REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

19/8/2021

DATE SIGNATURE

Case No.: 2012/10002

In the matter between:

C3 SHARED SERVICES (PTY) LIMITED Applicant

and

NICOLAS JOHN GRANGE First Respondent

XTRAVISION (PTY) LIMITED Second 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 wide-ranging relief against the respondents effectively interdicting and restraining the respondents from competing directly or indirectly with the applicant. Some eleven prayers are directed to this end in the notice of motion.

2. The respondents have opposed the relief and full sets of affidavits have been exchanged.

3. The first respondent had been a shareholder, director and employee of the applicant. It is common cause that the applicant and first respondent concluded a written agreement pursuant to which the first respondent as the seller sold his shares in the applicant for a purchase consideration of R3 million, and resigned as an director and employee.

4. After selling his shares in the applicant, the first respondent purchased a 50% shareholding in the second respondent and became its managing director.

5. The agreement contains what is styled a “Non-Compete” clause:

> *“7.1 The Seller to hereby warrant and undertake that for a period of 30 (thirty) months, recorded from the effective date of this agreement and within South Africa he will not, directly or indirectly, personally or through any nominee:*
>
> *7.1.1 Carry on any business in competition to the business sold in terms of this agreement, for*

clarity business include electronic security and fire detection services and infrastructure related to the services;

7.1.2 Approached any of the clients as per annexure "A" with the purpose of selling services and/or products as defined in clause 8.1.1 above to them;

7.2 The Seller will be liable to pay a penalty of R500 000.00 (Five Hundred Thousand Rand) in each instance of breach of this clause 8. Instances of breach need to be determined via Arbitration or agreed between the Parties."[1]

6. Based upon the agreement, particularly this clause, the applicant seeks the wide-ranging interdictory relief against the respondents.

7. The relief that the applicant seeks is final relief. There appears to factual disputes that may be material and relevant. 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 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

[1] The cross-referencing to clause 8.1.1 would appear to have been intended to be a cross-referencing to clause 7.1.1 and the cross-referencing to clause 8 appears to have been intended to be a reference to clause 7.

applicant is failing to persuade the court on the papers, unless there are exceptional circumstances.[2]

8. At the commencement of the hearing of the matter, I enquired of Mr de Villiers, counsel for the applicant, the applicant's position in relation to the election. Both Mr de Villiers, for the applicant, and Mr Grobler were alive to the election, and the timing thereof.

9. At the request of the parties, I stood the matter down to enable the respective counsel to take instructions and to engage with each other. Upon resumption of the hearing, the parties were agreed that there was a need for oral evidence but could not agree on whether that oral evidence should be adduced consequent upon a referral of the application to trial or upon a referral of the application to oral evidence in the customary *Metallurgical* manner.[3] The parties also could not agree on the costs arising from the hearing before me.

10. Mr de Villiers for the applicant submitted that a referral to oral evidence is appropriate rather than a referral to trial. The applicant submits that the relevant issue to be referred to oral evidence would be interpretation of the agreement and particularly of the "Non-Compete" clause, and, inextricably linked thereto, whether there had been a breach of the agreement by one or more of the respondents. The applicant further

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[2] 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.

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

submitted that as the restraint period was for a fixed term ending in May 2022, the delays attendant upon a referral to trial which would require an exchange of pleadings would render the interdictory relief nugatory as the restraint period would have ended by the time the matter was heard on trial.

11. Mr Grobler for the respondents submitted that as the relief sought was far-ranging, which included relief against the second respondent who was not a party to agreement and so where it was not clear on what basis relief was sought against the second respondent, it was more appropriate that the issues be defined between the parties by way of pleadings and so a referral to trial was appropriate.

12. The parties therefore required me to decide on the appropriate referral, whether to oral evidence or to trial, as well as the incidence of costs.

13. Although there are several disputes between the parties, the central material factual disputes relate to whether there has been a breach of the agreement, which is to be determined in the context of the parties having different views, it would appear, on how the agreement should be interpreted. The respondents did not argue with any real vigour that the central factual dispute was otherwise. The respondents did in their practice note summarise the issues as being that of the interpretation of the agreement and whether the applicant had proven the alleged breach of that agreement. This accords with what the applicant submitted during argument was the central issue.

14. A court hearing oral evidence pursuant to the typical *Metallurgical* referral on the issue would not only determine that issue after hearing oral evidence, but would also consider all the relevant issues between the parties and so whether to grant the final relief sought by the applicant after considering all the affidavits together with the oral evidence.[4] The parties having gone to the effort and expense of filing full sets of substantive affidavits, and the central factual dispute is readily identifiable. To the extent that the applicant has not made out a legally cognisable case for relief against the second respondent – in respect of which I express no view –that deficiency will remain for the second respondent to raise in defence in due course if it has any merit. I am therefore inclined towards a referral to oral evidence rather than an effective commencement of the proceedings *de novo* by way of a referral to trial where the affidavits will play little role.

15. Whether a referral to oral evidence rather than trial will result in a court making a determination before the restraint period ends in May 2022 is uncertain but a referral to oral evidence would at least avoid the costs and delay attendant upon an exchange of pleadings.

16. On the incidence of costs, Mr de Villiers for the applicant submitted that the usual costs order should follow, being costs in the cause. Mr de Villiers also pointed out that the respondents did not cooperate in complying with the requirements of the Practice Manual that the parties

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

engage with each for purposes of preparing a joint chronology and practice note, and that this should be taken into account by the court in its exercise of its discretion in making an appropriate costs order.

17. Mr Grobler for the respondents submitted that the applicant should pay the costs arising from the matter not proceeding before me because the applicant had been forewarned by the respondents' attorney in a letter on 4 August 2021 that there was a distinct risk that there may be a referral to oral evidence, but the applicant nonetheless persisted with the application and that it was only when the election was put to the applicant's counsel at the commencement of the hearing that the election was then, belatedly, made to seek a referral.

18. It may transpire, with the benefit of hindsight following oral evidence, that the factual disputes raised by the respondents were opportunistic and had no merit. It may also transpire after the benefit of oral evidence that the defence resting on the factual dispute was well-founded. Or it may transpire after the benefit of oral evidence that although the factual disputes are decided in favour of the applicant, they were of sufficient merit and genuinely raised that it was overly ambitious of the applicant to have initiated motion proceedings. Accordingly, the outcome of oral evidence may inform the incidence of costs.

19. I also take into account that Mr de Villiers 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. An overly critical approach

should not, in the present circumstances, be taken towards this more circumspect approach adopted by the applicant.

20. I also considered the exchange of correspondence in the weeks and then days leading up to the hearing before me. There is an obligation on the parties in terms of paragraphs 120 and 121 of the Revised Consolidated Directive of 11 June 2021 that they must hold a pre-hearing conference and prepare a joint practice note addressing various issues. The parties were reminded of this in my published roll, which recorded that no joint practice note and chronology had been filed in the matter.

21. Having considered the correspondence leading up to the matter and having afforded the parties an opportunity to make submissions in relation to that correspondence and the requirements of the Consolidated Directive, it is clear that the respondents unilaterally decided that because in their view the parties were so far apart, it would be pointless to have a pre-hearing conference and prepare a joint practice note. The respondents did file their own practice note which sets out the reasons why in their view a joint practice note was not necessary. I am not persuaded by those reasons, which seeks to describe the divide between the parties. Ordinarily, the further apart the parties, the greater the need for, and benefit, of the parties' counsel engaging with each other to see what commonality could be reached, and a recordal be made of what issues are in dispute and which not. At the very least, a constructive attempt should be made in agree upon a joint chronology.

22. That engagement would also have afforded the parties an opportunity to engage in relation to a potential referral to oral evidence, such as the terms thereof rather than wait for this development to unfold during the court hearing and after I had read all the papers. The legal practitioners as experienced litigants would have realised that there was a distinct prospect that the court may raise the issue of the election that was ordinarily to be made whether to seek a referral to oral evidence at the outset

23. It also appears from the correspondence that arbitration proceedings were and are still also taking place between the parties arising from the agreement and that therefore it was not a difficulty of one or other of the parties not being available for purposes of holding a pre-hearing conference. Rather, it seems to have been a lack of will coupled with an intransigent approach by the respondents that prevented the compilation of a joint practice note.

24. In an earlier judgment, *Chongqing Qingxing Industry SA (Pty) Limited v Ye and others* 2021 (3) SA 189 (GJ), I had the following to say, albeit in relation to a difference instance of non-compliance with the Directive:

> *"7. The September Consolidated Directive cannot be read in isolation. It is supplementary to and must be applied together with the Uniform Rules of Court, the Practice Manuals of the division and such other directives as may be issued from time to time. A holistic and sensible reading of these*

documents, aimed at advancing the efficacy of the electronic system, is required. Legal practitioners are to embrace the spirit of these procedures. Many legal practitioners have done so, working with the judiciary and registrar staff to iron out teething problems and towards 'making the system work'. Other legal practitioners unfortunately view the procedures as a series of obstacles, which they with varying degrees of ingenuity seek to skirt or simply ignore.

8. Repeated appeals have been made by the judiciary to adhere to these procedures. The September Consolidated Directive also warns of punitive costs awards for non-compliance.

25. Taking these factors into account, in my view, such legitimate complaint that the respondents may have had that the applicant sought a referral too late and should be ordered to pay costs, is countervailed by their lack-lustre approach to compliance with their obligations in terms of the Directive.

26. Although I was included towards ordering that each party should, in these circumstances, be liable to pay their own costs, upon reflection this may work to the prejudice of the successful party depending on which way the factual dispute goes. As the factual dispute features centrally, an appropriate order is that the costs attendant upon the hearing before me be costs in the cause.

27. The following order is granted:

27.1. 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 there has been a breach of the sale of shares agreement, and which includes the interpretation of the agreement for that purpose.

27.2. Unless the court directs otherwise, in relation only to the issue referred to oral evidence:

27.2.1. the parties are entitled to call any witness who deposed to any affidavit in these application proceedings;

27.2.2. the parties are obliged to make available for cross-examination such witnesses who depose to affidavits in these proceedings to the extent that such party persists in seeking to place any reliance on that person's evidence in the affidavits;

27.2.3. the parties are entitled to call any further witnesses who were not deponents to affidavits in these application proceedings:

27.2.3.1. provided that such party has at least thirty court days before the date of the hearing of the oral evidence served on the other party

a statement of the evidence-in-chief to be given by such person;

27.2.3.2. but subject to the court, at the hearing of the oral evidence, permitting such further witnesses to be called notwithstanding that no such statement has been served in respect of his or her evidence;

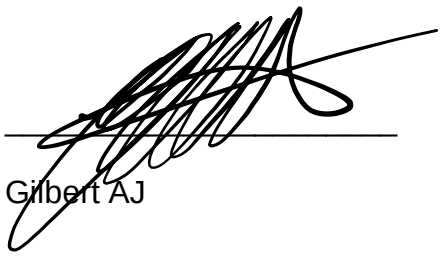
27.2.4. the parties may subpoena any witness to give evidence at the hearing or to furnish documents whether such person has consented to furnish a statement or not in relation to the issue referred to oral evidence;

27.2.5. that a party has served a witness statement in terms of sub-paragraph 27.2.3 above or has subpoenaed a witness shall not oblige such party to call the witness concerned;

27.2.6. uniform rule 35 will apply to the discovery of documents.

27.3. The remainder of the issues in the application stand over for determination on the affidavits filed by the parties to date by the court referred to in sub-paragraph 27.1.

27.4. Any costs arising from the hearing of this application on 16 August 2021 are costs in the cause.



Gilbert AJ

Date of hearing:	16 August 2021
Date of judgment:	19 August 2021
Counsel for the Applicant:	R F De Villiers
Instructed by:	Deneys Zeederberg Attorneys
Counsel for the First and Second Respondents:	C J Grobler
Instructed by:	Salant Attorneys