THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 061/2017

In the matter between:

VINCORP (PTY) LTD **APPELLANT**

and

TRUST HUNGARY ZRT **RESPONDENT**

Neutral citation: *Vincorp (Pty) Ltd v Trust Hungary ZRT* (061/2017) [2018] ZASCA 35 (27 March 2018)

Bench: Ponnan and Saldulker JJA and Plasket, Mothle and Schippers AJJA

Heard: 09 March 2018

Delivered: 27 March 2018

Summary: Contract – formation of – absence of *animus contrahendi* – whether pleadings and evidence tendered sufficient to justify reliance on *quasi mutual assent.*

ORDER

On appeal from: The Full Court of the Western Cape High Court, Cape Town (Rogers, Erasmus and Samela JJ sitting as a court of appeal):

(1) The appeal is upheld with costs.
(2) The order of the full court is set aside and substituted by:
'The appeal is dismissed with costs.'

JUDGMENT

Ponnan JA (Saldulker JA and Plasket, Mothle and Schippers AJJA concurring):

[1] Wine barrels, or more accurately, whether or not there were a series of agreements of sale between the parties in relation to them, is the subject of this litigation. The respondent, Trust Hungary ZRT (THR), as the name suggests, is a Hungarian company that conducts business as the manufacturer and supplier of Hungarian oak wine barrels to the wine industry. Alleging that it had sold and delivered wine barrels to the appellant, Vincorp (Pty) Ltd (Vincorp), a South African company, for which payment remained outstanding, it caused summons to be issued out of the Western Cape High Court, Cape Town against the latter. The trial judge, Van Staden AJ, dismissed the claim with costs, but granted leave to THR to appeal to the full court of that division. The full court upheld THR's appeal with costs. It accordingly set aside the order of the trial judge and replaced it with one ordering Vincorp to pay to THR the sum of US $112 526 together with interest as claimed and costs. The further appeal by Vincorp is with the special leave of this court.

[2] THR alleged on the pleadings, which was denied by Vincorp, that:

'3. Since about 2002 Defendant has been ordering and purchasing wine barrels from Plaintiff in terms of written purchase orders at Plaintiff's usual prices from time to time, and Plaintiff has been selling the wine barrels ordered by Defendant to Defendant accordingly.

4. During December 2008 and 2009 Defendant *inter alia* ordered and purchased wine barrels from Plaintiff for a total purchase price of US $146,850.00 in terms of written purchase orders. Copies of these written purchase orders are annexed hereto, marked "A1" to "A33".

5. In terms of these purchase orders, which were accepted by the Plaintiff and in terms whereof Plaintiff sold the wine barrels referred to in paragraph 4 above to Defendant, Defendant was obliged to pay Plaintiff the total amount of each order within 90 days from date of loading. Details of these purchases are as follows:

. . .

6. All these oak barrels were duly loaded and delivered by or on behalf of Plaintiff to Defendant or its duly authorised agents.

7. Defendant has failed and/or refused to pay to Plaintiff the purchase price of the wine barrels purchased by it in terms of Annexures "A1" to "A33" hereto, as it is legally obliged to do.

9. In the premises, Defendant is liable to pay Plaintiff the sum of US $146,850.00 which remains due, owing and payable, but despite demand, Defendant has to date failed and/or refused to pay the said amount or any portion thereof.'

[3] Each of annexures A1 to A33 to the particulars of claim was described as a 'purchase order and confirmation'. The following is a fair reproduction of Annexure 1.

To / Cim: VinCo CC, PO Box 1459, Suider Paarl 7624, South Africa	Date of Order / Rendelés dátuma: 2008-12-16	Loading Date / Szállítási határidő: 2009-01-03
Customer ID / Vevő adatai: Adam Tas	Purchase Order No / Rendelési szám: B0904/4274	Delivery Date / Szállítási nap:

Type Tipus	Qty. Db	Age of wood Fa kora	Toast lev. Pörkölés	T.Head Fej pörk.	Hoops # Abroncs #	Logo Logo	Vintage Évjárat	Bung Dugó	Bung hole Akona	Unit Price Egységár
300 L	8	24 months	M	-	8	Trust	2009	Silicone	50 mm	550.00 $
300 L	9	24 months	M+	-	8	Trust	2009	Silicone	50 mm	550.00 $
TOTAL / ÖSSZES:		17	PAYMENT TERMS / FIZ. MÓD:		90 Days		TOTAL AMOUNT / ÖSSZESEN:			9350.00 $

SPECIAL REQUESTS / SPEC. KERES
Mark heading as follow: Trust Logo, Wood Type, Toasting Level, Vintage
Supply with each barrel an A4 Packing slip with the following detail: Customer ID, Toasting Level, Wood Type, Size of Barrel.

SHIPPING INSTRUCTIONS—ORDER EX FACTORY			
Tariff Code:	44616	Consign by sea to Cape Town:	Röhling
Consignee:	Vincorp (Pty) Ltd	Nominated Fright Forwarder:	FRA/Claudine/Tel: 01.48.16.12.88 Bremen/H G. Machowiak/Tel: 049.42.13.03.10
Ordered by:	Ilse Liebenberg	Documents from supplier:	3 x Commercial invoices
Insurance:	To be arranged by buyers	Original Documents to:	1 set direct to: Vincorp (Pty) Ltd, PO Box 7477, Stellenbosch 7599, South Africa
Packaging:	Containerised	Copy of Documents:	1 set direct to: VinCo CC, PO Box 1459, Suider Paarl 7624, South Africa

PLEASE CONFIRM THIS ORDER AND FAX TO: +27 21 872 0110

ACCEPTED BY COOPER: .....

signature / stamp aláírás / pec

Save for differences relating to the respective customer in each instance, the other 32 annexures, were for the most part, identical in form to Annexure 1.

[4] In dismissing THR's claim, Van Staden AJ held:

'52. I agree with counsel for Vincorp that the Trust has not succeeded in showing that there was *animus contrahendi* to enter into an agreement of purchase and sale on the part of VinCo. In my view the parties were at cross-purposes - Molnar was convinced that Vincorp is the purchaser of the barrels, whereas Vincorp only intended to render logistical services. The fact that Vincorp had no intention to purchase is also supported by the following:

52.1 Vincorp categorically stated in the letter of 28 August 2002 that it was only rendering logistical services and would make no payments to the Trust unless payment was received from Vinco. The letter of 28 August 2002, delivered to Pretorius of VinCo, obviously supports Vincorp's version.

52.2 The change in the purchase orders in Feburary 2002.

52.3 Vincorp came on the scene when the relationship between the Trust and VinCo had already been established.

52.4 VinCo placed all the orders with the Trust.

52.5 There was no evidence that Vincorp dealt with the Trust for any other reason but to render logistical services.

53 In all the circumstances I conclude that the Trust has not discharged the *onus* of showing that Vincorp ever had the intention to purchase the barrels in question.' (Footnotes omitted.)

[5] Having reached that conclusion, the learned judge then added:

'54 As stated above the Trust did not file a replication and did not rely on either estoppel or *quasi-mutual assent* in the pleadings. A party raising *quasi-mutual assent* as a defence should also plead and prove it.

55 The Trust has not pleaded or proved *estoppel* or *quasi-mutual assent* and it is irrelevant. However, in my view, it is clear that the Trust and Vincorp were at cross-purposes. There was a mutual mistake and both parties were mistaken about the other's state of mind. In such circumstances parties can often rely on the said doctrine or on *estoppel*. I therefore considered *estoppel* and *quasi-mutual assent* in the matter under consideration.

56 To rely on the doctrine of *quasi-mutual assent* the understanding of what 0has been agreed of one party must be reasonable as oppose[d] to that of the other party being

unreasonable. In respect of *estoppel* it must be shown that the other party made a negligent representation.

57 In my view, had the Trust pleaded *estoppel* or *quasi-mutual assent* it would have been to no avail. There is no question of the Trust having proved the requirements of *estoppel*. In order to rely on the doctrine of *quasi-mutual assent*, the understanding of what has been agreed of one of the parties must be reasonable, as opposed to that of the other that must be unreasonable. There are probabilities favouring the version of both parties, but not to such an extent that it can be said that one version is reasonable as opposed to the other being unreasonable.

58 The Trust could therefore not have successfully raised estoppel or *quasi-mutual assent*.' (Footnotes omitted.)

[6] In upholding THR's appeal, the full court (per Rogers J, with whom Erasmus J and Samela J concurred) reasoned:

'[36] It has long been accepted in our law that a person cannot escape from an apparent agreement merely because his subjective intention differed from the apparent agreement. This is known as the doctrine of quasi-mutual assent. In *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 324 (A) at 239F-240B the court said that in various earlier decisions our courts had adapted, for purposes of the facts of their respective cases, the well-known dictum of Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 at 607

"If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms".

See also, for example, *Pillay & Another v Shaik & Others* 2009 (4) SA 74 (SCA) paras 55-60; and see Christie *The Law of Contract in South Africa* 6th Ed at 10-12; 24-30.

[37] Although this doctrine may have its roots in estoppel, it appears now to have an independent existence (Christie op cit 28-30), expressing the essentially objective nature of the enquiry into whether there is consensus, namely that the law does not concern itself with the working of the minds of the parties to a contract but with the external manifestations of their minds (see *SAR & H v National Bank of SA Ltd* 1924 AD 704 at 715; *Makata v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras 72-73 per the majority and para 157 per the minority). The learned trial judge erred, in my respectful view, in stating that a party raising quasi-mutual assent must plead it.

[38] The external manifestations of the parties' conduct over the period 2002-2009 was such that a reasonable person would have understood there to be consensus between them that

Vincorp was buying barrels from THR in accordance with orders placed by the former and invoices issued by the latter. This is how commercial documents of this kind would normally be understood.

[39] If both parties to a supposed contract subjectively know that the external manifestations of their conduct are not to be taken at face value the court will naturally not insist that there is a contract contrary to their actual state of mind (see Christie op cit 25). But the evidence and documentation to which I have referred satisfy me that THR subjectively understood the external manifestations of the interactions between itself and Vincorp in a manner consistent with its pleaded case, namely a series of sale agreements in accordance with Vincorp's orders. The trial judge found that this was Molnar's sincere belief but that THR and Vincorp were "at cross-purposes".'

[7] In *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 324 (A) at 239I-240B, after referring to the leading cases and academic writings on the topic, Harms AJA concluded:

'In my view, therefore, the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention? . . . . To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that representation; and thirdly, was the other party misled thereby? . . . . The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?'

[8] Undertaking the enquiry postulated by Harms AJA, requires an exposition in some detail of the background facts. Those facts appear from the correspondence exchanged between the parties and the evidence of the *dramatis personae.* Events commenced in 2001 when, with a view to expanding its business into South Africa, THR ran a series of advertisements in local wine journals and magazines 'seeking individuals who might be interested in representing its products' locally. By 'representing', so testified Mr James Molnar, the managing director of THR, it was envisaged that those individuals would act in 'a sales capacity'.

[9] One such advertisement piqued the interest of Mr Mihan Pretorius who, on 31 August 2001, despatched the following email to THR:

‘Regarding the advertisement . . . I am addressing this letter to you on behalf of my corporation VinCo.

. . . .

VinCo has the necessary infrastructure, management and skilled (coopers) labour for the marketing, distribution and after sale service of wine barrels.

I see this as a[n] excellent opportunity to market “TRUST” in South Africa. As such, I would like to engage in conversation with you if we are in principle and in broad terms in agreement that such an arrangement could be mutually beneficial. I am also prepared to visit your establishment in Hungary, hence your reaction on this letter.’

[10] Mr Pretorius thereafter travelled to Hungary, where he met Mr Molnar and inspected THR’s facilities. He testified:

‘In 2001. Wat – met u terugkeer na Suid-Afrika, was daar enige verstandhouding wat u bereik het met mnr Molnar en Trust Hungary? --- Ja, die verstandhouding was dat ek die vate, of sy produk sal bemark in Suid-Afrika. Op daai stadium het hy voorgestel dat daar nóg 'n agentskap belang stel om dit te doen, en voorgestel dat ons dit dalk saam moet doen. Ek het dit van die hand gewys, en hy het ingestem, en ons het dan nou besluit dat ek dit alleen sal doen, of my maatskappy dit alleen sal doen, die bemarking … (tussenbeide)

Sou Vin Co. alleen in Suid-Afrika die reg hê … (tussenbeide) --- Alleenagentskap het, ja (onduidelik) ja … (tussenbeide)

Alleenagentskap vir Trust Hungary se vate. --- Presies.’

[11] On his return to South Africa, Mr Pretorius emailed Mr Molnar on 21 January 2002:

‘My wish is that our friendship and business relationship will grow this year.

. . . .

. . . I want to thank you for your trust in me – you won't be disappointed.

As mentioned earlier, the time frame to introduce ‘TRUST’ to the South African market is very unfavourable, but I am happy with our progress under the circumstances below.

. . . .

Except for one or two winemakers, most of the winemakers are very interested and curious about ‘TRUST’ barrels and would like to have some trial barrels for next year. Luckily, most of the big wineries ordered some barrels – I will send you my list of orders late afternoon or early tomorrow.

It is a privilege to be associated with “Trust”.

. . .

PS.

For payment purposes, I will work through a company called VINCORP. They are a financing company and specialize in financing wine barrels.

Please forward me your bank details and method of payment.'

[12] On 31 January 2002 Ms Barbara Kerner of THR despatched a 'proforma invoice' to Mr Pretorius. She invited him to '[c]heck it and please advise if everything is OK or do you need any modifications.' In material part the 'proforma invoice' read:

Vevõ / Sold To:	Shipped to:	Final destination:
VinCo	SST C/O Rohling France	VinCo
. . .		. . .
Contact person: Mihan Pretorius		Contact: Mihan Pretorius

[13] During March 2002 Mr Molnar invited Mr Pretorius and some other wine makers to visit Hungary to attend 'THR's 10th anniversary and open house in Hungary'. On 6 July 2002 Mr Pretorius reported to Mr Molnar that barrel sales were going well in South Africa. He added:

'I have been very busy seeing winemakers lately. I am seeing about 2 to 4 new clients on average per day. I will send you a full report on sales for June and July later.

A question that comes up frequently is "what kind of variety does our barrel compliments the best ?" – please advise!'

Mr Molnar replied the next day 'all varieties work well in our barrels'. He then proceeded to advise Mr Pretorius as to how best the barrels could be used for optimum fermentation and aging of both white and red wines. Mr Molnar also informed Mr Pretorius that he planned to visit Cape Town from 'Tuesday Sept. 10th and stay until Saturday the 14th'. He added 'I hope these dates work for you so we can tackle clients together'. Under cover of a separate email on the same day Mr Molnar sentMr Pretorius 'a complete price list as discussed in Hungary'. Mr Molnar did indeed visit South Africa, not in September as previously intimated, but during October of that year.

[14] On 28 August 2002 Vincorp wrote to Vinco setting out their terms of service. The letter read:

'Dit is belangrik om daarop te let dat Vincorp geen betalings sal maak aan die vervaardigers alvorens ons nie die fondse vanaf VinCo ontvang het nie. Ons behartig slegs die logistieke

funksie en neem ook geen verantwoordelikheid vir die kwaliteit of vakmanskap van die vate nie. Indien enige van VinCo se kliënte finansiering sou verlang, is Vincorp se huuropsie beskikbaar. Ons sal egter elke geval op sy eie meriete evalueer in terme van ons kredietbeleid.'

[15] On 9 October 2002 Mr Pretorius wrote to Mr Molnar that 'dealing through Vincorp will be the best option and will be for mutual benefit to Trust and VinCo'. He attached a letter from Vincorp to his email. The attachment on a Vincorp letterhead, under the hand of its logistics clerk, Ms Ilse Liebenberg, read:

'We do the procurement and financing of oak barrels in the South African wine industry. Vincorp has been in operation for the past 3 years and has procured and financed +/- 50 % of all new barrels for the South African market during the previous season. We have longstanding relationships with all the large French cooperages and deal directly with them on a daily basis. They prefer to deal with Vincorp because once we have made the credit decision they are ensured of payment. It is important to note that we are not barrel agents, we only do the procurement and financing of the barrels. Due to our well established infrastructure and the related cost savings for our client, we generally prefer to deal directly with the foreign cooperages. We offer a one stop service that includes, order of barrels, procurement and logistics, forward cover, financing and away payment of foreign amounts.

Please confirm the payment terms. We normally order exw and payment is due 60 days after bill of lading.'

[16] On 4 November 2002 Mr Molnar wrote to Mr Pretorius:

'Thank you for getting back to me regarding Laborie. Shipping costs from Szigetvar to Cape Town with my freight company Kuhne and Nagel are as follows:

Price is US$4326.00 transit time from Germany is 16 days, this is for a 40 foot High Cube Container.

I would add one week to get to Germany and customs clearing time in Cape Town.

If you do not wish for us to arrange the container let me know, otherwise I will for December 4th most likely.'

Mr Pretorius replied the next day:

'Thanks, but Vincorp will arrange the transport through shipping agent; Rohlig. This is part of Vincorp's contract with me. What I still need from you is the amount of barrels a 20ft, 40ft & 40ft HC can take for the 225L and 300L ranges.'

[17] On 13 February 2003 THR informed Mr Pretorius that the barrels that he had ordered were ready for loading. Mr Pretorius reiterated: 'The company in South Africa that is handling my logistics and forward payments are Vincorp'. He went on to supply Ms Liebenberg's details as the contact person. Mr Molnar, in his evidence in chief, stated that he had been aware of this email. Later that year, during August, THR furnished Mr Pretorius with new order forms and guidance as to how he could more easily complete them.

[18] On 28 October 2003 Mr Pretorius wrote to Mr Molnar:

'It is barrel order time again in South Africa and I am running around like a mad dog.

With reference to my experience from the previous season, I want to ask you to extend my payment terms from 60 days to 90 days after loading date: Below, the reasons for my request:

. . .

It is very important for me to pay you on time, every time, but with my growing market it will become more and more difficult.'

Mr Molnar acceded to Mr Pretorius' request in an email to the latter on 31 October 2003.

[19] Early in 2004, according to Vincorp, its bankers began to experience difficulty with the payment of THR's invoices. Apparently, so Vincorp was informed, the difficulty lay in obtaining approval from National Treasury for the expatriation of funds to meet THR's invoices, which had been issued in the name of Vinco, not Vincorp. In that regard Mr Paul Haumann, the financial director of Vincorp, testified:

'Mnr Haumann, net voor die verdaging het ek u geneem na bladsy 37, na daardie epos wat Mihan Pretorius gestuur het oor vorige veranderinge of fakture. Weet u waaroor dit gegaan het? --- Ja, baie van die invoices wat ons van Trust ontvang het nog op daardie stadium het vir Vin Co aangeteken, het Vin Co se details op gehad as die koper.

As die koper? --- Ja en ons het probleme begin ondervind by die bank om die betaling te doen. Ek dink die name Vincorp en Vin Co is baie naby aan mekaar, maar hulle het dit opgetel dat dit Vin Co nie Vincorp is nie en ek moes … (tussenbeied)

Kan ek u net vra? --- Ja.

Tot in daardie stadium het van die betalings deurgegaan terwyl die faktuur van Trust Hungary Vin Co aangetoon het as die koper. --- Ja, van dit het deur gegaan.

Goed. --- En toe het die bank vir ons gesê hoor hierso die invoices stem nie ooreen nie. Sal julle asseblief sorg dat die invoices moet ooreenstem met die bill of lading, die bill of entry en die customs, klaringsdokument anders kan ons nie die betaling doen nie.
Uit … (tussenbeide) --- Uit ons euro rekening uit.
Uit Vincorp se euro rekening. --- Ja. So dit was 'n spesifieke versoek van ons kant af dat hulle asseblief Vincorp details vir administratiewe doeleindes op die invoice sit sodat ons die buitelandse betaling kan doen.
Goed. --- Namens Vin Co.
Goed. En aan u het u daardie versoek oorgedra? U sien nou die epos hier onder. --- Ek het vir mnr Pretorius gevra of vir Trust te vra.'

[20] Later, under cross examination, Mr Haumann's evidence went thus:
'Voor daardie punt, dis nou hier op 29 Januarie 2004, was daar enige probleme met die fakture terwyl dit uigemaak is aan Vin Co. sodat u nie betaling kon maak? --- Die bank het dit laat deurgaan, en toe ewe skielik het hulle vir ons laat weet dat weet, daardie Vin Co. stem nie ooreen met Vincorp op die invoer dokumentasie nie, en hulle kan nie die betaling laat deurgaan nie.'
On this aspect of the case, Mr Pretorius testified:
Korrek. Weet u waarom daar dan nou toe gevra is dat die fakture uitgemaak word aan Vincorp? --- Dit is op versoek [van] Vincorp gewees, bloot oor logistieke redes en administratiewe redes in terme van – ek dink dit was die Reserwe Bank, of ook vir die klaring van die vate deur die hawe by doeane, ensovoorts.
Goed. Maar voordat daardie fakture nou op versoek van Vincorp verander word, het – sê u dis uitgemaak aan Vin Co. En wie is aangetoon as die koper op daardie fakture wat aan Vin Co. uitgemaak … (tussebeide) --- Wel, Vin Co. sou aangetoon word as die koper, ja.
Dis nou fakture wat Vin Co. ontvang van Trust Hungary. --- Presies, soos die eerste ene.'

[21] On 2 February 2004 Mr Pretorius did indeed request THR to replace Vinco with Vincorp on the documentation, but stressed that Vincorp 'acts as financing company and importing agent on behalf of VinCo (my company)'. In reply he was informed:
'I have transmitted your ask to the accounts but I'm very sorry they said this time is unable to change the invoices to your new address.
All we doing can is to do the new address on the invoices to your next shipment. I hope you understand this and don't be angry.'

Thereafter, THR's invoices were altered to accord with Mr Pretorius' request and things appear to have proceeded smoothly, so much so that by December 2007, Mr Pretorius complained to THR that Vincorp 'is processing my orders to[o] slow'.

[22] From the end of 2008 through to 2009 a series of orders were placed with THR. Those form the subject of the present litigation. Each was under cover of a VinCo letterhead. It was addressed to Ms Annamária Ruppert of THR and read:

'Dear Ami

Attached, order for [the name of the cellar]'.

Best wishes,

Mihan'

Mr Pretorius also on occasion issued specific instructions to Ms Ruppert in respect of company branding on the barrels as per the request of particular wineries. The order confirmation from THR bore inter alia the following information:

Bill to / Számlázási Cím:	Ship To / Szállítási hely:
Vicorp PTY Ltd.	VinCo CC
. . .	. . .

Customer ID / Vevõ adatai:

VinCo. Mihan Pretorius

[23] When payment for those orders did not eventuate as anticipated, Ms Laura Kope of THR emailed Mr Paul Haumann on 24 November 2009:

'I'm writing on behalf of Trust Hungary. They have notified us that Vincorp has a balance of US$112,726 and I'd like to inquire about the payment.

Can you please let us know how soon Vincorp can arrange to pay the balance?'

In answer, Mr Haumann wrote:

'You must contact your agent in South Africa, Mr Mihan Pretorius. We only did the logistics on your behalf – which Trust is aware of. The relationship with Trust has always been that we only settle once your agent has paid us – this has always been the case in the past.'

To which Ms Kope replied:

'Yes, I was aware of the arrangements, but since I noticed the last payment Trust Hungary received was a month ago, I just wanted to see if there was any chance of them receiving another payment anytime soon.

Do you have any info based on your correspondences with Mihan?'

[24] On 1 December 2009 Mr Molnar addressed the following email to Mr Haumann:

'I have not had the opportunity to meet you but I did deal extensively with Ilse Liebenberg. Over the past 6 years VinCorp has made their payments for barrels from Trust Hungary. This year the payment has not been made. We have reviewed the orders placed by and through VinCorp. Numerous emails confirm this relationship, not to mention the practice of the past 6 years. VinCorp did in fact import these barrels and order these barrels. If you require a payment plan I am likely able to accommodate you, alternatively please remit payment in full.

Please do not hesitate to contact me with any questions.'

Mr Andre Viljoen, the Managing Director of Vincorp, replied:

'Thank you for your email sent today 1 December 2009. I wish to refer to the correspondence between Mr Paul Haumann and your Ms Laura Kope of Trust International Corp. and attach the email for your attention.

We do not intend to answer your mail in great detail or to react to each averment you have made. Our failure to do so must however not be seen as an admission of any allegation nor as an admission in any form. Our right to react more fully at a later stage is reserved.

I wish to make it clear that Vincorp has never acted as an agent or re-seller of Trust barrels in South Africa, which is apparent from the work method that we adapted and was confirmed by your Ms Kope. The only reason why Vincorp ordered the barrels on behalf of Mr Pretorius was to comply with South African statutory requirements applicable to importers - the details of which I am sure you are aware. The transactions were structured in this fashion for the sake of the system and not because it created a Seller/Buyer relationship between our companies.

The work method over the past six years confirms this state of affairs. The method clearly shows and supports our position that we are merely an intermediary. Vincorp only pays when your Mr Pretorius, as your agent, receives money from your clients in South Africa and pays to us. We do the administration and logistics on behalf of and at the request of Mr Pretorius. We render this service to numerous cooperages and the work method is exactly the same. I believe that it is disingenuous of you to attempt to hold Vincorp responsible in circumstances where there is non-performance or lack of cooperation by Mr Pretorius.

Vincorp will endeavour to assist you in this matter as far as it is within our power to influence Mr Pretorius. If we can assist in other ways we are more than willing to do so.

We trust the matter will be speedily resolved.'

[25] Impasse having been reached, THR caused summons to be issued against Vincorp. The *onus* was on THR to prove the contract on which it relied. Proof of the terms of the contract included proof of the anterior question, namely whether both

parties had the requisite *animus contrahendi*.[1] The pleadings tend to obfuscate rather than clarify the true issues in the case. THR pleaded that since 2002 Vincorp had ordered and purchased barrels from THR. It then specifically pleaded that during December 2008 and 2009 Vincorp ordered and purchased barrels from THR in terms of written purchase orders that were accepted by THR. Consequently, according to the particulars of claim, the written purchase orders constituted the agreement between the parties. No other underlying agreement was pleaded. Apart from the fact that those purchase orders do not specifically reflect Vincorp as the purchaser, they had been despatched to THR by VinCo, not Vincorp. The letter dated 28 August 2002 from Vincorp to VinCo defined the relationship between them. Vincorp there stated that it was only rendering logistical services and would make no payments to THR unless payment was received from VinCo.

[26] Vincorp only came onto the scene after the relationship between VinCo and THR had already been established. VinCo placed the orders with THR. From 2002 to 2004, invoices were made out by THR to VinCo, not Vincorp. It was only when Vincorp's bank experienced difficulty with the expatriation of funds that, at Mr Pretorius' request, a change to the invoices came to be effected. However, that was for that rather limited purpose and in no way served to alter the relationship between the parties. The mere fact that Vincorp came to be reflected as the purchaser or importer on some of the documents (for the purposes of expatriating funds from Vincorp's Euro bank account as part of its logistical services to VinCo) in itself did not herald any new legal relationship between it and THR. Other than in the execution of the logistical services, Vincorp did not deal with THR. In any event whilst those documents may otherwise have been a telling indicator in THR's favour, they have to be counterbalanced by the evidence that they were produced for a specific limited purpose. That evidence is credible. There is no counter to it.

[27] Moreover, it was never Mr Molnar's case that THR understood the external manifestations of the interaction between it and Vincorp as a series of sale agreements

[1] *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) para 33.

in accordance with the latter's orders. In his evidence, Mr Molnar alluded to a meeting with Ms Liebenerg during October 2002. His evidence on that score was:

'Well, Ms Liebenberg, for lack of a simpler word to put it, was really trying to sell me on the merits of doing business with Vincorp. She said that they understand the South African more in business and therefore are in a position to guarantee payment for the barrels that go through them. And she said this is a service they offer to many cooperages because this is their primary business model. In addition to that she says they have some logistics capabilities which they like to handle if they work with you as a cooperage. I said: well, you know, we normally have our own freight companies and we did refer her to ours but we understand that they had a relationship with a company called Röhlig. We were comfortable with that. She kept explaining to me that they will handle everything and the upside of working with them is we're ensured of payment.

They were also rendering other services such as custom clearance and associated services. --- Yes, they offered things that didn't always apply to me but things like forward cover; fluctuations in the rand. They also provided financing, of course, that being their main business, to wineries here. And, of course, they handled the customs and shipping from other areas as well.

Now, in what capacity would they render these services and would they make payment to you? --- They would be acting in a distributor-like capacity, the buyer.

The buyer would be from you? --- They would be buying my barrels from me, yes.'

Mr Molnar sought to elevate this to the foundation for some sort of underlying agreement between THR and Vincorp. On this footing, Mr Molnar said that THR's intention was to accept what they believed to be an offer by Vincorp. However, that was never pleaded. The trial court found that Mr Molnar's version regarding his interaction with Ms Liebenberg during 2002 is improbable. And, what is more, Ms Liebenberg was a logistics clerk who had no authority to bind Vincorp.

[28] Much was also sought to be made of the letter written by Ms Liebenberg to THR on 7 October 2002. Irrespective of what had gone before, so I understood counsel to submit from the bar in this court, that letter, was the genesis of a new contractual relationship between the parties. First, that letter does not constitute an offer. Nor, was it intended by Vincorp to be an offer. The evidence in this regard on behalf of Vincorp is explicit. Second, that letter must be seen against the backdrop of the relationship between the parties since inception, which I have attempted to sketch in far greater detail than might otherwise have been necessary. Third, the full court appears to have

accepted that Ms Liebenberg was not authorised to write the letter but nonetheless, somewhat contradictorily, was willing to hold the content of the letter against Vincorp on the basis that 'nobody had suggested that what she said about Vincorp was factually incorrect'. Fourth, it is difficult to discern the precise nature of the new legal relationship sought to be asserted by THR. In argument it was suggested that the letter signalled that Vincorp would replace Mr Pretorius as purchaser. That, however, is incompatible with the suggestion in Mr Molnar's evidence that Vincorp was in effect the guarantor of payment. Plainly, it is logically incompatible for Vincorp to have been both purchaser and guarantor at the same time. What detracts from the assertion that Vincorp's role had changed to that of purchaser (or at the very least had become liable for payment) is Mr Pretorius' request to THR for an extension of payment terms from 60 to 90 days. That request was made on 28 October 2003, approximately one year after the letter which supposedly altered Vincorp's status (from whatever it may previously have been) to that of purchaser.

[29] From 2001 Messrs Molnar and Pretorius regularly communicated with each other. They met in Hungary and South Africa. When Mr Molnar visited South Africa, they visited clients together. Mr Pretorius even took clients to Hungary where they visited THR's business and met with Mr Molnar. Vincorp was never part of this interaction. Before the first order placed by VinCo, Mr Pretorius informed Molnar in January 2002 that for payment purposes VinCo would work through Vincorp. From the first supply of barrels by THR, for which it invoiced VinCo as the purchaser, payments were made by VinCo through Vincorp. From 2002 until 2004 THR invoiced VinCo. This only changed to meet the requirements of Vincorp's bank. Even then in an email dated 2 February 2004, Pretorius reminded Molnar that Vincorp was acting as VinCo's importing agent. On 5 November 2002, VinCo informed Molnar in an email that, as 'part of Vincorp's contract with' it, the latter would arrange transport. It was a reference to the agreement as per the letter of 28 August 2002. Mr Molnar did not query the reference to a contract between VinCo and Vincorp. On 13 February 2003, VinCo informed THR in an email that Vincorp was the company in South Africa handling VinCo's logistics and forward payments. Payment terms were agreed between THR and VinCo. Written orders were sent to THR by VinCo. THR then confirmed those orders to VinCo and

inserted the name of VinCo and/or Pretorius under the words 'Customer ID'. THR initially addressed VinCo, not Vincorp, in respect of late payment.

[30] To the aforementioned considerations falls to be added the exchange of emails between Ms Kope and Mr Haumann. In them, Ms Kope had signified her awareness of 'the arrangements', namely that 'Vincorp only did the logistics' which, as she put it, 'Trust is aware of'. The full court accepted Ms Kope's evidence that 'she was definitely not aware of the financial arrangements and her statement 'that she was aware of the arrangements was an "overstatement" of what she knew'. It described her email as 'an unguarded email'. In that, the full court may have been far too charitable to Ms Kope. Those emails do not represent the sum total of Ms Kope's involvement in the matter. She penned other emails as well. By way of example on 28 January 2008 Ms Kope wrote to Mr Pretorius 'Dear Mihan, Please find attached our invoice'. Later that day she wrote: 'I am showing Rohlig on the purchaser order. Mihan, can you please confirm if Rohlig is arranging the shipping?' The next day, in excess of five years from the date when Vincorp is alleged to have stepped into Mr Pretorius' shoes as purchaser, she wrote to Mr Pretorius: 'Hi Mihan Can you let me know when we can expect payment for the two outstanding invoices from 2005? . . . Please arrange payment ASAP!!!. Not only do these emails belie her assertion that her response to Mr Haumann was a 'bad choice of words', but they also afford material corroboration for Vincorp's case that THR was never under any misapprehension as to the true relationship between the parties.

[31] In view of the fact that the documents relied upon were, in terms, plainly not offers to purchase, one would have expected THR to lay a foundation in fact for a finding that it was entitled to conclude, or that a reasonable person would have believed, that the written purchase orders constituted an offer to purchase.[2] However, the evidence tendered on behalf of THR falls woefully short of laying any such foundation. In the final analysis, the evidence adduced on behalf of THR does not disclose any conduct on the part of Vincorp that could have caused Mr Molnar to believe that those documents constituted an offer to purchase, other than the mere fact of their delivery to THR. A proper analysis of the evidence does not disclose any conduct on the part of Vincorp that could have caused THR to labour under the genuine

[2] *Spes Bona Bank Ltd v Portals Water Treatment South Africa (Pty) Ltd* [1983] 1 All SA 375 (A) at 374.

misapprehension that Vincorp was anything other than VinCo's importing and logistical agent. As Nienaber JA observed in *Africa Solar* (para 33): 'If, at the end of all the evidence, there is uncertainty as to whether *animus contrahendi* on the part of both parties had been established, the plaintiff, on that particular issue, had to lose.' In my view, this is precisely such a case.

[32] It remains to observe: Van Staden AJ concluded that THR had failed to discharge the onus of establishing the necessary *animus contrahendi* on the part of both parties. That ought to have been the end of the matter. The learned judge then referred *en passant* to the fact that THR had not pleaded or proved estoppel or quasi mutual assent. The full court seems to have taken its cue from those observations. Arguably, the only conceivable basis for holding that an agreement arose out of the documents was the passage in the judgment of Blackburn J in *Smith v Hughes*[3] upon which the full court relied. However, the application of that test was not foreshadowed in THR's pleadings. In that regard the following observation by Heher J in *Constantia Graswerke BK v Snyman* 1996 (4) SA 117 (W) at 124I-J is apposite:

'Whatever the relationship of quasi-mutual assent to estoppel (see, for example, the discussion in Christie *The Law of Contract in South Africa* 2nd ed at 26-8), I have no doubt that, where the first-mentioned is relied upon by the plaintiff to meet a denial by a defendant that he is a party to a contract, that reliance amounts to a confession and avoidance in the sense of the plaintiff conceding that, although it is unable to rely upon the signature to the agreement as proof of real *consensus*, other facts nevertheless justify the conclusion that legal *consensus* existed between the parties. That, in turn, requires the raising of a replication so that the defendant may properly be apprised of the defence and may plead further to it, if necessary. The plaintiff did not do that and, in my view, its claim as formulated does not cater for counsel's submission.'

[33] As it was put in *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) paras 13 - 14:

'Turning then to the nature of civil litigation in our adversarial system, it is for the parties, either in the pleadings or affidavits (which serve the function of both pleadings and evidence), to set out and define the nature of their dispute, and it is for the court to adjudicate upon those issues. . . . There are cases where the parties may expand those issues by the way in which they conduct the proceedings. There may also be instances where the court may mero motu raise a question of law that emerges fully from the evidence and is necessary for the decision of the

[3] *Smith v Hughes* (1871) LR 6 BQ 597 at 607.

case. That is subject to the proviso that no prejudice will be caused to any party by its being decided. Beyond that it is for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.'

[34] Assuming, however, that the case as pleaded was sufficient to justify reliance on quasi-mutual assent, THR still had to fail. As I have endeavoured to show, the evidence, considered holistically, does not support a finding of quasi-mutual assent. And, had the full court embarked upon the enquiry postulated by Harms JA in *Sonap Petroleum,* which it failed properly to do, it ought, in my view, to have found that even on that score THR had to fail.

[35] In the result the appeal must succeed and it is accordingly upheld with costs. The order of the full court is set aside and replaced by: 'The appeal is dismissed with costs.'

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V M Ponnan

Judge of Appeal

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