THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 494/13

In the matter between Reportable

ALEC PETER WRIGHT **APPELLANT**

and

WILLIAM ROBERT WRIGHT **FIRST RESPONDENT**

WRIGHT METALS CC **SECOND RESPONDENT**

Neutral citation: *Wright v Wright* (494/13) [2014] ZASCA 126 (22 September 2014)

Coram: Maya, Shongwe, Majiedt and Saldulker JJA, Gorven AJA

Heard: **29 AUGUST 2014**

Delivered: **22 SEPTEMBER 2014**

Summary: Challenge to factual findings of a referee appointed in terms of section 19bis of the Supreme Court Act 59 of 1959 – party challenging referee's factual findings has to persuade a court through admissible evidence that there are genuine disputes of fact on material aspects.

ORDER

On appeal from: South Gauteng High Court, Johannesburg (Kathree – Setiloane J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Majiedt JA (Maya, Shongwe and Saldulker JJA and Gorven AJA concurring):

[1] Section 19bis of the Supreme Court Act, 59 of 1959 (the section)[1] provides for the appointment of a referee to enquire and report upon, inter alia, a matter which relates wholly or in part to accounts. The present dispute concerns the debatement of a partnership account. By consent between the parties, the Wright brothers, a chartered accountant, Mr Desmond Snyman, was appointed as a referee to investigate the matter and to report to the high court. At issue in this appeal is how a challenge to a referee's factual findings in his or her report is to be approached.

[2] The Wright brothers owned a metal business, Wright Metals CC, the second respondent. The appellant, Mr Alec Peter Wright, ran the business and his wife kept the business' books of account and performed other administrative duties. A dispute arose between the appellant and the first

[1] The section has been replaced, with minor changes, by section 38 of the Superior Courts Act, 10 of 2013.

respondent, Mr William Robert Wright, concerning the profits from the business. The sibling enmity culminated in litigation. The first respondent obtained a court order in the South Gauteng High Court, Johannesburg, before Satchwell J, declaring that the brothers had conducted business in partnership, a part whereof comprised the metal business, the second respondent. Satchwell J's order dissolved the partnership, ordered the appellant to provide an accounting of the partnership business, debatement of the account and payment of any amount found to be due to the first respondent. The accounting had to be made in respect of the period from March 1989 to date of dissolution of the partnership.

[3] Attempts to resolve the accounting and debatement between the parties came to nought. The parties consented to referral of their dispute to a referee in terms of the section. Thereafter the first respondent brought an application for payment of the sum of R1 085 000 and interest, being the amount the referee found to be due to the first respondent pursuant to his report. The appellant opposed the application, raised a number of disputes with the referee's report and sought dismissal of the application. He also counter-applied for a referral of the disputes for trial, alternatively for the hearing of oral evidence and, in the further alternative, for remittal to the referee.[2] The high court dismissed the counter-application and adopted the referee's report without modification,[3] thus having the effect of a finding by the court in the proceedings.[4] The appeal before us is with leave of the high court.

[4] The appellant challenged the referee's report on a number of aspects:

(a) Whether the referee was correct in adding an amount of R12 969 to the profits of the business. The appellant averred that this is telephone expenditure, all of which save for an amount of R150 was business related.

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[2] In terms of s 19bis (1).
[3] *Wright v Wright & another* 2013 (3) SA 360 (GSJ).
[4] Section 19bis (2).

(b) A dispute arose about the 2001 capital account adjustment made by the referee on the basis that the source of the funds was not properly proved by the appellant, who insisted that the source documents had in fact been provided to the referee.

(c) The amount of sales for the 2005 financial year was allegedly incorrectly calculated and reflected by the referee.

(d) The referee allegedly incorrectly excluded certain expenses from his calculations on the basis that they were not business related. The appellant takes issue with this as they are weighbridge expenses, which the appellant avers are business related by their very nature.

[5] The appellant contended that these are genuine disputes of facts, raised in good faith, which required adjudication at a trial or through the hearing of oral evidence. In this regard the appellant placed reliance on the well-known principles set out in *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd.*[5] Before dealing with these contentions, it is necessary to consider the functions of a referee under the section and how a challenge to his or her report should be approached by a court.

[6] There is a dearth of reported cases on the section. This may suggest a lack of use in practice or the uncontentious interpretation and application of the section whenever it was used. The section provides a useful tool for a court to resolve factual disputes expeditiously where the court would otherwise be delayed, inconvenienced or disadvantaged.[6]

[5] *Room Hire Co (Pty) Ltd v Jeppe Street Mansions (Pty) Ltd* 1949 (3) SA 1155 (T) at 1163.
[6] PM Nienaber 'Building and Engineering Contracts' in Joubert (ed) *LAWSA* 2 ed vol 2(1) (2003) para 479.

[7] The section reads in relevant part:

'(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 arising 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 manner as may be prescribed by a special order of court or by rules of court. . .'

[8] The high court undertook an extensive analysis of the origins of the section.[7] I do not deem it necessary to regurgitate this helpful analysis. The high court also made reference to *Young's Estate v Estate Young,*[8] the (Natal) Arbitration Act of 1898, 24 of 1898 (the Natal Arbitration Act) and the Transvaal Arbitration Ordinance of 1904. I agree with the learned judge's finding that *Estate Young* is authority for the proposition that 'a court is bound by the findings of a referee contemplated in s 19bis, unless it can be found that the conclusions arrived at by the referee were unreasonable, irregular or wrong'[9] And the section is indeed, as the learned judge observed, 'an almost verbatim promulgation of the Natal and Transvaal statutory provisions, save for s 25 of the Natal Arbitration Act of 1898. . . .'[10]

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[7] Paragraphs 9 and 10.
[8] *Young's Estate v Estate Young* 1917 NPD 244.
[9] Paragraph 9.
[10] Ibid. Similar procedures existed in sections 21 to 23 of the Cape Arbitrations Act 29 of 1898 and in the South West Africa Proclamation 3 of 1926.

[9] Section 25 of the Natal Arbitration Act provided that: 'the report or award of any officer of the court, official or special referee, or arbitrator, on any such references shall unless set aside by the Court, be equivalent to the verdict of the jury'. In *Estate Young* the Full Bench interpreted the provision to mean that a referee's report shall be equivalent to the verdict of a jury (ie factual finding). It referred[11] with approval to the following dictum of Innes CJ in *Union Government (Minister of Railways and Harbours) v Wilkinson and Carroll*:[12]

'The principles which should guide the Court in dealing with the verdict of a jury in a civil case are well recognised. It cannot retry the suit. The decision upon all matters of fact – and the existence of the negligence in such matter – is for the jury. And their conclusion cannot be set aside merely because the Court may not upon a perusal of the record agree with it, but only if it is such as reasonable men could not properly have arrived at . . . And we should only be so justified if the conclusions arrived at were wholly unreasonable.'

[10] The position of a referee under s 19bis is, as the high court correctly found, similar to that of an expert valuator who only makes factual findings but dissimilar to that of an arbitrator who fulfils a quasi-judicial function within the parameters of the Arbitration Act 42 of 1965.[13] In this regard, the dictum of Boruchowitz J in *Perdikis v Jamieson*[14] is apposite:

'It was held in *Bekker v 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

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[11] At 253.

[12] *Union Government (Minister of Railways and Harbours) v Wilkinson and Carroll* 1916 AD 123 at 127. See further: *Chaffer and Tassie v Richards* 1905 NLR 207 at 216 – 217.

[13] Paragraphs 14 and 15 of the high court's judgment. An arbitral award may be set aside only on the limited statutory grounds set out in s 33 of the Arbitration Act, namely the arbitrator's misconduct in relation to his or her duties qua arbitrator; or where the arbitrator has committed a gross irregularity in the conduct of proceedings or has exceeded his or her powers; or where the arbitral award has been improperly obtained. See generally: *Lufuno Mphaphuli & Associates (Pty) Ltd v Andrews & another* 2009 (4) SA 529 (CC); *Cool Ideas 1186 CC v Hubbard & another* [2014] ZACC 16, 2014(4) SA 474 (CC). There are consequently significant differences between the powers and functions of arbitrators and referees and between the bases on which an arbitrator's award and a referee's report can be impugned.

[14] *Perdikis v Jamieson* 2002 (6) SA 356 (W) para 7.

reasonable man, that is, his judgment is exercised unreasonably, irregularly or wrongly so as to lead to a patently inequitable result.'

This is also the position in respect of the referee's report – it can only be impugned on these narrow grounds.

[11] As outlined above, the primary thrust of the attack on the referee's report concerned disputes on calculations, exclusions and misinterpretations of validly incurred expenses. The appellant's case was that genuine disputes of fact have been raised which warranted referral to trial or for the hearing of oral evidence or remittal to the referee. But there is an insurmountable difficulty in these contentions, namely the absence of first hand, primary evidence from the appellant to underpin these factual disputes.

[12] The referee executed his assignment by evaluating the files, documents and reports of the parties' expert witnesses. The appellant had engaged the services of a chartered accountant, Mr Jacques Pieter Theron (Mr Theron), while the first respondent had also appointed a chartered accountant, Mr Mark O'Hara (Mr O'Hara). The referee had conveyed his proposed methodology to the accountants as well as the parties' attorneys at a preliminary meeting. Based on his evaluation of the experts' submissions and supporting documentation, the referee concluded that the appellant owes the sum of R1 085 000 and interest to the first respondent as his share of the partnership's profits. On behalf of the appellant Mr Theron challenged the referee's findings in the respects enumerated above and concluded that the total profit due is only R156 106. Mr Theron filed an affidavit in support of the appellant's opposition to the application. A confirmatory affidavit of Ms Thereza Carmen Schmidt (Ms Schmidt), an auditor in Mr Theron's firm's employ, accompanied Mr Theron's affidavit.

[13] The appellant's challenge to the referee's factual findings was based entirely upon Mr Theron's report, as confirmed by Ms Schmidt. But the

appellant's misconceived approach to the matter permeates this challenge. The factual findings could only be impugned on the narrow grounds outlined above. It was for the appellant to persuade the high court that the report should not be adopted or that it should be adopted with modifications. Unless and until it was properly impugned on the narrow grounds, it stood as the court's factual findings upon adoption without modification. It was not for the first respondent to persuade the high court that the referee's report and factual findings were correct. That would subvert the purpose 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.[15] 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' 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. I discuss next the challenge itself against the backdrop of this misconceived approach.

[14] Mr Theron (assisted by Ms Schmidt) prepared his report and reached his conclusions solely on the basis of the books of account and other source documentation provided by his client, the appellant. A glaring omission from the appellant's papers is a confirmatory affidavit from his spouse who, as stated, wrote up the books of account of the business. The absence of such an affidavit confirming the correctness of the information furnished to Mr Theron to enable him to prepare his report is fatal. Without that affidavit Mr Theron's report constitutes inadmissible hearsay.

[15] Compare *Doyle & another v Fleet Motors PE (Pty) Limited* 1971 (3) SA 760(A) at 763 C-D.

[15] It is well established that in application proceedings the affidavits take the place of both the pleadings and the essential evidence to be led at trial.[16] The deponent to an affidavit is required to set out the source of his or her information. Hearsay evidence is inadmissible, save in urgent applications and where a court in its discretion permits such evidence in terms of s 3 of the Law of Evidence Amendment Act 45 of 1988. Where a respondent in motion proceedings seeks to raise genuine disputes of fact it must do so through admissible evidence. A court will not permit factual disputes to be raised through inadmissible evidence where admissible evidence is readily available.[17] 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.[18]

[16] The appellant's challenge to the referee's factual findings must fail on this ground alone. But there is another compelling reason why the factual findings must stand. This is on the basis referred to by the high court, namely that no substantiation for the cross-referenced challenges is provided by Mr Theron.[19] None of the challenges contain any motivation in support of each challenge. It is not necessary to list them as the high court has already done so in full.[20] On the authorities outlined in footnotes 17 and 18, a genuine dispute of fact on material aspects can only be raised through a fully motivated answer and/or countervailing evidence where the facts are peculiarly within a party's knowledge. Mr Theron's challenge on behalf of the appellant did not meet this standard and was correctly rejected by the high court.

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[16] *Foize Africa (Pty) Ltd v Foize Beheer BV & others* 2013 (3) SA 91 (SCA) para 30.
[17] *Minister of Land Affairs and Agriculture & others v D&F Wevell Trust* 2008 (2) SA 184 (SCA) para 56.
[18] *Wightman t/a JW Construction v Headfour (Pty) Ltd & another* 2008 (3) SA 371 (SCA) para 13.
[19] Paragraph 28 of the high court's judgment.
[20] See paras 29–35.

[17] For these reasons the high court was correct in adopting the referee's report without modification. The appeal must fail.

[18] The following order is issued:

The appeal is dismissed with costs.

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S A MAJIEDT

JUDGE OF APPEAL

APPEARANCES

For Appellant:	N Alli
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	Phatshoane Henny, Bloemfontein
For Respondents:	A Bester
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