

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
<u>19/8/2021</u>	
DATE	<u>[Signature]</u>
	SIGNATURE

Case No.: 2020/21979

In the matter between:

WHISKEY CREEK TRADING 4 (PTY) LIMITED

Applicant

and

LUCID VENTURES (PTY) LIMITED

Respondent

JUDGMENT

This judgment was handed down electronically by circulation to the parties' legal representatives by email and is deemed to be handed down upon such circulation.

Gilbert AJ:

1. The applicant seeks payment from the respondent of two amounts that the applicant alleges the respondent was obliged to advance to the applicant in terms of a written shareholders agreement.
2. Whether the applicant is entitled to the relief is dependent upon the interpretation of the shareholders agreement.
3. The respondent raises two points *in limine*. The first point *in limine* is that the applicant's claims for payment in terms of the shareholders agreement are subject to an arbitration dispute resolution mechanism in the agreement. The second point *in limine* is that the matter cannot be decided on the papers as there is a relevant material dispute of fact.
4. This material dispute of fact relates to whether these application proceedings were settled, particularly whether agreement was reached that the applicant withdraw this application. The applicant submits that the respondent's version in support of the matter having been settled is sufficiently far-fetched and fanciful that it can be rejected on the papers.
5. The applicant seeks final relief in the form of a money judgment. This brings to the fore the election to be made by an applicant when seeking final relief by way of motion proceedings where there are relevant material factual disputes whether to persist with seeking final relief by way of motion or whether to seek a referral of the matter either to trial or to oral evidence. This election is to be made upfront in the hearing and not once

it becomes clear that the applicant is failing to persuade the court on the papers, unless there are exceptional circumstances.¹

6. Whatever may be said as to the merits of the factual dispute, and in respect of which I naturally express no view, the dispute whether the matter has become settled is a relevant and material issue. Should the respondent succeed on the basis that these proceedings have become settled, that would be the end of these proceedings. It therefore follows that this anterior issue would need to be decided.
7. At the commencement of the hearing of the matter, I enquired of Mr Hoffman, for the applicant, the applicant's position in relation to the election. Both Mr Hoffman, for the applicant, and Mr Mýburgh, for the respondent, were alive to the election, and the timing thereof.
8. At the request of Mr Hoffman, I stood down the matter to enable him to take instructions. Having taken instructions, Mr Hoffman informed the court that the applicant would seek a referral to oral evidence of the settlement issue. Mr Mýburgh for the respondent did not oppose the referral. But the parties were not agreed as to the appropriate costs order to be made consequent upon the referral. Mr Hoffman submitted that the appropriate order would be that the costs arising from the referral be reserved. Mr Mýburgh submitted that the applicant should be liable for the

¹ See the decision of the Full Court of this division in *ABSA Bank Limited v Molotsi* [2016] ZAGPJHC36 (8 March 2016), paras 25-27, applying *Law Society, Northern Province v Mogani* 2010 (1) SA 186 (SCA), para 23 and *De Reszke v Maras and others* 2006 (1) SA 401 (C) para 33.

wasted costs. It is therefore necessary for me to make a determination in relation to the costs.

9. In light of the parties' stance on a referral to oral evidence, I am prepared to grant such an order referring the settlement issue to oral evidence. It will then be for that court after hearing oral evidence to decide the matter in its totality having heard oral evidence on the referred issue and based upon the affidavits already filed in the matter.² To this end, the parties prepared for my consideration a draft referral order along the usual *Metallurgical* lines,³ adapted to their purposes. I propose making an order in terms of the draft order, with some minor changes on procedural aspects.
10. In the circumstances, the parties were agreed that it was neither necessary nor appropriate for me to make any findings in relation to the other disputes between the parties. This included in relation to the respondent's reliance upon the arbitration clause.
11. On the issue of costs, Mr Hoffman submitted that there were no wasted costs, in effect, and that the court which decides the settlement issue in due course would be best placed to make an appropriate costs order. Mr Hoffman submitted that should it transpire after the hearing of oral evidence that the respondent's reliance upon the matter having become

² *Lekup Prop Co No. 4 (Pty) Limited v Wright* 2012 (5) SA 246 (SCA) at 258I.

³ *Metallurgical and Commercial Consultants (Pty) Limited v Metal Sales Co (Pty) Limited* 1971 (2) SA 388 (W).

settled was a contrived ruse, the respondent should not have had the benefit of any costs arising from a referral to oral evidence on that ruse.

12. Mr Mýburgh countered that upon receipt of the answering affidavit, the applicant was placed on guard that there were material disputes of fact, particularly in relation to the settlement issue. The answering affidavit details, according to Mr Mýburgh, sufficient facts supporting the settlement issue that the applicant should have responsibly at that stage made the election not to persist in seeking final relief on motion but instead to have agreed to a referral to oral evidence at that stage and so have avoided the need for the parties to come to court on an opposed basis only to find that the applicant then elected to seek a referral to oral evidence.
13. It may transpire, with the benefit of hindsight following oral evidence, that the respondent's reliance upon settlement was opportunistic and had no merit. It may also transpire after the benefit of oral evidence that the defence was well-founded. Or it may transpire after the benefit of oral evidence that although the defence fails, it was nonetheless of sufficient veracity that it warranted a referral to oral evidence. Accordingly, the outcome of oral evidence would inform the incidence of costs.
14. I also take into account that Mr Hoffman did, albeit only at the commencement of argument, make the election, and did not persist in first seeking to argue the matter on its merits. The applicant, in the present

circumstances, should not be faulted for adopting a more cautious approach.

15. In the exercise of my discretion, the costs arising from the hearing on 17 August 2021 should be reserved. The court subsequently and having heard oral evidence whether these proceedings had become settled would be better placed to make a determination as to the incidence of any costs that arose upon the referral of oral evidence.
16. The following order is made:
 - 16.1. The matter is referred for the hearing of oral evidence, at a date and at a time to be arranged with the Registrar, on the issue whether the parties settled these application proceedings on the terms set out by the respondent in its answering affidavit.
 - 16.2. The evidence shall be that of any witnesses whom the parties or either of them may elect to call, subject to sub-paragraph 3 below.
 - 16.3. Save in the case of Mr. Justin Nicholas Divaris and Mr. Gidon Saul Novick (whom the parties are obliged to make available for cross-examination to the extent that such party persists in seeking to place any reliance on these persons' evidence in the affidavits), neither party shall be entitled to call any witness unless:
 - 16.3.1. it has served on the other party at least 30 calendar days before the date appointed for the hearing (in the case of a witness to be

called by the respondent) and at least 20 calendar days before such date (in the case of a witness to be called by the applicant), a statement wherein the evidence to be given in chief by the witness is set out; or

16.3.2. the Court, at the hearing, or if the parties so agree, permits such person to be called notwithstanding that no witness statement has been so served in respect of his or her evidence.

16.4. The witness statements referred to in sub-paragraph 3 above shall:-

16.4.1. attach all documents to which the witness will refer in evidence; and

16.4.2. stand as the witness' evidence in chief (save for the right of either party to lead evidence on clarification).

16.5. There shall be no general discovery in respect of the issue referred to oral evidence.

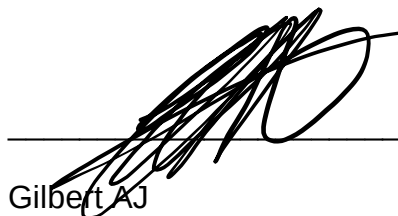
16.6. Either party may deliver a notice, at least 15 calendar days before the hearing of the matter, requiring the other party to make targeted disclosure of any document not already referred to in the affidavits and/or witness statements. Such notice shall be complied with by the receiving party within 10 calendar days of receipt thereof.

16.7. Either party may subpoena any person to give evidence at the hearing, whether such person has consented to furnish a statement or not.

16.8. The fact that a party has served a witness statement in terms of subparagraph 3, or has subpoenaed a witness, shall not oblige such party to call the witness concerned.

16.9. The remainder of the issues in the application stand over for determination on the affidavits filed by the parties to date.

16.10. The costs arising from the hearing of the application on 17 August 2021 are reserved.



Gilbert AJ

Date of hearing: 17 August 2021

Date of judgment: 19 August 2021

Counsel for the Applicant: Mr J Hoffman

Instructed by: Alan Allschwang & Associates Inc
Johannesburg

Counsel for the Respondent: Mr J L Mýburgh

Instructed by: Cliffe Dekker Hofmeyr Inc
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