THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

In the matter between Case No: A584/14

TRUST HUNGARY RZT **APPELLANT**

and

VINCORP (PTY) LTD **RESPONDENT**

Coram: ERASMUS, SAMELA & ROGERS JJ

Heard: **25 JULY 2016**

Delivered: **2 SEPTEMBER 2016**

JUDGMENT

ROGERS J (ERASMUS & SAMELA conc):

Introduction

[1] The appellant ('THR) appeals with the leave of the trial judge, Van Staden AJ, against the dismissal of its action against the respondent ('Vincorp'). THR's claim is for the purchase price of wine barrels sold and delivered. In its particulars of claim THR alleged that since about 2002 Vincorp had been ordering and purchasing barrels from it in terms of written purchase orders. The claim concerned barrels allegedly ordered by Vincorp during 2008-2009.

[2] There is no dispute that THR manufactured the barrels and that they duly arrived in South Africa. Vincorp pleaded, however, that it was not the party which purchased the barrels. That was the issue before Van Staden AJ. He found against THR, concluding that the buyer had been VinCo CC, a corporation controlled by one Pretorius. Although the latter entity is referred to in documents and evidence as VinCo, I shall use the name VCC to avoid confusion with Vincorp. There was a commercial relationship between VCC, THR and Vincorp. There is no corporate connection between them.

[3] In the trial THR was represented by Mr Carstens SC and Vincorp by Mr van Rooyen SC. In the appeal Mr McLarty SC appeared for THR while Mr Van Rooyen SC again appeared for Vincorp.

Factual background

[4] In the latter part of 2001 THR wanted to expand its sales in South Africa and ran various advertisements. Pretorius, whose corporation VCC was a barrel agent, made contact with THR's managing director, Molnar. Pretorius visited Hungary. THR agreed to appoint VCC as its South African sales representative. The initial arrangement was that THR would invoice VCC and the latter would in turn invoice its South African customers. VCC had to pay in advance for any orders placed on THR. VCC was not cash-flush and had to borrow money to make these payments.

[5] Vincorp provided financing and logistical services for the importation and supply of wine barrels. At the beginning, when VCC had to make advance payments

to THR, Pretorius used Vincorp for outward transfers to THR because Vincorp had a foreign-currency account. This was merely a banking and administrative function. In mid-2002 VCC and Vincorp discussed an expansion of Vincorp's role. On 28 August 2002 Paul Haumann, Vincorp's financial manager, wrote to Pretorius setting out the services which Vincorp could offer VCC for the importation of barrels from Hungary. These included the following. Vincorp would (i) place orders with THR on the basis of orders Vincorp received from VCC; (ii) arrange importation from Hungary to South Africa; (iii) complete all documentation and ensure compliance with foreign and South African law; (iv) take out insurance for the duration of the logistical process; (v) take out forward cover at VCC's request; (vi) make outward payments to THR on behalf of VCC; (vii) attend to customs clearance. For these services Vincorp would charge VCC 2,5% on the total amount invoiced by Vincorp to VCC.

[6] It is clear from the documents in the record that the amount on which Vincorp levied its 2,5% fee was the sum of THR's ex-warehouse price for the barrels plus shipping, clearing and importation costs. Vincorp's invoice to VCC would thus be the sum of these various amounts and the 2,5% fee. In this way Vincorp would recoup the price of the barrels paid to THR, logistical costs and its fee. (Curiously no invoices issued by Vincorp to VCC were produced at the trial. Haumann said they would be in a cupboard somewhere.)

[7] Haumann's letter concluded by stating (i) that Vincorp would make no payments to the manufacturer before it obtained funds from VCC; (ii) that Vincorp only performed a logistical function and assumed no responsibility for the quality of the barrels; (iii) that if VCC's clients wanted finance, Vincorp's rental option was available, in regard to which each case would be considered on its merits in terms of Vincorp's credit policy.

[8] Pretorius accepted the terms contained in the letter which thus constituted a contract between Vincorp and VCC. Haumann testified that this was typical of Vincorp's arrangements with barrel agents. The letter, which was in Afrikaans, was not seen by Molnar.

[9] Molnar visited South Africa in September/October 2002. Pretorius took him to various wine estates. Pretorius also introduced him to Vincorp's Ilse Liebenberg, a logistics clerk. There is a factual dispute about the meeting. Pretorius and Liebenberg (whose surname by the time of the trial was De Waal) testified that it was a courtesy call so that Molnar could meet the person who would be handling the logistics. Molnar testified that the three of them met at a restaurant in Stellenbosch where substantive business was discussed.

[10] What is clear is that Pretorius wanted Vincorp to supply him with a letter to VCC. On 7 October 2002 Liebenberg sent him a draft. Her covering note said that she did not know exactly what Pretorius wanted the letter to say and that if he had changes he should furnish them to her before she dispatched the letter. It appears that Pretorius was satisfied with the draft because on 9 October 2002 he sent it to Molnar under cover of a note stating:

'As discussed with you earlier, dealing through Vincorp will be the best option and will be for mutual benefit to [THR] and [VCC]. If you have any questions, you are more than welcome to contact them direct.'

Pretorius included Liebenberg as a recipient of this note and its attachment.

[11] The caption of the attached letter, purporting to be by Liebenberg on behalf of Vincorp to THR's Molnar, was ' Payment terms'. The first paragraph referred to 'our indent B301/578 for the KWV'. This document is not in the record but is probably an order for barrels for KWV. The letter 'B' features in all the Vincorp orders appearing in the record. The word 'indent' in a business context refers to an order for goods, usually an order for foreign goods placed through a local agent.

[12] The substantive content of the letter appeared under the heading 'Background information' and reads thus:

'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 long-standing 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.'

The letter concluded by listing Australian and French references for Vincorp. The letters 'exw' in the last sentence in the quoted passage stand for 'ex-warehouse'. What the sentence thus conveys is that Vincorp normally orders at the price charged by the manufacturer for collection of the product at the manufacturer's premises and that it pays this price to the manufacturer 60 days after the date of the bill of lading.

[13] Molnar testified that this letter accorded with what Liebenberg said at the meeting and that the letter was handed to him at or around the time of the meeting. Although the immediate context of the letter may have been an order for KWV, he understood the explanation to be of general application in THR's future dealings with Vincorp. The background, he said, was that South African sales were expected to grow. South African wine estates usually placed their orders for imported barrels in October. VCC did not have the resources to fund the advance payments for THR's barrels and THR was not willing to give it credit. By contrast the information about Vincorp furnished to him by Pretorius and Liebenberg showed that Vincorp was a company of substance with a track record. He had contacted some of the foreign cooperages to check Vincorp's credentials. He was satisfied. The arrangement going forward would thus be that Vincorp would order the barrels and be responsible for payment.

[14] Haumann testified that he was unaware of Liebenberg's letter until the dispute about non-payment arose in late 2009. According to him she was not authorised to conclude contracts on Vincorp's behalf. He said that he himself did not have any contractual negotiations with THR though he was party to various emails relating to the logistics of importing barrels from THR.

[15] Liebenberg's evidence was that she had no authority to conclude contracts. She denied having discussed business with Molnar. By the time she met him briefly in October 2002 she was aware of Haumann's letter to Pretorius dated 28 August 2002 because she was involved in implementing Vincorp's logistical services to VCC. She could not recall why Pretorius wanted the letter. She knew that he would be sending it to Molnar. When asked why she had written an unauthorised letter, she said she thought she was just explaining how the process would work in relation to KWV orders.

[16] The trial judge formed an unfavourable opinion of Pretorius and counsel did not ask us to place reliance on his evidence. I shall thus not refer to it. Molnar, Haumann and Liebenberg all made a favourable impression on the trial judge as did two other witnesses called by THR, Ms Ruppert and Ms Kope. Van Staden AJ did not think any of them was trying to mislead the court. They were testifying about events which stretched back nearly 12 years in regard to a commercial relationship which had only gone sour about seven years after the relationship began. In regard to the Stellenbosch meeting, he thought the inherent probabilities favoured Liebenberg's version and that Molnar was mistaken, perhaps with the passing of time having become convinced in his own mind of what took place. He found in any event that Liebenberg was not authorised to bind Vincorp.

[17] My impression on reading the transcript is that the trial judge was somewhat charitable in his assessment of Haumann and Liebenberg. However I think it is unnecessary to decide whether we would be entitled to interfere with his factual findings. I shall proceed on the basis that THR failed to discharge the burden of proving Molnar's version of the meeting. I also accept that Liebenberg was not authorised to bind Vincorp. Indeed THR did not refer to the letter of 7 October 2002 in its pleadings.

[18] The fact that Liebenberg was not authorised to bind Vincorp and that THR did not place reliance on the letter in its pleadings does not mean that the letter is irrelevant. The entire history between the parties, including the circumstances surrounding the letter, was exhaustively examined in the court a quo. No objection to any of the evidence was taken. Although the letter itself did not constitute a

contract, it contains a factual description, by one who could be expected to know, of how Vincorp operated. That is a relevant circumstance in assessing the conduct of the parties and how their subsequent actions should reasonably be understood.

[19] As a fact, what happened as from the latter part of 2002 is that Vincorp issued documents in the form of orders placed on THR. These order forms were transmitted to THR, either by Vincorp directly or through VCC. In some instances Vincorp's orders were recast by Pretorius according to a template approved by THR but without alteration to the substance of Vincorp's original orders. The Vincorp orders, addressed to VCC, identified Vincorp as the consignee. The shipper was identified as Röhlig, being the shipper arranged by Vincorp. The order forms specified that THR was to supply three sets of commercial invoices. The original documents were to be sent to Vincorp. The order made provision for signature on behalf of Vincorp and for acceptance by the cooper (ie THR). The orders were generally signed by Liebenberg for Vincorp and by Molnar or others for THR though signed acceptance does not seem to have been an invariable practice.

[20] Upon receipt of an order, THR issued a 'manufacturing order and confirmation'. The purpose of the manufacturing order was to confirm that THR was proceeding to manufacture barrels in accordance with the order placed on it. There are no manufacturing orders in the record dating back to the early stages of the relationship but Liebenberg confirmed that THR sent them to Vincorp. The manufacturing orders contained the following inserted information: 'Bill to' – Vincorp; 'Ship to' – VCC; 'Customer ID' – VCC/Pretorius. Particulars of the barrels ordered were set out in a table. The final column of the table recorded the name of the wine estate for which the barrels were intended and Vincorp's order number. The manufacturing order contained the following note at the foot:

'Please advise within 24 hours in case of any additional comments about this confirmation, otherwise your order confirmed and valid!'

[21] Upon shipment the barrels were accompanied inter alia by THR's invoice issued to Vincorp and a packing slip identifying the customer as Vincorp and listing the latter's order numbers. The bill of lading identified Vincorp as the consignee. The

bill of entry, used for customs clearance in South Africa, named Vincorp as the importer and THR as the supplier.

[22] All payments for imported barrels were made by Vincorp to THR.

Change in invoicing?

[23] In fairness to Vincorp I must note that during 2003 there seems to have been a deviation from the above practice. This appears from an email exchange between Pretorius and one Roland of THR over the period 29 January – 2 February 2004 in which Pretorius requested that all invoices be addressed to Vincorp. He asked Roland to change the invoices for the three containers already received and which had been addressed to VCC. Roland apologised but said that THR's accounts department was unable to change the three invoices already issued. Pretorius persisted, saying that it was important to make the change for the following reasons: (i) that Vincorp was a separate company of which he, Pretorius, was not a director; (ii) that Vincorp acted as a financing company and importing agent on VCC's behalf; (iii) that Vincorp was responsible for all payments to THR.

[24] I do not think anything adverse to THR's alleged understanding of the contractual position can be inferred from the above email correspondence. The trial judge found that until this email exchange all the THR invoices had been addressed to VCC. Although that is what Haumann suggested in oral evidence, it is at odds with Pretorius' email of 2 February 2004 which concluded with a statement that hitherto THR had addressed its invoices (ie correctly and in contra-distinction to the three invoices about which he was complaining) to Vincorp, not VCC. However unreliable Pretorius may have been as a witness, it is most unlikely that this contemporaneous statement was incorrect. There was no reason at the time for Pretorius to make a false assertion and he would have known that THR could easily ascertain whether what he was saying was right or wrong.

[25] From Pretorius' email it thus is apparent that initially THR's invoices were issued to Vincorp in accordance with the orders placed by the latter. For unexplained reasons there was a deviation in the latter part of 2003 in respect of

three orders. This may well have been nothing more than an oversight by THR's accounts department or a mistake occasioned by the similarity between the names VinCo and Vincorp. Things then returned to normal, and the consistent practice thereafter was that THR issued its invoices to Vincorp.

Different classes of customers?

[26] Haumann's evidence was that there was an important distinction between Vincorp's existing customers and VCC's customers. In the former category, according to Haumann, were KWV, Distell and the Lusan group.[1] For convenience I shall refer to these as ' Vincorp customers' and 'VCC customers' respectively. His version was that Vincorp was liable to THR for orders relating to Vincorp customers but not for orders relating to VCC customers.

[27] In respect of VCC customers, Haumann testified that Vincorp merely rendered logistical services to VCC in accordance with the letter of 28 August 2002. Although Vincorp made payments to THR in respect of VCC customers as well as its own customers, it only did so in the case of VCC customers upon receipt of the money from VCC. This was an arrangement of convenience because Vincorp had a foreign-currency account with FNB and the facilities for obtaining forward exchange cover. In the case of VCC customers, Vincorp's 'orders' were not true orders – they were generated merely to ensure that the barrels were entered into Vincorp's system so that they could be tracked for logistical purposes. There was a similar explanation for the requirement that THR's invoices be issued to Vincorp rather than VCC: FNB insisted that invoices correspond with the bills of lading and bills of entry.

[28] As I have already observed, Molnar was not aware of the letter of 28 August 2002. He testified that he was never made aware that Vincorp's position was that it would only pay THR upon receipt of money from VCC. He also denied knowing anything of the supposed distinction between Vincorp customers and VCC customers. Whether any distinction was drawn in the documentation which passed between Vincorp and VCC is not altogether clear. Haumann gave very confusing

[1] Lusan is an acronym for the wine estates Le Bonheur, Uitkyk, Stellenzicht, Alto and Neethlingshof.

evidence about the way Vincorp and VCC should have accounted for the transactions between them, procedures which he said were often not followed because of Pretorius' administrative disarray. Despite careful reading I am not sure I have followed Haumann's explanations. Be that as it may, these matters were not visible to THR. Insofar as THR was concerned, no distinction was drawn, in the documentation which came into existence, between customers who were supposedly Vincorp customers and those who were supposedly VCC customers. Vincorp's orders were identical as were the documents issued by THR.

[29] There was no reliable evidence to gainsay Molnar's version of how matters appeared to him. The impression created by Vincorp's orders, its receipt without objection of invoices issued to it by THR, and by Vincorp's payment for all barrels supplied pursuant to those invoices, was consistent with the way Molnar says he understood Liebenberg's letter of 7 October 2002. Although Liebenberg admitted writing the letter, she denied ever discussing substantive business with Molnar. Haumann likewise denied ever having discussed contractual arrangements with Molnar. It follows that on Vincorp's own version nothing was ever communicated to Molnar to place the commercial documentation in a different light or to draw the distinction between Vincorp and VCC customers. I leave aside Pretorius' evidence, which as noted was found to be unreliable in general.

[30] During argument we invited Mr van Rooyen SC to explain how Vincorp's contractual liability to THR in respect of Vincorp customers arose if, as its witnesses testified, there were no contractual discussions between Vincorp and THR. He was not able to point to anything beyond Vincorp's orders – documents which in form were identical to those issued by Vincorp in respect of VCC customers.

[31] There was email correspondence between Vincorp and THR from time to time regarding the practical implementation of Vincorp's orders. In none of these emails is a distinction drawn between classes of customers or any suggestion that the orders were anything other than what they purported to be. For example in January 2007 Jeanell Mostert of Vincorp emailed THR explaining that when Vincorp placed an order at the agent (ie THR's agent VCC), a contain number appeared on the order and that this was very important because Vincorp grouped containers so

as to control estimated arrival dates and thus meet its customers' delivery requests. Vincorp also took out insurance and forward cover for its customers. THR was asked not to re-group barrels without first contacting Vincorp.

[32] In January/February 2009 there was email correspondence between Haumann, Ruppert and Pretorius to make sure that they all had the same information about Vincorp's orders. In the schedule attached to Haumann's email of 8 January 2009 THR was asked to use the list to verify that all orders had been received. On 22 January 2009 Ruppert emailed to say that she was missing certain orders. Haumann replied saying that all the processed orders had been sent to Pretorius and asking whether Ruppert wanted him to send the orders to her as well. She replied in the affirmative. On 22 January 2009 Ruppert asked Haumann if he still had orders for THR, since this might justify a third container. He replied that she had all Vincorp's orders. 2 February 2009 Haumann emailed Ruppert attaching a summary of the orders Vincorp had processed to date. From the schedule attached to the email of 8 January 2009 and from the content of some of the emails one can see that the orders related to both classes of customers identified by Haumann. As I have said, no distinction was drawn.

Commercial probabilities

[33] Molnar's understanding is inherently plausible from a commercial perspective. In the early days, before Vincorp's involvement, THR sold barrels to VCC but required it to make advance payment (this would have applied to the relatively small volumes which Pretorius bought in the latter part of 2001 and early 2002). Nobody has suggested that VCC was an entity to which THR could reasonably have been expected to extend credit. This made the expansion of THR's sales in South Africa problematic. Vincorp thus became involved as the season approached for the placing of fresh orders in the latter part of 2002. If THR had understood the position to be that Vincorp would not make payment unless it received the money from VCC, THR would have had to rely on VCC's creditworthiness. That was the very thing THR was unwilling to do. Liebenberg's description of Vincorp's status in the letter of 7 October 2002, together with the references furnished, would have given Molnar comfort that Vincorp was a company

of substance. Even if Liebenberg was not authorised to write the letter, nobody suggested that what she said about Vincorp was factually incorrect.

The September 2007 circular

[34] THR also led evidence concerning a circular which Vincorp addressed to its suppliers and agents in September 2007. THR and VCC were among a group of email recipients. In the circular Vincorp clarified its invoicing requirements. Invoices from suppliers (THR was a supplier) had to contain Vincorp's order reference number and the name of Vincorp's client. If this was not done, Vincorp could not allocate costs and this might lead to delay in payment. After setting out certain other documentary requirements, Vincorp said that payment would be made 30 days after (i) full delivery of the barrel order; (ii) receipt of an original invoice made out in Vincorp's name; (iii) confirmation from the client that the barrels were in good order. The circular concluded by stating that to avoid misunderstanding Vincorp did not accept any orders from agents on behalf of clients. My understanding of the latter statement is that Vincorp would not accept responsibility for orders supposedly placed by agents on its behalf with suppliers.

[35] Molnar testified that the circular did not contain a qualification that Vincorp would only make payment to suppliers once it had received money from the customers or agents. When asked about this, Haumann said that it was a general circular sent out at the beginning of the season and was not intended to cover all scenarios, only the scenario applicable to most agents and suppliers.

Establishing contractual consensus

[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'.

Extension of time for payment

[40] There are two further pieces of evidence with which I must deal. The first is that on 28 October 2003 Pretorius emailed Molnar to say that it was barrel order time again in South Africa. He asked whether Molnar would extend his payment terms from 60 days to 90 days after loading. He wrote again on 31 October 2003 to say that he was processing his orders and asking for a response to his request, adding that he needed to arrange forward cover according to payment dates. Molnar replied that he would agree to the 90-day term.

[41] Mr van Rooyen submitted that this email exchange evidenced an understanding that VCC rather than Vincorp was the purchaser of the barrels. I do not think that in all the circumstances the submission is well-founded. In motivating his request for an extension to 90 days, Pretorius specifically referred inter alia to the fact that KWV and Distell only paid him 30 days after delivery in South Africa. KWV and Distell were so-called Vincorp clients, in relation to whom Vincorp accepted in the court a quo that it was contractually liable to THR. The Vincorp orders stated that it would make payment to THR within 60 days after loading. It is common cause that the party which actually made the payments was Vincorp. One can understand, commercially, that Vincorp would have had back-to-back payment terms with VCC. So if THR was willing to extend the 60 days to 90 days, this benefited VCC.

November 2009 correspondence

[42] The other piece of evidence concerns the communications which took place between THR and Vincorp when the former was pressing for payment of the 2008/2009 orders. On 24 November 2009 Kope emailed Haumann noting that Vincorp had an outstanding balance of $112 726 and asking when Vincorp would pay. Haumann replied that THR should contact its ‘agent’ in South Africa, Pretorius, adding that Vincorp ‘only did the logistics’ for THR and that Vincorp’s relationship with THR had always been that Vincorp only settled once Pretorius paid Vincorp. He said this had always been the case in the past. Kope replied that she ‘was aware of the arrangements’ but had noticed that the last payment received by THR was a

month before and just wanted to know if there was any chance of receiving another payment soon. She asked whether Haumann had any information based on his correspondence with Pretorius. Haumann did not reply. (Haumann had been writing with increasing frustration to Pretorius over the period August-November 2009, his last email being 5 November 2009 in which he said that he did not know what more to do, that Pretorius was making things very difficult and awkward for Vincorp and that Vincorp really wanted to sort out the situation with THR.)

[43] On 1 December 2009 Molnar wrote to Haumann saying that he had not had the opportunity to meet him but had dealt extensively with Liebenberg. Over the past six years Vincorp had paid for barrels from THR but had failed to do so in the current year. He had reviewed the orders. Numerous emails and past practice confirmed that Vincorp was the importer of the barrels. He said he could probably accommodate Vincorp if it required a payment plan, otherwise Vincorp was to remit payment in full. And so battle lines were drawn. Vincorp's reply was written by its managing director, probably with legal input.

[44] Unsurprisingly Mr van Rooyen in the court a quo and in this court placed considerable reliance on Kope's apparent acknowledgment of the arrangement described by Haumann in his email of 24 November 2009. In his evidence Molnar used strong language in expressing his view of Haumann's email – 'a despicable mistake', 'categorically false', 'a cruel joke', 'absolutely absurd'. He testified that Kope, who did not work for THR but an associated company TIC and was based in the United States, was not familiar with the arrangements. She had only joined TIC in 2005. He had not instructed Kope to reply as she did. Probably one of the Hungarian employees had asked her to assist because she was fluent in English.

[45] Kope said that she would not have involved herself in THR matters unless asked to do so. The request in this case had come from THR's general manager, Manno Pal, because of her language skills. Apart from Molnar (who travelled a good deal and had an office in the United States), the only other Hungarian staff member fluent in English was Ruppert who was probably away at the time. She had directed her enquiry to Vincorp because it was reflected as the buyer in THR's records. THR furnished TIC with weekly reports regarding sales and payments received. She was

aware that there were two relevant entities in South Africa, the one which was billed (Vincorp) and the one to which THR shipped the barrels (VCC). She was definitely not aware of the financial arrangements. Her statement that she 'was aware of the arrangements' was an 'overstatement' of what she knew, a 'bad choice of words'. She was not intending to confirm anything but just trying to get further information from Vincorp. She had not spoken with Molnar before writing the emails.

[46] I am not persuaded that Kope's unguarded email is a sufficient basis for finding that THR, when accepting the orders and delivering the barrels, understood there to be an arrangement in terms whereof Vincorp would not make payment unless it received payment from VCC. There is nothing to suggest that Kope herself had any relevant dealings with Vincorp. The judge regarded Molnar and Kope as honest witnesses and he specifically accepted Kope's explanation about the email of 24 November 2009. There was evidence from Vincorp that historically its payments to THR did not religiously follow the 60-day or 90-day limit. Haumann testified that historically Vincorp only paid THR after receipt of money from VCC (or from the customers, who sometimes paid Vincorp directly), which was sometimes as late as four to six months after invoice date. I accept that this was the de facto position. I am willing to accept, also, that the Hungarian office knew that in practice the timing of Vincorp's payments to THR was influenced by cash flows from VCC. However until the second half of 2009 Vincorp had never defaulted. The fact that THR tolerated late payments does not mean that it did not regard Vincorp as ultimately liable. Vincorp was the party to whom THR directed the request for payment when the delay became unacceptable.

Conclusion

[47] It is thus my respectful view that the trial judge erred in dismissing THR's claim. Although the summons alleged an outstanding balance of $146 850, it is common cause that if Vincorp is liable the correct amount is $112 526.

[48] The summons includes a prayer for interest at the prescribed rate of 15,5% p/a a tempore morae. We were not addressed about the mora date. If demand was necessary to place Vincorp in mora, the letter of 1 December 2009 would appear to

have been sufficient demand. At any rate summons was issued in October 2011. The prescribed mora rate was 15,5% on both occasions and would continue to apply despite later changes in the prescribed rate. Accordingly, and without making a determination of the exact mora date, interest at 15,5% should be ordered as prayed.

[49] Mr McLarty asked that we include an order allowing the travel and accommodation costs of Molnar, Kope and Ruppert. I think that these are matters for the taxing master. Prima facie there is little basis for the defendant to resist the reasonable travel and accommodation costs of Molnar and Kope. An adverse inference might have been drawn if the plaintiff did not call Kope. I prefer to express no opinion regarding Ruppert. The trial judge said that her evidence did not really take the matter further and I have likewise found it unnecessary to dwell on her testimony though this does not necessarily mean that it was not a reasonable precaution for the plaintiff to call her, bearing in mind that it bore the onus.

[50] I would thus make the following order:

(a) The appeal is allowed with costs.

(b) The order of the court a quo is set aside and replaced with the following:

(i) The defendant is ordered to pay the plaintiff $112 526 together with interest at the prescribed rate of 15,5% a tempore morae.

(ii) The defendant is further ordered to pay the plaintiff's costs of suit.

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ROGERS

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ERASMUS J (conc)

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SAMELA J (conc)

APPEARANCES

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