Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No. 8252/2013

Before: The Hon. Mr Justice Binns-Ward

Hearing: 2-5 September 2019
Judgment: 16 September 2019

In the matter between:

ANAIT TECHNOLOGY LTD	Plaintiff
and	
INTERLOG TRADING (PTY) LTD	First Defendant
ALVARO TANGOCCI	Second Defendant
BENJAMIN MAANDA MANYATSHE	Third Defendant
HENRY PETER LOMBARD	Fourth Defendant

JUDGMENT

BINNS-WARD J:

[1] This action concerns a claim by the plaintiff ('Anait'), a company registered in the British Virgin Islands, for payment of the purchase price for goods sold to the first defendant ('Interlog') in terms of a written agreement concluded between those parties on 30 November 2012. The agreement was sometimes referred to in the

evidence as '*the purchase order*'. The goods in question were a container-load (10 000 kg) of Micromix superconcentrate (often referred to in the evidence as '*the product*'). I shall describe the peculiar circumstances in which Anait, which was not a trading company, came to sell the product to Interlog presently.

[2] Micromix concentrate, as I understood the evidence, is a substance cultured from various bacteria that in processed form is used in a wide range of environmentally friendly applications for things such as agricultural fertilisers, sewerage treatment and oil spill rehabilitation. The product is manufactured by Bioagritech s.r.l., a company incorporated in the diminutive Republic of San Marino. That company apparently owns the intellectual property rights in the formula used to produce Micromix.

[3] Interlog is a South African registered company. It has a factory at its principal place of business in Observatory, Cape Town, where Micromix concentrate is processed by mixture with other materials into products for use in various of the aforementioned applications. The products are marketed by Interlog under the brand name 'Ergofit'. Interlog enjoys distribution rights in respect of products made with Micromix in terms of an agreement with Bioagritech's related company, B.E.A. s.r.l.. (Whether the distribution rights are worldwide, as claimed by Mr Alvoro Tangocci, the second defendant and a director of Interlog, or only for sub-Saharan Africa and the Middle East, as evinced in a discovered deed of contract, does not appear to be material.)

[4] The purchase price for the container load of Micromix purchased by Interlog from Anait was €1 040 000. The agreement provided (in clause 2.4) that it was payable by the Interlog as to €240 000 within 30 days of the receipt by it of an invoice for the goods to be rendered by Anait within five days of the signature of the purchase order[1] and the balance on delivery of the product at the '*delivery location*'. The delivery location was defined in the agreement as '*the location for delivery specified in this order* [i.e. at Interlog's factory premises in Observatory] *or such other location as agreed in writing between the Customer* [Interlog] *and Distributor* [Anait]. The agreement further provided (in clause 2.8) that any amount due but unpaid in terms of the purchase order would bear interest from due date of payment to actual date of

[1] Notwithstanding the terms of the agreement, the relevant invoice was rendered by the plaintiff only on 15 April 2013.

payment at the LIBOR rate[2] (rounded down, if necessary, to four decimal places) quoted for one month Euro deposits.

[5] In terms of clause 3 of the terms and conditions of the purchase order, title to and risk in the product would pass to Interlog on delivery.

[6] The purchase order agreement, which is by its terms governed by South African law, contains both a non-variation and a sole memorial clause.

[7] The second, third and fourth defendants, who are all directors of Interlog, have been joined in the action because they stood as sureties for, and co-principal debtors with, the first defendant. The relevant deed of suretyship was executed for the purpose of providing Anait with security for the payment of the purchase price in terms of the purchase order. It recorded (in clause 29) '[n]*otwithstanding any provision herein, this Suretyship shall cease to be of force and effect on the signature of a Shareholders Agreement between the Sureties and the Creditor governing their relationship as shareholders of the debtor if and when the Creditor becomes a shareholder of the Debtor*'.

[8] Both the purchase order agreement and the deed of suretyship contain clauses providing that any costs awarded in any litigation arising between the parties to them would be recoverable on the scale as between attorney and own client.

[9] Notwithstanding the abovementioned terms of the purchase order concerning delivery, in circumstances to be described presently, Interlog made the arrangements for the shipment of the purchased container of product from Europe to South Africa, including its overland transport from point of production to the port for loading on a vessel to be shipped to Cape Town. It was in possession of the bill of lading in respect of the container, which indicated that the freight had been prepaid. The bill of lading identified Interlog as both consignor and consignee, and Interlog engaged the clearing agents that customarily attended to its imports for the purposes of clearing the goods.

[10] However, after the goods arrived in the port at Cape Town at the beginning of March 2013, Interlog declined to sign the necessary documentation for their clearance, despite Anait having put the clearing agents in funds to pay the VAT and

[2] London interbank offered rate.

other charges necessary to clear the goods and enable them to be delivered to the 'delivery location'. Anait, which was anxious to ensure delivery to Interlog's factory in accordance with the purchase order, was advised by the clearing agents that only Interlog as the designated consignee could clear the goods into South Africa and that it would not be permissible for Anait to so in its stead.

[11] The upshot was that the container could not be cleared in Cape Town owing to Interlog's refusal to sign the clearance documents. It would appear that it remained in a bonded warehouse at the port. The plaintiff has since lost track of it, and Interlog has shown no interest in it. There were anecdotal indications in the course of the evidence at the trial that the product has a limited shelf life. The implication was that wherever the container might now be, its contents have probably become unusable. The organic nature of the product, as it was described by Mr Tangocci, as well as his emphasis on the importance of synchronising delivery of the raw product with the execution by Interlog of its clients' orders for processed products lent support to the impression that Micromix concentrate is something that goes off if not used relatively quickly. That is also the impression given in correspondence addressed by a third party, Mr Clive Parkes, to Mr Martin Chesler, who in a broad sense was a broker in the dealings between Anait and Interlog, concerning an offer by Parkes to purchase the container when it became apparent that Interlog was obstructing its delivery. Parkes emphasised in the correspondence he addressed to Chesler in this regard how important it would be that he be able to lay hands on the product within a matter of a few months if it were to be of any usefulness to him in supplying it to clients in South America.

[12] It is clear enough on the evidence that Parkes, who was an established customer of Interlog, and appears to have been on friendly terms with Tangocci, had been informed of Interlog's refusal to take delivery of the product. Tangocci acknowledged in evidence that Interlog would have been willing to sign the necessary clearance documents to facilitate the delivery of the product to Parkes had Anait been willing to sell it to him.

[13] Mr Chesler, who knew Parkes as an acquaintance of his late father, Lewis Chesler, had a sceptical view of Parkes' ability to afford to buy the container, invited Parkes to produce substantiation of his ability to financially sustain his offer so as to

enable him to be able to commend it for Anait's consideration. There is nothing on record to suggest that Parkes was able to do so.

[14] It is convenient at this stage, against the background described above, to consider the substantive defences set out in the defendants' plea in the form in which it was finally amended at the commencement of the trial. Although the content of the plea was not altogether coherent or consistent in various respects, the essence of the defence was that the purchase order was not enforceable. The crux of the defence was set out in paragraphs 26-30 of the plea as follows:

> 26. The purchase order set out in [the purchase order agreement] was at all times conditional upon the Plaintiff honouring a prior share purchase oral agreement entered into in London in or about October 2012 between the Plaintiff's representatives viz. Martin Chesler and Tredoux and the Second and Third Defendants representing the First Defendant to the effect that the Plaintiff would purchase 40% of the Defendants' shares for the amount of US$5 000 000.
>
> 27. The Plaintiff having performed a due diligence check in respect of the First Defendant was aware of the fact that the First Defendant would not be able to operate without the Plaintiff honouring the aforementioned oral share purchase agreement since the Defendants lacked any working capital.
>
> 28. It was at all times known to both the Plaintiff, its representatives as well as the First Defendant and its directors viz. the Second and Third Defendants, that without the injection of US$5 000 000 generated by the sale of 40% of the Defendants' shares to the Plaintiff as agreed between the parties and referred to above, the Defendants would not have been able to take delivery of the goods referred to in [the purchase order] for the reasons set out below:
>
> 28.1 None of the Defendants held the requisite working capital to commence production with the goods referred to in [the purchase order] and by taking delivery of the goods would have carried on business recklessly, aware that it that it would not be able to pay its debt as and when it became due and payable in contravention of Section 22(1) of the Companies Act 71 of 2008.
>
> 28.2 By accepting delivery of the goods and proceeding to production the Second and Third Defendants would have acted in contravention of Section 76(3)(b) and (c) of the Companies Act 71 of 2008 and risked an adverse order as contemplated in Section 162(5)(c)(iii) of the Companies Act 71 of 2008.
>
> 28.3 By reneging on the oral purchase of shares agreement alluded to above the Plaintiff knowingly and intentionally made it impossible for the Defendants to perform in accordance with [the terms of the purchase order].

> 29. Without admitting that the Defendants were compelled to take delivery of the goods referred to in [the purchase order] the Plaintiff failed and refused to mitigate its alleged losses by selling the said goods at the same price claimed in this action to a willing buyer who offered to replace the Defendants as the purchaser of the goods and despite the Plaintiff not having in fact paid the €240 000 as claimed in Claim A.
>
> 30. The Plaintiff acted in extreme bad faith, malice and with the sole intention of financially ruining the Defendants.

[15] The defendants also denied liability because, so it was pleaded on their behalf, delivery of the Micromix concentrate had not been effected to the delivery location.

[16] The allegation that performance in terms of the purchase order agreement was contingent upon the implementation of an oral agreement that the plaintiff would purchase a 40% interest in the first defendant was not borne out by the evidence.

[17] It was clear from the testimony of Martin Chesler, which was not effectively rebutted, that an investment in the amount of US$5 million into a joint venture between a corporate entity representing the interests, of the one part, of the Good Life Trust - being a family trust of Mr Anthony Tabatznik, a wealthy philanthropist with an interest in projects for the promotion of environmental conservation and rehabilitation, so-called 'green projects' - the owners of the intellectual property in the Micromix product, of the second part, and the first defendant, of the third part, was under discussion at the time the purchase order was contemplated. Tabatznik's interest had been sparked by the motivational effect of a document that had been prepared by Chesler in June 2012 after discussions with Mr Tangocci. The document had been provided by Chesler to Mr Jacques Tredoux, Tabatznik's business advisor. It indicated expressly that 'the opportunity' it gave out to be available was based entirely on the assertions of Interlog's directors. It pointed out that '*Interlog is in its early stages and no independent verification of its accounts, sales and order book have* (sic) *yet been carried out*'. Tabatznik had given the go-ahead for the idea of establishing a joint venture to be taken further at a meeting that he and his daughter had had with the second and third defendants in London in October 2012. He had entrusted the practicalities of the transaction to Tredoux, who worked closely in that connection with Chesler.

[18] It is evident that Tredoux and Chesler devised that the contemplated investment should occur by means of the formation of a group of companies, of which

the manufacturing company in San Marino and the first defendant in South Africa would be part, with the plaintiff company being the ultimate parent company. The idea was that the contemplated group of companies would be structured in such a way as to reflect a 40% proprietary interest in the group's business by the Good Life Trust, a 40% interest by the first defendant and a 20% interest by the manufacturers of Micromix in San Marino. It was contemplated that the Good Life Trust would acquire its interest in return for making a US$5 million capital funding investment in the proposed joint venture.

[19] The Good Life Trust's possible investment into the proposed joint venture was contingent, however, on the positive result of a reasonably detailed due diligence study into the viability of the businesses of Interlog and the manufacturing company in San Marino. In this regard a list of the information required by the Trust's corporate advisor was forwarded to both of the other proposed joint venture parties. As to be expected in the circumstances, the requested information included details of the proposed joint venturers' financial standing vouched by management accounts and audited financial statements. This information was still outstanding at the time that the purchase offer agreement was entered into. Indeed, the first defendant proved unable to provide audited financial statements because it was involved in a dispute with its company auditors over an unpaid fees account of R140 000.

[20] I do not find it necessary to describe the factual context in detail, but it is evident that at the time the purchase order agreement was concluded, much had still to be settled between the parties before the mooted joint venture could be established. Not only had the first defendant and the San Marino interests still to satisfy the Good Life Trust of the commercial viability of the proposed joint venture enterprise, but it is also evident that from their side the shareholders of the first defendant company were concerned about whether subsequent possible additional capital injections into the business by the Good Life Trust might not result in a dilution of their proprietary interest in the joint venture and a loss of control by them over their own component company; something they were disinclined to accept.

[21] It was shortly after the abovementioned meeting in London, and at a time when a spirit of optimism prevailed about the establishment of a joint venture and when Anait had already been designated by the Good Life Trust as the vehicle to be the ultimate holding company in the group structure through which it was envisaged

the venture might be conducted, that the directors of the first defendant sought to persuade the interested investor to pay for a container load of Micromix concentrate that they said was urgently needed to enable the company to satisfy existing orders from America and Saudi Arabia. The request was for a loan, the repayment of which, it was suggested, might be set off against the contemplated multi-million dollar capital investment by the Tabatznik interests into the proposed joint venture.

[22] The Good Life Trust, however, had no interest in advancing a loan to Interlog. It was nevertheless prepared to assist Interlog by funding an arrangement in terms of which Anait would purchase a container load of Micromix concentrate from the manufacturer for €800 000 and on-sell it to Interlog at a 30% mark-up for €1 040 000. The mark-up was determined with reference to the margin (40%) that Interlog's directors had represented that the company was able to make on the distribution of product. The intended result was that Interlog would not make a substantial profit on the transaction if the joint venture did not go ahead, but that it would nonetheless share in the profit with the other joint venture parties if the contemplated joint venture did proceed by virtue of the group relationship between Anait and Interlog that would pertain in those circumstances.

[23] The Good Life Trust was also only willing to enter into the aforementioned back to back sale agreement upon the provision to Anait of acceptable security for the payment by Interlog of the €1 040 000 purchase price. It was in that context that the second to fourth defendants were required to stand as sureties and co-principal debtors. In the course of negotiating the terms of the deed of suretyship those defendants secured the insertion of that part of clause 29 thereof that has been quoted in paragraph [7] above. The factual context, including the prior presentation by Martin Chesler to Alvaro Tangocci of the concept of a group structure for the joint venture in terms of which Interlog would be an indirectly held subsidiary of Anait, shows that the '[s]*hareholders Agreement between the Sureties and the Creditor governing their relationship as shareholders of the debtor if and when the Creditor becomes a shareholder of the Debtor*' was understood to be the agreement in terms of which Anait would acquire a proprietary interest in Interlog.

[24] The specially settled wording of clause 29 of the deed of suretyship is wholly inconsistent, in the factual context that I have described, with there having been any apprehension on the part of any of the defendants that payment in terms of the

purchase order was conditional on the implementation of the contemplated joint venture. On the contrary, the contingent liability undertaken by the second to fourth defendants in terms thereof could only be triggered in the event of a default in payment of the purchase order debt in circumstances in which the contemplated joint venture had *not* been established. The liability would have fallen away upon the incorporation of Interlog into a group structure headed by Anait for the conduct of the contemplated joint venture business upon signature of the shareholders' agreement referred to in the clause. The sureties' insistence on the incorporation of clause 29 in the deed of suretyship would make no sense at all if it had been the common intention that Interlog would not be liable to pay the agreed price in terms of the purchase order if Anait did not acquire a proprietary interest in the company.

[25] The defence that compliance by Interlog with its obligations in terms of the purchase order agreement was subject to Anait purchasing a 40% interest in Interlog for US$5 million is also inconsistent with the tenor of a discussion between Martin Chesler and Alvaro Tangocci at Interlog's factory on 25 January 2013 at a stage when there was still a remaining, albeit considerably diminished, possibility that the joint venture would be established and the product purchased by Interlog from Anait was still on the high seas en route from Italy to Cape Town. Unbeknown to Tangocci at the time, the conversation was recorded by Chesler. A transcript of the conversation was produced at the trial. Tangocci did not attempt to disown what it revealed as to what he had said at the time.

[26] The transcript shows that the discussion between Chesler and Tangocci concerning the contemplated joint venture and the purchase order was fairly wide-ranging. It covered subject matter such as Tangocci's unhappiness with a 30% mark-up having been included in the price stipulated in the purchase order agreement and his chagrin about a discussion he had with Jacques Tredoux late in December 2012 at the Newport Café in Mouille Point, Cape Town, concerning the interest that a certain 'Warren' would have in the American business of the contemplated joint venture, as well as Chesler's and the Good Life Trust's disquiet about Interlog's inexplicable inability to provide the financial information concerning its business that was required for the due diligence study. It is clear upon a reading of the transcript that both of the interlocutors were conscious that the prospects of the contemplated joint venture being proceeded with had by that stage become less than promising.

[27] When Chesler broached the consequences of the joint venture not proceeding, Tangocci stated, '*You've got a contract, we bring your money back plus the interest and we part that's one … Because that would be the normal way right?*' To which Chesler responded '*What do you mean? Plus the 30% return? Or are you querying the return?*', which elicited the reply from Tangocci '*No, I'm not querying*'. The 'contract' to which Tangocci referred was the purchase order agreement. He proceeded later in the conversation to assure Chesler that Chesler had no reason to be concerned about Interlog's ability to pay the purchase price because Interlog had secured contracts that assured it of the means to do so.

[28] Furthermore, and in any event, without rectification or in the absence of proof of related fraudulent conduct on the part of Anait's representatives in the conclusion of the purchase order agreement, the allegation that the agreement was subject to the terms of an extraneous unrecorded oral agreement was legally untenable in the face of the sole memorial and non-representation clauses in the purchase order agreement. Taking cognisance of evidence that contradicted the effect of those clauses would run counter to the parol evidence rule; cf. *De Villiers v McKay NO and Another* [2008] ZASCA 16, [2008] 3 All SA 1 (SCA), 2008 (4) SA 161 at paras. 4-5. Evidence in support of the allegation, even were it available, would be legally irrelevant in the circumstances and consequently inadmissible.

[29] It is clear, if regard is had to all of the abovementioned features of the matter, that the pleaded defence that Anait was precluded from exacting performance of the purchase order agreement if the contemplated US$5 million investment in terms of a joint venture agreement were not made cannot be sustained.

[30] The notion that the second to fourth defendants would make themselves guilty of reckless trading if they permitted Interlog to accept delivery of the goods when the company was unable to pay for them is also without foundation. If reckless trading were a relevant consideration at all in the factual context of the matter, the directors of Interlog would be exposed on that front by entering into the contract in the first place if the company did not have the means to comply with its undertaken obligations. The reference to reckless trading, with its connotation of potential personal liability by the directors who were culpably party to it, was nothing more than a meaningless distraction in circumstances in which the directors had in any event undertaken

personal co-liability for the debt by way of the deed of suretyship and where there is no reason to suspect that the security so furnished will not be adequate.

[31] Sections 22(1) and 76(3) of the 2008 Companies Act have no bearing on the validity of contracts entered into by companies that are trading recklessly or whose directors are acting in breach of their fiduciary duties. Section 22(1) falls to be read with s 424 of the 1973 Companies Act (which is still in operation[3]). The effect of a contravention of s 22(1) is an exposure to personal liability for the debts of the company by those responsible for trading in it reckless of its ability to meet its obligations to creditors; it is not to preclude the company's creditors from enforcing their contractual rights against the company. Similarly, the effect of conduct by a director in breach of his or her obligations in terms of s 76(3) exposes the director to liability to the company for any loss sustained by it in consequence of the director's misfeasance (see s 77(2) of the Act); it does not absolve the company of any of its effectively undertaken contractual obligations. The defendants' invocation of the aforementioned provisions of the Companies Act was therefore wholly misplaced.

[32] As the plaintiff's claim was one for specific performance, not for damages, the defence that it should have mitigated its loss was equally misplaced. But even were mitigation of loss an applicable consideration, the defendants would have been held to have failed to discharge the onus that burdens anyone properly raising such defence. The idea that Clive Parkes would have purchased the goods was unsubstantiated. Parkes' failure to respond effectively to Martin Chesler's request for a positive indication of his ability to pay for the goods if they were sold to him is telling.

[33] Finally, I turn to the defence based on the allegation that the plaintiff failed to deliver the goods in terms of the purchase order agreement. As will have become apparent from my description earlier of the shipping of the product from San Marino to South Africa, Interlog was in point of fact in actual control of the goods from the time of their shipment, which makes its directors contention at the trial that it had not been given delivery nothing short of bizarre.

[34] In the circumstances of the refusal by Interlog to allow the goods to be cleared for import, the plaintiff's claim for specific performance relies, in the context of the frustration of its ability to give actual delivery of the product to Interlog, on the

[3] By virtue of paragraph 9 of Schedule 5 to the 2008 Companies Act.

doctrine of fictional fulfilment. Initially considered to be available only when a non-compliant contractant had prevented the fulfilment of a condition to which the contract was subject with the intention of frustrating the execution of the agreement,[4] it has for some time now been acknowledged that the doctrine also applies when the frustration of the performance of the contract is occasioned by the intentional prevention by one of the contracting parties of an obligation under the contract being discharged; cf. *Du Plessis N.O. and Another v Goldco Motor & Cycle Supplies (Pty) Ltd* [2009] ZASCA 62, [2009] 4 All SA 203 (SCA), 2009 (6) SA 617 at paras. 24-27 and the other authorities cited there. In other words, the doctrine also applies when the carrying out of an obligation in compliance with a term of the contract is frustrated.

[35] One of the cases in point cited in *Du Plessis* supra loc. cit. is *Koenig v Johnson & Co Ltd* 1935 AD 262. The judgments in that case are germane to the current matter, for that case also involved the application of the doctrine of fictional fulfilment in respect of a seller's obligation to make delivery in terms of an agreement of sale. It would not serve any useful purpose to go into the facts of *Koenig* in any detail. I shall instead summarise the issues in simplified form. The seller was obliged in terms of the sale agreement in that matter to deliver to the purchasers a business together with letters patent in respect of a flooring product that was manufactured and sold by the business concerned. The application for the registration of the patent had been submitted in the name of the company in which the business was held and operated. The patent was still in the course of registration when possession of the business was given by the seller to the purchasers, and so the agreement was amended to provide that the purchasers would pay only part of the purchase price upon transfer of the business with the balance to be paid when the patent registration had been completed. The shares in the company in which the business was conducted were also transferred to the purchaser when the business was handed over. A third party then gave notice of opposition to the registration of the patent, claiming that it was based on a copy of his invention. The objector would have been obliged, on demand, to put up security for the costs to be incurred in the litigation that would follow to

[4] Cf. *MacDuff & Co (in liquidation) v Johannesburg Consolidated Investment Co* 1924 AD 573 at 591, where Innes CJ described the doctrine in the following way: '[B]*y our law a condition is deemed to have been fulfilled as against a person who would, subject to its fulfilment, be bound by an obligation, and who has designedly prevented its fulfilment …*'.

determine the validity of his opposition to the registration of the patent. There was good reason to suppose that he was not able to afford to put up the required security and that accordingly a demand for security would put an end to his attempt to thwart the registration. The seller therefore asked the purchasers to use the company it had acquired from him to demand security for costs and to allow him in the company's name, against an indemnity from him in respect of the costs to be incurred, to fight off the opposition to the registration of the patent. Only the company could counteract the third party's opposition. The seller could not do so in his own name. The purchasers refused to assist, with the result that the seller ended up not being able to deliver the registered patent. The purchasers had appreciated that by refusing the assistance requested by the seller they could frustrate his ability to deliver the letters patent, but considered, for reasons that the appeal court considered to have been misdirected and groundless, that they were acting in good faith by doing so. Wessels CJ dealt with the latter point in the following words: '*If* [the purchasers] *deliberately and intentionally frustrated* [the seller] *on delivering the "new patent," their opinion and motive are immaterial*.'

[36] The seller sued the purchasers for the balance of the purchase price, contending that the doctrine of fictional fulfilment applied in respect of his obligation to deliver the patent. He alleged that his ability to fulfil his outstanding obligation had been frustrated by the purchasers' deliberate and unjustifiable refusal to assist him to neutralise the opposition to the registration of the patent.

[37] Each of the four judges who heard the appeal in *Koenig* delivered a judgment. For reasons that are not relevant to the current matter the bench was divided 2:2 on the outcome of the appeal. What makes their judgments pertinent, however, is that all of them were agreed that the doctrine of fictional fulfilment applied in respect of the non-delivery of the letters patent. And were it not for the other features of the case, which have no equivalent in the current matter, they would have been unanimous in holding the seller entitled to the balance of the purchase price notwithstanding his failure or inability to actually deliver the letters patent against payment of it.

[38] It seems to me that the judgments in *Koenig*, which have been accepted without qualification, as far as I have been able to establish, in a number subsequent decisions of the appeal court as authoritative in respect of the operation of the doctrine of fictional fulfilment, support the plaintiff's counsel's submission that the

effect of Interlog's frustration of Anait's ability to give delivery of the container in terms of the purchase order renders its failure to give actual delivery irrelevant to its entitlement to claim the purchase price from Interlog. The facts serve as an illustration of the application of the doctrine in respect of the frustration by one contracting party of the counterparty's ability to perform its obligations under the contract.

[39] For these reasons the defendants' reliance as a defence on the non-delivery of the goods to the delivery location must fail.

[40] The plaintiff claimed interest on the €800 000 component of the purchase price with effect from 1 February 2013 when Interlog took control of the consignment of the container of Micromix concentrate in San Marino. I have already remarked on that having been an effective form of delivery, but it was not delivery in the terms agreed in the purchase order agreement. In my judgment the plaintiff is entitled to interest only from the date upon which the first defendant frustrated delivery of the product to the delivery location in Cape Town. For this purpose I have determined that the relevant date is 28 March 2013, being the date that the plaintiff tendered to pay the VAT and clearance charges and to deliver the goods to the delivery location against the provision by the directors of Interlog of security for the repayment to Anait of the VAT. The first business day after that date was 2 April 2013 by reason of the intervening Easter weekend.

[41] In the result, judgment is granted in the plaintiff's favour in the following terms:

The defendants are directed, jointly and severally, the one paying, the others being absolved, to pay to the plaintiff -

1. **in respect of claim A pleaded in the particulars of claim:**

    a. the amount of €240 000,

    b. interest thereon, as provided for in terms of clause 2.8 of the purchase order agreement (annexure POC 1 to the particulars of claim), from 15 May 2013 to date of payment at the London interbank offered rate ('LIBOR') quoted for one month euro deposits as of 11:00 a.m. London time on Thursday, 16 May 2013;

2. **in respect of claim B pleaded in the particulars of claim:**

   a. the amount of €800 000,

   b. interest thereon, as provided for in terms of clause 2.8 of the purchase order agreement (annexure POC 1 to the particulars of claim), from 28 March 2013 to date of payment at the London interbank offered rate ('LIBOR') quoted for one month euro deposits as of 11:00 a.m. London time on Tuesday, 2 April 2013;

3. the plaintiff's costs of suit on the scale as between attorney and own client, including the fees of two counsel.

A.G. BINNS-WARD
Judge of the High Court

APPEARANCES

Plaintiff's counsel:	**L.A. Rose-Innes SC** **D. Goldberg**
Plaintiff's attorneys:	**ENSafrica** **Cape Town**
Defendants' counsel:	**J. Van der Schyff**
Defendants' attorneys:	**Brink & Thomas Attorneys** **Cape Town**