IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, PRETORIA

DATE: 1 December 2014
CASE NO: 5479/2011

In the matter between:

DIANNE EUGENIE DOBSON N.O **APPLICANT**
as Executrix in the estate of the late P.V Dobson
And

ELIZABETH ANN MEGAW N.O **RESPONDENT**
In her capacity as executrix in estate of the late
ROBERT ERNEST MEGAW N.O

JUDGMENT

RANCHOD J:

[1] This is an opposed application in which the applicant in her capacity as executrix in the estate of the late P.V Dobson seeks the following relief against the respondent in her capacity as executrix in the estate of the late (attorney) R.E Megaw:

1. That the ruling of the expert, Mr. D Swart, dated 25 October 2013 and attached as "X", be made an order of court;
2. That the respondent be ordered to make payment to the applicant as follows:

2.1 The amount of R554 193.04;

2.2 Interest on the amount of R554 193.04 from date of summons, 21 January 2011, to date of payment at 15.5% per annum.

3. Further and alternative relief.

[2] It is necessary to place the dispute between the parties in perspective.

[3] The applicant is the duly appointed executrix of the late Mr Dobson ('Dobson). The respondent is the duly appointed executrix of the late RE Megaw ('Megaw'). Megaw, for many years, acted as Dobson's attorney, and after he passed away he also acted as the executor of Dobson's estate until he was removed by virtue of a court order obtained by the current applicant, with effect from 21 May 2010. The expert ('Swart') says when the respondent (the executrix in estate late Megaw) made submissions to him for preparation of his expert report she stated that "it is common cause that PV Dobson's businesses were managed "unconventionally"[1]. Applicant's counsel says this seems to suggest the manner in which the businesses of Dobson were managed by Megaw as well. Action was instituted by the applicant (as plaintiff) against the respondent (as defendant), under case number 5479/11 in this court. The applicant, inter alia, sought a statement and debatement of an account from the defendant (Megaw) as there was a dispute whether any monies was owed to Dobson (now the applicant) regarding the account for and the administration of the estate for the period 1 August 2008 to 6 May 2010. Applicant says during the action it was difficult and later it became impossible to obtain documents from the defendant. The finalisation of the action was in essence an accounting exercise. The sensible route was for the parties to agree to have the disputes of determining whether Megaw owed any monies to the estate of Dobson, if any, to be determine by an expert Chartered Accountant. To finalise the action the parties prepared a written agreement for the referral of the accounting dispute to an expert. This was in the form of a draft order which was made an order of court on 13 August 2013 by Ledwaba DJP.

[4] Paragraph 1 of the court order is relevant for purposes of this application before me. Although somewhat lengthy, it bears setting out in full:

1. The parties hereby (agree) to appoint Deleeaw (sic) Swart as an Expert to make a finding and adjudicate upon the disputes between the parties, as follows:

[1] Annexure "X" to the Notice of Motion, page 6 paragraph 5.6.5

1.1 The Expert is hereby authorised and requested to decide upon the dispute in respect of whether the defendant (in her capacity as executrix) owes any amount to the plaintiff (in her capacity as executrix) regarding accounting for and the administration of the estate of the late Percival Victor Dobson, during the period 1 August 2008 until 6 May 2010 and if so, to determine the amount thus owed;

1.2 The disputes regarding defendant's alleged indebtedness to the plaintiff in respect of the account of the administration of the estate of the late P V Dobson is recorded in the pleadings, and a copy of all pleadings will be submitted to the Expert.

1.3 The parties shall make submissions to the Expert in writing, which written submissions will be made by each party to the Expert on/or before 2 September 2013;

1.4 The aforesaid written submissions will also be submitted to each other party on 2 September 2013. Upon receipt thereof, the other party may respond in writing to the other side's submissions if they so choose within 14 days after receipts thereof, which responses will be submitted to the Expert simultaneously;

1.5 The Expert shall have the power to call for all and any documents from either of the parties and/or any third parties, as the case may be, and both parties will give their full co-operation in order to facilitate such documents to be obtained and submitted to the Expert;

1.6 If the Expert so desires, the Expert may call any of the parties to address the Expert and make verbal submissions. Should any party fail to make any written submissions to the Expert, fail to respond to the other side's submissions and/or submit documents and/or be present before the Expert upon request, such a failure will not detract from the Expert making a finding in this matter;

1.7 Upon receipt of all representations and/or submission of all documents as requested by the Expert, as the case may be, the Expert will hand down his decision and make a finding within 30 days after receipt of all documents and/or submissions by the parties, alternatively such a date as advised by the referee, which date will not be more than 60 days after receipt and/or submission of all documents.

1.8 The parties will be liable in equal parts for the payment of the Expert's account. The Expert's account will be paid by the parties within 14 (Fourteen) days of delivery thereof;
1.9 The decision by the Expert will be final and binding on both parties;
1.10 The Expert's ruling may be made an Order of Court by either party;
1.11 The Expert may also make a decision on the costs occasioned by his appointment and my indicate which party is responsible for the payment of the other party's costs.

[5] The disputes regarding the account of the alleged indebtedness by Megaw in the administration of the estate of Dobson were recorded in the pleadings. Both parties duly made submissions to Mr D Swart (Swart) and he prepared his expert report dated 25 October 2013. Swart concluded that the respondent owed the applicant (in her representative capacity as executrix of estate late Dobson) an amount of R554 193.04.

[6] Towards the end of November 2013 the applicant applied on notice of motion for the expert's ruling to be made an order of Court. The respondent opposed the application on, as I understand it, the following grounds:
6.1 That the applicant withheld material evidence from Swart, in particular with regard to undisclosed and unauthorised sale of assets by the applicant from estate late Dobson.
6.2 Swart erred in not calling upon and considering certain evidence from third parties who received payment from the late Megaw after being requested to do so by the respondent;
6.3 Swart erred in not accepting certain vouchers which it is alleged clearly supported certain expenses on behalf of estate late Dobson by Megaw.

[7] Respondent raised a point in limine in the answering affidavit. It is necessary to deal with it first. Respondent says Swart was appointed in terms of section 19bis of the Supreme Court Act 59 of 1959 as a referee. The latter Act has since been replaced by the Superior Courts Act 10 of 2013 which came into effect on 23 August 2013 but it is common cause or not in dispute

that the former Act is applicable in that the court order was made on 13 August 2013. The relevant part of section 19bis provides:

"1. In any civil proceedings any court of a provincial or local division may, with the consent of the parties, refer –

(a) Any matter which requires extensive examination of documents or 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 which arises in such proceedings,

for enquiry and report to a referee and the court may adopt the report of any such referee, either wholly or in part, and either with or without modifications, or 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.

2. Any such report or any part thereof which is adopted by the court, whether with or without modifications, shall have effect as if it were a finding by the court in the civil proceedings in question.

3. Any such referee shall for the purposes of such enquiry have such powers and shall conduct the enquiry in such a manner as may be prescribed by a special order of court or by rules of court…"

[8] The argument seems to be that as Swart was a referee the court has a discretion to accept his report either wholly or in part. Hence, in view of the objections raised by the respondent the court is not bound to accept the report. The submission is in my view without merit.

[9] The court order clearly states that Swart is appointed as an expert[2] and his decision will be final and binding on both parties[3].

[10] *Wright v Wright*[4] was a challenge to the factual findings of a referee appointed in terms of section 19bis. The court held:

"[10] The position of a referee under section 19bis is, as the high court correctly found, similar to that of an expert valuator who only makes factual

[2] Paragraph `1 of Court order dated 13 August 2013.
[3] Paragraph 9 of Court order dated 13 August 2013.
[4] Wright vs Wright (494/13) [2014] ZASCA 126 (22 September 2014).

findings but dissimilar to that of an arbitrator who fulfils a quasi-judicial function within the parameters of the Arbitration Act 42 of 1965[5].

[11] By parity of reasoning it seems that a referee's position is also similar to that of an expert chartered and forensic accountant (as Swart is). However, I need not dwell on that further as, in my view, what is decisive of the matter is that the parties agreed that the expert's decision was final and binding on the parties and, the agreement was made an order of court.

[12] In *Perdikis v Jamieson*[6] Boruchowitz J said:

"It was held in Bekker vs RSA Factors 1983(4) SA 568(T) that a valuation can be rectified on equitable grounds where the valuer does not exercise the judgment of a reasonable man, that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result".

[13] In *Wright* the Supreme Court of Appeal held that this is also the position in respect of a referee's report – it can only be impugned on these narrow grounds. In my view the expert's report, which is final and binding on the parties can similarly only be impugned on these narrow grounds.

[14] The respondent's contention that Swart was appointed as a referee and that this court is seized with having to debate the account cannot be sustained. His appointment could be equated to that of a referee, but a referee has to enquire into a matter and then report back to the court and the court may adopt the report, either wholly or in part. This is not the case with regard to the terms on which Swart was appointed. Furthermore, the very purpose for appointing an expert was to avoid the court having to debate the account.

[15] I turn then to the allegation by respondent that Swart did not adjudicate upon certain transactions and did not have regard to certain documents and that he should have called for oral testimony.

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[5] Wright vs Wright (494/13) [2014] ZASCA 126 (22 September 2014) at paragraph 10.
[6] Perdikis v Jamieson 2002(6) SA 356 (W) paragraph 7.

[16] The parties agreed that Swart will essentially make a finding on the basis of the documents submitted to him by the parties, the expert being entitled at his discretion to call for any verbal submissions[7].

[17] Clear time limits were set within which the parties were to make written submissions[8] and the expert was to file his report[9]. It is clear that finality was the aim of the court order and to avoid further protracted litigation.

[18] The respondent says certain assets sold by the executrix, before she was appointed as such, to Adendorf Auctioneers was, in effect the perpetration of fraud on estate late Dobson and would have negatively impacted on the executor's fees that the late Megaw would have been entitled to. Firstly, this submission was not made to Swart. The information about sale of assets belonging to Dobson's estate was obtained only after Swart had compiled his report. Secondly, and more importantly, if it is contended that Megaw was deprived of any executor's fees it is something that must be claimed from the estate and the procedure for lodging claims and objecting to Liquidation and Distribution Accounts provided for in the Administration of Estates Act 66 of 1965 should be followed.

[19] Much was made about an alleged secret estate account having been opened by the applicant in Cape Town (the estate is being dealt with in Pretoria). Again, I fail to see the relevance of that in the debate of what Megaw's estate owes the Dobson estate.

[20] Many other transactions are mentioned in the answering affidavit which do not seem to form part of any dispute between the parties. In any event, the respondent had ample opportunity to present them to the expert. They do not form a basis upon which to impugne the finding of the expert on the narrow grounds referred to earlier. Issues such as alleged fees owing to

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[7] Court order, annexure "X" to founding affidavit at paragraph 1.6.
[8] Court order annexure "X" to founding affidavit paragraph 1.3 and 1.4
[9] Court order annexure "X" to founding affidavit paragraph 1.7.

Megaw by Dobson fall to be claimed from the latter's estate and fall outside of the scope of the dispute between the parties or conceivably, are disputes in the main action in this matter.

[21] It appears from the papers that that main action was for the debatement of a statement of account for monies owing by Megaw to Dobson and the court order appointing an expert provides accordingly. The main action was instituted during 2010 already. Yet neither during his lifetime nor by his executrix after his death, was a claim lodged in Dobson's estate for any monies owing by Dobson to Megaw.

[22] Lastly, respondent alleges that as these are disputes of fact because Dobson conducted his business "unconventionally" and the hearing of oral evidence falls outside the expertise of Swart, the court is requested to attend to the hearing of the evidence itself as it is not possible to deal with it in motion proceedings. This is a disingenuous argument. The very purpose for which the expert was appointed would be subverted if the court was to entertain a re-hearing. It is an attempt to get around the finality of the expert's report. In *Wright*[10] the court said:

"The factual findings could only be impugned on the narrow grounds outlined above."

[23] Respondent's counsel argued that as the applicant did not pertinently reply to certain allegations in the answering affidavit they must be accepted as correct. In *Wright*[11] albeit in the context of a referee the court said:

"It was not for the first respondent [here the applicant] to persuade the high court that the referee's [here the expert's] report and factual findings were correct. That would subvert the purposes of the section. The referee had been appointed, by consent between the parties, to facilitate the high court's task of resolving the factual issues arising from the accounting and debatement, as the high court was called upon to do. The appellant had the duty of impugning the factual findings or to raise genuine disputes of fact. It is legally untenable to approach the matter like the appellant did, namely to treat the referee's report as if it was the first respondent's factual 'version'

[10] Wright vs Wright (494/13) [2014] ZASCA 126 (22 September 2014) at paragraph 13.
[11] Wright vs Wright (494/13) [2014] ZASCA 126 (22 September 2014) at paragraph 13.

which had to be tested against the appellant's factual version. That is not the manner in which the section is meant to operate. Put differently, a court is not required to adjudicate a challenge to the referee's factual findings under the section in the way that it would decide factual disputes in motion proceedings."

At paragraph 15:

"Litigants are required to seriously engage with the factual allegations they seek to challenge and to furnish not only an answer but also countervailing evidence, particularly where the facts are within their personal knowledge."

[24] The respondent has failed to do so.

[25] I make the following order:

1. The ruling of the expert, Mr Swart, dated 25 October 2013 and attached as "X" is made an order of Court.
2. The respondent is ordered to pay the applicant the sum of R554 193.04.
3. The respondent is to pay interest on the amount of R554 193.04 from date of issue of summons to 31 July 2014 at the rate of 15.5% per annum and from 1 August 2014 to date of payment at the rate of 9% per annum.
4. The respondent is to pay the costs of this application.

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N. RANCHOD
JUDGE OF THE HIGH COURT

Appearances:

Counsel on behalf of Applicant : Adv J De Beer

Instructed by	: Roestoff & Kruse
Counsel on behalf of Plaintiff	: Adv G Naude
Instructed by	: Van Zyl Smith & Associates
Date heard	: 28 August 2014
Date delivered	: 1 December 2014