

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

Case Number: 52270/2015

- | | |
|-----|---------------------------------|
| (1) | REPORTABLE: NO |
| (2) | OF INTEREST TO OTHER JUDGES: NO |
| (3) | REVISED: NO |

30/6/23

DATE

SIGNATURE

In the matter between:

ANDRE NICOLAAS NEPGEN

Applicant

and

GARY BLAKE

First Respondent

JOHN GEORGE LANDSKRON

Second Respondent

ORDER

The application is dismissed with costs.

JUDGMENT

Fisher J

Introduction

- [1] This application is framed as a review under the Promotion of Administrative Justice Act,¹ (PAJA) alternatively, the common law. The review is aimed at a decision made by the first respondent pursuant to his appointment as an independent expert auditor for the purposes of determining the quantum owing to the plaintiff on liquidation of a partnership which existed between the applicant and the second respondent, Messrs. Nepgen and Landskron. The impugned decision came about as a result of an agreement entered into between these partners in the context of a trial action which remains pending between them.

Material facts

- [2] The applicant, Mr Nepgen and the second respondent, Mr Landskron are respectively plaintiff and defendant in the action to which this application relates. I will refer to them interchangeably by their names or as plaintiff and defendant.
- [3] Messrs. Nepgen and Landskron were business partners in the business of providing spare parts and related services in the auto body repair industry as a service to short term insurers.
- [4] A facet of the business was the incorporation of companies through which the partnership business would be conducted for the profit of the partnership. Both partners would contribute to the provision of loan capital and other funds needed to conduct the companies' businesses and thus ultimately that of the partnership. The partners made drawings from the entities.
- [5] Ultimately, it was intended that there would be an accounting in relation to amounts loaned and amounts drawn by the partners respectively in order to determine the apportionment of share in profits.
- [6] As part of the partnership business, the partners incorporated five companies, the businesses of which were conducted for the benefit of the partnership.

¹ 3 of 2000.

- [7] The plaintiff and defendant conducted the partnership business together from 2005 to 2015. This partnership and its dissolution are the subject of the trial action.
- [8] The following was claimed in the action:
- “An order of dissolution of the partnership, payment of an amount alleged to be due on such dissolution in the amount of R 811 000 (rounded off) together with interest and costs”.
- [9] Mr Landskron denied that there was a partnership and argued that each of the companies should be viewed in their own right.
- [10] At a pre-trial conference held in June 2016 it was agreed that the only issue to be decided on the merits was whether a partnership had come into existence. The merits and quantum were thus separated in terms of rule 33(4).
- [11] After a trial on the merits at which both parties testified, the court found in favour of the plaintiff’s contention for a partnership. There were attempts made by the defendant to appeal this decision but these came to nought.
- [12] The parties set down the matter for a determination of quantum before Davis J on 25 November 2019.
- [13] For the purposes of the trial, the plaintiff filed an expert summary of Mr Ivor Davkin, a chartered accountant and tax advisor. In the summary it was stated that Mr Davkin had been provided with voluminous documentation and information pertaining to amounts allegedly loaned to the partnership by the plaintiff, including payments made in respect of suretyship obligations and travel and accommodation expenses. The opinion of Mr Davkin was that, from these documents and information provided to him, he was able to calculate that the plaintiff had loaned to the partnership an amount of in excess of R 1.8 million. His report concluded that there was an amount due by Mr Landskron to Mr Nepgen in an amount of a little over R 1 million.
- [14] Mr Landskron did not file an expert summary. It seems that the plan was to cross-examine Mr Davkin on his own report.

[15] On the first day of the hearing and at the suggestion of the court that the quantum hearing may turn out to be nothing more than an accounting exercise, the parties entered into an agreement which was made an order of court (the consent order).

[16] The consent order reads as follows:

“HAVING HEARD COUNSEL ON BEHALF OF THE PARTIES AND BY AGREEMENT, THE FOLLOWING ORDER IS MADE:

1. The matter is postponed sine die, costs to be in the cause.
2. The Plaintiff shall provide an account of the partnership business from inception of the partnership during 2005 to the date of dissolution thereof, supported by vouchers (where possible) to determine the amount that may be owing by one partner to another;
3. Plaintiff shall render the account in paragraph 2 within 2 months from date hereof and such account shall be reconciled by an auditor of the Plaintiff's choice.
4. The Defendant shall, within 2 months of receipt of the Plaintiff's account (if so advised), provide the Plaintiff with a similar account drafted by an auditor.
5. Should either the Plaintiff or the Defendant fail to comply with the provisions of paragraph 2 or 4 above, such party shall be *ipso facto* barred.
6. The auditors shall prepare a joint report within 2 weeks after expiry of the date in paragraph 4 above, wherein they shall set out the issues that are in dispute and also indicate if such dispute is of a legal, factual or an accounting nature.
7. The disputes so identified that are of an accounting nature shall be referred to a senior independent auditor to be agreed upon by the parties and failing agreement (within 10 days) either party may request the Chairperson of the South African Institute of Chartered Accountants to appoint the senior auditor.
8. The senior auditor shall be obliged to hand down his decision within one month of his appointment.
9. The decision of the said senior auditor shall be final and binding on the parties.

10. In the event of a factual or legal dispute arising, any party may approach the Deputy Judge President with a request that the matter be allocated a preferential trial date the matter being part-heard before the Honourable Mr Justice Davis." (Emphasis added).

[17] In purported pursuance of the consent order, a rudimentary report was filed by Mr Nepgen which set out amounts paid to Mr Landskron. These payments were supported by bank statements.

[18] In response to this report, Mr Landskron filed a report by Mr Engelbrecht, also an auditor and tax consultant who had been engaged for the purposes of meeting the terms of the consent order.

[19] Mr Engelbrecht, in his report, expressed that in order to determine the quantum – being what one partner owed to the other, he would need access to a complete set of accounting records for all the entities run under the partnership as well as other possible business ventures. He opined that an accurate account of the partnership could only be produced if access was given to all relevant documents such as cash books, bank statements and journal entries together with supporting vouchers and EFT payment advices "and other relevant documentation in respect of all the various transactions".

[20] He expressed the opinion that reliance by Mr Davkin on incomplete accounting records, bank statements and documents covering only some of the companies involved had resulted in an incomplete accounting record.

[21] In conclusion, Mr Engelbrecht stated that Mr Davkin's account was "not an account of the partnership business". He stated further that, in his opinion, it could not be "regarded as an account contemplated in the consent order".

[22] The report of Mr Engelbrecht is replete with factual content and the recordal of factual disputes arising from instructions given to him by the defendant as to certain facts and queries raised in relation to Mr Davkin's account. The report also bemoaned the fact that there was much missing documentation.

[23] The report ended with a heading "Overall conclusion" under which the following was stated:

“44. Mr Engelbrecht emphasizes that it is not possible to prepare a proper and complete account of the partnership business.

45. According to the Defendant the plaintiff was in charge of the finances and the accounting records for the various entities (companies). Apparent differences in the loan accounting of the partners should rather have been discussed, clarified and where applicable, rectified from time to time during the tenure of the partnership. This was apparently not done, and it is impossible from the available information to calculate what the difference(s) may amount to.

46. Based on the available information, it appears as if Mr Davkin’s account is not a complete/accurate account of the partnership business since inception during 2005 to the date of dissolution thereof.”

[24] Thus, in summary, at that stage a rudimentary report of Mr Davkin had been filed by the plaintiff in purported compliance with the consent order. This report was filed off the back of Mr Davkin’s expert summary filed in terms of the rules of court. This financial case was gainsaid by the report of Mr Engelbrecht filed in purported compliance with the consent order.

[25] The report of Mr Engelbrecht revealed in no uncertain terms that an accounting as contemplated in the order was not possible without resort to further factual information and further records.

[26] The consent order contemplated that the next step in the agreed process would be for a joint report to be prepared by the two auditors. The report was to set out the issues in dispute and also indicate if the dispute was of a factual, legal or accounting nature.

[27] On 16 April 2021 and in the face of the impasse which was evident from the report of Mr Davkin and the response of Mr Engelbrecht, Mr Landskron’s attorney, Ms L Da Silva of Pennells Attorneys wrote to Mr Orelowitz, Mr Nepgen’s attorney purporting to invoke the consent order and specifically paragraph 6 thereof which required the drafting of a joint report. It was sought that Mr Davkin draft a joint report and deliver it to Mr Engelbrecht for his comments.

[28] Purportedly to this end there ensued numerous email communications between Mr Davkin and Mr Engelbrecht referring to schedules and attachments. These were positioned in the papers haphazardly with running email chains being attached in no particular order.

[29] I asked at the hearing of the matter on 18 April 2023 that I be provided with a chronological bundle of documents. Regrettably, this bundle was not forthcoming until 02 June 2023 and only after my office sent a reminder to the applicant's attorneys. The bundle ultimately received it was without pagination according to caselines or any other system of page numbering. This has unfortunately delayed the handing down of this judgment.

[30] The email correspondence between the two accountants reveals that they decided to provide their "joint report" in the form of schedules which purported to summarise the versions of each of their clients. It is immediately apparent that these summaries are based on the respective factual disputes between the parties as to the figures on the schedules. As such they are partially if not entirely subjective.

[31] On 07 May 2021 Mr Davkin wrote to Mr Engelbrecht as follows:

"Hi Pieter I understand schedule 1 to detail what is claimed per A Neppen and the response to such claims by J Landskron.

What I don't understand is schedule 2 "summary of amounts/items dealt with by the defendant and his expert" is this meant to constitute a counter claim?

Equally confusing is the statements "other payments made by the plaintiff R 1 978 60"

I have also submitted this schedule to Andre for his comments."

[32] Ultimately, no agreement could be reached between the two auditors. On 11 May 2021 Mr Neppen filed a document drawn by Mr Davkin which was named "the plaintiff's joint expert report" according to the filing sheet, but which was

headed the "Plaintiff's addendum to expert summary in terms of rule 36(9)(b)". I quote from this document directly (and verbatim) in that it conveys the woeful lack of any joint agreement between the parties' auditors:

"7. Given that the dispute and preparation of a joint report by the auditors/accountants ("accountants") of the parties is not capable of the meaningful resolution, this addendum is prepared by the plaintiff's suggested per-amble to a joint report, the reasons why such joint report cannot be prepared, and plaintiff's accountant's response is set out below *ad seriatim*:-

AD para 1, Regard must be had to the Court of first instance (case no: 52270/2015 Molopa-Sethosa J), which Court decided on the merits of this matter relating to the partnership agreement, and how it was operated over the relevant period through the different, legal entitles.

Copy of said judgment is available on request.

Ad para 2. It is denied that the main point of dispute is whether a complete and accurate account of the partnership from 2005 to date of dissolution of the partnership is required.

2.1 The court order provides for an "account of the partnership! business" to be prepared by the plaintiff, which statement of account between the partners, together with voluminous supporting documentation, has been provided to the defendant.

2.2 The account prepared by the plaintiff encompasses the statement of total expenditure incurred by the plaintiff on behalf of the partnership business, and duly adjusted to reflect his 50% share of such expenditure as expended on behalf of the partnership.

These amounts comprised the different items to which the aforesaid loans or payments on behalf of Vuzimix relate.

3 The defendant's auditor/accountant contention and dispute that the plaintiff's statement of account does not constitute an account of the partnership business,

and that the defendant owes the plaintiff R 1 050 923.00, is speculative and is therefore rejected.

4.4.1 & 4.4.2 The defendant's auditor/accountant is put to the proof that the plaintiff's statement of account neither constitutes: "a complete and accurate account" of the partnership business. No proper reasons are given for his assertions in this regard.

5 In my view, this dispute requires the intervention, and appropriate decision, of a senior independent auditor to be agreed upon by the parties and falling such agreement an appointment made by the Chairperson of the South African Institute of Chartered Accountants. I categorize the dispute between the experts as an accounting dispute.

6 refer para 5 above.

7. The plaintiff's statement of account in respect of expenditure incurred on behalf of the partnership business and consequent 50/50 split and supported by relevant documentation is summarized as per schedule 1. Schedule 2 provided by the defendant's auditor/accountant is not supported by any documentation and is considered unfounded and speculative."

[33] As if this were not confusing enough, on 18 May 2021, Mr Landskron filed a document headed "Defendant's joint expert report".

[34] This report of Mr Engelbrecht purports to set out what Mr Landskron contends should be in the joint report. It seems to have escaped the parties by this stage that a "joint report" had to reflect agreement.

[35] In this report the "main point of dispute" is identified as "whether it is possible to render an account of the partnership business".

[36] The report goes on to state:

"6. Both the Plaintiff and the Defendant have raised further issues (dealt with in paragraphs: 7 to 10 below) which will only become relevant should the senior

independent auditor determine that it is indeed possible to render an account as contemplated by the Court.

7. The issues raised by the Plaintiff are summarized in Schedule 1 attached while the issues raised by the Defendant are summarized in Schedule 2 attached.

8. The expert summary of the Plaintiff's auditor dated 31 January 2020 (together with certain documents) as well as the report/account of the Defendant's auditor dated 8 April 2021 (together with certain documents) and which includes a response to the issues raised by the Plaintiff should be regarded as an integral part of this joint report”.

[37] The state of “agreement” between the parties’ auditors at this stage can be summarized as follows: Mr Davkin for the plaintiff continued to assert that the accounting which he had set out in his first expert summary and the rudimentary report which was thereafter purportedly issued in accordance with the consent order reflected the true account of the partnership; Mr Engelbrecht for the defendant held fast to his conviction that it was impossible to render an account as contemplated in the consent order.

[38] Thus, Mr Engelbrecht in his report characterizes the dispute to be determined by the senior auditor under the consent order as primarily being whether it was possible to render an account. Reference to schedules 1 and 2 are stated by Mr Engelbrecht to be relevant only should the senior auditor determine that it is possible to render the account.

[39] Thus, at this stage, the joint interaction between the auditors had not actually resulted in any formulation of any accounting dispute.

[40] The factual issues raised by the respective parties are said to be “summarised” in the schedules. Reference to the schedules reveals a distillation of factual disputes which arose as to the contentions pertaining to the payments reflected thereon.

[41] Notwithstanding that the premises put forward for the figures in the schedules were awash with factual disputes and Mr Engelbrecht’s starting premise being that it was impossible to draw an account due to the lack of financial records of

the partnership, the parties agreed that the consent order be invoked on the basis that an independent senior auditor be appointed by the Chairperson of the South African Institute of Chartered Accountants.

[42] This resulted in the appointment of the first respondent, Mr Gary Blake.

[43] Apart from being subjective, the schedules relied on are not a model of clarity. They use columns to denote the monetary values to be apportioned to projects, loans, payments, salary shortfalls. One column reflects an amount which is put forward in relation to the particular item/category of income or expenditure on the factual version of the one partner; the next column shows the figure attributed by the version of the other partner and there is then a third column which purports to record the differences in relation to the respective versions.

[44] It is immediately apparent when reference is had to these schedules that the exercise which Mr Blake had been called on to perform is heavily fact dependant.

[45] In sum, the dispute which was characterized by Mr Davkin as an “accounting” dispute was clearly not such a dispute whilst Mr Engelbrecht was of the view that an accounting was actually impossible.

[46] Against this background, Mr Blake commenced the fulfilment of his mandate by asking that both parties provide him with all relevant documents.

[47] On 13 July 2021 the plaintiff’s attorney sent an electronic *Google Drive* folder with what was said to be “all the relevant information” from the plaintiff.

[48] On 14 July 2021 the defendant’s attorney sent an email to Mr Blake in which they expressed surprise that a document prepared after the “joint report” and referred to as “submission 6 – Response to Landskron Schedules received 09/04/2021” – had been included in the documents submitted by the plaintiff to Mr Blake. This document is at the centre of the dispute. I will refer to it as “document 6”.

[49] The defendant's attorneys indicated that they did not want to obstruct the process by objecting to Mr Blake receiving document 6, but that they would request the defendant and his auditor to respond thereto.

[50] On 29 July 2021 the defendant's attorney wrote an email to the plaintiff's attorney listing the documents in their Google Drive Folder to be the following:

“1.1 Index and Overview;

1.2 Auditors Report – Mr. Ivor Davkin;

1.3 Summarized claim by Mr. Nepgen;

1.4 Claim documentation by Mr. Nepgen;

1.5 Mr.Landskron's response dated April 2021 as well as Mr. Pieter Engelbrecht's Report;

1.6 Mr. Nepgen's response to Mr. Landskron's Report dated May 2021, including the Joint Experts' Report;

1.7 Judgements;

1.8 Mr. Landskron's Joint Report.”

[51] It was recorded in such email that the receipt by Mr Blake of the overview and the summary of Mr Nepgen's claim were objected to by the defendant and should be ignored.

[52] This notwithstanding, it was stated that, due to the subjective nature of the materials which were sought to be excluded, the defendant had prepared its own overview which would be submitted to Mr Blake. It was reiterated however that the defendant was of the opinion that both overviews should be disregarded by Mr Blake.

[53] It was further submitted by the defendant's attorney that Mr Blake “must make a ruling on the disputes raised in the Joint Report ...”.There were, however, no disputes crystalised for determination.

- [54] Reference was also made to the fact that the plaintiff's *Google Drive* initially contained the submission 6 document but that this seemed now to have been removed.
- [55] The defendant's *Google Drive Folder* included the defendant's response to the plaintiff's overview indicated in red on the same document and the defendant's account and schedules 1, 2 and 3.
- [56] On 08 September 2021 Mr Blake, having reviewed all the documents save document 6, asked that the parties confirm that there was no objection to him opening the document and having reference to its content.
- [57] The plaintiff's attorney obviously confirmed that he had no objection. The defendant's attorney indicated that it "strongly objected" to Mr Blake having reference to document 6. It was indicated by the defendant's attorney that the only documents to which reference should be had were the judgment on the merits, the plaintiff's and the defendant's auditors reports and the joint report of the plaintiff's and defendant's auditors. I assume the latter to be a reference to the schedules referred to earlier. It was stated that any other document had "nothing to do with accounting".
- [58] On 08 September 2021 Mr Blake again asked that both parties confirm that they had no objection to him having reference to document 6.
- [59] After having received no response to this request and on 15 September 2021, Mr Blake wrote to the parties stating that he was drafting his report and that it would be available for release on 17 September 2021. Significantly, he confirmed that the only information being used for the determination was the judgment, the plaintiff's and the defendant's auditors reports and the "joint report" of the auditors.
- [60] There was no response from the plaintiff as to this information from Mr Blake.
- [61] On 17 September 2021 Mr Blake revealed his findings. The result was that the defendant was indebted to the plaintiff in the amount of R127 521 arising from the partnership business.

[62] The plaintiff is aggrieved by this finding and thus brings this application for review. The defendant has tendered payment of the amount awarded.

[63] It is not disputed that the nature of document 6 is such that it contains further factual disputes and argument in relation to the figures provided in the schedules which, as I have said, are themselves underpinned by factual disputes.

Ground for review and defendant's case in opposition

[64] The basis for the relief sought by the plaintiff is unclear. In the founding affidavit, the plaintiff characterized the alleged review as being one under PAJA. In argument it was raised on behalf of the plaintiff that it was a review at common law. This position was changed mid- argument to assert that the appointment of Mr Blake was a statutory appointment in terms of section 38 of the Superior Courts Act.² It was then argued that it was also a review in terms of section 33(1) of the Arbitration Act.³

[65] Thus, there was no final identification of the nature of the process. It seems however, that it can be discerned from this casting about that the argument of the plaintiff is that the function of Mr Blake was a quasi-judicial one which entailed the determination of disputes of fact. It is not in dispute that if this were not the case the plaintiff would be out of court as to this application.

[66] The ground for the review advanced by the plaintiff is that Mr Blake, in considering the matter and making the award failed to take the contents of a document containing factual submissions and argument in relation to the accounts of the partnership. It is on this basis alone that it is contended that proper hearing was not given to the applicant.

[67] The remedy claimed by the plaintiff is that the award of Mr Blake should be set aside and the matter remitted back to him for reconsideration on the basis that the contents of the document is taken into account.

² 10 of 2013.

³ 42 of 1965.

[68] The defendant asserts that the court order sets out the basis on which Mr Blake was required to determine the dispute and that any breach of the agreement should be determined in terms of private law and be subject to the law of contract. Having said this, it was argued for the defendant that Mr Blake was appointed as an expert valuer, and as such his was not a quasi-judicial function. It is argued from a legal perspective that, as long as a valuer arrived at his decision honestly and in good faith the parties were bound by it. The defendant argues that, as it is conceded that Mr Blake acted honestly, and no case is made out that he acted in bad faith the application cannot succeed.

[69] The case thus reduces to a question whether the function of Mr Blake was quasi-judicial in nature. If it was not, the plaintiff must fail.

What was the nature of Mr Blakes appointment?

[70] The defendant is correct in his point of departure being that the dispute falls to be determined under the law of contract. The consent order is a private agreement between the parties.

[71] The plaintiff's case is premised on the submission that the consent order, properly construed, clothed Mr Blake with quasi-judicial powers. The case purportedly made out is that Mr Blake was called upon by the order to act in a quasi-judicial roll and determine disputes of fact. On such a case it would make sense that the factual content of document 6 would be relevant.

[72] To the extent that this court is called on to interpret the consent order (and I must point out that this was not specifically addressed on behalf of the plaintiff), the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions.

[73] The process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant context, including the circumstances in which the document came into being. Interpretation is no

longer a process that occurs in stages but is one unitary exercise.⁴ In *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd*⁵ it was said that:

“A court must examine all the facts – the context – in order to determine what the parties intended. And it must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.”

[74] The agreement contained in the consent order provides for the parties’ respective auditors to prepare a joint report “wherein they shall set out the issues that are in dispute and also indicate if such dispute is of a legal, factual or an accounting nature”.

[75] In terms of paragraph 7 it is the ‘The disputes so identified that are of an accounting nature’ that are to be referred to the senior auditor.

[76] This is clear and unequivocal. Reference to paragraph 10 of the consent order shows that in the event of factual or legal disputes arising these would be for the determination of the court.

[77] It is, to my mind, clear that was not contemplated that the senior auditor would determine disputes of a factual or legal nature. This stands to reason. The consent order came in the middle of a trial where the factual and legal disputes were already before the court.

Conclusion

[78] Mr Blake was appointed to deal with accounting disputes only. These disputes were to be formulated by the parties’ respective auditors. The disputes were however never so formulated.

[79] It is not in dispute that what was placed before Mr Blake required the determination of factual disputes.

⁴ *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; [2012] 2 All SA 262 (SCA); 2012 (4) SA 593 (SCA) (16 March 2012).

⁵ *Novartis v Maphil* (20229/2014) [2015] ZASCA 111; 2016 (1) SA 518 (SCA); [2015] 4 All SA 417 (SCA) (3 September 2015) at para 28.

[80] The determination of the disputes was not in accordance with the consent order which contained the terms of reference of Mr Blake.

[81] He thus, arguably, acted ultra vires in seeking to determine the factual disputes which underpinned the schedules placed before him by the respective auditors of the parties.

[82] Such a case is, however, not before me and I must deal with the case as presented to me. The review ground squarely raised is that further factual matter should be presented in the form of document 6. In fact, no factual information was allowed to be taken into account at all.

[83] Thus, the review must fail.

Costs

[84] Both parties have contributed to the confusion which has reigned in relation to this matter. It should have been clear to each of them and their legal and financial representatives that the issues at hand required factual determinations. In the circumstances, I am of the view that it is proper that no order be made as to costs.

Order

In the circumstances I make the following order:

The application is dismissed.

D FISHER
JUDGE OF THE HIGH COURT
JOHANNESBURG

Heard: 18 April 2023

Delivered: 30 June 2023

APPEARANCES:

For the applicant: Adv JK BERLOWITZ

Instructed by: ORELOWITZ INCORPORATED

For the second respondent: ADV BC STOOP SC

Instructed by: PENNELLS ATTORNEYS