Reportable:	YES / **NO**
Circulate to Judges:	**YES** / NO
Circulate to Magistrates:	**YES** / NO
Circulate to Regional Magistrates:	**YES** / NO

IN THE HIGH COURT OF SOUTH AFRICA

(NORTHERN CAPE DIVISION, KIMBERLEY)

Case No: 377/14

In the matter between:-

JAN JACOB DE CLERCQ VAN ZYL Applicant

and

FJ VAN ZYL EN SEUNS BOERDERY (PTY) LTD

(Registration Number: 1994/003008/07) 1st Respondent

FREDERIK JACOBUS VAN ZYL 2nd Respondent

Coram: Lever AJ

JUDGMENT

Lever AJ

1. In the present application, applicant in its Notice of Motion dated 11 March 2014 sought in part A thereof: the appointment of Pieter Hendrik Strydom (Strydom) as referee to deal with the deadlock that existed between the shareholders and directors of the first respondent; that Strydom be vested with the powers set out in annexure "X1" to the said Notice of Motion; that Strydom report back within a specified period with a recommendation as to whether first respondent should be placed under business rescue, be wound-up or whether another mechanism should be used to deal with the deadlock **alternatively** distribute the assets of the first respondent (presumably to the applicant and second respondent); and that Part B of the Notice of Motion be postponed for consideration on the date that Srydom's report came before the court for consideration.

2. In part B of the said Notice of Motion, applicant sought that: the first respondent be placed under business rescue; Strydom be appointed as the business rescue practitioner; that the costs of the application be costs in the business rescue. **Alternatively**, that the first respondent be wound-up and the costs of the application be costs in the winding-up.

3. The second respondent agreed with the approach that a referee be appointed to make progress in the resolution of the disputes between himself and the applicant, his brother, that arose from the estate of their late father and the business of the first respondent. However, second respondent proposed that as applicant had nominated Strydom to be a referee that he should also nominate a co-referee and that these joint referees be appointed by agreement. This was agreed to and an order was taken by

consent that the said referees be appointed with certain defined obligations and powers.

4. On the 23 May 2014 my sister, Madam Justice Pakati J made an order to the effect that Stydom, applicant's nominee and Tony Wright (Wright), second respondent's nominee were jointly appointed as the referees in terms of s38 of the Superior Courts Act (the Act).

5. The said court Order defined its objective as: "…to enable the resolution of such disputes, and then to divide and distribute the assets of the First Respondent, after collection of all debts and payment of all liabilities, between the Applicant and the Second Respondent in the most financially efficient manner;".

6. The said Order went on to state that the joint referees shall have the powers conferred by s38 of the Act, the powers conferred by such Order as well as the powers conferred by annexure "X1" to such Order.

7. The said Order then provided for the manner in which the referees were to report back to the court.

8. Then the Order provided:

"5 The referees are, specifically, to report and make recommendations in respect of the following:

5.1 A suitable mechanism by means of which the deadlock that subsists between the shareholders and directors of the First Respondent may be justly and equitably be resolved, *alternatively* the net assets of the First Respondent may be justly and equitably distributed so as to resolve the disputes referred to in paragraph 1 above;

5.2 Whether the First Respondent should be placed in business rescue or not;

5.3 Whether it is just and equitable that the First Respondent is wound-up or not."

9. The said Order then dealt with certain procedures required: to serve such order on the joint referees; in the event that the referees were unable to determine any issue, after deliberation, they were entitled to appoint an appropriate expert who would provide a final ruling on such issue which was binding on the referees; if it was necessary to apply to court for further direction; and costs."

10. Annexure "X1" to the said Order provided that:

"The referees shall, without limiting the generality of their powers to investigate the affairs of the First Respondent in whatever manner they deem fit, be entitled to-

1. determine the assets and liabilities of the First Respondent;
2. require the Applicant and the Second Respondent to provide a detailed account of-
   2.1. the assets of the First Respondent which may be in their possession or which they may have dealt with; and,
   2.2. any claims which they may have against the First Respondent or which the First Respondent may have against them;
3. make all investigations necessary and in particular to obtain from the Applicant, the First Respondent and the Second Respondent all information with regard to the assets and liabilities of the First Respondent;
4. obtain information regarding the financial affairs of the First Respondent from bank managers and/or managers of any other financial institution with regard to each and every asset and liability of the First Respondent;
5. obtain information from the auditors or any other person who may have knowledge of the financial affairs of any related companies, close corporations, trusts or businesses of the First Respondent, and in respect of which any of its shareholders has or may have had an interest in, directly or indirectly, which may relate to the assets and/or liabilities of the First Respondent;
6. obtain copies of the financial statements of the First Respondent and all companies, close corporations, trusts or businesses in which the shareholders of the First Respondent directly or indirectly may have an interest, *alternatively* may have had an interest;
7. make recommendations regarding the payment or delivery by shareholders of any such portion of the assets of the First Respondent which they may have dealt with;

8. make recommendations regarding the delivery and/or transfer by the shareholders of any assets of the First Respondent which may be in their possession and/or held by them;
9. take all steps they deem necessary to comply with their mandate herein;
10. to the extent that the funds are available to do so, discharge the debts and liabilities of the First Respondent;
11. cause the financial records of the First Respondent to be brought up to date;
12. cause a valuation to be made of the company and/or any of its assets;
13. make recommendations to the Applicant and the Second Respondent regarding the resolution of the disputes prior to the presentation of their report to the Honourable Court."

11. The referees were appointed under the provisions of s38 of the Act. The said s38 has replaced s19*bis* of the Supreme Court Act of 1959 (the repealed Act). Despite minor differences in wording and form, s38 of the Act and s19*bis* of the repealed Act are in substance to the same effect. Accordingly, any prior judgments relating to the application of s19*bis* of the repealed Act, depending upon the jurisdiction of the court that handed down such judgment down and whether or not any of the minor differences in wording or form being material or not, would either be persuasive authority or binding on this court.

12. The said s38 of the Act provides:

"38(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 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 the effect as if it were a finding by the court in the proceedings in question.

(3) …"

13. From the founding affidavit, the answering affidavit and the replying affidavit filed respectively by the applicant and the second respondent, the disputes between them appear to be far ranging. It is also evident that applicant and second respondent are unable to resolve these disputes.

14. These disputes have their origins in a farming enterprise originally conducted by second respondent and his late father, which applicant later joined. This family farming enterprise was originally conducted by way of a partnership and later in 1995 the first respondent was incorporated.

15. Their late father, the applicant and the second respondent were all directors of the first respondent and they were also the only shareholders in the first respondent. After the distribution in terms of their late father's will applicant and second respondent each own 50% of the shares in first respondent. This much is common cause between the applicant and the second respondent.

16. From that point, applicant's and first respondent's versions part ways. Applicant contends that the first respondent took over the assets and operations of the partnership. That these assets included two farms in Namibia originally registered in the name of second respondent. The Namibian farms are now registered in the names of

separate close corporations in which second respondent's wife, who is a Namibian citizen has a 51% interest in each of them. The remaining members interests in said close corporations is owned by the second respondent. The reason for the Namibian farms being transferred from second respondent to the relevant close corporations is not directly relevant to the present matter.

17. Applicant also contends that the livestock of the said farming enterprise belongs to the first respondent. He also contends that certain farms registered in his own name belong to the first respondent. Applicant further contends that the partnership ceased to exist after the incorporation of the first respondent.

18. By contrast second respondent contends that the Namibian farms do not belong to the first respondent. Second respondent gave a detailed explanation as to how he came to acquire the Namibian farms. He explained one such farm was bought with the assistance of a loan from the farming enterprise, which was debited against his loan account. He also explained that the other Namibian farm was bought with a loan from a financial institution, which was repaid by the first respondent but again such loan repayments were debited to his loan account with the first respondent.

19. Second respondent contends that whilst the first respondent was incorporated and took over the partnership bank account and that all the farming enterprises income was paid into that account and its expenses were paid from that account, two partnerships between his late father, his brother, being the applicant and himself, continued to exist. On the second respondent's version the livestock continued to be owned by these two

partnerships. One of these partnerships carried on business in Namibia and the other one carried on business in South Africa.

20. The applicant and the first respondent agree that their father died on the 24 January 2004. Second respondent's position is that both farming partnerships dissolved on the death of their father. As set out above, applicant's position is that there was only one partnership which came to an end on the incorporation of the first respondent. On this set of facts, it is evident that no new partnership was constituted between applicant and second respondent after their father's death. Neither applicant nor second respondent contends that a new partnership was formed. Second respondent contends that until their father's death the Namibian and South African partnerships existed and owned the livestock of their farming enterprise. Second respondent further contends that upon the death of their father the partnership assets being the livestock were divided in terms of the will of their late father.

21. Applicant and second respondent also dispute if and when they stopped farming together for the benefit of the first respondent and the effect of such conduct.

22. From the date of their late father's death, there is no evidence that there was ever a meeting of the first respondent's Board of Directors. Since that date, there is no evidence that the said directors ever adopted a resolution to conduct the affairs of the first respondent. Nor is there any evidence that there was ever a meeting of the first respondent's shareholders from that date. In these circumstances, it is clear that there was and exists a deadlock between the applicant and the second respondent in running the affairs of the first respondent.

23. Depending upon how the above disputes are resolved would affect the division of the first respondent's assets between the applicant and second respondent as well as their respective loan accounts in the first respondent. The said loan account is also an area of dispute between the applicant and the second respondent.

24. This is the climate in which the joint referees were appointed.

25. On the 15 December 2015 the joint referees, nominated respectively by the applicant and second respondent, filed a consensus report.

26. The referees, in their report defined the disputes between the applicant on the one hand and the second respondent on the other as follows:

"22.1 **Farming operations conducted by the first respondent and partnerships:** Jan (applicant) and Fred (second respondent) are disputing whether the partnership and company (first respondent) became one and traded as such. They are also disputing the date on which farming operations ceased in the first respondent.

22.2 **Ownership of the livestock on the farms:** According to Fred, the partnerships continued to hold the livestock after the formation of the first respondent. Jan disputes this and states that the first respondent owned the livestock.

22.3 **The ownership of the Namibian farms:** According to Jan, the Namibian farms are the assets of the first respondent and should not have been transferred into Fred's name. Fred states that the farms were purchased by him in his personal capacity.

22.4 **The value of shareholder loans:** Fred alleges that he invested substantial sums of money in the first respondent, which resulted in a large loan owed by the first respondent to Fred."

27. It is evident that the referees conducted extensive investigations in respect of the disputes set out above. After concluding that applicant and second respondent have nothing in common and that they do not believe there will ever be a reconciliation

between the brothers, recommended that the court should divide the assets between the two brothers in an equitable manner.

28. The referees after considering the versions of the applicant and the second respondent, the evidence provided by the attorney who finalised the estate of the late father, who is in fact a cousin of both the applicant and second respondent, the documentary evidence available and the evidence of the respective loan accounts in the partnership and subsequently in the first respondent, concluded that the Namibian farms belonged to the second respondent.

29. The referees were unable to make a determination as to whether the livestock vested in the partnerships or in the first respondent. In the light of this they calculated the applicant's and second respondent's loan account with the first respondent to cater for each position. In other words, the referees calculated the said loan accounts on the assumption that the livestock belonged to the partnership and then recalculated the said loan accounts on the assumption that the livestock belonged to the first respondent.

30. In assessing the loan accounts of the applicant and the second respondent in the first respondent, the referees set out how they went about this exercise. They had access to the financial records of the partnership and subsequently those of the first respondent. They also met with the auditors of the first respondent. Both the applicant and the second respondent made submissions to the joint referees which were considered by the joint referees in calculating the said loan accounts based on the alternative scenarios.

31. In the final analysis the referees provided the following figures for the respective loan accounts in the two scenarios relating to the ownership of the livestock set out above. These are:

    31.1. On the basis that the first respondent does not own the livestock:

        31.1.1. An amount of R3,652,020.80 (three million six hundred and fifty-two thousand and twenty rand and eighty cents) owed to the first respondent by applicant (Jan); and

        31.1.2. An amount of R4,175,386.22 (four million one hundred and seventy-five thousand three hundred and eighty-six rand and twenty-two cents) owed by the first respondent (the company) to the second respondent (Fred).

    31.2. On the basis that first respondent does own the livestock:

        31.2.1. An amount of R7,260,118.22 (seven million two hundred and sixty thousand one hundred and eighteen rand and twenty-two cents) owed to the first respondent by applicant (Jan); and

        31.2.2. An amount of R567,288.79 (five hundred and sixty-seven thousand rand two hundred and eighty-eight rand and seventy-nine cents) owed by the first respondent to the second respondent.

32. In 2007 the applicant sent a message to the second respondent indicating that he wanted them to go their own separate ways. At the time the first respondent had an overdraft with the bank. It seems that the second respondent approached the bank, who because of the overdraft of the first respondent and the fact that first respondent's farms were mortgaged as security to the bank for such overdraft, would not allow the

second respondent to open a bank account in his own name for his own farming enterprise.

33. The arrangement that second respondent made with first respondent's bankers was that a new account will be opened in the first respondents name. In other words, two accounts were operated in the name of the first respondent with the relevant bank. The bank divided the then outstanding amount on the overdraft between the applicant and the second respondent and each one of them was responsible for half the liabilities of the first respondent at the time that the second bank account was opened as set out above. The applicant would run the original bank account in first respondent's name and be responsible for half of the overdraft owed to the bank and second respondent would run the new bank account in first respondent's name and be responsible for the other half of the overdraft owed by the first respondent to the relevant bank.

34. From his conduct, it is clear that the applicant acquiesced in this solution. The adoption of this solution showed at minimum that none of the bank, applicant or second respondent had any respect for the separate corporate identity of the first respondent. Clearly, each of them were pursuing their own agenda and interests. In my view this is a significant fact in seeking a just and equitable solution to the difficulties between the applicant and second respondent.

35. The second respondent paid off his share of the first respondent's liabilities and because of a threatened liquidation of the first respondent by the bank, second respondent made arrangements with the bank to pay off applicant's share of such liability as well. In

the final analysis second respondent repaid the entire liability of the first respondent to the bank. Second respondent has completed paying off this liability of first respondent as well as a liability of first respondent to the Land Bank. This is one of the reasons why there is such a large disparity between the respective loan accounts.

36. The referees could make no finding as to whether the partnership/s owned the livestock and whether or not the applicant and second respondent continued trading for the benefit of the first respondent.

37. On the 21 April 2016 the second respondent filed an affidavit dealing with the said referees' report. With certain reservations second respondent moved in terms of s38(1) of the Act for the court to adopt such report. In such affidavit, the second respondent made certain suggestions regarding the implementation of the referees' recommendations contained in the said report.

38. On the 23 June 2016, the applicant's then attorneys of record withdrew. The matter was set down on the opposed roll for hearing on the 12 August 2016. A week before the hearing on the 5 August 2016 Messrs Van de Wall Inc filed a Notice of Appointment as the applicant's new attorneys of record in the matter. Applicant then on the same date, filed a poorly drafted, lengthy, repetitious and confused affidavit in which he took issue with the findings of the referees as set out in their report. Applicant also accused the referees of being biased.

39. On the 12 August 2016, the matter came before me and I impressed upon the legal representatives of both the applicant and the second respondent who appeared in the

matter at that time, the desirability of the parties engaging each other in an attempt to find a mutually acceptable way forward in the matter.

40. In the result, I made the following Order by agreement on the 12 August 2016:

"1 The matter is remitted to the joint referees for the purpose of further enquiry and report as set forth below.

2 The affidavit of Applicant dated 5 August 2016 ("the affidavit") is referred to the joint referees.

3 Second Respondent shall be entitled to present written submissions to the joint referees as regards the content of the affidavit.

4 The referees are authorised and requested:

4.1 To consider:

4.1.1 The affidavit, as read with the submissions referred to in paragraph 3 above.

4.1.2 The proposal captioned: "IMPLEMENTATION OF THE REPORT" in paragraphs 14 to 53 of the affidavit of Second Respondent dated 29 March 2016.

4.1.3 To engage with the parties as regards the above, to the extent that they deem it necessary.

4.2 To file a further report ("the Further Report") in regard to their findings and recommendations on these issues, if possible by the end of September 2016.

5 Upon receipt of the Further Report, the parties are directed within two weeks to exchange detailed lists of issues (if any) in the Report and the Further Report with which they take issue. Such list shall (be) provided with the level of particularity which characterises further particulars for trial, and shall isolate specific items of dispute (with reference, where necessary, to individual entries to the schedules to the Report) and not broad averments to areas of dispute.

6 The matter is postponed *sine die*, to be enrolled on a date to be agreed between the legal teams and the Honourable Mr Justice Lever, and – in the absence of agreement – upon a date to be determined by him.

7 The above Honourable Court shall determine, upon the resumption of the matter:

7.1 Which aspects of the Report and the Further Report (if any) are adopted;

7.2 Which issues (if any) are referred to trial, and on what terms.

8 Applicant shall make a contribution of R50 000.00 to Second Respondent's Costs, and make payment thereof by no later than 31 October 2016."

41. On the 9 November 2017 the second respondent's attorney served a Notice of Set Down on the Applicant's then attorney, being Messrs Van De Wall Inc, setting the matter down for the 9 February 2018. On the 28 November 2017 Messrs Van De Wall Inc withdrew as the applicant's attorney. On the 9 February 2018, when the matter was called, the applicant was represented by Mr Fletcher of Fletchers Attorneys. Mr Fletcher informed me that he had only been briefed a few days before the hearing to move an application for a postponement. The application for a postponement was moved and debated before me. I considered such application and in an *ex tempore* judgment dismissed such application. My reasons for doing so are not pertinent to the present judgment.

42. After the application was dismissed Mr Fletcher, his mandate having terminated, asked to be excused. Mr Fletcher was excused and the applicant who was in court took over the matter in person.

43. The applicant had not complied with either paragraph 5 or 8 of the Order of the 12 August 2016, which is quoted above. The applicant when he addressed the court did not indicate that he was not aware of the said Order on the contrary he asked to be excused for his failure to pay the contribution to the costs of the second respondent contemplated in paragraph 8 of the said Order, because of a dispute regarding fees with his former attorney. The said Order was made by consent. Applicant was represented by

both counsel and an attorney at the time the said Order was made. In the circumstances, applicant was clearly aware of the said Order and its terms.

44. The second respondent also filed an affidavit by an accountant on the 16 December 2017, dealing with the consequences of the livestock being owned by either the partnership at the time of the death of the father of the applicant and second respondent. The said accountant also dealt with the practical proposals made by the second respondent and shows how they will achieve a fair and equitable separation of the business of the second respondent from both the applicant and the first respondent. This affidavit was served on the applicant by way of Sheriff. The applicant did not respond to this affidavit either.

45. The applicant in arguing his case tried to convince me that there were disputes of fact and that consequently I should not implement the referees report. He went about this by reading lengthy extracts of the affidavit he filed in response to the referees' main report. The said affidavit was both dated and filed on the 5 August 2016. The applicant then asked me in the alternative to wind-up the first respondent.

46. I assume that in the circumstances the applicant was asking me to not implement the referees report and supplementary report and that I should refer the matter to trial and in the alternative if I was not disposed to refer the matter to trial I should order that the first respondent be wound-up.

47. Mr Kirk-Cohen SC, who appeared for the second respondent, referred me to the case of **Wright v Wright**[1] in regard to the role and function of a referee. This case was decided under the provisions of s19*bis* of the repealed Act. After setting out the history and development of s19*bis* Kathree-Setiloane J deals with the nature of a referees' report and findings on fact in particular in regard to when such findings may be set aside or departed from. In this regard, Kathree-Setiloane J stated:

> "[15] It is significant, in this regard, that an arbitrator, as contemplated in the Arbitration Act, fulfils a quasi-judicial function whereas a valuator is required only to make a finding. Similarly, a referee, appointed in terms s19bis of the Act, is required only to make a factual finding. A referee, unlike an arbitrator, does not exercise a judicial or quasi-judicial function. Accordingly, the grounds upon which the award of an arbitrator and the report of a referee may be challenged differ significantly. In this regard, a report of a referee as contemplated in s19bis may be set aside if his or her judgment is exercised unreasonably, irregularly or wrongly, whilst the award of an arbitrator, appointed in terms of the Arbitration Act, may only be set aside on the limited basis as provided for in s 33 of the Arbitration Act, which includes that an arbitrator has misconducted himself in relation to his duties as an arbitrator; or has committed a gross irregularity in the conduct of the proceedings; or has exceeded his powers; or that the award was improperly attained.
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> [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.
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> …
>
> [18] The court is afforded a wide discretion in terms of s19bis of the Act. It may adopt any one of the courses provided for in the section: it may adopt the report of the referee either wholly or in part, and either with or without modifications, or it may remit the report for further inquiry or report or

[1] 2013 (3) SA 360 (GSJ).

consideration by the referee, or make such other order, in regard to the findings of the referee, as may be necessary or desirable. The power of the court in the latter instance would, in my view, include the power to set aside the report if it is patently unreasonable, irregular or incorrect, or to refer the report or aspects thereof to oral evidence or trial, if a real dispute of fact, as envisaged in Room Hire Co (Pty)Ltd v Jeppe Street Mansions (Pty) Ltd 1949 (3) SA 1155 (T) at 1163, can be shown to exist. The court may, therefore, adopt any one of the said courses it deems 'necessary or desirable'. The court may, however, only refer the question of whether to adopt the report or not to oral evidence or trial, if a real dispute of fact is shown to exist in relation to findings of the referee."[2]

48. I have established that Wright's case has been confirmed by the Supreme Court of Appeal on appeal[3]. To the extent that Wright's case deals with the nature of a referees report, the discretion a court has in adopting its recommendations and the circumstances when such report can be set aside, for the reasons set out above and in the circumstances of this case, I consider myself bound by such authority.

49. Mr Kirk-Cohen then submitted that the applicant has not properly placed a real dispute of fact before me. He referred to the Order of 12 August 2016. More specifically to paragraph 5 of such order. Mr Kirk-Cohen submitted, applicant as *dominus litus* had taken no steps to bring his application to finality. Applicant had not set out the areas of dispute in accordance with paragraph 5 of the said Order. Whilst I believe Mr Kirk-Cohen is correct in this regard, I do not intend to decide the matter on this basis.

50. I shall decide the matter on the disputes raised on the papers at the date of the hearing of this matter that are in my opinion material to the outcome. If I believe any dispute

[2] Wright's case, above at paras [15], [16] and [18].
[3] Wright v Wright 2015 (1) SA 262 (SCA).

raised on the papers is not material to the outcome, it will not enjoy consideration. To do otherwise would simply make this judgment unmanageable.

51. In my view, I could only refer the matter to trial if I could find that the applicant has properly put before the court real disputes of fact. Similarly, I am of the view that I can only order the winding-up of the first respondent if I can reasonably form the opinion that there is no other fair and equitable manner to resolve the disputes between the applicant and the second respondent.

52. Dealing with the four areas of dispute identified by the referees and quoted above, I shall deal with such issues and the disputes around them in the following order: firstly, the ownership of the Namibian properties; secondly, whether the farming operations included the partnerships contended by the second respondent and the issue of whether the applicant and second respondent farmed for the benefit of the first respondent company or whether they farmed for their own account after the death of their father; thirdly, the ownership of the livestock; and finally, the value of the respective loan accounts.

53. In respect of the ownership of the Namibian properties, the referees have made a finding that such properties are not assets of the first respondent. In response to this applicant has referred to an application for finance from the Land Bank to purchase the farm De Brak where apparently, the Namibian properties are listed as an asset of the first respondent. Applicant has also referred to a letter from the first respondent's auditors motivating that the first respondent should buy all of the assets of the then partnership.

54. Considering the Land Bank application first, the Namibian Properties are listed on such application, but they are listed in a section that relates to “own properties or spouses’ properties which are not being tendered for purposes of security”. In my view the Namibian properties are not listed on such form to show that they are owned by the first respondent company.

55. Turning now to the letter from the auditors, in the absence of a resolution from the first respondent company or even an allegation that such resolution has been taken, this letter merely evidences a recommendation from the auditors. The applicant contends that such letter is evidence that the first respondent bought the said Namibian properties. For the reason already set out in this paragraph, I cannot support applicant’s contention in this regard.

56. In my view neither the Land Bank application nor the letter from the auditor creates a real dispute of fact. The referees have found that the payments the farming partnership made towards the purchase of such property were properly debited to the second respondent’s loan account, first with the partnership and later with the first respondent company. In these circumstances, there is no real dispute of fact on this question which I would be justified in referring to trial.

57. Turning now to the second area of dispute being, whether the relevant farming operations included the South African and Namibian partnerships and when the applicant and the second respondent stopped farming for the benefit of the first respondent. The referees found that both the Namibian and the South African partnerships were in existence at the time of the death of applicant and second

respondent's father. The applicant's efforts were focused on who owned the livestock. In that context the applicant referred to different statements made to banks, SARS and the Master in relation to who owned the livestock.

58. It seems that the deceased father, the applicant and the second respondent were not averse to making inconsistent statements depending upon the circumstances and the context. However, this in itself does not mean that the relevant partnerships did not exist. In the context of farming in a different country subject to a different tax regime, it would make perfect sense to have a Namibian partnership or other Namibian entity to conduct business in Namibia.

59. The Namibian Partnership is the only such entity referred to. It is further corroborated by certain of the financial statements referred to by the referees. The South African partnership features in the will of the applicant's and second respondent's late father. It also features in the relevant Liquidation and Distribution account lodged to finalise the estate as well as receipts signed by both applicant and second respondent acknowledging receipt of their share of such partnership in respect of the late father's will. Such information that was placed before this court by the applicant does not constitute a real dispute of fact in the sense necessary for me to refer the matter to trial.

60. In considering when the farming operations ceased in the first respondent. It is evident from the date of their father's death that the applicant and second respondent were trying to extricate themselves from the relationship both seemed to regard themselves as having been forced into in the farming business. In his answering affidavit at paragraph 59 thereof, the second respondent states:

> "From 2004, we had farmed separately from one another. The only thing that linked us to each other and to the company was the fact that we still both used the company account at Standard Bank, and occupied farms owned by the company."

61. To this in paragraph 113 of his reply applicant responded candidly: "The content hereof is admitted."

62. The applicant in his response to the referees' main report takes a more legalistic approach and points out that the assets belonged to the company. On applicant's version he was referring to the first respondent's overdraft facility, the first respondent's farms and the livestock. The ownership of the livestock question is a dispute where the referees declined to make a finding. This question will be dealt with presently.

63. Whilst the applicant is correct at least insofar as the overdraft facility and the relevant properties and certain movables are concerned. In the context it would be artificial to look only at this. As already mention from the death of their father applicant and second respondent had been trying to sever the links between them. As far as the first respondent is concerned, from the date of their father's death, there is no evidence of a single meeting of the Board of Directors or a resolution adopted by the directors. Similarly, there is no evidence of an annual general meeting or any other shareholders meeting.

64. It must be remembered that both applicant and second respondent conducted their farming operation from the first respondent's farms which they occupied as well as farms that they each individually owned in their own right. They had each received livestock from the estate of their late father. They had each used the assets of the first

respondent that happened to be on the properties that they occupied to their own benefit. They also appeared to be tied to each other by the liabilities of the first respondent.

65. Neither accounted to the other or the first respondent. It is evident that second respondent realised that the only way he could extricate himself from this situation was to first deal with the liabilities of the first respondent. On the undisputed evidence before the court he in fact did this.

66. Each brother was in breach of their respective fiduciary duties to the first respondent. Each of them may in fact be guilty of a number of offences under corporate law. For present purposes neither of these questions, has any relevance. It is clear that neither of them showed any regard for the separate corporate identity of the first respondent and its governance structures.

67. In this context, the only reasonable inference that can be drawn is that both applicant and second respondent intended to farm for their own account. That as a matter of fact they were farming for their own account albeit that they were both using and/or abusing certain assets of the first respondent in doing so. In my view the farming operations of the first respondent, as a matter of fact came to an end in 2004 after the death of the applicant's and second respondent's father.

68. I now turn to the third issue being the ownership of the livestock. On this question the affidavit of the accountant being Mr De Wit filed and dated 14 December 2017 is relevant. Mr De Wit shows that there is no difference in the differential between the

two scenarios relating to the loan accounts calculated by the referees. In paragraph 8.2.1 of his affidavit Mr De Wit puts the position as follows:

> "8.2.1 Whichever scenario is applied as regards the livestock, the net difference between the parties' respective loan accounts remains the same; hence the neutrality of the issue between the applicant and the second respondent;"

69. This affidavit was served on the applicant by way of the Sheriff. He has not responded to it. I cannot see anything wrong with the position taken by Mr De Wit. As a matter of fact, this renders the question of who owned the livestock moot in the present circumstances. In these circumstances it would not serve any purpose for me to deal with any of the apparent disputes raised by the applicant in regard to this question. Nor, in fact, would any purpose be served by referring this question to trial or oral evidence.

70. The fourth issue to be considered is the issue of the loan accounts. As has been set out above, the referees' have made findings and have provided figures for two separate scenarios. The referees deal with the issues raised by the applicant in the applicant's response to their first report (the main report). They indicate that they allocated a debit to the applicant's loan account where he could not supply substantiating documents and/or vouchers to show the exact nature of the relevant expense.

71. In the context where these disputes have been raging back and forth for 10 years or so, it is reasonable to expect that the applicant would take care to preserve appropriate records to validate his business expense claims. Applicant could not supply these supporting vouchers to the referees, in these circumstances it is appropriate that they should allocate the relevant expense as a debit to his loan account. No doubt the same applied to the second respondent.

72. More to the point, in this context, if applicant could not supply the referees with acceptable evidence to show the business nature of the disputed expenses, he will surely not have evidence such as to satisfy this court as to business nature of the disputed expenses. No supporting vouchers were placed before the court which would show a factual basis for a real dispute of fact. In the present papers, applicant did not even contend that such supporting vouchers existed or that he could trace them and place them before the court if this question was referred to trial. In these circumstances, I cannot find that there is I real dispute of fact that I would be justified in referring to trial or to oral evidence.

73. It is evident in reading the second respondent's answering affidavit together with the allocation of debits against his loan account that referees made a number of important debit allocations to his loan account that he probably still doesn't agree with, yet he has accepted the methodology and the result achieved by the referees despite this.

74. In my view, the referees have actually made a finding of fact in relation to the calculation of the said loan accounts. This is especially so in the context of what Mr De Wit has demonstrated. In these circumstances I find that the recommendation that made by the referees in their main report and their supplementary report that the matter be referred to trial is inappropriate, and I shall decline to implement such recommendations.

75. In regard to the valuation of the first respondent's farms, the referees' have obtained the services of an independent land valuator who has filed his reports. The findings of the said valuator are binding on the referees in terms of the original order made by my

sister Pakati J in appointing the referees. In any event, neither the applicant nor the second respondent has raised any issues with these valuations.

76. The second respondent has made certain proposals for the practical implementation of the findings of the referees to achieve an equitable and fair solution in the circumstances. These proposals have been approved by the referees.

77. On the evidence before me I find that the livestock was owned by the partnerships as claimed by the second respondent. In any event, and on the opinion of Mr De Wit this scenario would be the most beneficial to both applicant and second respondent from a tax perspective.

78. The proposals made by the second respondent have been refined by Mr De Wit to make the entire exercise both tax compliant and tax efficient. In broad strokes the order that I will make will: cater for the transfer of the properties belonging to the first respondent that second respondent now occupies and farms to the second respondent upon transfer of the second respondent's shares in the first respondent to applicant; cater for capital gains and other taxes; equalise the respective loan accounts in the first respondent; provide for the amounts applicant will have to pay to achieve this either by payment, or sale of certain of his assets; will provide for the payment of the referees fees and disbursements; and will leave applicant with all the shares in the first respondent in which the first respondent's properties which he occupies and farms are housed.

79. The second respondent is not seeking costs against the applicant and having regard to the history of the matter and the context it is appropriate that save for orders relating to costs already made each party shall bear their own costs.

In the circumstances, the following order is made:

1. Subject to paragraphs 3 to 7 below:

   1.1. The report of the Referees, Messrs Pieter Hendrik Strydom and Tony Wright ["the Referees"] dated 15 December 2015 (with valuations annexed thereto)("the Main Report"), and

   1.2. The Supplementary Report of the Referees dated 8 December 2016 ("the Supplementary Report");

   (collectively referred to as "the Report) are wholly adopted and made an order of court.

2. There shall be an order of costs in favour of the Referees as follows:

   2.1. The order shall be in favour of each referee in regard to their own fees;

   2.2. The fees and disbursements of each referee shall be borne in equal shares by Applicant and Second Respondent, and shall be enforceable against Applicant and Second Respondent as to 50% each;

   2.3. Each referee shall draw up invoices for Applicant and Second Respondent separately, reflecting;

      2.3.1. One half of the total fees and disbursements payable, less;

      2.3.2. Any amounts paid by that party previously;

2.4. Each party shall – within 5 court days of the presentment of each invoice to him – indicate whether he requires same to be taxed. Should he do so, the taxing master shall tax the amounts upon the basis that they are disbursements to expert witnesses, and affix thereto his allocatur;

2.5. Each party shall pay the amount to the referees within one month of presentation of invoice, or – should the fees proceed to taxation – within one week of allocatur, together with interest at the rate of 9% per annum;

2.6. The provisions of paragraph 5.2 below shall comprise a mechanism for receiving payment of the referees' fees and disbursements, and shall not derogate from any of the rights accorded by this paragraph.

3. As regards the issue left open for determination by the referees as to the date upon which the farming operations in the name of the First Respondent ceased (such dispute identified by the Referees in the final sentence of paragraph 22.1 of the Main Report, and left open by them in paragraph 44 of the Main Report), it is directed that:

3.1. The first respondent ceased trading operations on 24 January 2004;

3.2. To the extent that the partnerships known as "Van Zyl en Seuns" and "Van Zyl en Seuns Namibia" subsisted as at this date, that these partnerships terminated on 24 January 2004 (being the date of passing of the late Frederick Jacobus van Zyl {Snr});

3.3. That – subsequent to 24 January 2004 – Applicant and Second Respondent traded in their own names and for their own profit and loss.

4. As regards the status of the loan accounts between the parties, it is directed for the purposes of this order that the division and distribution of assets referred to below shall – as regards the loan accounts of the Applicant and Second Respondent – proceed on the basis that:

4.1. Applicant is found to be indebted to the First Respondent in the sum of R3,652,020.80 (three million six hundred and fifty-two thousand and twenty rand and eighty cents);

4.2. First Respondent is found to be indebted to Second Respondent in the sum of R4,175,386.22 (four million one hundred and seventy-five thousand three hundred and eighty-six rand and twenty-two cents);

as found by the referees in paragraph 112 of the Main Report.

5. Applicant and Second Respondent are directed – in order to implement the recommendations contained in paragraphs 130, 132 to 133 inclusive of the Main Report – to take such steps and sign such documentation (whether personally, or as directors of the First Respondent) in order to give effect to the following:

5.1. Applicant shall be liable to pay Second Respondent the sum of R4,013,703.51 (four million and thirteen thousand seven hundred and three rand and fifty-one cents){"the loan equalisation amount"} comprising:

5.1.1. One half of the difference between their respective loan accounts in the first respondent, determined upon the basis referred to in paragraph 4 above, plus:

5.1.2. The additional sum of R100,000.00 (one hundred thousand rand), representing one half of the difference in value between the farms to be transferred to Second Respondent (on the one hand);

5.1.3. and the farms retained by Applicant/First Respondent (on the other hand);

together with interest thereon at the prescribed rate with effect from the date of this order to date of satisfaction thereof.

5.2. In the event that within three months of the date of this order, 5.2.1. Applicant fails to pay this amount to Second Respondent or;

5.2.2. Applicant fails to pay any portion of the cost to the Referees (provided that same is then payable);

Then:

5.2.3. The sheriff shall be authorised to sell one or both of the farms De Brak and/or Nielersdrift 182 owned by First Respondent. The farm to be sold is to be nominated by the Applicant within five days of a written request by Second Respondent or the Referee/s or – failing such nomination – chosen by the sheriff such as to realise the unpaid amount of the referees' fees and disbursements, as also the unpaid amount of the loan account equalisation amount.

5.2.4. The sheriff shall pay, from the proceeds of this sale:

5.2.4.1. R4,013,703.51 (four million thirteen thousand seven hundred and three rand and fifty-one cents) to second respondent (on behalf of the applicant in order to discharge his debt to second respondent) together with interest thereon at the prescribed rate with effect from the date of this order to the date of payment;

5.2.4.2. To the referees, such sum as may be owed to them by the applicant;

5.2.4.3. The balance, if any, to the first respondent.

5.3. First respondent will transfer the Waterval group of farms to second respondent or his nominee together with any movables on the farms that first respondent may still own.

5.4. Second respondent must, on registration of the Waterval group of farms into his name or into the name of his nominee:

5.4.1. Transfer his shares in first respondent to applicant at par value;

5.4.2. Resign as a director of first respondent.

5.5. As regards taxation:

5.5.1. First respondent will pay SARS any taxes which arise from the transfer contemplated in paragraph 5.3 above;

5.5.2. Provided that second respondent has received the amount referred to in paragraph 5.1 above, he will refund first respondent the aforesaid tax.

6. All parties shall do such things and sign such documents as may be necessary to give effect to this order. In the event of the failure or refusal of a party to do so, the Sheriff of the High Court is hereby authorised to take such steps, and to sign all documents as may be necessary on behalf of the party in default in order to give effect to this order.

7. Save for any costs order already made, each party shall bear their own legal costs relating to this matter.

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Lawrence Lever

Acting Judge

Northern Cape Provincial Division

Legal Representation:

Applicant:

In person

Second Respondent:

Adv. S.C. Kirk-Cohen SC oio Duncan & Rothman

Date of Hearing:	9 February 2018
Date of Judgment :	28 September 2018
Date Judgment Delivered:	26 October 2018