



**IN THE HIGH COURT OF SOUTH AFRICA  
(EASTERN CAPE DIVISION, GQEBERHA)**

**NOT REPORTABLE**

**Case no: 1069/2016**

In the matter between:

**FREDERICK FRANCOIS GELDENHUYS N.O**

**First Applicant**

**PETRUS WAGNER HANCKE N.O**

**Second Applicant**

**LOUISE HANCKE N.O**

**Third Applicant**

**JOHANNA PETRONELLA JULINA HANCKE N.O**

**Fourth Applicant**

and

**COEGA DEVELOPMENT CORPORATION (PTY) LTD**

**Defendant**

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**JUDGMENT**

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**Govindjee J**

[1] The plaintiffs instituted the action in their capacity as the duly appointed trustees of the Mentorskraal Family Trust ('the Trust'), trading as JBay Plant Hire.

The defendant ('Coega') is a duly registered company operating in Gqeberha. The action arises from Coega's award of a tender to Pro-Khaya Construction CC ('Pro-Khaya') to build a school at Sea Vista, St Francis Bay ('the project'). Pro-Khaya sub-contracted a portion of its work to various small, medium and micro-enterprises ('SMMEs'), one of which was Qingqani Ma-afrika Construction CC ('QMC').

### **The claim**

[2] The Trust claims that it was approached by QMC during the middle of 2015. QMC required the rental of machinery and the supply of material from the Trust for the construction of roads. QMC advised that Coega was the implementing agent in respect of the project and that the Trust was to approach Coega regarding payment for the rental of machinery and supply of material to QMC.

[3] The plaintiffs rely on an oral agreement with Coega, represented at the time by Mr H Petersen ('Petersen'), to support their claim. In terms of the agreement, it is alleged that the Trust would supply the machinery and material to QMC for the project, and that it would render invoices for its services to Coega, who would be liable to make payment of the invoices. The Trust complied with its obligations, providing QMC with machinery for rent and material for road construction as requested, and in terms of quotations accepted by QMC. Invoices rendered were paid by Coega. In respect of invoices dated at the end of August, September and October 2015, however, Coega paid only the sum of R150 000, leaving a balance of approximately R400 000 outstanding.

### **The defence**

[4] Coega refused to make payment of the amount claimed. It pleads no knowledge of the averment that QMC advised the Trust that it (Coega) was the implementing agent of the project and that the Trust was to approach it regarding payment. Coega denies that it concluded an oral agreement with the Trust. Its pleaded defence is that QMC was financed by Rapid Infrastructure Development Agency (Pty) Ltd trading as Small Business Finance Support ('SBFS') in the amount of R820 000, and would cede all its payments from Pro-Khaya to SBFS. SBFS

would, as part of its technical and after-care support, process and pay all amounts due to QMC suppliers, but only after receipt of the capital amount from Pro-Khaya and after QMC had verified the amount to be paid to a supplier. Coega did not plead that the Trust was aware of this arrangement.

[5] Two special pleas, related to misjoinder and non-joinder, were dealt with at the commencement of the trial and were dismissed by way of an *ex tempore* ruling following argument.<sup>1</sup>

### **The evidence**

[6] Mr Petrus Hancke ('Hancke'), the second plaintiff and one of the trustees of the Trust, testified that he had represented the Trust when it entered into an agreement with Coega, represented by Petersen. He had summarised the terms of the agreement, as he understood them, in unanswered correspondence to Petersen, as follows:

- '1. Ons is gedurende the middle van verlede jaar genader deur Ma Africa vir die huur van masjienerie en voorsiening van padbou material.
2. Dit is algemene kennis dat voormelde firma oor geen kredietwaardigheid beskik nie en dat ons nie bereid was om enige risikos met hulle te loop nie.
3. Op hulle versoek het ons met u telefonies gepraat, wie ons die versekering gegee het dat jul organisasie in beheer van al die fondse vir die spesifieke projek is en dus sal toesien en onderneem da tans betalings sal ontvang.
4. Op sterkte van hierdie versekering duer u het ons voortgegaan en die dienste gelewer soos deur Ma Africa op kwotasie aanvaar en deur hul versoek.
5. Rekening is aan u gelewer en u het ooreenkomstig betalings gemaak aan ons. In November het u ons meegedeel dat 'n dispuut tussen Ma Africa as sub kontrakteur

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<sup>1</sup> See *Corvine Investments CC v Advtech (Pty) Ltd t/a Property Division* [2022] ZAGPJHC 617 ('*Corvine Investments*') paras 43-46, 70.

en die hoof kontrakteur ontstaan het. U het egter steeds oorbetalings aan ons gemaak in terme van u onderneming...’

[7] The correspondence was dated 24 January 2016 and addressed to ‘Die Senior Besigheids Adviseur, Coega Development Corporation, Port Elizabeth’. Petersen’s email address, to which the correspondence had been sent, was reflected as ‘h\*\*\*.\*\*\*@coega.co.za’.

[8] Hancke confirmed the case of the plaintiff, as reflected in the paragraphs of the particulars of claim, as cited above. He and Petersen agreed that delivery notes would be signed off by QMC personnel, following confirmation that what appeared on those notes had been delivered to site. That was invoiced for, on a monthly basis, and a summary of the invoices provided to QMC. Those documents would be taken to Petersen and had initially been met with payment arranged by him.

[9] A payment of R353 620 had been received on 14 August 2015, and appeared in the QMC general ledger. Petersen had attended to the payment upon receipt of a statement and following a telephonic discussion that payment was required. According to Hancke, he communicated with Petersen by either calling his mobile phone or by telephoning Coega and being put through to Petersen by a receptionist. The amount received corresponded with a statement dated 5 August 2015, and presumably related to goods supplied up until the end of July 2015. The Trust’s bank account reflected the payment, which had followed the delivery of invoices to Petersen. Hancke could not make sense of the description ‘Rida’, which appeared alongside the payment. He understood the payment to emanate from Coega.

[10] Hancke described the goods and services reflected in three invoices to QMC, dated the end of August, September and October 2015. A statement dated 29 February 2016 summarised the position as follows:

Date	Description	Debit	Credit
31 August 2015	Tax invoice – August	R148 148	
12 October 2015	Payment received		R148 148

30 September 2015	Tax invoice - September	R162 714	
12 October 2015	Payment received		R1852
31 October 2015	Tax invoice – October 2015	R232 016	

[11] Only a single payment of R150 000 had been paid in respect of the three invoices. The payment had been received on 12 October 2015. On this occasion the words 'Coega Development Corporation' appeared in the description. That payment had been broken into two, so that a part payment for the September 2015 invoice was reflected (R1852). The balance of R392 878 remained outstanding and formed the basis of the action.

[12] Hancke explained that he had spoken to Petersen prior to receipt of the R150 000 payment. Petersen agreed to make payment of that amount immediately, and undertook to pay the balance as soon as possible. In support of this, Hancke highlighted that the 24 January 2016 correspondence, quoted above, concluded with reference to an outstanding balance. That correspondence had been forwarded again on 29 January 2016, without response, and on 23 February 2016, now coupled with the threat of institution of legal proceedings.

[13] Hancke testified that he always dealt with Petersen in claiming the payment of the invoices and knew of no other party other than Coega. During cross-examination, he explained that although QMC required the services, the arrangement was only concluded following the discussion with Petersen. QMC had explained to Hancke that money for the project would be administered by Coega. Having been approached by QMC for rental of machinery and supply of material, Hancke had telephoned Petersen. He had obtained his details and number from QMC, via his son, who explained that Petersen should be approached for payment of whatever work or machines were provided to QMC. On the strength of the conversation that followed with Petersen, he had decided to render the services to QMC, who were considered a business risk.

[14] No documentation had been provided to Hancke by QMC explaining the nature of its relationship with Coega, and forming the basis of the Trust's claims for payment from Coega. Hancke explained that Petersen had been easily trusted given previous business undertakings with various departments of Coega. The oral agreement was concluded on the first occasion he had spoken to Petersen, during the middle of 2015. Hancke provided Petersen with the background for the call, based on the request for services from QMC. Petersen confirmed that he would be responsible for the finances and that Hancke could rest assured that payment would be received.

[15] The process for payment was also agreed telephonically. Delivery notes and invoices were to be signed off by QMC before payment would be received. Hancke, feeling assured by the discussion, agreed to proceed. No documentation was received at the time confirming that Petersen was in fact employed by Coega and making undertakings on its behalf.

[16] Hancke testified that he was unconcerned that payment received on 14 August 2015 referenced 'Rida' as opposed to Coega. He had not noticed that descriptor and simply accepted that Petersen had made the necessary payment arrangement. The only other relevant payment received, on 12 October 2015, had referenced 'Coega Development Corporation'.

[17] Petersen was the only witness called by Coega. He testified that he was employed by Coega and was the programme manager for SBFS, which was a subsidiary of Coega. SBFS was a private company which financed businesses and provided business support to meet Coega's social and economic obligations.<sup>2</sup>

[18] There was no written contractual relationship between Coega and QMC. QMC had approached SBFS for support following Coega's awarding of the project to Pro-

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<sup>2</sup> The relevant submission to the Coega board reflects that the subsidiary (SBFS) would focus on extending bridging finance to Coega-contracted SMEs. Coega would commit its own resources to the project and would control the payment cessions. One of the key objectives of SBFS would be to become sustainable and generate its own revenue. A dormant subsidiary, Rapid Infrastructure Development Agency ('RIDA') could be used for the creation of an entity that would provide bridging finance to Coega-contracted SMEs.

Khaya. They required access to plant hire, material and wages in order to accept a sub-contractor arrangement. The member of QMC, Ms Sokupe ('Sokupe'), had signed two acknowledgements of debt (in her personal capacity and as member of QMC) in favour of SBFS for payment in the total sum of R820 000. An 'agreement of cession and pledge' between QMC (as cedent) and SBFS (as cessionary) was signed. The introduction to the agreement explains as follows:

1.1 The Cedent has been contracted to carry out certain works by Coega Development Corporation (Pty) Ltd ("CDC").

1.2 The Cessionary has loaned and advanced the Cedent a sum of money to enable the Cedent to fulfil its obligations to CDC in terms of the contract.

1.3 The Cedent is desirous of transferring all right, title and interest in and to payments due to him by CDC in respect of the abovementioned contract as are sufficient to cover its debt to the Cessionary for the duration of the contract.'

[19] Petersen explained that Coega would not have been involved in Pro-Khaya's decision to appoint QMC as a sub-contractor. QMC required funding to accept that appointment and approached SBFS, who entered into the two acknowledgements of debt and cession arrangement to protect their investment. He explained that SBFS would extend limited cover for the benefit of QMC up to the amount of R820 000. The agreement would not be open-ended so that any invoices submitted by the Trust would be met with payment by Coega. Payments would be subject to Pro-Khaya making payment to QMC. SBFS could only render services up to the total amount of the acknowledgments of debt signed by QMC, or based on payments received by QMC from Pro-Khaya.

[20] Petersen testified further that SBFS had made both of the payments that the Trust had received, and not Coega. The 12 August 2015 payment, in the amount of R353 620, had been made from the RIDA account, and the statement reference was 'Rida'. The second payment, dated 12 October 2015, had been made from the same account in the amount of R150 000. On this occasion the person making payment had erroneously inserted 'Coega Development Corporation' as the reference.

[21] The relationship between payments received by QMC from Pro Khaya and payments made from the RIDA account to the Trust was also explained. Petersen's suggestion that money would be paid by Pro-Khaya prior to any payments to the Trust was, however, not borne out by the relevant journal entries prepared by SBFS for QMC. As to the amounts received from Pro-Khaya, Petersen suggested that Pro Khaya had short-changed QMC because of a dispute regarding the appropriate rate. This resulted in SBFS making use of the 'loan-facility' in paying a larger amount to the Trust. Petersen had, however, not represented Coega in making such payments and had never indicated to the Trust that he did so.

[22] Petersen acknowledged, during cross-examination, that his email signature made reference to a 'Small Business Finance *Unit*', as opposed to a separate legal entity.<sup>3</sup> An ordinary reader, he agreed, may well consider this to be a unit falling within the larger Coega enterprise. His emails, including his signature, made no reference to the existence of a separate legal entity apart from Coega. He conceded that, generally speaking, suppliers to Coega would not be aware that an internal arrangement had resulted in the use of RIDA to assist SMMEs. He suggested that Sokupe may have explained the position to Hancke, or may have been expected to indicate its loan agreement with SBFS.

## The issues

[23] The matter must be approached on the basis that the particulars of claim sought to imply that Petersen had actual authority to conclude an agreement on behalf of Coega.<sup>4</sup> The plea over failed to raise authority as an issue, so that it may be accepted that Petersen's authority to bind Coega is uncontested.<sup>5</sup>

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<sup>3</sup> See *Board of Executors Ltd v McCafferty* 2000 (1) SA 848 (SCA) ('*McCafferty*') para 12, 15: different entities may be considered to be co-employers of an employee in certain circumstances.

<sup>4</sup> Ostensible authority was not pleaded: cf *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) ('*Vodacom*') paras 33 – 42, 59, 119, 121. Unlike *Vodacom*, the issue of authority was not dealt with in the particulars of claim: see H Daniels *Beck's Theory and Principles of Pleadings in Civil Actions* (6<sup>th</sup> ed) (2002) at 13.28.1. Also see *Ying and Another v South British Insurance Co Ltd* 1957 (2) SA 194 (E) at 198F-H.

<sup>5</sup> See *Durbach v Fairway Hotel* 1949 (3) SA 1081 (SR): the denial of the authority of an agent is a special defence and must be specifically and unambiguously pleaded, and not left to be inferred from a general traverse of the allegations in the declaration: at 1082.



[24] It is for the plaintiff to prove the claimed contractual nexus on a balance of probabilities. This relates to the identity of the parties to the contract as well as the terms of the agreement.<sup>6</sup> Proof of the terms of the contract include proof of the anterior question whether both parties had the requisite *animus contrahendi*, and failure to do so will result in the plaintiff being unsuccessful.<sup>7</sup> As the SCA confirmed in *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd*,<sup>8</sup> 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, it is the plaintiff that fails.

### **Did the Trust enter into an agreement with Coega?**

[25] The first essential requirement for a contract is that there is an agreement by two (or more) persons for future performance or non-performance by one or more of them.<sup>9</sup> In ascertaining whether there was an agreement between the parties, it is convenient to consider the matter from the perspective of an offer and acceptance.<sup>10</sup> The agreement on which a contract is based may be actual or apparent. It is actual when there is a true meeting of the minds of the parties on all material aspects of the contract. The parties have the same intention concerning the subject-matter, namely the performance or non-performance in question, and this intention is expressed or communicated by each to the other. It is apparent when, despite the lack of subjective consensus between the parties, there is an objective appearance of agreement (or a reasonable belief in the existence of consensus) which the law will uphold as a binding contract.<sup>11</sup>

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<sup>6</sup> *Stucco Italiano Decorators (Pty) Ltd v Nitida Wine Farm and Others* [2012] ZAWCHC 123 para 61.

<sup>7</sup> *Africa Solar (Pty) Ltd v Divwatt (Pty) Ltd* 2002 (4) SA 681 (SCA) at 698B.

<sup>8</sup> *Ibid.*

<sup>9</sup> F Du Bois (ed) *Wille's Principles of South African Law* (9<sup>th</sup> Ed) (Juta) (2007) at 740. The Trust did not plead a contract concluded with CDC by conduct or by quasi-mutual assent: see GB Bradfield *Christie's The Law of Contract in South Africa* (8<sup>th</sup> ed) (LexisNexis) (2022) at 36-37; *Constantia Graswerke BK v Snyman* 1996 (4) SA 117 (W) ('*Constantia*') at 124I-J, cited in *Vincorp (Pty) Ltd v Trust Hungary ZRT* [2018] ZASCA 35 (*Vincorp*) para 32; Also see *Vincorp*, especially at paras 27 – 33 and *Fischer v Ramahlele* 2014 (4) SA 614 (SCA) paras 13-14: it is generally for the parties to identify the dispute and for the court to determine that dispute and that dispute alone.

<sup>10</sup> *Reid Bros (SA) Ltd v Fischer Bearings Co Ltd* 1943 AD 232 at 241.

<sup>11</sup> Du Bois above n 9 at 737.

[26] To form an agreement it is necessary, firstly, that each party knows what the other intends to do in the way of performance and, secondly, that each assents to the other's intention. For an offer to be capable of being turned into a contract by acceptance, it is necessary that the offer must contain definite terms of performance and that it must be made with the intention of being accepted by some other person.<sup>12</sup> Acceptance of an offer is an assent by the person to whom the offer is made to be bound by the terms contained in the offer.<sup>13</sup> In order for the acceptance to constitute a contract it is necessary that the acceptance be definite and unconditional, and also that the acceptor be a person to whom the offer was intended to be made.<sup>14</sup> An acceptance by some other person does not constitute a contract.<sup>15</sup>

[27] In *Bird v Sumerville and Another*,<sup>16</sup> for example, the court gave detailed consideration to the intended recipient of an offer, holding that it was impossible to say that the appellant intended to make an offer to two respondents jointly in circumstances where he did not know of the existence of the second respondent. Consideration was given to the expressed intention of the appellant in making the offer (to the first respondent only). As that offer was not accepted by its recipient, the court held that no contract of sale had been concluded.<sup>17</sup>

[28] The evidence establishes that the Trust, via Mr Hancke (junior), offered to supply material and machinery to QMC in return for payment. The Trust's intention, also considering its communication with QMC, was that Coega would accept the offer and assume responsibility for payment. In fact, the offer was communicated to

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<sup>12</sup> See du Bois above n 9 at 741. An offer can be accepted only by a person to whom it was made or was intended to be made. An acceptance by some other person does not constitute a contract and an offer cannot be accepted by a person who does not even know of it: at 743. Also see *Blew v Snoxell* 1931 TPD 226 at 229-230: 'an offer made by one person to another cannot be accepted by a third ... for the simple reason that there was no intention on the part of the one person to contract with the other person whatever the subject matter of the contract may be.'

<sup>13</sup> See *Levin v Drieprok Properties (Pty) Ltd* 1975 (2) SA 397 (A) at 409A-C.

<sup>14</sup> Du Bois above n 9 at 742.

<sup>15</sup> Du Bois above n 9 at 743. What determines who can accept an offer is the intention of the offeror as proved by the terms of the offer and by any other admissible evidence: *Hersch v Nel* 1948 (3) SA 686 (A) at 691 – 693. Also see *Rudman and Norman (Edms) Bpk v Dunell, Ebdon & Kie Bpk* 1959 1 PH A12 (O): an offer of renewal of contract was clearly intended to be accepted by two company directors, rather than the company to whom the offer was addressed. It was held that the company was not entitled to accept the offer.

<sup>16</sup> *Bird v Sumerville and Another* 1961 (3) SA 194 (A).

<sup>17</sup> *Ibid* at 203F-H.

Petersen, who communicated his agreement. The arrangement was concluded orally, by way of a brief telephone call. A second telephone call, seemingly equally brief, related mainly to the invoicing process and clarified the relationship between Petersen's principal and QMC.

[29] Petersen was a Coega employee, performing key functions for SBFS. His e-mail address reflected that reality and the overall project was a Coega project. He appeared to suggest, during cross-examination, that it was incumbent on QMC to have clarified its relationship with SBFS to the Trust. There is simply no evidence that it did so or that the Trust had any inkling that Petersen represented an entity other than his employer in his dealings with it. Petersen had no difficulty in accepting that, absent such communication, any outside person would have been unaware of the specifics of an internal financing arrangement involving SBFS. Hancke's evidence, which must be accepted, was that his dealings were with Petersen for payment and that, in that respect, he knew of no other entity other than Coega.

[30] Petersen, however, had no intention to contract on behalf of Coega. As the following excerpt indicates, and as this court accepts, he intended to accept the offer on behalf of SBSF, an entity fulfilling a specific function for Coega:

'Is it correct that you represented CDC [Coega] in an agreement for CDC to pay for a SMME that was contracted by one of its contractors Pro-Khaya?

No, absolutely not.

Did you ever make that statement to the plaintiff?

No, absolutely not.

Why would you not have made such a statement, why would the plaintiff believe otherwise?

We indicated that we will make payment M'Lord on behalf of the CDC and maybe I must go back to the engagements that we have had with Mr Hancke jnr. My engagement was in terms of the arrangements was with Mr Hancke jnr. Mr Hancke

jnr. contacted me via telephone and part of our services as support services that we provide, is to make payment on behalf of the SMME's that we fund...So, because the payments are ceded to us Mr Hancke contacted me...So we offer this product to our client and the first and the initial engagement was a brief conversation that we had with Mr Hancke M'Lord and he telephoned me and I confirmed who I am...So I confirmed that we were able to pay upon receipt of payment, because Qingani Ma-Afrika's payments they were not able to pay themselves. So in that respect we agreed to make payment based on the fact that the progress payments are ceded to us...'

[31] Put differently, it may be accepted that the Trust's initial conversation with Petersen was intended to convey an offer to Coega. Petersen indicated his agreement, the Trust knowing full well that he did so on behalf of a principal.<sup>18</sup> The Trust assumed, however, seemingly on the strength of their discussions with QMC, that Petersen was expressing agreement on behalf of Coega. The Trust was mistaken in doing so. In fact, considering the evidence in its entirety, it is apparent that Petersen never intended to contract on behalf of Coega and, judging by the evidence of the external manifestations, the Trust was not truly in agreement with Coega. The 'us' and the 'we' in the quotation, above, are clearly references to the SBSF, as cessionary to QMC's progress payments. This is, in effect, Coega's plea.

[32] The fact that somebody has authority to contract on behalf of a principal does not mean that every time such person concludes a contract they do so as the principal's agent:<sup>19</sup>

'The mere fact that he had the authority to bind his principal cannot without more be proof of the fact that he did in fact act as agent for him ... the question whether he acted as agent or not in a particular case must be established from other circumstances.'

[33] Even though it is accepted for present purposes that Petersen had the authority to bind Coega, he did not accept the offer and contract on its behalf, even

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<sup>18</sup> Cf *Cullinan v Noordkaaplandse Aartappel-kernmoerkwekers Koöperasie Bpk* 1972 (1) SA 761 (A).

<sup>19</sup> *M & C Finance (Pty) Ltd v Segalo* 1994 (1) SA 233 (O) at 235I – 236C.

though the Trust might have understood that he had done so.<sup>20</sup> *Mr Ronaasen* relied on *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others (SFW)*<sup>21</sup> to argue that Petersen's failure to respond to the correspondence addressed to him on 24 January 2016 was a strong indicator in support of the Trust's version. I disagree in the circumstances, which I consider to be clearly distinguishable from *SFW*. The letter was addressed some six months after the alleged contract, as part of the process leading to litigation, which Petersen explained was part of the reason for not responding. While he may not have taken issue with much of the contents of the letter, he did not intend to contract on behalf of Coega.<sup>22</sup> The letter does not tilt the scale sufficiently. Considering the evidence before me, the Trust has ultimately failed to discharge the onus of establishing the necessary *animus contrahendi* and proving a contract with Coega, represented by Petersen, on a balance of probabilities.<sup>23</sup>

## Costs

[34] I have considered *Mr Ronaasen's* submissions that Petersen's conduct in failing to explain to Hancke that he was contracting with SBFS warrants the conclusion that each party be ordered to pay their own costs. In deciding to follow the usual approach in respect of costs, I have been influenced by the fact that the defendant's special pleas and amended plea were filed during October 2020. Those pleas, read together, ground the defendant's case in Petersen acting on behalf of SBFS, a separate legal entity from Coega, and the denial of an oral agreement between the Trust and Coega. The plaintiffs nevertheless persisted in their claim against Coega. They have been unsuccessful and must be ordered to pay the defendant's costs, including the costs of only one counsel, on the usual scale.

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<sup>20</sup> Cf *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479 – 480; cf *Marais & Others v Varicor Nineteen (Pty) Ltd* [2017] ZASCA 46 (*Marais*) paras 23 – 32. Also see G Glover 'Agency in South Africa: Mapping its defining characteristics' in *Acta Juridica* (2021) 243 at 267.

<sup>21</sup> *Stellenbosch Farmers' Winery Group Ltd and Another v Martell & Cie SA and Others* [2002] ZASCA 98 para 22.

<sup>22</sup> See *Vincorp* above n 9, paras 28, 31. The SCA confirmed, at para 32, that failure to discharge the onus of establishing the necessary *animus contrahendi* on the part of both parties is the end of the matter.

<sup>23</sup> *Vincorp* above n 9 para 32. See *Marais* above n 20 para 33; *South African Eagle Insurance Company Limited v NBS Bank Limited* [2001] ZASCA 118; [2002] 2 All SA 220 (A) paras 26, 27; *Corvine Investments* above n 1 paras 60 - 63.

**Order**

[35] The following order will issue:

1. The plaintiffs' claim is dismissed with costs.

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**A GOVINDJEE**  
**JUDGE OF THE HIGH COURT**

**Heard:** 22-23 February 2021; 09-10 February 2023 and 11 April 2023

**Delivered:** 13 June 2023

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