a referee's report, accords with the test applied in Estate Young and Chaffer, albeit that the jury system has been discontinued in South Africa. A referee's report as contemplated in s19bis of the Act, is a finding of an expert appointed by the court, to investigate and provide a report of his or her findings to the court on questions of fact. A court should therefore, be "extremely slow" to interfere with these findings, unless it can be shown that the findings are so unreasonable, irregular or wrong, so as to lead to a patently inequitable result.*[13]

49. In this matter, the Golovey report which was procured by the Defendant to bolster the defendants claim of no liability served only to level criticisms which were unmotivated and unsubstantiated.

[13] Paragraph 16 of the judgement in Wright vs Wright and Another 2013 (3) SA 360 (GSJ), confirmed on appeal in Wright v Wright and Another 2015 (1) SA 260 (SCA) ("the SCA judgement"). Section 19 bis referred to therein is the predecessor of Section 38

50. By contrast the Referee's report, was initiated at the instance of the Defendant and by agreement between the parties in terms of a court order and the Referee was independently appointed by SAICA an independent accounting body and accordingly no bias could be attributed to the Referee's findings.

51. The Referee's report was well motivated, structured, logical and in compliance with the appointment order. In so far as the Referee applied his discretion, the Defendant placed no evidence before this court to gainsay this discretion. I found the discretion applied to be fair, equitable and persuasive.

52. Judgement is therefore granted in favour of the plaintiff in terms of the order enumerated above.

T. MOOSA AJ
ACTING JUDGE OF THE HIGH COURT
GAUTENG LOCAL DIVISION, JOHANNESBURG

Delivered: This judgement was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 06 December 2022

For the Plaintiff: Plaintiff's Counsel:
H B Marais SC
Email:
Cell: 083 441 5429

For the Defendant:	I Allis Email: Cell: 082 776 6554
DATE OF JUDGMENT:	06 December 2022