

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA,
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 28613/14

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

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DATE

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SIGNATURE

In the matter between:

CUBA, VULINDLELA WILSON N.O

First Applicant

WAINER, HARVEY ELLIOT N.O

Second Applicant

NEVHUTALU, LUFUNO LESLIE N.O

Third Applicant

And

HOLOQUIN GLOBAL (PTY) LIMITED
BEN-ISRAEL, PAUL JUSTIN
BUTKOW, CLIVE

First Respondent
Second Respondent
Third Respondent

J U D G M E N T

RUBENS, AJ:

[1] The first, second and third applicants are the trustees of the Vulindlela Family Trust (*“the Trust”*). The Trust claims payment of an amount R2 million from the first, second and third respondents jointly and severally, the one paying the others to be absolved.

[2] For convenience I shall refer to the first applicant as Cuba, to the second and third applicants as such, to the first respondent as Holoquin, to the second respondent as Ben-Israel and to the third respondent as Butkow.

[3] Ben-Israel is the sole director of Holoquin. While Butkow acknowledges that he informed Cuba on 3 February 2014, that he was a director and joint CEO of Holoquin, he is in fact not a director of the company. Whether or not he is a joint CEO of the company is unclear but nothing turns on this.

[4] The claim against Holoquin arises out of a Share Subscription Agreement between the Trust and Holoquin (*“the Subscription Agreement”*) which the Trust alleges was lawfully cancelled by it with the result that Holoquin “... has [sic] *obligation to make restitution of what it has received in terms of the agreement*”.

[5] The claim against Ben-Israel and Butkow is founded upon an alleged warranty that all information and documentation provided by them to the Trust was true and accurate. They are alleged to be jointly and severally liable to pay the sum of R2 million to the Trust consequent upon their breach of the

warranty. In the alternative, it is alleged that the warranty amounted to representations which were false to their knowledge and that they are accordingly delictually liable to pay the Trust's damages in the sum of R2 million. Such liability on their part is also alleged to be joint and several with that of Holoquin.

[6] Holoquin, Ben-Israel and Butkow have raised a number of special defences in answer to the claims advanced by the Trust. These are the following:

- 6.1 The Trust is not properly before the court as there is no evidence in the founding affidavit that the second and third applicants have authorised Cuba to conduct the litigation on behalf of himself and the second and third applicants in all of their names or that the second and third applicants join in the litigation through their own participation (*"the first authority defence"*).
- 6.2 The Subscription Agreement provides for disputes between the parties in relation to the Subscription Agreement to be referred to arbitration (*"the arbitration defence"*).
- 6.3 There was no proper resolution or decision of the joint trustees in accordance with the Trust Deed which authorised Cuba to address the letter of demand calling upon Holoquin to perform

its obligations under the Subscription Agreement or the letter of cancellation of the Subscription Agreement (*“the second authority defence”*).

[7] I will first deal with the first and second authority defences before I deal with the claims advanced by the Trust.

[8] It is trite that the general rule is that the trustees of a Trust must join in suing (Cameron, Honoré’s *“South African Law of Trusts”* fifth edition p322, para 197 and the authorities cited in footnote 454 and para 256 p419). While it may be possible for a trustee to execute a power of attorney to a fellow trustee to conduct litigation if authorised by the Trust Deed, the trustee so authorised is not substituted for the trustee granting the power of attorney in suing. All trustees must still sue and represent the Trust. All that the authorisation effects is that one trustee may conduct the litigation on behalf of himself and the trustee who has authorised him to do so, in both their names (see *Lupacchini N.O. & Another v Minister of Safety & Security* 2010 (6) SA 457 (SCA) para [2] at 459 D-E).

[9] The contention is that there is no evidence in the founding affidavit that the second and third applicants have authorised Cuba to conduct the litigation on behalf of himself and the second and third applicants in all of their names or that the second and third applicants join the litigation through their own participation. All that is stated in the founding affidavit is that Cuba is

authorised by the second and third applicants to represent the Trust in the litigation.

[10] It is further contended that the attempt to cure this “*defect*” in the replying affidavit by annexing a resolution passed by the trustees on 9 May 2014 does not pass muster as the resolution does not authorise Cuba to conduct the litigation on behalf of himself and the remaining trustees against Ben-Israel and Butkow.

[11] Finally it is contended that in so far as Cuba relies on informal ratification by the trustees for Cuba to conduct the litigation against Ben-Israel and Butkow on behalf of himself and the remaining trustees, the Trust Deed does not permit informal ratification. Reliance is placed on clauses 10 and 11 of the Trust Deed which it is submitted require all decisions of the trustees regarding or arising from the Trust Deed are required to be made by way of majority vote taken at a properly constituted and quorate meeting of the trustees. This did not occur and, in any event, attempted ratification after institution of the application is ineffectual (see *Van Der Westhuizen v Van Sandwyk* 1996 (2) SA 490 (W) at 494J-495E).

[12] In my view there is no merit in these contentions:

12.1 Cuba expressly alleges in the founding affidavit that he is duly authorised by his co-trustees to represent the Trust in the litigation. This is challenged in the answering affidavit on the ground that it constitutes hearsay. The challenge is misguided.

The allegation is not hearsay as Cuba would have personal knowledge of the authorisation. There is no suggestion that Cuba's allegations are untrue.

12.2 In response to the challenge regarding Cuba's authorisation the second and third applicants deposed to affidavits which are attached to the replying affidavit in which they confirm that they reviewed and approved the founding affidavit before it was deposed to by Cuba. None of the trustees has suggested that the authorisation was not valid because it was not taken at a properly constituted quorate meeting of the trustees. It is not disputed that the applicants are all of the trustees of the Trust nor is it suggested that the Trust Deed does not confer a power on the trustees to resolve to institute the litigation.

12.3 Clauses 10 and 11 of the Trust Deed do not invalidate "*informal*" resolutions of the trustees. In terms of clause 10.2 all decisions of the trustees regarding and arising from the Trust Deed shall be by way of majority vote. In terms of clause 11 a quorum for meetings of trustees shall be two trustees and the trustees are empowered to regulate their meetings and the manner in which they are convened as they deem fit. There is no requirement of formality regarding how the remaining trustees should signify their association with the action so long as adequate proof is provided that the litigating trustee was properly authorised from

the outset to act on behalf of all the trustees. (See Cameron, Honoré “*South African Law of Trusts*” *ibid* and the authority cited in footnote 457.) The affidavits deposed to by the second and third applicants constitute adequate proof that Cuba was properly authorised from the outset to act on their behalf.

[13] In my view, the contention that there was no proper resolution of the trustees in terms of the Trust Deed which authorised Cuba to despatch the letter of demand calling upon Holoquin to perform its obligation under the Subscription Agreement and the letter of cancellation of the Subscription Agreement is also without merit:

13.1 Cuba alleges in the founding affidavit that he delivered a notice to Holoquin on 24 January 2014 calling upon Holoquin to remedy its breaches of the Subscription Agreement and that he also hand delivered the notice to Ben-Israel and Butkow. A copy of the letter is annexed to the founding affidavit.

13.2 The submissions in the respondents’ heads of argument prepared by Mr L N Harris SC, who also appeared for the respondents at the hearing of this application, are again that the Trust Deed provides that all decisions of the trustees regarding or arising from the Trust Deed shall be by way of majority vote at a properly constituted quorate meeting of the trustees and that Cuba does not allege that the decision to give notice to remedy

the alleged breaches was made by any trustee other than himself nor is there any mention of a resolution of the trustees in the letter itself.

- 13.3 There is no suggestion that the Trust Deed does not confer the power on the trustees to resolve to call upon Holoquin to remedy its breaches of the Subscription Agreement. This case is for that reason distinguishable from *Edinburg v Mercantile Credit (Pvt) Ltd* 1980 (1) SA 744 (ZR) which is relied upon by Mr Harris SC. In that case the court found that the trustee concerned did not have the power in terms of the Trust Deed to bind the Trust as a surety in her own interest. This is consistent with the passage in Cameron, Honoré “*South African Law of Trusts*” at paragraph 198 pages 324 to 325 which is also relied upon by Mr Harris SC. All that is there stated by the learned authors is that “*The suggestion that the ambit of the authority conferred by the trust deed is a matter of ‘internal management’ with which outsiders need not concern themselves is contrary to both principle and authority and must be discountenanced.*”

- 13.4 The letter calling upon Holoquin to remedy its breaches of the Subscription Agreement is signed by Cuba “*For The Vulindlela Family Trust*” and asserts that:

“1. *The above agreement was entered into in good faith between The Vulindlela Family Trust ...*

(Vulindlela) and Holoquin Global (Pty) Ltd ... (Holoquin).

2. *Various clauses of the agreement have been breached by Holoquin in particular Clauses 4.2, 4.3.10 and 4.3.11.*
3. *Mr Vulindlela W Cuba representing Vulindlela has displayed patience in waiting for the fulfilment of all clauses of the agreement without success.*
4. *In terms of clause 4.3.12 of the agreement, Vulindlela reserves the right to cancel this agreement in terms of Clause 6.*
5. *In terms of Clause 6 of the agreement Vulindlela hereby gives a written notice to Holoquin to remedy all the breaches of the agreement.*
6. *If the breaches are not remedied after 14 days, Vulindlela will regard the agreement as cancelled, and expect the repayment of the invested capital in terms of Clause 6."*

13.5 Ben-Israel responded to the notice in an email addressed to Cuba on 5 February 2014 in which he sought a meeting to discuss the way forward. He did not question Cuba's authority to address the demand on behalf of the Trust which is precisely what the letter of demand indicates that Cuba did. Cuba's alleged lack of authority is raised for the first time in the answering affidavit in which it is also alleged that Holoquin responded to the demand by allegedly remedying its breach.

13.6 The allegations in the founding affidavit are sufficient to constitute prima facie evidence that Cuba was duly authorised to address the letter of demand on behalf of the Trust. There is nothing to suggest that he would have taken an important step

such as this in the name of the Trust without having been duly authorised by his co-trustees to do so and I again refer to the affidavits deposed to by the second and third applicants.

13.7 In so far as the letter cancelling the Subscription Agreement is concerned, Cuba expressly alleges in the founding affidavit that he prepared the letter after consulting with his fellow trustees. The opening paragraphs of the letter, a copy of which was attached to the founding affidavit, read as follows:

- “1. On 24 January 2014 The Vulindlela Family Trust (VFT) gave a written notice to Holoquin Global (Pty) Ltd (HQ) in terms of Clause 6 of the agreement to remedy all breaches specified in the notice.
2. On 13 February 2014, the notice period of 14 days expired, and HQ has failed to remedy the breaches.
3. In terms of Clause 6 of the agreement VFT hereby cancels the agreement.”

13.8 In my view this again affords prima facie proof of Cuba’s due authorisation to address the letter of cancellation on behalf of the Trust. It also constitutes additional prima facie evidence that Cuba was duly authorised to address the letter of demand on behalf of the Trust. Cuba would hardly have discussed addressing the letter of cancellation with his co-trustees without mentioning the letter of demand and the fact that, as the letter of cancellation records, the 14 day notice period had expired. There

is nothing in the answering affidavit, apart from unsubstantiated denials, which displaces the *prima facie* case established in the founding affidavit. The affidavits deposed to by the second and third applicants are also decisive in this regard.

[14] Turning now to the claim of the Trust against Holoquin for repayment of the sum of R2 million, the Subscription Agreement, in relevant part, provides as follows:

“1. **RECORDAL**

- 1.1 *Holoquin has an authorised share capital of 400 000 (four hundred thousand) ordinary shares of R1 (one Rand) each (sic) of which 280 000 (two hundred and eighty thousand) have been issued.*
- 1.2 *Vulindlela has agreed to subscribe for 31 112 ordinary shares in Holoquin at the price of R64.28 (sixty four Rand and twenty eight cents) per share, the total consideration payable to Holoquin being R2 million (two million Rand). These shares will constitute 10% (ten per cent) of Holoquin's issued share capital. This transaction is (sic) recorded in clause 4 hereunder, is binding on Vulindlela and Holoquin and is unaffected by clause 1.3 and clause 5 ...*

4. **SUBSCRIPTION FOR SHARES**

- 4.1 *Vulindlela hereby subscribes for 31 112 (thirty one thousand one hundred and twelve shares) ordinary shares in Holoquin at the price of R64.28 (sixty four Rand and twenty eight cents) per share, the total consideration payable to Holoquin being R2 million (two million Rand).*
- 4.2 *Payment shall be made by electronic transfer of the said R2 million (two million Rand) in to Holoquin's bank account ... simultaneously with signature hereof against delivery of a share certificate reflecting Vulindlela as the registered owner of the shares referred to in this sub clause.*

4.3 *Holoquin warrants to Vulindlela that at the date of signature hereof and the giving effect to the transaction in this clause 4 ...*

4.3.2 *The authorised share capital of the company will be R400 000 (four hundred thousand Rand) divided into 400 000 (four hundred thousand) ordinary shares of R1 (one Rand) each, and 280 000 (two hundred and eighty thousand) have been issued and fully paid up, and that all such shares rank pari passu in all respects;*

4.3.3 *The effect of the transaction set out in clause 4.2 is the issued share capital of Holoquin will be 311 112 (three hundred and eleven thousand one hundred and twelve shares) and Vulindlela will be the registered and beneficial owner of 10% (ten per cent) of Holoquin's issued share capital ...*

4.3.10 *Vulindlela and Holoquin agree that a formal shareholder agreement will be concluded within 30 (thirty) days of the signing of this agreement;*

4.3.11 *Holoquin warrants that within 30 (thirty) days, an amended Memorandum of Incorporation (MOI) will be drafted for acceptance by all;*

4.3.12 *Subject to clause (sic) 4.3.10 and 4.3.11, if for whatever reason, the shareholder agreement or the MOI is not concluded within the stated period, Vulindlela reserves the right to either claim specific performance or to cancel the agreement in terms of clause 6;*

4.4 *All the information and documentation provided to Vulindlela by Mr Clive Butkow and Mr Paul Ben-Israel, are warranted by them as well as all the other beneficial shareholders and directors, as being true and accurate. Vulindlela relied upon such warranties in entering into this agreement. No warranties other than those set out in clause 4.3 are given ...*

6. **BREACH**

6.1 *Should any of the parties commit a breach of a material term of this agreement and remain in breach for a period of 14 (fourteen) days after despatch by the aggrieved party to the defaulting party of a written notice calling upon the defaulting party to remedy the said breach the aggrieved party shall have the right to either claim*

specific performance or to cancel this agreement. In the event of this agreement being cancelled the aggrieved party shall be entitled to exercise all rights conferred upon him in terms of this agreement and at common law.

6.2 *The costs of the successful party in protecting and/or enforcing any of his rights in terms of this agreement including all litigation and arbitration costs shall be paid by the other party on the scale as between attorney and own client.*

7. **ARBITRATION**

7.1 *In the event of a dispute arising between the parties in relation to this agreement its interpretation, the enforcement or protection of rights in terms hereof, its amendment or cancellation such dispute shall be referred to arbitration ...*

9. **GENERAL**

The parties acknowledge and agree that:

9.1 *This agreement constitutes the entire agreement between them and save as is herein set forth there are no terms and conditions, rights and liabilities between them and no warranties or representations have been made by any of them or on behalf of them which may have had the effect of inducing any of the parties to conclude this agreement or at all; the parties hereby expressly waive any rights which they may have had as a result of any such terms, conditions, warranties and representations ..."*

[15] It is common cause that notwithstanding the provisions of clause 4.2 of the Subscription Agreement, the Trust effected payment of R2 million to Holoquin on 13 June 2013 in advance of the receipt of a share certificate.

[16] It is also not in dispute that at the time when the Subscription Agreement was concluded:

- 16.1 Holoquin had an authorised share capital of 400 000 ordinary shares all of which had been issued. Two hundred thousand shares were held by and registered in the name of Jar Cafe CC (“*Jar*”) the members of which were one Aubrey Pieterse (“*Pieterse*”) and one Jurgen Alan (“*Alan*”) and two hundred thousand shares were held by and registered in the name of Acquinity CC (“*Acquinity*”) the members of which were Ben-Israel, his brother Dylan and Butkow;
- 16.2 The recordal in the Subscription Agreement that only 280 000 shares in Holoquin had been issued was false;
- 16.3 It was not possible for the Trust to subscribe for and for Holoquin to issue 31 112 shares to the Trust;
- 16.4 The representation that only 280 000 of the 400 000 authorised shares in Holoquin had been issued was material.

[17] Notwithstanding the payment of the subscription price of R2 million by the Trust to Holoquin, no shares in Holoquin were issued to the Trust, no shareholders’ agreement was concluded and no amended MOI was drafted.

[18] Consequently, on 24 January 2014, a notice calling upon Holoquin to remedy its breaches of clauses 4.2, 4.3.10 and 4.3.11 (to which I have already made reference) was delivered to Holoquin (“*the breach letter*”).

[19] The first meaningful response to the breach letter was contained in a letter addressed by Ben-Israel on behalf of Holoquin to the Trust on 5 February 2014, the effect of which was that Holoquin denied that the breach letter had been addressed on behalf of the Trust and contended that the Subscription Agreement had not come into being as Cuba has not been authorised by the Trust to conclude it. (The contention that no valid Subscription Agreement had been concluded was subsequently abandoned by Holoquin.)

[20] On 17 February 2014, Cuba on behalf of the Trust, addressed a letter to Holoquin for the attention of Ben-Israel and Butkow reading as follows:

- “1. *On 24 January 2014 The Vulindlela Family Trust (VFT) gave a written notice to Holoquin Global (Pty) Ltd (HQ) in terms of Clause 6 of the agreement to remedy all the breaches specified in the notice.*
2. *On 13 February 2014, the notice period of 14 days expired, and HQ has failed to remedy the breaches.*
3. *In terms of Clause 6 of the agreement VFT hereby cancels the agreement.*
4. *In terms of Clause 6, upon cancelation of the agreement, VFT is entitled to exercise all rights conferred upon him (sic) in terms of the agreement and at common law.*
5. *During the notice period, it has come to the attention of VFT that:*
 - a) *Messrs Clive Butkow (Clive) and Paul Justin Ben-Israel (Paul) were not duly authorised by the HQ shareholders to enter into the agreement on behalf of HQ.*
 - b) *During the negotiations and signing of the agreement, there were HQ material developments between shareholders which had the effect of making HQ unable to fulfil the agreement. Clive and Paul were aware of*

these developments, failed to disclose them and proceeded to sign the agreement.

- c) *In good faith VFT paid an amount of R2 million to a bank account specified by Clive and Paul which happened to be HQ's bank account.*
 - d) *In Clause 4.4 of the agreement Clive and Paul warranted that all information and documentation provided to VFT, and presented (sic) that HQ had more than one director when in fact it had one director.*
6. *The state of affairs of HQ at the time the agreement was signed, considered with the terms of the agreement make Clive and Paul personally liable for the repayment of R2m plus interest ...*
 7. *VFT demands (sic) Clive and Paul to refund VFT the R2 million plus interest by end of business day of 19 February 2014 into the following bank account ...*
 8. *In the event that Clive and Paul fail to refund VFT in terms of point 7 above VFT will consider all options to recover the outstanding amount without further notice." (emphasis supplied) ("the cancellation letter").*

[21] Ben-Israel alleges in the answering affidavit that the first time that any of the respondents had sight of the cancellation letter was on receipt of the founding affidavit in this matter. On this basis Ben-Israel alleges that the Subscription Agreement was not cancelled. He also pointed out that the 14 day notice period referred to in the breach letter expired on 7 February 2014 and not on 13 February 2014. Ben-Israel's denial that the cancellation letter was received by Holoquin cannot be accepted.

[22] Butkow responded to the cancelation letter as follows on 28 February 2014 in an email which he addressed to Cuba:

“Vuli I want to re-iterate my commitment to the resolution of the Holoquin matter. I will be in a position by tomorrow or Tuesday to pay you the R2 million. On payment of this money, I require a letter from yourself closing out this matter ...”

[23] Cuba responded to Butkow’s letter by email on the same day in which he stated that:

- “1. There is no impasse with Holoquin as that agreement was cancelled after VFT followed the due process.*
- 2. The matter will be automatically closed if the terms of the cancellation letter are met. Therefore, the letter you request is in your hands.*
- 3. I do not agree that there is a matter to be facilitated outside the cancellation letter. No one outside facilitated the VFT defective investment. Reversing that needs no facilitation after VFT followed the due process contained in the unfortunate former agreement ...” (emphasis supplied)*

[24] Neither Ben-Israel nor Butkow nor Holoquin denied the receipt of Cuba’s 23 February 2014 email or seeks to reconcile the emails exchanged on that day with Ben-Israel’s *ex post facto* denial in the answering affidavit that the cancellation letter was received by Holoquin.

[25] The “*letter*” which Butkow required from Cuba as set out in his email of 23 February 2014 was a document entitled “*Deed Of Release*” which the Trust was not prepared to sign.

[26] The parties then handed the matter over to their respective attorneys and on 20 March 2014 the Trust’s attorneys addressed a letter of demand to Holoquin for the attention of Ben-Israel requiring payment of the sum of R2 million together with interest at the mora rate from date of cancellation of the Subscription Agreement.

[27] Holoquin’s attorneys responded in a letter dated 31 March 2014 in the following terms:

“Your letter dated 21 March 2014 addressed to our client [Holoquin] refers.

Contrary to what you state, the payment of R2 million by your client to our client, was not in terms of the agreement which you partially set out in your letter. The reason for this is that, as your client is aware, your client did not sign the agreement and, accordingly, no transaction in terms thereof came into being. As a result none of the terms of the document on which your client seeks to rely are [sic] enforceable, including but not limited to the 14 day mora period therein. This was stated in our client’s letter to you dated 5 February 2014. Therefore, your client’s demands in its letter dated 24 January 2014 are of no legal consequence, and the purported cancellation falls into the same category.

Our client does admit that an amount of R2 million was paid to it for 10% of its issued share capital, and a share certificate evidencing that is enclosed.

Your client’s rights are limited to those of a shareholder of 10% of the ordinary shares of a company, and are subject to the Memorandum of Incorporation of the company and the Companies Act 71 of 2008.”

[28] The enclosed share certificate was a copy and not an original which purported to reflect that the applicants' in their capacities as trustees of the Trust were the registered proprietors of 40 000 shares in Holoquin. The share certificate purports to have been signed by a director of Holoquin on 3 February 2014.

[29] Quite apart from the fact that the share certificate was not tendered as performance by Holoquin of its obligations in terms of the Subscription Agreement but on some other undisclosed basis there are contradictory allegations in the respondents' answering affidavit. At one place in the answering affidavit Ben-Israel alleges that *"9.1 First, Holoquin has materially performed its obligations under the contract. It has issued 10% of Holoquin's issued share capital to the Trust in return for the payment of R2 million...In his letter of 24 January (VWC 13, P97) Mr Cuba informed Holoquin that the contract had been breached and that Holoquin had 14 days to remedy the breach. Holoquin responded by issuing 40 000 shares in the name of the Trust on 3 February 2014. The shares were issued within the 14 day period and as a result, the breach was cured."* (emphasis supplied) There is no attempt to reconcile the allegation that the issue by Holoquin of the 40 000 shares constituted performance by Holoquin of its obligations under the Subscription Agreement with the allegation in Holoquin's attorneys' letter of 31 March 2014 that the Subscription Agreement had not come into being.

[30] At another place in the answering affidavit Ben-Israel admits that *"... it was not possible to issue the shares to [the Trust] as the agreement stated. In*

order to ensure there was compliance with the obligation that the Trust was the owner of 10% of the issued share capital of [Holoquin], 10% of the said issued share capital was transferred to the three respondents NNO.” (emphasis supplied). That admission was correctly made. A purported issue of shares in excess of those authorised is void in terms of section 38(3) of the Companies Act 71 of 2008.

[31] Not only does the Subscription Agreement not provide for a transfer of shares but the identity of the transferor is not disclosed nor is it explained how R2 million was due to Holoquin against a “*transfer*” as opposed to an “*issue*” of shares. Further, as explained in *Inland Property Development Corp (Pty) Ltd v Cilliers* 1973 (3) SA 245 (A) at 251C per Rumpff JA “*In regard to shares, the word ‘transfer’, in its full and technical sense, is not a single act but consists of a series of steps, namely an agreement to transfer, the execution of a deed of transfer and, finally, the registration of the transfer.*” Apart from tendering a copy of a share certificate coupled with an assertion that the Subscription Agreement did not come into being, Holoquin does not allege that it executed a requisite deed of transfer or that the transfer was registered.

[32] The tender of the copy of the share certificate was rejected by the Trust in its attorneys’ letter of 10 April 2014 in which it was pointed out that the Subscription Agreement had already been cancelled. The letter continued “6. *The issue of the share certificate is an after-thought. We note that this purports to be share certificate number 3. Certificate number 1 records that Jar Cafe owns 200 000 ordinary shares in your client. Certificate number 2*

records that Aquimm (sic) owns 200 000 ordinary shares in your client. The authorised share capital in your client is 400 000 ordinary shares. 7. Accordingly, there are no more ordinary shares that can simply be issued to our client without shareholder approval. 8. Moreover, in the disputed agreement (signed by Mr Paul Justin Ben-Israel), your client warrants that the issued share capital is 280 000 shares. Clearly, this is not so. This is one of a number of intentional misrepresentations made by Mr Ben-Israel and Mr Clive Butkow (the latter holding himself out to be a director although he is not a director) purporting to act on your client's behalf. These individuals are liable to our client in their personal capacity." (emphasis supplied). There was no response to this email.

[33] In the circumstances it is clear that Holoquin was and remains in flagrant breach of the Subscription Agreement, that the Subscription Agreement was lawfully cancelled by the Trust and that Holoquin has not advanced any legitimate defence for repayment of the sum of R2 million, apart from the alleged arbitration defence to the claim which I will deal with below.

[34] As I have indicated, the Trust's claim against Ben-Israel and Butkow is, in the first instance, based on a warranty allegedly provided by them to the Trust. Reference was made in the founding affidavit to a series of emails dated 9 and 10 June 2013 (to which I will return), which led to the wording of clause 4.4 of the Subscription Agreement followed by an allegation that "*It is accordingly clear that each of [Ben-Israel] and [Butkow] were [sic] aware of*

the warranty contained in clause 4.3 [sic] and agreed to this warranty prior to the final conclusion of the [Subscription Agreement].”

[35] Ben-Israel and Butkow are not parties to the Subscription Agreement and the warranty contained in clause 4.4 would, notwithstanding its wording, not apply to them. In order to overcome this difficulty Mr S C Vivian who appeared on behalf of the applicants, submitted that Ben-Israel and Butkow gave a warranty separately from the Subscription Agreement in their personal capacities. When I enquired of him whether the separate warranty was oral or written he referred me to the series of emails dated 9 and 10 June 2013. If I understood him correctly, the contention is that the mere despatch of these emails constituted the provision by Ben-Israel and Butkow of a separate or stand-alone warranty in their personal capacities.

[36] On 9 June 2013, Ben-Israel enclosed an amended “MOU” under cover of an email which he addressed to Cuba and one Farrel Wainer. On 10 June 2013 Cuba addressed an email to Ben-Israel recording that he had reviewed the “MOU” and that *“Clause 4.4. I think it is important to record that the [Trust] relied on information presented by Clive Butkow and that all the current shareholders warrant the contents of that information.”* On 10 June 2013 Ben-Israel advised in an email which he addressed to Cuba and copied to Farrel Wainer and Butkow that he had *“... amended clause 4.4 to add the following: All the warranties in clause 4.3 where (sic) provided to [the Trust] by Mr Clive Butkow and Mr Paul Ben-Israel and that all the current shareholders warrant the contents of this information being a true and accurate reflection of*

the company.” On the same day Farrel Wainer addressed an email to Cuba and Ben-Israel which he copied to Butkow reading as follows “Please amend as below. All the information and documentation provided to [the Trust] by Mr Clive Butkow and Mr Paul Ben-Israel, are warranted by them as well as the other beneficial shareholders and directors, as being a [sic] true and accurate. [The Trust] relied upon such warranties in entering into this agreement.” These emails are the genesis of clause 4.4 of the Subscription Agreement.

[37] I do not agree with Mr Vivian that these emails constitute a separate or stand-alone warranty provided by Ben-Israel and Butkow in their personal capacities. If the contention is that the emails constitute a separate or stand-alone written warranty, Ben-Israel was the only author of one of the emails. None of Butkow, or the other beneficial shareholders, or the other directors is the author of any of the emails. What the emails evidence is an attempt to draft and incorporate a warranty provision in a Subscription Agreement to be concluded between the Trust and Holoquin. The emails do not evidence an intention on the part of Ben-Israel, Butkow, the other beneficial shareholders and the other directors to provide any warranty separate from the Subscription Agreement. It is clear that the parties intended that the Subscription Agreement would govern their relationship. I agree with Mr Harris SC that the warranty claim is simply an unfounded attempt to bind parties who are not parties to the Subscription Agreement.

[38] In the circumstances the Trust’s claim against Ben-Israel and Butkow based on the alleged separate or stand-alone warranty must fail.

[39] As set out above, the Trust advances an alternative claim against Ben-Israel and Butkow based on allegations that they misrepresented the matters recorded in clauses 1.1, 4.3, 4.3.2 and 4.3.3 of the Subscription Agreement with the fraudulent intention of inducing the Trust to conclude the Subscription Agreement and effect payment of R2 million to Holoquin when they well knew that the entire authorised share capital had been issued and that Holoquin was not in a position to issue the 31 112 shares subscribed for by the Trust.

[40] The approach to applications in which relief is sought based on allegations of fraud is set out in *NM Prinsloo NO v Goldex 15 (Pty) Ltd* 2014 (5) SA 297 (SCA) per Brand JA as follows:

“[19] I therefore agree with the appellants’ contention that Webster J should not have made a finding of fraud against Prinsloo on the basis of untested allegations against him on motion papers that were denied on grounds that could not be described as farfetched or untenable. The reasons why he should not have done so, derive not only from common sense, but from many years of collective judicial experience. They were thus formulated in Sewmungal and another NNO v Regent Cinema 1977 (1) SA 814 (N) at 819 A-C:

‘In approaching this particular type of problem [of factual disputes arising on affidavit] it is not wrong for a court at the outset to have some regard to the realities of litigation. What appears to be a good case on paper may become less impressive after the deponents to the affidavits have been cross-examined. Conversely, what appears to be an improbable case on the affidavits, may turn out to be less improbable or even probable in relation to a particular witness after he had been seen and heard by a court. An incautious answer in cross-examination may change the whole complexion of the case.’”

[41] Mr Vivian, in a forceful argument, sought to persuade me that Ben-Israel's and Butkow's denials of any fraudulent intent on their part were untenable and should accordingly be rejected on paper. I cannot agree.

[42] In order to assert a delictual claim of this nature, the Trust would need to prove:

42.1 A false representation;

42.2 That the false representation was made:

42.2.1 wrongfully or unlawfully (the criterion of unlawfulness);

42.2.2 intentionally or negligently;

42.3 That the act or omission caused the Trust to sustain loss; and

42.4 That a damages claim by the Trust represents compensation for such loss.

(See *Siman & Co v Barclays National Bank* 1984 (2) SA 888 (A); *Standard Chartered Bank of Canada v NedPerm Bank Limited* 1994 (4) SA 747 (A); *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 860 (A).)

[43] As I have indicated, I am of the view that the representations which were made by Ben-Israel and Butkow which constituted the basis for the recordals in clauses 1.1, 4.3, 4.3.2 and 4.3.3 of the Subscription Agreement were false.

[44] However Ben-Israel refers in the answering affidavit to an agreement which he alleges was concluded between Acquinity and Jar Cafe, prior to the conclusion of the Subscription Agreement, regarding the restructure of Holoquin. He alleges that Pieterse and Alan, the members of Jar Cafe, were fully aware of the proposed Subscription Agreement and agreed to the transaction on 4 June 2014. The structure which Ben-Israel proposed which was accepted by Pieterse and Alan was that each of himself, his brother Dylan, Butkow, Pieterse and Alan would hold 14% of the issued share capital in Holoquin aggregating 70% of the issued shares, leaving 30% of the issued shares available for issue to outside investors including the Trust. The restructuring agreement was concluded on 4 and 5 June 2013. Unbeknown to Ben-Israel, Pieterse and Alan had, on 14 May 2013, caused Jar Cafe to cede and pledge to an entity ZAH all of the former's shares in Holoquin as security for a loan of R500 000. This was not disclosed by Pieterse and Alan to Ben-Israel when the restructuring agreement was concluded and the result was that Jar Cafe was unable to comply with such agreement. The restructuring agreement formed the basis of the transaction being discussed with Holoquin.

[45] In *Commissioner for the South African Revenue Service v Sassin* 2015 JDR 2293 (KZD):

“[45] It is well-established that motion proceedings are by their very nature generally inappropriate for the purpose of making findings of fraud. Fraud is a serious allegation that carries serious consequences. It is an offence that affects a person’s good name and reputation and could have serious consequences for him/her, particularly in the business world. In matters in which charges of criminal or immoral conduct are made, it is a requirement that such charges must be proved by the ‘clearest’ evidence, or ‘clear and satisfactory’ evidence or some similar phrase. Moreover, fraud will not be lightly inferred because as explained in Gates v Gates, supra:

‘... There is not, however, in truth any variation in the standard of proof required in such cases. The requirement is still proof sufficient to carry a conviction to a reasonable mind, but the reasonable mind is not so easily convinced in such cases because in a civilised community there are moral and legal sanctions against immoral and criminal conduct and consequently probabilities against such conduct are stronger than they are against conduct which is not immoral or criminal.’

[46] The approach that application proceedings are inappropriate for the resolution of matters where fraud is alleged, is in my view, correct since it is undesirable to resolve disputed issues on paper which are largely dependent on considerations not only of probability but also of credibility.

[47] Our courts have consistently held that it would be unwise to decide a disputed issue of whether fraud was committed on motion proceedings without the benefits inherent in the hearing of oral evidence, including discovery of documents, cross-examination of witnesses, and so forth. The logic behind this is to be found in the reasoning of Brand JA in Prinsloo NO and others v Goldex (Pty) Ltd ...

[48] Fraud cannot be inferred, particularly in motion proceedings, from a mere error, a misunderstanding or an oversight, however unreasonable such might be. Where the basis of an allegation of fraud is the knowledge of a particular fact, our courts tend to distinguish between knowledge and belief of that fact. Although knowledge of a fact can generally be inferred from evidence, a belief of that fact only leads to an inference of knowledge where the party would have some justification for that belief, and the means of establishing it.”

[46] Mr Harris SC submitted that what I am asked to do is find by inference that Ben-Israel and Butkow must have intended to fraudulently induce

Holoquin to enter into the Subscription Agreement absent any statement that they had an intention to defraud. The intention to defraud is simply to be inferred from the fact that it was not possible for Holoquin to issue any shares to the Trust.

[47] Mr Harris SC also submitted that I cannot exclude the possibility of an error or a misunderstanding or an innocent belief on the part of Ben-Israel and Butkow. He referred me in this regard to an email addressed by Ben-Israel on 4 June 2013 reading as follows:

“Gents

In terms of Vuli as an investor, there are some complications regarding the share structure. Aquinity (sic) owns 50% of Holoquin and Jar Cafe owns 50%, this leaves 0% to allocate to other shareholders. Therefore, for the money to be transferred to Holoquin (i.e. the Seller must be the beneficiary), we will need to change the structure.

What I propose is as follows, both Aquinity and Jar Cafe will sell their 50% stake to Holoquin for R2.50 (a token and nominal amount to comply with the law). This will create a situation whereby there are 400 000 authorised shares but no shareholders. Thereafter, Holoquin will sell 70% of its shares to five people, being Paul, Jurgen, Aubrey, Clive and Dylan – this gives each of us 14% of the company, for R1 each (this will balance the books). This leaves 30% of the company to be issued to other shareholders. 10% of this will be sold to Vuli for R2m, where the money will be made available immediately. If we conclude a transaction with Ori and Alan, we will issue another 10% of the shares to them for R2m, leaving 10% unallocated shares.

Let me deal with the Clive issue upfront. I have discussed with Clive this structure and he had agreed that if this is implemented he will forego the R600 000 paid, in other words, there will not be a debt between Jar Cafe and Clive. The alternative is that we cannot agree on this and we will lose Vuli, which at this critical time is not an option for me. We need the money to ensure that all can be focused on delivering Woolworths and Truworths.”

[48] Seventy percent of 400 000 is 280 000. Thus if the restructure had been implemented, it would have been possible for 10% of the shares in Holoquin to be issued to the Trust. As I have pointed out, according to Ben-Israel, Jar Cafe agreed to the proposed restructure without disclosing to him that it has ceded and pledged its shares in Holoquin to ZAH which rendered the proposed restructure unworkable. In the circumstances I am not in a position to find by inference that Ben-Israel and Butkow must have fraudulently intended to induce the Trust to conclude the Subscription Agreement and I cannot exclude the possibility of an innocent even if misguided belief on their part that the Subscription Agreement would be implemented in accordance with its terms. As a result I cannot find that the version proffered by Ben-Israel and Butkow is untenable.

[49] Mr Harris SC submitted that in those circumstances I should dismiss the application of the Trust against Ben-Israel and Butkow as there are disputes of fact on the papers which the trustees ought reasonably to have foreseen when the application was launched. I do not agree. The email addressed by the attorneys of the Trust to which I have referred, rejecting the tender of the share certificate, contained allegations amounting to allegations of fraud on the part of Ben-Israel and Butkow. This email was not responded to and I cannot find in those circumstances that the trustees should have anticipated any material dispute of fact. There is also no dispute of fact concerning the claim of the Trust against Holoquin arising from the latter's breach of the Subscription Agreement.

[50] The only remaining issue is the question of the arbitration agreement. The claim of the Trust clearly falls within the terms of the arbitration agreement in clause 7.1 of the Subscription Agreement. Mr Harris SC submitted that I should not be drawn into the merits of the case in deciding whether or not to grant a stay. He referred in this regard to *Communications & Allied Industries Pensioners Association v Communications & Allied Industries Pension Fund* Supreme Court of Zimbabwe Judgment No. SC29/08 Civil Appeal No.101/07, cited in Ramsden *The Law of Arbitration South African & International Arbitration* p98. I cannot see any reason why it is not permissible for a court to have regard to the merits in order to determine whether there is any dispute which falls within the ambit of the arbitration agreement. As there is no dispute regarding the claim of the Trust against Holoquin under the Subscription Agreement, there is nothing to be referred to arbitration and there is no reason why the Trust should not be entitled to approach this court for judgment against Holoquin.

[51] I would in any event not have ordered a stay of the proceedings against Holoquin. A court may make an order staying a referral to arbitration when it is satisfied that there is sufficient reason to do so (see section 6(2) of the Arbitration Act 42 of 1965). Ben-Israel and Butkow are not parties to the Subscription Agreement. Referring the claim of the Trust against Holoquin to arbitration will therefore result in a multiplicity of proceedings on substantially the same facts with the same witnesses. This is undesirable because of the risk that different tribunals may come to different conclusions (see *Valkin v Valkin* 1953 (4) SA 510 (W); *Universiteit Van Stellenbosch v J A Louw* 1983

(4) SA 321 (A) at 335 H). This renders it desirable for the claims of the Trust against Holoquin and Ben-Israel and Butkow to be pursued in a single proceeding before this Court.

[52] I do not consider that this is a case in which I should refer the delictual claim of the Trust against Ben-Israel and Butkow to trial. There are a limited number of distinct issues which it is more appropriate to refer for the hearing of oral evidence. Mr Harris SC submitted that if I refer the matter for the hearing of oral evidence I should order that such proceedings should be stayed. The basis for this submission is that the delictual claim of the Trust is premature because until such time as it becomes clear that Holoquin is unable to satisfy the contractual claim of the Trust arising out of the Subscription Agreement, the Trust would not have suffered any damages. Mr Vivian's answer to this was that the liability of Ben-Israel and Butkow is joint and several with Holoquin and that in those circumstances there is no need for a stay. He did not cite any authority for this proposition and I have been unable to find any. Partners, co-parties to negotiable instruments and those on whom the contract clearly by express words or necessary implication imposes liability *in solidum* are jointly and severally liable. Joint and several liability may also be imposed by statute. An example is the Matrimonial Property Act 88 of 1984 ss 17 (5) and 23 (5). At common law joint wrongdoers are jointly and severally liable for the same delict – payment of the damages by one absolves the other from liability. Section 2(1) of the Apportionment of Damages Act 34 of 1956 provides that: "*Where it is alleged that two or more persons are jointly or severally liable in delict to a third*

person...for the same damage, such persons...may be sued in the same action.” However, as the claim of the Trust against Holoquin is contractual and not delictual, Ben-Israel and Butkow are not jointly and severally liable with Holoquin in respect of such claim.

[53] In the circumstances:

53.1 Holoquin is ordered to pay the Trust R2 million together with interest thereon at the rate of 9% per annum from 17 February 2014 to date of payment, both dates inclusive.

53.2 Holoquin is ordered to pay the costs of the application against it.

53.3 An order is granted referring the claim of the Trust against Ben-Israel and Butkow for the hearing of oral evidence, on the following terms:

53.3.1 in relation to the representation as recorded in clause 4.3.2 of the Subscription Agreement (*“the representation”*), whether or not Ben-Israel and/or Butkow knew at the time when the share subscription agreement was concluded that Holoquin’s entire authorized share capital of 400 000 shares had been issued and that it would accordingly not be possible for Holoquin to issue

the 31 112 shares to the Applicants in terms of the share subscription agreement.

53.3.2 whether or not Ben-Israel and/or Butkow made the representation with the intent to defraud the Trust and to induce the Trust to enter into the Subscription Agreement.

53.3.3 whether or not the Trust was induced by the representation to enter into the Subscription Agreement.

53.3.4 whether or not the Trust has suffered any damages caused by the representation and if so the quantum of such damages.

53.4 The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject, however, to what is provided in paragraph 53.4.

53.5 No further witness may be called save with leave of the Court and provided that an affidavit setting out such witness's evidence shall have been served on the opposing party not less than 30 days before the hearing.

53.6 Within 21 days of the making of this order, each of the parties shall make discovery, on oath, of all documents relating to the issues referred to in paragraph 1 hereof, which are or have at any time been in the possession or under the control of such party and which documents are not already attached to the affidavits delivered by either party.

53.7 Such discovery shall be made in accordance with Rule of Court 35 and the provisions of that Rule with regard to the inspection and production of documents discovered shall be operative.

53.8 The incidence of the costs incurred up to now in respect of the claim of the Trust as against Ben-Israel and Butkow shall be determined after the hearing of oral evidence.

53.9 Such referral is stayed for a period of 15 (fifteen) days from the date of this Order. If Holoquin fails to effect payment of the sum of R2 million together with interest in full prior to the expiration of the 15 (fifteen) day period, the matter may be proceeded with.

A P RUBENS
ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

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11/02/2016

DATE OF JUDGMENT:
19/02/2016