REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG LOCAL DIVISION, JOHANNESBURG)

CASE NO: 2008/20378

DELETE WHICHEVER IS NOT APPLICABLE
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In the matter between:

SYSTEMS APPLICATIONS CONSULTANTS (PTY) LTD **Plaintiff**

And

SYSTEMS APPLICATIONS PRODUCTS **Defendant**

JUDGMENT

TSOKA J:

[1] The plaintiff is Systems Applications Consultants (Pty) Ltd t/a Secureinfo (SAC), a South African Company which carries on business as a software developer and

implementer. Its software specializes in security of software of large international companies.

[2] The first defendant SAP AG, now known as SAP SE (SAP), is a German company which carries on business as a developer and marketer, world-wide, of software applications and business solutions of computer programs with integrated financial, human resources, sales and services, data warehousing, logistics and manufacturing standard application software based on an open integration and application platform.

[3] The second defendant is Ungani Investments (Pty) Ltd (Ungani), a South African Company which funded SAC to institute both contractual and delictual claims against SAP. It consented to be joined as a party to the litigation. Its role in the present proceedings is thus limited to its function as the funder of SAC.

[4] SAP is sued in this matter as a parent company of SAP SI. It is SAC's allegations that SAP induced SAP SI to breach its contractual obligations with SAC. According to the latter, in 2004, it concluded an agreement with SAP SI in terms of which contract SAP SI was to promote SAC's software product that was compatible with SAP's software and computer programmes. SAC further alleges that the SAP induced SAP SI not to sell and promote SAC's software product but instead promote and sell a product known as Compliance Calibrator owned by an American company, Virsa.

[5] According to SAC, SAP's interference in the contractual relationship between it and SAP SI resulted in the consultants of the latter no longer selling and promoting SAC's product, which product to the knowledge of the contracting parties was known as a better and good solution for SAP SI's customers. The interference and strong -arming of SAP SI by SAP, so contends SAC, caused the destruction of its business hence the latter sues SAP in delict for the damages suffered as a result of SAP's unlawful conduct.

[6] As SAP is a peregrinus of this court, SAC launched an application to attach shares in SAP's local company to found jurisdiction, which application was in due course granted. Evidently, SAP is an incola of Germany and the cause of action of SAC arose wholly in Germany. It is on this basis that the German Law is applicable while all the procedural issues relating to this matter are to be determined by the South African Law.

[7] Although the litigation in this matter commenced more than 12 years ago in 2008, the trial in this matter only commenced in October 2020 and was concluded on 17 September 2021. It is SAC's contention that SAP resisted its claims on numerous technical bases and raised several unmeritorious interlocutory defences which defences were unsuccessful with result that SAC ran out of funds and had to turn to Ungani for funding to enable it to prosecute these claims. It is further SAC's further allegation that SAP, because of its limitless financial muscle, it engaged in every delaying tactic available so that the trial should never ever see the door of the court for the proper ventilation and resolution of the issues in this matter. That SAC's contention has some semblance of truth, is evidenced by the blunder- buss

approach as to how this litigation was conducted, the number of documentary exhibits produced, the numerous emails discovered, the various unmeritorious applications launched as well as the numerous unfounded and unmeritorious objections raised and decided against SAP. The less said about how the trial was conducted, the better. The record, however, speaks for itself.

[8] There appears to be four discrete issues, the fourth pleaded in the alternative, to be determined in this matter which issues on 14 September 2021, SAP conceded that they are indeed the issues to be resolved by this court, which issues, in my view, would not have required almost twelve months to resolve.

[9] The four issues are the following-

9.1 Whether SAC is a party to the contract concluded between it and SAP SI which issue is commonly referred to between the parties as the identity issue and whether the parties who acted on behalf of SAP SI had the necessary authority to bind it;

9.2 Whether the contract between SAC and SAP SI was in fact ever concluded;

9.3 Whether in German law of delictual liability, SAC made a case in terms of section 826 of the BGB alternatively in terms of section 823(1) of the BGB.

[10] Unlike the South African law, which in the main is based on the Roman –Dutch law and is uncodified, the German substantive law is codified, hence a determination

must be made whether SAC has made a case against SAP based on section 826 of the BGB or section 823 of the same code.

Is SAC a party to the alleged agreement between it and SAP SI which agreement is commonly known as the Software Distribution Agreement (the SDA).

[11] The issue with the identity of the contracting party to the SDA was raised as a special defense by SAP as it contends that SAC was not a party to the SDA but Secureinfo Limited, an Irish Company founded in1997 having its registered offices in Dublin, Ireland.

[12] SAP further contends that SAC is not a contracting party to the SDA, as this Irish company was, this is common cause, deregistered in 2000 with the result that in 2004 when the SDA was allegedly concluded, Mr Peter Tattersall (Mr Tattersall) acted for a non-existing principal. This being so, so contends SAP, the German Law provides that there is therefore no contract ever concluded between SAC and SAP SI but that Mr Tattersall is thus liable to SAP, should the latter suffer damages and elect to sue Mr Tattersall for concluding the SDA on behalf of a non-existing company.

[13] As this court is dealing with foreign law, namely German Law, which is a question of fact, which must be proved, the onus is on SAC to prove that it was the other contracting party to the SDA. *In Asphalt Venture Windrush Intercontinental SA &*

another vs UACC Bergshav Tankers AS2017(3) SA 1(SCA) para 13, the court reasoned as follows:

"*Where a court is dealing with the evidence of experts on foreign law it is entitled to consider it in the same way in which it considers the evidence of any other expert. As this court has constantly said, foreign law is a question of fact and must be proved. This is achieved by reference to the evidence of experts i.e. lawyers practicing in the courts of the country whose law our courts want to ascertain…"*

[14] In the present matter, SAC led the evidence of Professor Doctor Barbara Dauner-Lieb (Prof Dauner-Lieb) while SAP led the evidence of Professor Doctor Gerhard Wagner (Prof Wagner) to prove the German Law on the issue whether SAC was the contracting party to the SDA or not. The two witnesses are German professionals and are both experts on the law of contract and delict. Prof Dauner-Lieb is a judge in Germany while Prof Wagner is a professor of Law at the university of Humboldt.

[15] The starting point as to whether SAC was the other contracting party to the SDA, in my view, hinges on the evidence of Mr Tattersall.

[16] The evidence of Mr Tattersall is that in 1997 he incorporated a company known as Secureinfo Limited in Ireland as his advisors informed him that Ireland was a tax haven with the result that he would pay less tax in that country than if he used a South African company. When he was later informed that the tax advantage he wanted to take advantage of has been changed, and the fact that he was

dissatisfied with his advisers regarding the incorporation of Secureinfo Limited, he abandoned this name. Neither did he pay his advisors their fees due to them in incorporating the company.

[17] During 2000 the Irish authorities deregistered Secureinfo Ltd. But as he still wanted to go international with his software product, which incidentally is known as Secureinfo, he adopted the company's name. The reason for doing so, according to him, was to utilize the brand name Secureinfo and the fact that the name was more palatable to him than SAC. From that time onwards and until he met and marketed his software product to SAP SI, he operated as SAC t/a Secureinfo Limited, sometimes just as Secureinfo. He never traded in South Africa as Secureinfo Limited because in South Africa the appellation ''Limited'' could only be used for a public company while it is undeniable that SAC is a private company entitled to use the appellation ''(Pty) (Limited)"

[18] At the time of the abandonment and deregistration of Secureinfo Ltd, this company had no directors. Neither did it have any employees. In fact, according to his evidence, this company never traded at all. There is therefore no company in South Africa known as Secureinfo Limited with its trading address in Carlswald, Midrand.

[19] During 2004, acting on behalf of SAC trading as Secureinfo Limited, he met SAP SI's employees, namely Mr Mario Linkies, (Mr Linkies) who was the leader of the Security team at SAP SI reporting to one Mr Manfred Wittmer (Mr Wittmer), and one Mr Rolf Ahrens (Mr Ahrens), a procurist (a legal advisor of SAP SI), to negotiate the terms and conditions of the SDA. Although he has no anchor to refresh his memory

as to which name he negotiated the selling and promotion of his software product, which product was compatible with SAP's software systems, he remembers clearly that he informed the two officials from SAP SI that he was acting for SAC trading as Secureinfo Limited, a company that is from South Africa.

[20] Mr. Tattersall's version is supported by Mr Linkies who corroborates that indeed Mr. Tattersall informed them that he acts for SAC trading as Secureinfo Limited. Although Mr Ahrens remembers little of the name used by Mr. Tattersall, in his evidence he persisted with the version that the only company that Mr. Tattersall represented and acted for was Secureinfo Ltd and no other company.

[21] Not only is the testimony of Mr. Tattersall corroborated by Mr Linkies but by Dr. Sachar Paulus as well. Dr Paulus was the head of security at SAP SI at the time. According to Dr Paulus, although memory fades with time, he remembers that Mr. Tattersall informed them that he represents a South African company SAC t/a Secureinfo Limited. This, according to him stuck with him as in Germany there is no trading name such as is found in South Africa. That is the reason why in 2011, when he deposed to an affidavit for an application to attach shares in the local SAP to find jurisdiction, he clearly remembered that SAC was trading as Secureinfo.

[22] SAP's witnesses instead of refuting Mr Tattersall's version, do in fact corroborate that the other contracting party to the SDA is SAC. Mr Christian Lehment (Mr Lehment), the liaison officer with customers at SAP SI, who works in Doctor Paulus's security department, testified that Mr Tattersall introduced himself as a managing director of SAC. Later in the interaction with Mr Tattersall, the latter

changed the name he wished to partner with SAP to that of Secureinfo. From that time onwards he regarded Mr Tattersall's company as Secureinfo. He surprisingly denied that Mr Tattersall ever told him that SAC was trading as Secureinfo.

[23] In cross-examination, matters took a different turn. He now remembers that Secureinfo is a South African company and no longer an Irish company. When confronted with the emails coming from their department alluding to the names SAC and Secureinfo being used interchangeably, his explanation is then that he did not pay attention to the names of the companies Mr Tattersall represented. Neither does he recall that Doctor Paulus was ever told of SAC's trading name.

[24] What puts beyond doubt that Mr Lehment's version cannot be true appears from the email that he personally sent to Mr Tattersall on 6 August 2001 at 9. 54.57 am introducing himself as the person working in Dr Paulus's team. In that email, with the subject line of Authorization Toolkit, he addressed the email to Mr Tattersall of SAC. In addition, almost a month later, on 18 September 2001 at 5: 20:16 pm he was sent an email by Doctor Paulus. In the email the subject line reads "RE SAP – Secureinfo/SAC- Partnership; Status request". From just this email one can clearly see that not only Mr Tattersall interchangeably uses SAC and Secureinfo, but SAP SI too. Mr Lehment's version that he knows of no other company other than Secureinfo is nothing but an untruth.

[25] Christina Buchholz (Ms Buchholz), an employee in the Integration and Certification Center of SAP testified that she also dealt with Mr Tattersall representing

Secureinfo and not SAC. In cross -examination, she was shown emails that speak a different language to her testimony. She then changed tack that as a technical person, she paid no attention to the names of the companies used by Mr Tattersall but only to the product Mr Tattersall introduced to SAP.

[26] Tellingly, Ms Buchholz while holidaying in Sweden, sent Ms Christina Mildenberger, her co-worker at SAP, an email which email reads-

"*From: Buchholz, Christina*

To: Mildenberger, Christina

Subject: FW: Secureinfo. Software Partner Application

Date: Thursday, 13 September 2001 12:11:13

Hello Christina,

Even from Sweden, I still have to work for you. Please send this partner (Systems Applications Consultants, attn: Mr Peter Tattersall, (and please don't laugh) a validation (without integration assessment) for my SAP Technology / Security.

Thank you and best regards

Christina.''

[27] Nothing can be clearer from this email than that both SAP SI and SAP knew that the company that Mr Tattersall sought to partner with SAP, was Systems Applications Consultants, SAC, a company whose managing director was Mr Tattersall, and that Mr Tattersall was from South Africa and was representing a South African company.

To most, if not all, that dealt with Mr Tattersall, knew this fact. To suggest otherwise is disingenuous. This is nothing but a diversion as to the correct plaintiff in this matter. In fact, according to Prof Dauner-Lieb, there is an important principle of German contract law that says the intention of the counterpart that matters is that of the entity that actually operates the business, irrespective of the name used by such entity.

[28] In the present matter, the entity that actually operates the business is SAC and not Secureinfo Ltd founded in Dublin, Ireland in 1997 with no directors. Prof Wagner, in his opinion, supported by the German Federal Supreme Court (BGH) in the case of *Lothar K*, concedes that the intention of the true owner of the business is indeed the real contracting party than what name the other party uses, even if the name may create confusion. That is the basis of the joint minute of both Professors Dauner-Lieb and Wagner agreeing that the maxim: "*Falsa demostratio non nocet"*- loosely translated, "a false declaration does not harm", applies. According to the two experts, the subjective will of the two parties, in the present matter, SAC and SAP SI, prevail over the name the other contracting party uses.

[29] The German law principle of unity of firm name alluded to by Prof Wagner, in terms of which a single business must always use its proper name but not the name of another corporate entity, is not offended by Mr Tattersall in using SAC t/a Secureinfo. On the evidence on record, both SAP SI and SAP knew which entity Mr Tattersall represented. It is undisputed that the company that Mr Tattersall represented was SAC. This company SAC, trading as Secureinfo or Secureinfo Ltd or just as Secureinfo, means no other corporate entity other than SAC, the present plaintiff in this matter. To contend as SAP does, that Mr Tattersall represented an Irish

company founded in 1997 in Dublin, Ireland, is a red-herring. The contention is unfounded and is rejected.

[30] Having regard to the oral testimony of the witnesses, the emails exchanged between the parties, the conclusion reached is that Mr Tattersall has, on a preponderance of probabilities, proved that SAC is the plaintiff. On this basis, SAC has the capacity to participate in the proceedings before this court. SAP's special plea has thus no merits. It must therefore fail.

Whether the SDA was ever concluded and the persons who acted on behalf of SAP SI in concluding the contract had the necessary authority to bind SAP SI.

[31] The real issue is whether the SDA was concluded by conduct or not. Again, the issue of an offer in terms of s 154 (2) of the BGB is nothing but a diversion. In fact, according to Prof Dauner-Lieb, she testified that it is almost impossible to determine when an offer is made, accepted or a counter offer made and accepted, when it is common cause that in May 2004 at a meeting in Beinshein, Germany, Messrs Tattersall, Linkies and Ahrens went through the SDA clause by clause, one suggesting something while the other suggesting something else until an agreement was reached with regard to the terms of the SDA other than the minor issue as to whose responsibility was it who will attend to customer's complaint should such complaint arise regarding support of the software product, Secureinfo.

[32] That the draft SDA contemplated signature by SAP SI is beyond question. Mr Tattersall, however, does not rely on the signed SDA to assert SAC's rights. His reliance that the SDA was concluded is based on the conduct of both Messrs Linkies and Ahrens as well as the persons in SAP who implemented the terms of the SDA ie. by conduct.

[33] According to Mr Tattersall, when in May 2004, and all the terms of the SDA were agreed to, but one, he was assured that the partnership between SAC and SAP SI has been established. Both Mr Linkies and Mr Ahrens, assured him that he need not have to worry about the signature by SAP SI as the two were unsure who in SAP SI had to give a final approval and signature of the SDA.

[34] In German Law of contract, there is what is known as "*Duldungsvolmacht*"- "tolerated power of representation" and "*Anscheinsvolmacht*"– "apparent power of representation". The real issue is whether Mr Linkies and Mr Ahrens had the power to negotiate the terms of the SDA and thus bind SAP SI in spite of the lack of signature by the latter. Professors Dauner-Lieb and Wagner, in their joint minute, principle 3, express themselves thus-

"The contractual assent of corporate employee other than duly authorized agents is not sufficient to bind the corporation to an agreement. The German law doctrines of "tolerated power of representation (Duldungsvollmacht)" and "apparent power of representation (Anscheinsvollmacht)" have as the common purpose to protect the good faith contractor. They require that the represented legal juristic person knows (Duldungsvollmacht) or should have known (Anscheinsvollmacht) the actions of the

person represented and does not impede the consequences of either. They also require that the other party to the contract acted in good faith, i.e. that it relied and had reason to rely on the perceived authority of the would be agent".

[35] Both Mr Linkies, Mr Ahrens, and to some extent, Mr Wittmer had these power of authority to bind SAP SI. It must be borne in mind that Mr Linkies was at the competence center, risk management & IT security of SAP SI while Mr Ahrens, was a procurist (a legal advisor) of SAP SI. Mr Wittmer was Mr Linkies's boss at SAP SI. That these persons had, on a balance of probabilities, authority to bind SAP SI is beyond question. If not, and SAP SI, "*closed their eyes and looked the other way*", as Prof Wagner puts it, SAP SI is bound by the actions of both Mr Linkies and Mr Ahrens in concluding the SDA.

[36] In the instant matter, there are several indicia that SAP SI knew of the actions of both Mr Linkies and Mr Ahrens. The first is the conclusion and announcement, both internally and externally, that a partnership has been established between SAC or if you like Secureinfo, and SAP SI. Not only was the announcement, externally made by SAP SI alone, but with Mr Tattersall's input which was sought as well. The foundational basis of this partnership was nothing else but the SDA. At the time of the announcement of the partnership, it was common cause that only Mr Tattersall signed the SDA. The fact that SAP SI had not yet signed the SDA, did not prevent the announcement of the partnership between the two parties. Neither did SAP SI ever objected to the announcement of the partnership that internally, the SDA had not yet been signed.

[37] Secondly, the terms of the SDA, as evidenced by the contract concluded between SAP SI/ TRW, SAP SI/ BHP Billiton indicate that SAP SI knew or at least should have known of the conclusion of the SDA. Thirdly, large payments emanating from SAP SI were made to Mr Tattersall in terms of the SDA. From the payments so made, SAP SI deducted their 25% share of the license revenue as envisaged in the SDA. There cannot therefore be any suggestion that SAP SI did not know of the SDA. Rhetorically, if SAP SI did not know of the SDA, how was its 25% share determined? Who agreed to it? And when?

[38] According to Prof Dauner-Lieb, if SAP SI did not prevent the announcement of the partnership and the implementation of the two contracts mentioned above, and in fact, the making of the large payments to the other contracting party, without pulling the emergency brakes, SAP SI must be taken to have conferred authority on both Mr Linkies and Mr Ahrens either by tolerated power or by apparent power to deal with Mr Tattersall or SAC.

[39] The board representative to sign the SDA on behalf of SAP SI was Mr Alfred Ermer. In spite of the fact that he knew that his signature to the SDA was lacking, according to Mr Linkies, Mr Ermer congratulated Mr Linkies on how quick the partnership with Mr Tattersall was concluded. In the face of the evidence of Mr Linkies, Mr Ermer, who was available to testify was not called to refute Mr Linkies' version. The inevitable and reasonable inference to be drawn is that Mr Ermer was not called as he could not support SAP's version that the SDA was never concluded. Mr Linkies's evidence on this issue must thus be accepted as the truth.

[40] In disputing Mr Tattersalls version that the SDA was concluded, SAP raised two bases, namely, that Mr Tattersall was putting pressure on Mr Linkies to furnish him with the signed SDA and secondly, that, in Germany, SAP SI's official authorized representative who would sign on behalf of SAP SI and bind it, were expected to be recorded in the public company register in Dresden, Germany.

[41] Mr Linkies' unchallenged evidence, despite SAP's attempt to put his evidence in doubt, is that he pressurized Mr Tattersall to push his own company to regularize the relationship between SAC and SAP SI. In fact, Mr Linkies denied that Mr Tattersall "sat on his neck" by pressurizing him to produce the signed SDA. In cross examination, Mr Linkies was pertinently confronted with the version that SAP's local attorney would testify that he, Mr Linkies, admitted to him that pressure was put on him by Mr Tattersall and that he, Mr Linkies knew that there could not be an SDA without signature which factor was known to Mr Tattersall.

[42] Surprisingly, SAP's local attorney who was present in court and available to testify, was not called. Mr Linkies' testimony that Mr Tattersall never pressurized him to produce the signed SDA, and that the pressure on SAP SI to sign the SDA came from him, remains unchallenged. The pressure exerted on Mr Linkies by Mr Tattersall, if any, is not concession on Mr Tattersall's part that he knew that the SDA had not yet been approved, authorized and signed.

[43] Mr Linkies explained to the court that he, himself, was put under pressure in order to make the concession that Mr Tattersall pressurized him to produce the signed SDA. He explained to the court that he made the concession as his life and that of his family was at risk. In fact, he testified that he received threatening telephone calls with the result that to save his and his family's lives, he left SAP. The result is that there is therefore no basis to second- guess Mr Linkies's evidence that he pressurized SAP SI for his own purposes for the signature of the SDA. And that it was not Mr Tattersall but himself who pressurized his employers through Mr Tattersall for the production of the signed SDA.

[44] With regard to Dresden's register reflecting the names of the persons authorized to represent SAP SI and thereby bind it, Prof Dauner-Lieb pointed out that the doctrines of tolerated power and apparent power of representation were not excluded by the existence of this register, which, ostensibly, Mr Tattersall should have known as the register was there for all to see. In fact, in her opinion, if the register was to exclude these doctrines, there would never be room for operation of these doctrines. Prof Wagner, on the other hand did not suggest otherwise.

[45] Prof Dauner-Lieb finally concluded that the German company statute, Aktiengesetz, specifically made provision for the possibility that those with official authority to

represent the company, as reflected in the register, could tacitly be delegated to others. She pointed out that in terms of section 78 (4) Aktiengesetz, this delegation of authority is in fact authorized.

[46] Did Mr Tattersall act in good faith in relying on the absence or rather the assurance that he need not worry about the signature of the SDA?

[47] According to both Mr Linkies and Mr Ahrens, at the meeting in May 2004 when the SDA was discussed and its terms agreed to, but one, he was given an assurance that the partnership between him and SAP SI has been established. Mr Tattersall was informed that although the other contracting party has not signed, the signature will be forthcoming though the person to sign on behalf of SAP SI was, at that stage, unknown. It was on this basis that shortly thereafter the partnership was publicly announced. Both Mr Linkies and Mr Tattersall made the front page of an IT magazine known as Sicherheit announcing the partnership.

[48] According to Prof Dauner-Lieb, Mr Tattersall's reliance on Mr Ahrens, the procurist at SAP SI, was more than reasonable and justified. Mr Ahrens was not only a procurist but one of the authorized signatories of SAP SI. There is therefore no basis to suggest that Mr Tattersall, on these facts, would not take Mr Ahrens's word for it. In any event, Mr Ahrens himself believed that the partnership has been established. How then can one blame a counter- party, a foreigner and a non-lawyer such as Mr Tattersall believing that a partnership has indeed been established, and that he need not concern himself of the absence of the signature

of the SDA by SAP SI? Mr Tattersall cannot therefore be blamed for believing that the SDA was concluded. His belief was justified and, in the circumstances, reasonable.

[49] Had the formal signature been a bar to the conclusion of the SDA, both SAP SI and its parent company SAP, would not have publicly announced the partnership, the very foundation of the unsigned SDA. In any event, at no stage was Mr Tattersall informed that the partnership cannot be announced as the SDA has not been signed and that the minor term of support had not been resolved. At that stage the SDA had the exclusivity clause that all the parties agreed to. None of the parties to the SDA ever raised this clause as the stumbling block for the signature of the SDA.

[50] The terms of the SDA were implemented by both Mr Tattersall and SAP SI. The implementation of the terms of the SDA was to the knowledge of all the parties concerned, effected in spite of the missing signature from SAP SI. This is because, according to Mr Tattersall, on 25 and 26 May 2004, over a period of two days “We went through the SDA from beginning to end. We went through every single clause. We discussed each one, why it was necessary, what is meant and what is expected and what they expected from our anticipated relationship”

[51] Although Mr Ahrens remembers this two-day meeting but not its details, Mr Linkies does. According to the latter, they discussed the SDA and all its terms and the fact that SAP SI, internally, had still to sign the SDA. He, however, is unable to shed light to the court as to whether Mr Tattersall was informed that the SDA had to go

through Laufzettel process, an issue now advanced by SAP as a basis on which SAC's claims had to be defeated. Mr Ahrens' sudden recall that Mr Tattersall was indeed informed of the Laufzettel process must therefore be rejected as an after-thought as he clearly did not remember the details of the May 2004 meeting other than the fact that the meeting in fact did take place.

[52] In June 2004, both parties were already intending to proceed with the joint marketing activities. At that time, it was clear to all and in fact common cause that SAP SI has not yet signed the SDA.

[53] Mr Tattersall's understanding that the internal process, or the Laufzettel, has been approved and given, is captured as follows-

> *"My understanding was that it had already been approved, as he Mr Ahrens says that there is a small issue that they want to resolve with the prospective support but they (SAP SI), my understanding was that they had approved it and that they were going to announce it as he says, this very week"*

Ultimately the partnership was indeed announced on 8 July 2004.

[54] Unsurprisingly, the following day on 9 July 2004, Mr Linkies wrote to Mr Tattersall and Mr Mark Lewis of Secureinfo in the USA confirming the partnership in the following terms-

"Hello Peter, hello Mark, I am very pleased to inform you that yesterday SAP SI has announced the partnership with Secureinfo. The next major step is the Secureinfo for SAP training at the end of the month…" The training referred to in this email is the training provided for in terms of the SDA. As a consequence of the announcement of the partnership, SAP SI immediately started informing everybody, including its staff and customers, that the partnership had been concluded. On this basis, Mr Tattersall understood that apart from the outstanding issue of customer support, the SDA was approved hence the announcement of the partnership.

[55] According to Mr Linkies, nothing in terms of the SDA could be done until the SDA had been approved. It was only on 7 July 2004 that the SDA was approved resulting in the announcement of the partnership on 8 July 2004. This is confirmed by an email from Mr Holger Plengemeyer, at Partner Management Sales Operation of SAP SI, addressed to Mr Linkies' boss Mr Wittmer, with the subject line: "Vertrag (contract) Secureinfo" that reads-

"The approval by Legal (Mr Ahrens' department) was issued last night. There are only a few details (support) to tie up. The announcement / press release will go out today (8 July 2004)"

[56] Mr Wittmer in cross-examination conceded that the partnership that was announced was the partnership contemplated in the SDA. From the email, and in particular with regard to the subject line, there can be no doubt that the announced partnership is the one contemplated in the SDA. Mr Ahrens' attempt to downplay the

announcement of the partnership as a marketing measure or tool, is thus untruthful, if one has regard to the invoice issued to SAP SI by Mr Tattersall for the disbursements of the training of SAP SI's security consultants at the end of July as provided in the SDA. Sight should not be lost that in terms of the SDA, Mr Tattersall or SAC/ or Secureinfo was not entitled to charge consulting fees but to charge only disbursements relating to travel, meals and accommodation. See Schedule P of the SDA. The invoice issued by Mr Tattersall and paid by SAP SI related to disbursements only. Furthermore, on 2 August 2004, a strategy workshop was held between the parties to plan and co-ordinate their sales and marketing activities in terms of the SDA.

[57] The result is that Mr Tattersall, in good faith, understood that the SDA has been approved and that SAP SI could go ahead and announced the partnership. Unsurprisingly, he understood that the signature was now just an internal formality which would occur in due course. That is the reason why on 9 August 2004, Mr Tattersall handed SAC's entire confidential list of customers leads to SAP SI as provided for in the SDA. Had the SDA not been approved, and the partnership not announced, there is no explicable reason why Mr Tattersall could have parted with SAC's confidential list of its customers leads. The conclusion reached is that Mr Tattersall indeed acted in good faith and in particular that the signature of the SDA was done away with, and that the signature was just an internal formality, which in any way, did not prevent the coming into operation of the SDA.

[58] The belief of Mr Tattersall that the SDA was concluded is supported by what happened in early 2005. During this period Mr Wittmer insisted that SAP SI earn a

commission on the consulting fees which was not provided for in the SDA. The SDA only provided for commission on license fees earned. In terms of the SDA, SAP SI was to earn 25% of the licensing fees but Mr Wittmer insisted on 30%. In the discussion that followed, Mr Tattersall invoked the provisions of the SDA, which invocation was never challenged. For the sake of peace, and probably for the smooth working relationship going forward, Mr Tattersall relented and agreed to SAP SI's 30% of the fees.

[59] Again, on 2 February 2005, with regard to the Syngenta contract, Mr Tattersall complained about the 30% fee to SAP SI and stated that –

> *"I have to change the rates to incorporate a strategy (possible strategy) consultants etc. I have difficulty with this 30% thing and we are going to have to come up with a better way around this because this disregard the essence of our agreement (SDA)…."*

[60] On 10 February 2005, Mr Tattersall further asserted the fact that SAP SI is disregarding the SDA in wanting to charge 30% fees not provided for in the SDA. He complained thus-

> *"Hi Dirk*
>
> *We are not accepting this 30% business. Firstly, this is not in our partnership agreement …Sorry but no go on the 30%, otherwise OK!"*

At no stage did SAP SI or its personnel dealing with Mr Tattersall ever suggested that there was no valid partnership agreement or that the SDA has not been signed.

[61] Lastly, Mr Tattersall raised the SDA when Mr Wittmer demanded that Mr Tattersall sign a Master Agreement with SAP SI. In the email, he pertinently referred to the SDA and pointed out that he is still awaiting a signed copy of the SDA from SAP SI. Mr Wittmer did not challenge Mr Tattersall on the validity of the SDA. The inescapable inference to be drawn is that Mr Wittmer knew that there was a valid SDA between Mr Tattersall and SAP SI. If all else acted in good faith, why not Mr Tattersall? The answer to the question is self-evident. The relationship between the two contracting parties was indeed governed by nothing else but by the SDA.

[62] In the result, the conclusion reached is that, from the various emails exchanged between Mr Tattersall and SAP SI, and within SAP SI itself, and the repeated invocation by Mr Tattersall of the SDA, leads to no other conclusion other than that there was a valid SDA between the parties. There is therefore no basis to conclude that Mr Tattersall did not act in good faith in his dealings with SAP SI or its personnel. The persons who acted on behalf of SAP SI had the necessary authority and permission to act on its behalf. Sight should not be lost that any reference to Mr Tattersall is reference to SAC or Secureinfo or SAC t/a Secureinfo or Secureinfo Limited.

[63] The honest and genuine belief that the SDA was concluded by conduct, and, in particular, implementation of its terms, was not only held by Mr Tattersall but SAP

SI as well. The two contracting parties genuinely believed that the SDA was concluded.

[64] That is the reason why on 14 July 2006, when SAC was sidelined by SAP SI and to no longer dealing with it, Mr Tattersall addressed a letter of complaint to Dr Henning Kagermann (Dr Kagermann), the Chief Executive of SAP. In that letter, he complained about the unfair treatment that he was now receiving from SAP SI since the emerging of Virsa. He appealed to the CEO to investigate the Partner Management activities of SAP SI.

[65] When Mr Tattersall did not receive a response from Dr Kagermann, he addressed his complaint to the Chairman of the Board of SAP, Prof Plattner, who in due course embarked on an investigation. An enquiry was instituted in particular with Mr Ahrens, the procurist of SAP SI. Tellingly and revealingly, the latter responded on 24 July 2006 to Mr Wittmer, Mr Linkies' boss at SAP SI, and cc'd his senior Manfred Hofmann in the legal department of SAP SI.

[66] The email is identified as SI 2519. And because of its importance in the entire dispute between the parties, it is worth reproducing it in its entirety. It reads-

"From: Ahrens Rolf

Sent: 24 July 2006 18:12

To: Wittmer, Dietrick, Kagermann

CC: Manfred Hoffman

Subject FW: Secureinfo

Hi Manfred,

Here is our joint statement regarding the complaint sent by Secureinfo to Henning Kagermann dated July 14, 2006;

Conclusion: In our view, the complaint is justified.

Facts: SAP SI issued a press release on 8 July,2004 stating that SAP SI is partnering with Secureinfo and that this partnership is strategic for SAP SI.

Shortly afterward, SAP made a decision - which applied to SAP SI as well - not to pursue the partnership and to market its own rival product, Virsa, instead. There is still even reference to the strategic partnership on our Website https://www.SAP SI.com/de/press release/1/1088593288732844/ and we report in general terms about the Global Security Alliance involving Secureinfo here: https://www.SAPss.com/de/service/crossindustry/tecnicalconsulting/ security/alliance

Legal opinion on the facts: At the time of the press release, it was no longer a question of "whether" there would be a partnership, but merely final details on the "how". The "how" had been set out in the Software Distribution Agreement ("SDA"). The SDA was about to be signed and the negotiations had been finalized. From the legal perspective, the question is a contract was implied in fact - for which there is some evidence – or whether there is a case

here of "culpa in contrahendo" (CIC) based on contract negotiations being broken off without legitimate reason.

Overall, it is very likely that the distinction is irrelevant, because Secureinfo would be entitled to contract conclusion (SDA) anyway due to "culpa in contrahendo". Secureinfo therefore has entitlement under the SDA. What is more, although a partnership with Secureinfo had been decided on, a decision was subsequently reached internally to give preference to the rival product, Virsa. This puts SAP SI in breach of numerous provisions of the SDA, including those in section 9.1; accordingly, sales activities to the benefit of Secureinfo are no longer being performed, and the rival product, Virsa is being wrongly supported.

It is difficult to quantify the amount of damages Secureinfo might claim for without having more specific details from Secureinfo; we have therefore made an initial list of the central claims for which are reasonable grounds;

a) *All Virsa contracts SAP SI helped bring about could be regarded as lost profit for Secureinfo.*
b) *Secureinfo might be able to obtain an injunction against SAP SI, preventing any further cooperation with Virsa [canvassing business for Virsa and so on]*
c) *Secureinfo might be entitled to have its partner logo reinstated on SAP's Partner Portal (its name still appears there)*

d) Secureinfo might be entitled to demand information from SAP SI about business SAP SI has conducted with Virsa as a basis for its claims for damages in a) above.

In our view, the documents so far are clear. Secureinfo has claims against SA SI. This conclusion cannot surprise anyone. To date, there has been no official notice ending any strategic partnership; de facto though, it is simply no longer being discussed. The cause is a change in strategy imposed by SAP AG (SE) on SAP SI; therefore, SAP AG should be involved is resolving the issue …

Please review the details of the information we have set down here. We will then forward a clean version of the email to you and SAP SI management for use in the discussions that will follow.

Best regards

Rolf and Dietrich"

[67] It is often said that the truth exists and only lies are invented. From the email quoted above, the following truths appear. In spite of the persistent denial that Mr Tattersall represented an Irish company founded in 1997, Mr Ahrens knew that Mr Tattersall's complaint related to Secureinfo, a South African Company. Although the SDA defines Mr Tattersall's product as Secureinfo and the company as Secureinfo Ltd, Mr Ahrens indirectly acknowledges that Secureinfo and Secureinfo Ltd interchangeably refer to the company Mr Tattersall represented. If Secureinfo is a product rather than a company, how does a product lodge a complaint with SAP regarding the conduct of Partner Management in SAP SI? At long last the existing truth is revealed. Everything else is an invention that is an untruth.

[68] The email unequivocally acknowledges that Mr Tattersall's complaint is justified. That there was in fact a partnership between SAC represented by Mr Tattersall and SAP SI, is clear. Mr Ahrens' evidence that the press release with regard to the

partnership was a marketing tool and an expression of intention of the two contracting parties to work together is an untruth. This partnership is not only still

referred to on SAP SI's website but was also referred to in the Global Security Alliance formed with the consent and concurrence of Mr Tattersall.

[69] In spite of the persistent denials and the various defenses raised in this matter, the email corroborates Mr Tattersall's evidence that in the two days in May 2004, the final details of the terms of the agreement encapsulated in the SDA were agreed to. It was only the "how" with regard to the client support services that were still to be finalized. Nowhere in the email does it allude to the internal process of Laufzettel and that the SDA was not approved and not yet signed. That the SDA existed is beyond doubt. Otherwise, how does a lawyer of Mr Ahrens' stature alludes to breach of non-valid and binding agreement between the parties? Mr Tattersall's evidence that the terms of the SDA were indeed implicitly implemented cannot therefore be doubted. That Mr Tattersall's complaint was founded on the SDA is more than apparent from this email. In the email, Mr Ahrens nowhere does he state that the exclusive marketing of Secureinfo weakens Mr Tattersall's complaint and that SAP SI would not have agreed to the clause that deals with exclusivity in terms of the SDA. In fact, in the email he alluded to clause 9.1 of the SDA that deals with the exclusivity clause. One can only agree with Mr Ahrens in the email that the conclusion that an implied agreement was entered into should not surprise anyone!

[70] Mr Ahrens' denial in court of the existence of an agreement between the parties, is nothing but an invention to avoid the consequences flowing from the breach of the SDA. His version that he remembers of no other name of Mr Tattersall's company,

is nothing but an untruth. His evidence that the four contracts concluded between the parties, and from which contracts SAP SI earned substantial revenue, were ad

hoc contracts, and not concluded in terms of the SDA, must, inevitably, be rejected. His stance that the legal report furnished to the board was being conservative with regard to risk to his company, must also suffer the same fate and be rejected.

[71] It must be remembered that Mr Ahrens also reported to the board of SAP SI that Mr Tattersall had a partnership with SAP SI and that an SDA was concluded by conduct. Again, on 17 August 2005, Mr Joachim Mueller, a SAP SI Board Member, enquired from Messrs Marian Rolke and Hoffmann as to whether there is a reseller cooperation agreement, with Secureinfo. Unsurprisingly, Mr Ahrens responded to the enquiry as follows -

"Hello Joachim, I know of such a partner contract, in concrete terms called software distribution agreement (SDA); Manfred Wittmer, Alfred Ermer, Maria Rolke of the partner management and myself were involved. A legal summary and a corresponding approval from the legal department exists; as my research yesterday revealed, the process has not been completed, that is no SDA signed by Secureinfo and SAP SI…"

[72] Confronted with this information, in cross- examination, he changed tack. He informs the court that the partnership was a mere marketing tool and that there was no valid SDA as same had not been signed. Astonishingly, he suggests that the various reports he made to the various parties confirming the existence of the

partnership with Mr Tattersall, depended on the audience to whom the reports were made. That Mr Ahrens and the truth appear to be no good friends, is captured by suggesting to Mr Tattersall's lead counsel that the truth is a big word. Truth is not a

big word. It is a fact. The result is that the email sent to Prof Kagermann is the truth and everything else is an untruth. Everything else he said in court, which contradicts his legal opinion of 2006, must be rejected as false.

[73] Much was made of the non-assertion of the SDA in the complaint by Mr Tattersall to Prof Kagermann. In my view, the fact that Mr Tattersall did not assert the SDA in his complaint to Prof Kagermann, is of no moment. Common sense, however, suggests that Mr Tattersall had a standing to complain as he did. The criticism is like saying a customer complaining of receiving a bad service to his motor vehicle, did not own a motor vehicle serviced by a particular motor dealership. It would be surprising and in fact beyond comprehension that any customer would complain of receiving a bad service while there is no connection between him and the motor vehicle that was serviced. That Mr Tattersall complained precisely because he had a relationship with SAP SI, is glaringly obvious. That relationship was founded on the SDA.

[74] Mr Ahrens' suggestion that there is no SDA signed by Secureinfo is an untruth. His opinion, prior to making enquiries and discovering that SAP SI had not yet signed the SDA, is to the contrary. It is more probably that after discovering that SAP SI had not yet signed the SDA, made him feel comfortable to contradict his legal opinion given to Prof Kagermann, the board of SAP SI and GAIS (the internal audit). It is also untrue that Secureinfo had not yet signed the SDA. The undisputed evidence of Mr Tattersall is that at the May meeting of 2004, he duly signed two

copies of the SDA which copies were given to Mr Linkies and Mr Ahrens. It was only SAP SI that was still to sign the SDA.

[75] The SAP SI's attempt to escape the concession of the existence of the partnership between it and Mr Tattersall, the consequences that the SDA was concluded and that its terms were implemented, was a stratagem invented to hang on the issue of exclusivity, that, according to SAP, somehow, the contracting parties would not have agreed to. It Is on this basis that, SAP SI, SAP and most of its personnel believed that if the issue of exclusivity could be given life to, the consequences of breaching the SDA would be avoided and thus defeat Mr Tattersall's reliance thereon. This strategy, in the circumstances, must fail.

[76] The issue of exclusivity which is provided for in the SDA arises in the following circumstances. During July 2006, and later in the day when Mr Tattersall was asserting his rights in terms of the SDA, there is communication between Messrs Ronald Geiger, Wittmer, Hoffman and Ahrens regarding whether Mr Tattersall was specifically told that the SDA was subject to signature of partner management. This is fully captured in the string of emails identified as SI 2608. On 1 August 2006, Mr Hoffman sent an email to Mr Wittmer that reads as follows-

"… Only if we can prove that Secureinfo knew and agreed to its competitors (such as Approva) being members of the Global Security Alliance from the start (or at least later) then, at least be doubtful as to whether Secureinfo could successfully assert its exclusivity right arising out of the SDA, section 9.1, final sentence.

This provision states: "PARTNER (SAP SI) shall not during this SDA market, or distribute, either directly or through intermediaries, any products directly or indirectly competing with the PRODUCT". We asked Manfred to take a closer look at this matter"

[77] The difficulty with this strategy is the following. The invention and assertion that Mr Tattersall agreed to exclusivity provision with SAP SI while agreeing to work with other competitors occurs long after the terms were fully discussed and agreed to by Messrs Linkies, Ahrens and Tattersall in the May 2004 meeting in Bensheim. That this is an after-thought, is more than obvious. In any event, neither of the parties refer to in the email were involved in the negotiation and conclusion of the terms of the SDA including clause 9.1 referred to therein, which clause deals with exclusivity. Furthermore, neither Approva nor Secureinfo, and for that matter Virsa, were a competitor to Secureinfo. Secureinfo was providing, in particular, the role management that the other products did not provide. This is common cause. It is also undisputed between the parties that neither solution was panacea but that the products were complementary to each other. In this context, there was no competition between Secureinfo, Approva and Virsa.

[78] The issue of exclusivity gave Prof Wagner an opportunity to opinioned that-

"… Terms that were controversial between the parties can never be brought into existence simply through rendering performance". As pointed above, the exclusivity clause was never controversial between the parties. Neither of the parties ever stated that the issue of exclusivity was still to be revisited. That issue was resolved between the contracting parties in May 2004. The only outstanding issue between

the parties, this is common cause, was the customer support, which the parties did not regard it as of any moment.

[79] In contrast, Prof. Dauner-Lieb opined that where the products are complementary to each other, then the exclusivity prevails. According to her, what is important is the will of the people and what they did. If there was implementation, as was the case in this matter, then there is no doubt that a contract was concluded. This opinion is more in accordance with the intent of the parties, in particular the evidence of Messrs Tattersall, Linkies and Ahrens that all the terms of the SDA, what their meaning were, were discussed and agreed upon. It was only the minor and non-controversial issue of customer support that remained outstanding.

[80] Prof Dauner-Lieb's opinion is supported by the decision of the Higher Regional Court of Thurigen 9/ 01/ 2008 wherein the court dealt with a dispute relating to payment of invoices regarding 5 phases of architectural appointment. In that matter, the parties agreed on phases 1-4 and not yet on the 5th phase of the appointment. The appointment relating to phases 1-4 were performed while the parties were still negotiating the terms of the final phase. In that matter, the court did not find it difficult to conclude that phases 1-4 of the agreement were concluded in spite of the fact that the terms of the last phase of the same draft agreement had not yet been finalized.

The court reasoned as follows -

"67. Contrary to the view expressed by the Defendant, this so-called open dissent in accordance with Section 154(1) BGB does not mean that no contract has been concluded between the parties. The rule of doubt does not apply if there is

recognizable will to bind the parties, and the dissent is limited to non-essential subsidiary agreements that must be concluded by interpretation, namely the operative law (BGH NUW 1997, 2671).

68. Such a will to bind both parties is implicitly assumed if, in the case of continuing obligations, the parties begin by mutual agreement with the implementation of the still incomplete contract (BGH NUW 1983, 1727)".

[81] Cadit Quaestio. In the present matter, it must be recalled that the contract in issue between the parties was for a period of 3 years from implementation. Thus, the fact that the issue of support, not exclusivity, had not been resolved, is of no moment. In the present matter, there was indeed a recognizable will to bind the parties. And the dissent was limited to non-essential subsidiary agreement of support.

[82] Ronald Stefan Geiger (Mr Geiger) a member of the Executive Board of SAPSI from 2003 to 31 December 2007, in his testimony, denied that there was a valid SDA between SAC and SAPSI.

[83] The difficulty with his denial of an SDA is, firstly, that Mr Geiger was not involved in the negotiations, conclusion and implementation of the SDA. Secondly, his denial is at variance with the evidence of Messrs Linkies and Ahrens who agree that there was indeed an SDA concluded. Thirdly, although Mr Geiger made enquiries as to the existence of a valid SDA, surprisingly, he did not bother to enquire from his predecessor, Mr Ermer, the person he took over from as the board member of SAPSI in 2005, whether there was a valid SDA or not. This, was in spite of the fact

that Mr Ermer only left SAPSI in late 2005. Although it was common cause that the SDA was with Mr Ermer for final signature, strangely, Mr Geiger did not even ask Mr Ermer about the whereabouts of the SDA and what became of it. Lastly, he never took the legal department of SAPSI to task that there was a valid SDA between SAPSI and SAC.

[84] The conclusion reached is therefor that his evidence of the denial of a valid SDA, is incorrect. The denial, having regard to evidence of Messrs Tattersall, Linkies and Ahrens, in particular, the legal department of SAPSI, is untruthful.

[85] Frank O'Neil (Mr O'Neil), the tax expert in Ireland, called by SAP to refute Mr Tattersall's testimony that he incorporated Secureinfo in Ireland in order to take the tax advantage to be derived therefrom, is unhelpful. The court finds his evidence irrelevant and of no consequence.

[86] It must be remembered that Mr O'Neil never met Mr Tattersall. Neither did he communicate with Mr Tattersall for the period 1999 to 2000 when Mr Tattersall was advised of the tax advantage to be derived by his registering Secureinfo in Ireland. Nor could he dispute what Mr Tattersall was told about the tax implication of choosing Ireland as the home of Secureinfo Ltd instead of South Africa.

[87] The fact that after deregistration in 2000, Secureinfo Ltd could be restored in the company registry in Ireland, is irrelevant, immaterial and inconsequential. The fact remains that Mr Tattersall abandoned the company as advised and adopted the

name of the company as the vehicle to partner with SAP in promoting his software product.

[88] Adrian Burke (Mr Burke), a solicitor in Dublin, Ireland, who testified on behalf of SAP that Secureinfo Ltd's place of business could be changed from that of Dublin to anywhere in the world, including South Africa, ostensibly, with the aim to refute the contention that Mr Tattersall's use of the South African address would not negate the fact that Secureinfo was an Irish company, is also unhelpful and immaterial.

[89] Mr Burke's evidence, having regard to the testimony of Messrs Tattersall, Linkies, Dr Paulus, and all the personnel of SAPSI, is, in the circumstances, inconsequential and of no value. The contracting parties to the SDA knew that the party to be partnered with SAP was a South African company. And that this company owned the software product introduced to SAP by Mr Tattersall. In any event, SAPSI and Mr Tattersall knew that the company Secureinfo Ltd was abandoned prior to the conclusion of the SDA. It was thus unsurprising that SAC did not challenge Mr Burke's evidence in this regard.

[90] SAP's other contention that the 4 contracts concluded in this matter were ad hoc and unrelated to the SDA, because the terms and conditions therein are not the mirror image of the terms of the SDA, is nothing else but a red-herring. Both Messrs Tattersall, Linkies, and grudgingly, Mr Wittmer, agreed that the 4 contracts were concluded in terms of the SDA. In his evidence, Mr Wittmer, although he suggested some other basis upon which the 4 contracts were concluded, he was unable to furnish to the court the basis upon which the said contracts were concluded. Neither

was he able to recall the terms and conditions of the basis upon which the contracts were concluded other than to suggest some understanding between the parties.

[91] Prof Wagner's example of a gym contract with a trial clause is irrelevant as this is a short- term contract while the SDA was a long-term contract, namely a contract of 3 years' duration. His suggestion that somehow an onus of proof would identify the source of the relationship between Mr Tattersall and SAP SI, is also unhelpful and irrelevant.

[92] Lastly, much of time was wasted by analyzing the terms of the 4 contracts in support that the contracts were concluded other than in terms of the SDA. Similarly, the minute deviations from the SDA, and in particular with regard to the terms of the end user license, is of no consequence. On the evidence on record, the only terms implemented by the parties were those of the SDA as any deviation therefrom are irrelevant and does not in any way invalidate the SDA.

[93] In the result, the fact that SAP SI did not sign the contract is neither here nor there. That the parties are bound by the terms of the SDA flows from implementation of this long-term relationship between them. The will or intent to be bound is implicitly assumed by the mutual agreement accompanied by the implementation of the terms of the SDA. The fact that the 4 concluded contracts between SAP SI and the third parties is not the mirror image of the SDA, is of no moment. The 4 contracts were substantially in terms of the SDA. Both Mr Tattersall and SAP SI earned substantial revenue therefrom.

[94] SAC alleges that the breach of the SDA by SAP SI as a result of the inducement by SAP to no longer honor the contract but to support Virsa's product, in German Law, amounts to delict. SAC in this regard relies on sections 826 alternatively 823 of the BGB.

[95] Section 826 of the BGB appears from exhibit 16. It reads-

> *"Anyone intentionally inflicting damage on another person in a manner contra bonos mores is liable to the other party for damages".*

[96] According to the two experts, a mere breach of contract, as is the case in this matter, is not sufficient to establish liability in terms of s 826 of the BGB. They agree that more is required to give rise to liability. In the joint minute, the experts expressed the principle as follows-

> *"Inducement of another to breach a contract with a third party alone is not sufficient to trigger liability under s826 BGB. Rather, liability under s 826 BGB requires the presence and evaluation of additional circumstances of wrongdoing that justify a finding of morally reprehensible behavior".*

[97] In argument, SAP contends that the SAC has not pleaded facts in support of delict as recognized in German Law but pleaded facts that in South African Law may well establish a delictual claim. This is, so contends SAP, the end of the matter, and that SAC is non-suited in German Law of delict. SAC must, consequently, loose its case against SAP. SAC is, however, of a different view. To resolve this disagreement, the court must have regard to the pleadings in this matter.

[98] On 3 November 2020, SAC filed its further amended Particulars of Claim. Paragraph 14 of the particulars of claims reads-

> *"14.1 The Defendant (SAP) was at all material times under a legal duty not to intentionally and unlawfully interfere with the contractual relationship between SAP SI and the Plaintiff with the intention of causing the Plaintiff a loss in terms of section 826 of the German Civil Code ("the BGB") and*
>
> *14.2 not to intentionally alternatively negligently and unlawfully injure the Plaintiff's business in terms of section 823(1) of the BGB".*

[99] After SAC had set out the acts upon which it relied as being in breach of the provisions of s 826 and s 823 of the BGB, in para 18, it pleads further that "By reason of the aforesaid breaches of its legal duties by the Defendant, the Plaintiff suffered a direct loss of sales of its security software, which, but for the intentional an unlawful conduct of the defendant, would otherwise not have made".

[100] Of particular importance is para 24 of SAC's particulars of claim which reads-

> *"The German law applicable to the pleaded facts is set out and explained in the expert summaries of Prof Dr Thomashausen filed on 20 June 2018 ("Thomashausen #1") and the rebuttal summaries of Prof Dr Thomashausen and Prof Dr Dauner-Lieb filed on 30 August 2018 (respectively "Thomashausen#2 and "Dauner-Lieb") and in particular…*
>
> *24.2 in relation to the claim under Section 826 BGB above, at para 56-69 and 81-82 of Thomashausen#1, paragraphs A1-5, 35-38 and B.XI-XII*

of Thomashausen#2, paragraph 1-11, 33-34 and 38-43 of Dauner-Lieb and

24.3 in relation to the claim under Section 823 BGB above, at paragraphs 70-77, 81, 83 and 84 of Thomashausen #1, paragraphs A1-5, 39-47 and B.X and BXII of Thomashausen#2 and paragraphs 1-11, 33- 37 and 43 Dauner-Lieb".

[101] SAP's complaint that SAC has not pleaded facts that in German Law would establish delict either in terms of s 826 or s 823, is unfounded. This matter being an action, SAC, in terms of the procedural law of South Africa, needs only alleges facta probanda and not facta probantia, ie the facts to be proved and not the evidence proving those facts. Once this elementary distinction is made, there can be no doubt, as pointed above, that SAC has pleaded the facts to be proved in this matter. Furthermore, SAC, in evidence, fully ventilated the facts upon which it relied in order to establish a delictual claim in German Law based on s 826 or s 823 of the BGB. SAP's complaint in this regard is thus unfounded. It is rejected.

[102] According to Prof Dauner-Lieb, although there is a distinction between mere participation or involvement in breach and active inducement of another, that is to say "really pushing it" (breach), the former does not constitute contra bonos mores while the latter does. Even Parlandt – see Exhibit 71 – where it is stated that-

"Breach of contract. The mere exploitation of the willingness of the principal to breach the contract or the mere participation of a third party in the breach of contract by principle does not give rise to a claim in terms of S826. This is not the case if there is a special degree of recklessness towards the other contracting

party, a serious violation of the sense of decency, which is incompatible with the fundamental requirements of a loyal attitude (Federal Court BGHNJW94,128, NJW RR99, 1186). This includes in particular inducement to breach the contract, (and Köhler FS Canares 2007 page 591…".

[103] Prof Wagner, however, in his Mùnchener Kommentar (Muko) says more is required that the inducement for one to breach a contract must be accompanied by, for example, an offer of indemnification against damages for such breach to be regarded as against the prevailing custom.

[104] Prof Wagner's opinion that inducement to breach a contract is not by itself sufficient to entitled one to damages appears contradictory to his view expressed in Muko, Exhibit 67, para 67, in particular, that the special circumstances are, inter alia "the breach of special fiduciary duties by the debtor to the contractual creditor, known to the third party".

[105] In the 1992 judgment, IVZ R332/90 (Munich) BGH at para 4 the court stated that-

> *"It has long been recognized by the Supreme Court case law that the participation of a third party in the breach of contract by one of the contracting parties may, under certain circumstances constitute an immoral damage to the contract obliging the other contractual party to pay compensation (BGHZ12,308(317f)…"*

[106] What then are the special circumstances that SAC says amount to contra bonos mores by SAP in inducing SAP SI to breach the SDA?

[107] It must be remembered that the special circumstances that render inducement to breach a contract, and thus contra bonos mores are not a closed list. What is contra bonos mores, is what the court's sense is that would in the circumstances of each particular matter, constitute a reprehensible behavior.

Inducement of breach of contract for the purposes of competition.

[108] SAC alleges that contrary to the terms of the SDA and that SAP SI was under obligation to promote its product, Secureinfo, SAP intentionally and unlawfully induce SAP SI to breach the SDA. This was in spite of the fact that the consultants believed in SAC's product. The promotion of Virsa's product was in competition with Secureinfo because Virsa's product was generating more revenue than Secureinfo

[109] In Parlandt, Exhibit 71, it is stated that "if the third party acts for competitive purposes, inducement to breach contractual rights and aiding and abetting is immoral even without the existence of further circumstances (Federal Court BGH Der Betriebsberater journal (BB) 81.166".

[110] Prof Dauner-Lieb opines that breach of contract for purposes of competition was itself without more contra bonos mores. For this opinion, Prof Dauner-Lieb relies on

Strau Law in the Parlandt commentary, the well-known and respected compendium on the law of contract in Germany. In the present matter, the conclusion reached is that for SAP to induce SAP SI to breach its contractual obligations with SAC, as evidenced by the SDA, for purposes of competition with Virsa, is against public decency and is thus contra bonos mores that squarely falls within the provisions of s 826 of the BGB. The court in BGH 13.3.1981, Exhibit 73 reasoned thus –

> *"Inducement to breach of contract is therefore as a means of competition which - even without the occurrence of further circumstances - puts the stamp of the illicit and morally reprehensible on this act of competition. The same applies to aiding and abetting a breach of contract".*

[111] The fact that inducement to breach a contract is in terms of Unfair Competition Act, is irrelevant. In fact, if the breach of contract is anticompetitive contrary to the Unfair Competition Act, makes the behavior more reprehensible. It does not, however, suggest that if inducement to breach a contract is not proscribed by the Unfair Competition Act, is thus morally acceptable. It remains morally reprehensible and thus contra bonos mores for the purposes of s 826 BGB. Prof Wagner's opinion that the 1981 judgment was dealing with a matter prohibited by the Unfair Competition Act, is thus of no moment and irrelevant. A conduct that is against the views of decent average persons in conducting business, once immoral, remains so, whether one is dealing with a case falling under the Unfair Competition Act or not. Prof Wagner's reliance on the author Oeschler is therefore unhelpful as the author merely reaffirms that for the purposes of s 826, a morally reprehensible behavior is required.

[112] In the present matter, SAP, through Global Business Development division (GBD) regarded Secureinfo as a competitor to Virsa's product. It is common cause that Virsa's product was generating more revenue for SAP although Secureinfo was a trusted and superior product to that of Virsa. In pursuance of revenue, Virsa's perceived competitor had to be eliminated hence SAP SI was induced to breach the SDA to the prejudice of SAC. This conduct, in my view, is morally reprehensible as it is against the views of decent average persons conducting business. This conduct is proscribed by the provisions of s 826 BGB. What makes matters worse is that, immediately after the acquisition of Virsa, the customers to whom SAP SI was promoting Secureinfo, were targeted specifically to choose Virsa instead of Secureinfo.

[113] The GBD did not only promote Virsa's Compliance Calibrator but targeted to terminate the sale to potential customers of Secureinfo, the product, the potential customers of Secureinfo, the entity. That this is so appears from an email from Mr Cometa to Mr Roberson. On 29 April 2005, Mr Cometa wrote an email, to his boss Mr Robertson, which email reads -

> *"… we need to make sure SAP SI stops reselling Secureinfo. I met with Mario Linkies in Atalanta, and he stated clearly to me that SAP SI is still reselling Secureinfo. I do not think Virsa needs to meet with our security team and discuss, but I do not see logic in positioning competitors against us. We are the only ones that sell Virsa. They are competing with us…".*

[114] On 2 May 2005, the perceived competitor was indeed targeted. Mr Cometa, unequivocally, recommended that SAP SI's relationship with Secureinfo be formally

terminated so that their customers can clearly be told that the relationship between SAP SI and Secureinfo no longer exists. In the Powerpoint attached to the email, it is pointed out that the internal positioning paper prepared by Mr Paulus (Dr Sachar) Brehn (Regine) should be addressed:

"If this paper is neutral or negative to Virsa or bullish on Approva and/or Secureinfo, this can slow things down and confuse our AE's and customers". On 5 May 2005, GBD, through Mr Robertson, wrote to MS Carol Wilson, the Chief Information Officer of SAP, that the continuous promotion of competitive products to the customers would undermine the commitment and opportunity. In terms of a new policy prepared by Mr Robertson, Secureinfo was disqualified for resale by SAP.

[115] On 16 June 2005, Mr Cometa wrote an email to Mr Gregory Tomb asking the latter to remove Secureinfo from SAP SI's website stating "as you know, we are reselling Virsa and generating incremental software revenue for SAP. Both you and Bernd Michael have been supportive of our relationship with Virsa along with Leo (Apotheker) so I wanted to see if you were aware of this and if you can help?" Following this email, Mr Michael Rumpf, the chairman of the board of SAP SI instructed the Secretary of the Board of SAP SI, Lemanczk, for inclusion of Virsa on SAP SI's website.

[116] In June and early 2005, the account manager of SAP, Switzerland, requested SAP SI to remove Secureinfo as the best security software solution for CIBA. This was done to maximize licensing revenue generated by Virsa. SAP Germany also entered the fray. It wanted a revision of SAP SI's recommendation regarding Secureinfo so that Virsa should be included as also being a software solution for

CIBA. SAP Switzerland also asked Mr Kleinmeyer to intervene in ensuring that Secureinfo was eliminated to compete with Virsa. All the people working with and under Mr Robertson ensured that SAP SI's senior personnel were involved in the elimination of Secureinfo and to position Virsa as the best generating revenue solution for CIBA and that the CIBA team should be encouraged to look at Virsa instead of Secureinfo.

[117] The evidence proves that, on the balance of probabilities, the inducement by SAP for SAP SI to breach the contract for the purposes of competition, in the circumstances, was reprehensible and immoral and thus sufficient to meet the contra bonos mores requirements for the purposes of s 826 BGB.

Breach of duties of loyalty or fiduciary duties.

[118] Both experts are ad idem that inducement of breach of contract for the purposes of breaching duties of loyalty or fiduciary duties, to the knowledge of the inducer, is immoral. In the present matter, it is undeniable that there was an existing partnership between SAP SI and Secureinfo. The partnership was known to SAP. The very essence of a partnership is the existence of the duty of loyalty or the fiduciary duties between the contracting parties. This is more obvious, as in the present matter, Secureinfo's intellectual property was entrusted to the other contracting partner, SAP SI. For SAP, in these circumstances, to induce SAP SI to breach the contract and thus breach the duty of loyalty or fiduciary duties created by this partnership, is contra bonos mores. The inducement to breach the partnership and thus the fiduciary duties imposed on the contracting party, is thus immoral.

[119] According to Prof Dauner-Lieb whether the partnership was officially registered or not, is irrelevant as the contracting parties knew that the de facto partnership in the instant case was a long - term partnership, namely a period of three years. Prof Wagner conceded that indeed a long- term partnership entails fiduciary duties for the common good of the partnership. His about turn in re-examination that the partnership between SAP SI and Secureinfo was a suggestion of co-operation in respect of the compatibility of Secureinfo.as a product and SAP's products, is implausible and must be rejected.

[120] The fact is that an average, reasonable and intelligent reader would read and understand the press release to be talking about the relationship between the parties rather than the compatibility of SAP SI and Secureinfo's products, which the reader, in any event, could not have known that the announced partnership was merely referring to the compatibility of SAC's and SAP's products. The conclusion reached is that, for SAP to induce SAP SI to breach this long term partnership, was indeed immoral for the purposes of s 826 BGB.

[121] It must been born in mind that although SAP SI, although it is a subsidiary of SAP, it is an independent legal entity that has its own Management and Executive boards that are free to choose who to conduct business with. In the instant case, SAP SI had the freedom of choice to enter into an agreement with any third party including Secureinfo, a corporate entity. It is on this basis that SAP SI concluded the SDA with Secureinfo.

[122] SAP, inexplicably, ignored this independence and freedom of choice of SAP SI to conclude the SDA and to honor the terms thereof. It induced SAP SI to breach the SDA, which inducement was not only unlawful but immoral as well. It actively influenced SAP SI not to perform the terms of the SDA. According to Prof Wagner, if this inducement amounts to active involvement more than a mere persuasion, the inducement to breach the contract then becomes immoral as envisaged in s 826 BGB. In the present matter, SAP's inducement of SAP SI to breach the contract was more than persuasion. It actively involved itself in the inducement of SAP SI to breach the SDA.

[123] Prof Dauner-Lieb expresses her opinion as being immoral in the following terms-

"Well, my concern of economic power is that in a group things are a little bit different. The mother company has normally the right to give directions to the daughter (SAP SI), but not unlawful directions…to do breaches of contract to give the mother (SAP) a better position of competition"

[124] In the instant matter, although SAP was free to express its views and strategies to SAP SI, it went further and brought coercive powers to bear upon SAP SI's employees to eradicate Secureinfo and actively promote Virsa's Compliance Calibrator. This conduct by SAP was unlawful and immoral as envisaged in s 826 BGB. According to Prof Wagner, this persuasion, which was for financial good by SAP was only okay until it crosses "moral zealotry".

[125] From the oral evidence of the witnesses that testified and the various emails before this Court, the coercive influence exercised by SAP over all its subsidiaries including SAP SI, was not only okay but crossed moral zealotry. The inducement is in fact more than palpable in the present matter. Employees of the subsidiaries were required to obey the strategy and decisions of SAP and if any employee dare to disobey the strategies and decisions of SAP, faced the risk of finding themselves out of employment. Mr Linkies, the person who was intimately involved with Mr Tattersall in promoting Securinfo as a better product to that of Virsa, was threatened with disciplinary actions in order to send out a message not only to the employees but to other senior management personnel as well, that SAP's strategy and decisions were the law to be obeyed by all.

[126] In spite of the fact that SAP and SAP SI knew that Virsa's Compliance Calibrator was not a comparable product to that of Secureinfo, on 22 July 2005, Mr Weiskam met with Mr Wittmer, Linkies's boss at SAP SI, to position Virsa's product at CIBA to the detriment of Secureinfo even though Virsa's product had "certain features / foundations" that were missing and did not meet the customers' needs. SAP's conduct as outlined above falls within the provisions of section 826 BGB. It is contra bonos mores. The cases cited by Prof Wagner that SAP's pursuit of self-interest confirm that this is not contra bonos mores, is incorrect. The cases do not deal with breach of contract at all.

[127] Any economic coercion by the parent company over its subsidiaries, even it is for pursuit of self-interest, if it amounts to exercise of economic coercion to subvert the independence of its subsidiary and to breach a contract such as the SDA, in the present matter, is immoral within the provisions of s 826 BGB. Reliance on the Co-

operation Agreement between SAP and SAP SI, to which the court turns to shortly, is misplaced. In any event, the Cooperation Agreement was to align the functions of SAP Deuchtland and SAP SI and for the two companies to cooperate with each other as its name suggests. The Co-operation Agreement did not in any way authorize interference with Secureinfo's rights and obligations as defined in the SDA. SAP's coercive power over SAP SI was to compel SAP SI to cease selling and promoting Secureinfo. As pointed above, the exercise of this coercive power was unilateral. It is thus contra bonos mores in terms of s 826 BGB.

Deceit

[128] SAC contends further that another basis upon which SAP immorally induced SAP SI to breach the SDA is the way or manner in which SAP SI was stopped to market its product, Secureinfo. It is SAC's contention that SAP, in a deceitful way, pressurized SAP SI not to comply with the terms of the SDA and in fact deceitfully induced the latter not to promote Secureinfo but the Compliance Calibrator of Virsa.

[129] This was also the opinion of Prof Dauner –Lieb that SAP's alleged inducement entailed deceiving or misleading SAP SI's customers with regard to the respective abilities of Virsa's Compliance Calibrator and SAC's Secureinfo, which inducement would undoubtedly be regarded as immoral, heartless and against the rules of fair play.

[130] Her opinion was based on the factual assumptions put to her in evidence as encapsulated in Exhibit 15 F. In terms of the assumptions, it is SAC's contention that SAP insisted that SAP SI's consultants advise their customers to use Virsa and not Secureinfo. The latter was never to be mentioned even when the customers asked for Secureinfo and well knowing that it was a better solution than that of Virsa.

[131] To compound the issue, even when the consultants honestly believed that the customers' needs and requirements would best be met by the use of Secureinfo, Virsa's product was to be promoted at all costs. Prof Wagner, however, does not accept that inducing another to deceive customers would be immoral. His reluctance to accept this basic principle, having regard to what follows below, is unhelpful and of no consequence.

[132] The assumptions given to Prof Dauner-Lieb went further to state that SAP SI's consultants complained to SAP that its insistence of SAP SI using Virsa instead of Secureinfo was hindering their performance, and their role as professionals in stating what they themselves did not believe in. In spite of this, SAP insisted that Virsa should be promoted nevertheless.

[133] The assumptions that Prof Dauner-Lieb expressed her opinion on were factual as confirmed by Mr LInkies. It was his evidence that SAP insisted that, once Virsa was acquired by SAP, it was SAP which insisted that Secureinfo be down- played and that Virsa be promoted. In terms of SI 2460, it is common cause that in 2005, Mr Wittmer, Mr Linkies and Dr Frank Off, when determining Security Solutions for their

customers, on 10 October that year, in Bensheim, agreed that Secureinfo was indeed the best product. They concluded that "…*The only product currently on the market is Secureinfo for SAP, which offers a proven methodology for the design and also fast implementation of a SAP roles concept*"

[134] It was also undisputed that Virsa had no role management functionality which functionality could only be provided for by Secureinfo. Although 90% of SAP SI's customers approached SAP Consulting for this role management functionality, SAP insisted that Virsa be recommended to these customers and not Secureinfo. Although this was less than honest and untruthful, the SAP SI's consultants were pressurized by SAP to comply with this directive. That this order given to SAP SI's consultants was reprehensible, immoral and deceitful, is obvious.

[135] Mr Linkies' further evidence was that SAP SI was more than willing to partner with Secureinfo as its product was the best solution to serve the needs of its customers unlike the product of Virsa. Yet SAP, in pursuance of revenue generated by the sales of Virsa's product, ignored this fact and insisted that Virsa's Compliance Calibrator, be recommended. This suppression of the true quality of Secureinfo's product vis-a vis that of Virsa and to the detriment of SAP SI's customers, is obviously immoral and deceitful. This is precisely what the provisions of s 826 BGB proscribed.

[136] During September 2005, in an email exchange between Ms Evelyn Taylor,Mr Matt Morneault, the New Business Development at SAP, and Mr Dennis Elkins, a complaint was raised that in the book on security that Mr Linkies was writing,

Secureinfo was mentioned, and, in particular, its role management functionality, which "*has been what has stalled SAPCC (Virsa) sales cycles".* On 22 September 205 Ms Evelyn Taylor sent an email to Mr Matt Morneault stating that-

"*I have a written statement from the authors [Mr Linkies' book] as well as the publisher that Secureinfo and others are mentioned as examples in few cases. If this does not reflect reality, we will stop the distribution"*

[137] That this conduct of stopping the distribution of Mr Linkies's book was, ostensibly, embarked upon with the sole aim not to stall Virsa's sales cycles as stated in the email referred to above, is quite apparent. In my view, this conduct by SAP, which conduct is unrelated to the business of SAP SI, SAP and, for that matter, Secureinfo or Virsa is against fair play and immoral that squarely falls within the provisions of s 826 BGB.

[138] That the pursuit of revenue for SAP was the primary focus rather than SAP SI's customers' needs is confirmed by an email from Mr Berhard Netzer sent to Mr Linkies and his boss Mr Wittmer which email reads-

> *"I think I made it very clear at our SOD meeting concerning development: in SAP Deutschland to which you with SAP SI also belong the license revenue enjoys unequivocal primacy. That also applies for all other countries in the region EMEA-C and in the world.*
>
> *With the Virsa Compliance Calibrator which is listed in the official SAP pricelist we make per deal top line license revenue in the region of many hundred thousand Euros. For Secureinfo the old SAP SI receives a*

significantly smaller incentive which SAP SI US –GAAP cannot be recognized as License revenue.

It is therefore beyond question that CIBA account management must offer SAP CC of Virsa and that we all have the common aim to realize this license revenue. This aim is to be supported without limit by SAP Consulting, from which it follows that you are not to evaluate the deployment of Virsa against Secureinfo objectively but you must make it clear to clients that the SAP in the last few weeks is committed to the Virsa product and that that is also the right option for them. If you used this argumentation your consulting revenue will not be imperiled"

Should the client on the basis of your advice to now require functionalities which go beyond the SAP CC so the possibility exists as Angela has already written for deploying the corresponding Virsa components. I wish to request you to give Ronald and Angela your best support in order to make the deal SAP CC of Virsa work…"

[139] The old cliché that says the customer is king was nothing to SAP. It was ignored to the prejudice of SAP SI's customers and to the prejudice of Secureinfo. To SAP the new king was revenue as the above-quoted email reveals. SAP SI was not to evaluate the deployment of the products of Secureinfo and Virsa objectively but to subjectively favour Virsa's product over that of Secureinfo. In order not to put SAP SI's revenue in peril, customers were to be lied to and be told that the Virsa's product was the right solution even though this fact was to the knowledge of SAP, false. That SAP deceitfully misled SAP SI's customers with regard to the product of Secureinfo and suppressed the truth, cannot be clearer than the above email

reveals. This conduct is, in any language, immoral and against fair play. It is reprehensible. It is thus contra bonos mores as envisaged in s 826 BGB.

[140] In spite of Mr Wittmer knowing that Secureinfo, for management purposes, was the best solution suitable for use by CIBA, on 11 August 2005, he sent an email to Mr Ronald De Louwere and Ms Angela Wahl- Knoblauch stating that-

"… In the mid of July we agreed with you, that consulting will take a neutral platform in order not to endanger your opportunity for SAPCC

To reaffirm this statement and to avoid any further misunderstanding and interference in the opportunity for SAP Compliance Calibrator at Ciba, the Security Consultant of my team will coordinate everything with you before they communicate with the customer. It is my desire, that you decide about the communication to Ciba…''

[141] Despite SAP being advised that Secureinfo was the best solution for CIBA, SAP insisted that Virsa be sold to CIBA instead. Although at the beginning Mr Wittmer took a neutral stance with regards to Virsa, he was ultimately won over by SAP to actively promote Virsa. This was so despite the fact that Secureinfo was the best product and that CIBA's requirements would best be fulfilled by the utilization of Secureinfo instead of Virsa. Although SAP SI was an independent corporate entity which was expected to act independently with regard to its business and to do what was good for its customers, nothing could be done by it until a clearance was sought and granted by SAP. The conclusion reached is that, in these circumstances, SAP's inducement of SAP SI to breach the SDA deceitfully, was immoral. This immorality is what is envisaged by the provisions of section 826 BGB. The conduct of SAP is thus contra bonos mores.

[142] That SAP acted immorally and reprehensibly in inducing SAP SI to breach the SDA, is evidenced by the independent incidents of the breach of the SDA stated above. These incidents, both independently and cumulatively, render the conduct of SAP contra bonos mores. The balance of probabilities, in the instant matter, tilt in favour of SAC that, SAP in inducing SAP SI to breach the SDA, also breached the provisions of s 826 BGB.

[143] In argument, SAP criticized the opinion of Prof Dauner-Lieb that these incidents stated above, were based on what is free-wheeling and not based on facts and, must, accordingly be rejected and that the opinion of Prof Wagner be accepted instead. In this regard SAP relies on AM and Another v MEC for Health, Western Cape 2021(2) SA 337 paras [20]- [21] wherein the Supreme Court of Appeal reasoned that before any weight could be given to an expert opinion, such opinion must be based on proven facts and not based on conjecture or speculation. It is SAP's contention that as Prof Dauner-Lieb's opinion is based on assumptions as evidenced by Exhibit 15, must, resultantly, be rejected and that the opinion of Prof Wagner be the only one that must be accepted as the opinion is based on facts.

[144] This contention by SAP is unsustainable and incorrect. As pointed out in Asphalt Venture Windrush quoted earlier in this judgment, a court in dealing with the evidence of an expert witness on foreign law is entitled to consider such evidence in the same way it considers the evidence of any other expert. Such evidence need not be rejected but an assessment must be made whether the opinion so expressed is founded on cogent reasons. Although Prof Dauner-Lieb was asked to expressed

her opinion on the assumptions put to her, those assumptions, this court, has since found them to be factual and true. In this context, the assumptions are no longer assumptions but proven facts. Prof Dauner-Lieb's opinion is no longer based on conjecture or speculation. SAP's criticism of her opinion is thus unfounded and unjustified. The criticism is rejected. Her opinion is acceptable to the court. Had this court, however, made a contrary finding with regard to the contents of Exhibit 15, SAP's criticism would be justified, and SAC's reliance on Prof Daune-Lieb's opinion would be nothing but speculation based on non- proven facts.

[145] SAP further criticized Prof Dauner-Lieb that her opinion is based on the opinion of Prof Thomashausen, who, although he filed two reports in this matter, was not called to testify. Secondly, she was attacked of being biased and having relied on Prof Thomashausen's opinion, which opinion was not based on German Law but the Croation Law of Obligation, which, inevitably, is the inapplicable law in the present dispute between the parties.

[146] The criticism and attack of Prof Dauner-Lieb is rather unfortunate and opportunistic. The fact that Prof Thomashausen was not called to testify did not prevent the two experts expressing an opinion on his reports. In fact, in their joint minute, the two experts, without demur, refer to his reports. At no stage did Prof Wagner, during his testimony, complained about the non-calling of Prof Thomashausen and indicated to the court that there is an issue that he would have liked to take up with Prof Thomashausen but because of his absence, he, Prof Wagner, was disadvantaged. That the non-calling of Prof Thomashausen was a non-issue and of little consequence, as he had already filed his two reports, which reports the two experts relied on, is obvious.

[147] It appears correct that Prof Thomashausen relied on the Croation Law of Obligation instead of the BGB. The criticism that Prof Dauner-Lieb relied on the Croation Law of Obligation instead of the BGB is, however, taken out of context and self-serving. At page 3542 line 10 to page 3543 line 7. Prof Dauner-Lieb said the following when cross-examined on this issue:

"PROF DAUNER-LIEB: I just have to understand what you're asking me. So my answer would be a big mistake, I don't understand it, but it doesn't affect my report at all because this passage of his writing about 2362 didn't interest me, was not relevant to the case in my opinion. So I would say okay on the assumption, we are far as this, but on the assumption he really said I copied the Croatian Code I would say in court I don't understand at all. That had never happened in my professional life before that somebody did it intendedly. But if he did it's not my position to be a judge over his standards, but I would say concerning my own report and my testifying, giving evidence on the case it's not infected (probably affected) because this part of his report was not relevant for my reasoning. And I didn't, that was perhaps my mistake, didn't delve deeper into it, but didn't confirm, I didn't make a footnote number 6666 confirmed. I did this really only at the points where I confirmed him, so I think yes I would say I' am shocked. If he really said I deceived the court, no I won't say any further. If he really said it yes I deliberately cited Croatian law, I would be shocked, but I would say at the one hand sorry, but it doesn't infect my analysis and my conclusions concerning the case''

[148] From the above quoted passage of Prof Dauener-Lieb's evidence, it is quite clear that she made an error in overlooking the mistake committed by Prof Thomashausen in relying on the Croation Law of Obligation instead of the BGB.

She apologized to the court for her sloppiness in that regard. What is clear, however, is that the sloppiness did not affect her reasoning and conclusions. According to her explanation, the reliance by Prof Thomashausen on the Croatian Law, was irrelevant to her reasoning and conclusions. Her analysis and conclusions of the issues in this matter, where based on the German law. Her analysis and conclusions were thus unaffected by the reliance of Prof Thomashausen on the Croation Law.

[149] SAP attacked Prof Dauner-Lieb's evidence on the basis that she was biased. Prof Dauner-Lieb denied this allegation by SAP. At page 3545 line 17 of the record, she states that in the beginning she made her own analysis and that she did not rely on Prof Thomashausen's report at all. In her own words "I relied on my own judgement and my own analysis''. In the absence of any evidence to second-guess her explanation, her explanation is accepted as reasonable. The criticism and the attack against her evidence is thus unfounded, unfortunate and unfair. Her opinion on the real issues in this matter is found to be creditworthy and reliable.

[150] Both experts agreed that in German Law, the intention and knowledge attribution, for purposes of section 826 BGB, require that an officer or director within the meaning of ss 30 and 31 BGB, i.e. an individual within the top- level management who acted with the relevant knowledge and intention. It is not sufficient that the knowledge and intention must be shared proportionally by the top- level management but by a specific top –level manager within the organization.

[151] In the present matter, SAC contends that, that individual person to whom such intention and knowledge attribution is to be made is either Mr John Robertson or Mr Apotheker.

[152] Mr John Christiaan Robertson (Mr Robertson) is a Director of Business Planning of SAP, USA. He joined SAP in October of 1997. He was asked to develop SAP Corporate Organization by Prof Kagermann.

[153] According to Prof Dauner-Lieb, Mr Robertson, in his capacity as a senior of the part of the business of SAP, would perfectly qualify as a s 31 BGB representative whose knowledge would be attributed to SAP. Prof Wagner, on the other hand, did not address this issue. On the available evidence, Mr Robertson was a s 31 representative whose knowledge and intention, for purposes of the individual within the top level management to meet the requirements of s 826 BGB, would suffice. The other individual within SAP who meets the requirements of s 31 BGB is Mr Leo Apotheker (Mr Apotheker), in his capacity as the executive board member of SAP. SAP is thus liable for the actions of either Mr Robertson or Mr Apotheker.

[154] The intention required in terms of section 826 BGB is not only limited to direct intention but indirect intention, in the form of dolus eventualis suffices. In other words, the knowledge of the existence of the possibility of the breach coupled with reckless disregard of the consequences for the third party would suffice. This, Prof Wagner labeled as “deliberate closing of eyes”

[155] Both experts agreed that the full details of the contract being breached is not necessary as long as there is knowledge of a contractual bond in existence between the contracting parties. In referring to the Ice Cream Case, 23.05.1995 IZR 39/74,wherein the representative of the defendant induced a contracting party to breach the exclusive agreement with a plaintiff for selling ice cream for purposes of competition in beach of the Unfair Competition Act, and on the basis that many sellers of ice cream sell different kinds of ice cream to other companies, and the inducement occurred despite the fact that the representative did not have the full details of the contract between the contracting parties, Prof Wagner opines that –

"you must not ignore what contracting parties say to you, you can go after own business until you are reminded what - it becomes obvious to you that there is a problem because your contracting partner is bound. Even in competition law you need knowledge of the additional contract that your contracting partner would breach perhaps if he entered into a contract with you."

[156] As to the burden of proof, the experts agree that this knowledge attribution, in the context of section 826 BGB, remains that of the plaintiff. And in the present case, the burden of proof is that of SAC. But according to the recent BGH decision, once the plaintiff has established this prima facie knowledge attribution, there is a rebuttal "onus" on the defendant. In the present matter, once SAC has presented a believable case, it is for SAP to disclose the knowledge in rebuttal, that its top –level management (its board) had about the matter. The experts' agreed principle 9, with regard to this issue, is stated as follows-

"According to BGH NJW 2020,1962 where strategically important decisions are involved, the corporation is required to disclose the knowledge that its top-level management (its board members) had about the matter"

[157] The decision referred to above is the Volkswagen Diesel case 25.05.2020 VI ZR 252/19. In that case, a strategic decision taken by a vehicle manufacturer, Volkswagen, in the context of engine development, by surreptitiously obtaining type-approvals of the vehicles by fraudulent deception of the Federal Motor Transport Authority and thereby placing those vehicles in the market, and deliberately exploiting the innocence and confidence of the vehicle buyers, the Court held that the corporation was thus required to disclose the knowledge that its top- level management (its board members) had about the matter. What is expected of the plaintiff, such as SAC, is merely to state sufficient facts that would, inevitably, lead to the conclusion that the corporation knew of this strategic decision.In the present matter, SAC has indeed stated sufficient facts leading to the conclusion that SAP knew of this strategic decision.

[158] Prof Dauner-Lieb opines that the shifting of “onus” is however, not limited to strategic decisions, particularly, as the concept “strategic decisions’’ is not a legal but a business concept. The decision taken must still remain important to the corporation for the shifting of the onus to occur. When such decision is escalated to the executive board level, according to her, this would in any event amount to strategic decision, otherwise why escalate it if the decision is unimportant. Even Prof Wagner in Muco agreed with the opinion of Prof Dauner-Lieb, though in discussing the Daimler case, he appears to be suggesting that the shifting of the burden of proof is limited to strategic decision only. That the decision to induce SAP SI to breach the SDA was indeed strategic, can be gleaned from Mr Ahrens’ legal opinion of 24 July 2006.In the opinion, Mr Ahrens specifically regard the decision of SAP to prefer Virsa instead of Secureinfo as strategic.

[159] In the instant matter, SAP SI's termination and promotion of Secureinfo was escalated to the Executive board of SAP to the person in the name of Mr Leo Aptoheker. That the termination and non-promotion of Secureinfo was indeed important and strategic, is clear. The reason why the executive board of SAP was kept abreast about Secureinfo was precisely because the termination and promotion of its product by SAP SI was important and thus strategic decision to SAP.

[160] In this case, it must be remembered that Mr Leo Apotheker was the director of Global Operations in 2004 and 2005, which later was renamed Customer Solutions and Operations for which he became the President. His department dealt with all customer interaction on the ground. Later, the Customer Solutions and Operations which became known as New Business and Partner Development (GBD), headed by Mr John Robertson, reported directly to Mr Leo Apotheker, who regularly received reports from the global field services. GBD was responsible for the promotion and the campaign to drive the SAP investment in Virsa and to see its success in the market. Mr Apotheker and Mr Robertson, as the various emails attest to, had regular monthly meetings. And reports about the success of the promotion of Virsa were exchanged between the two. In this context, Secureinfo was seen as a competitive threat to the success of Virsa. GBD was frustrated by SAP SI who were still promoting Secureinfo. And in order to stop this perceived threat, all consultants in SAP SI were instructed not to further promote Secureinfo even when customers of SAP SI asked specifically for Secureinfo. The customers were actively advised and encouraged to choose Virsa instead.

[161] As the emails attest to, Mr Robertson knew that SAP SI had a reseller agreement with Secureinfo. Despite this knowledge, he made no effort to establish the terms and duration of the reseller agreement. But on 12 August 2005, Mr Robertson's subordinate, one Mr Tom Collet (Mr Colllet), wrote to Mr Wittmer and Mr Michel Serie requesting the two for their support and cooperation in terminating SAP Consulting's promotion of Secureinfo, in particular, the termination of the latter's reference in SAP SI's website. Not only was this enough but the reference of Secureinfo in the book Mr Linkies was writing, on security within SAP's system, was to be deleted. Only Virsa was to be regarded as SAP's product to be supported and promoted and not Secureinfo. Furthermore, it was suggested that SAP's Global Security Alliance started by Mr Tattersall, which included Approva, was to be excluded from this alliance. This email was ccd to Mr Robertson. That, in all probabilities Mr Robertson had this information, is clear.

[162] Mr Robertson's denial in evidence that the termination of the reseller agreement would have no effect on Secureinfo, is therefore an untruth and misleading. His denial that if there was indeed an agreement and the agreement was to be terminated, would not amount to interference, is also misleading and untruth. So is his suggestion that, termination of the reseller agreement with Secureinfo and the cooperation between SAP Consulting and Secureinfo, was not factual but hypothetical.

[163] Despite his concession that he should have found out about the commercial relationship between SAP SI and Secureinfo, he was reluctant to admit that any suggestion of termination of such relationship would amount to interference. His insisted that nobody at SAP SI informed him of such a formal relationship, is an

untruth. In this context, his evidence is misleading, unreliable and unhelpful. The denial appears as self-serving. And the denial amounts to denying the undeniable. Neither was he prepared to concede that the purpose of the termination of the relationship with Secureinfo was to promote Virsa and maximize revenue for SAP.

[164] In spite of SAC of putting up a plausible story about interference and thus shifting the “onus” of rebuttal to SAP, the latter failed to discharge its evidential burden of sufficient knowledge of attribution by Mr Robertson and/or Mr Apotheker that the breach of the agreement, in these circumstances, was not contra bonos mores for the purposes of section 826 BGB.

[165] The Court thus finds that, on SAC’s evidence, the balance of probabilities favours SAC that the conduct of SAP in inducing SAP SI to breach its contract with Secureinfo is contra bonos mores as envisaged in s 826 BGB. The fact that Prof Kagermann honestly took upon himself to investigate Mr Tattersall’s complaint, which in the court’s opinion was the right thing to do and in fact honourable, is neither here nor there. The horse has already bolted as there was no plausible explanation from either Mr Robertson or Mr Aphoteker. As Prof Dauner-Lieb puts it, once the damage is done, subsequent investigations could not undo the liability for the damaged done to the knowledge of Mr Robertson and or Mr Apotheker. The conclusion reached is that SAP breached the provisions of s 826 BGB. The breach was resultantly reprehensible, immoral and contra bonos mores. This breach resulted in the damages that SAC may suffer and prove in due course.

The alternative reliance on section 823(1) of the BGB.

[166] SAC alleges in the alternative that SAP committed delict in that its right to an established and operative business that is protected in terms of s 823(1) BGB, has been violated and thus entitling it to damages.

[167] Section 823(1) BGB provides-

"Anyone intentionally, or negligently trespassing contrary to law, on the life, body health, freedom, property or any other right of another party shall be liable for the damages thus incurred to that other party."

[168] As can be seen from the wording of the section, unlike the provisions of s 826 BGB that requires intention, negligent conduct suffices for the purposes of s 823(1). The further difference between the two sections is that s 823(1) BGB protects only certain recognized rights while s 826 is wider.

[169] Both experts agree that the German Law recognized trespassing (injuring) of the right of an established and operating business as the right that is sufficiently covered by the words "any other right" as stated in s 823(1) BGB. The two experts in their joint statement state the principle thus-

"S*823 (1) includes the concept of "Sonstige Rechte" which undisputedly include the right to conduct "an established and operative business (eingerichteter und ausgeubter Gewerbebetrieb). Infringement of the right to an established business and operative business, as protected under Section 823(1) BGB requires a wrongful act that is directly aimed at the business itself and not only against separate and identifiable assets (Unmittelbarer betribsbezogener Eingriff)"*

[170] Messrs Tattersall and Braam Pelser, who was the Business Analyst at SAP based in De Hague, Holland, both testified about SAC's established and operative business operating from 32 Springfield Road, Carlswald, Midrand in the Republic of South Africa. According to Mr Pelser he was shocked to hear from SAP SI's consultants that SAP was pumping a lot of money in the promotion of Virsa and that within a period of two years, there would be no longer Secureinfo to speak about. This is the reason why in 2007 he visited the premises of Secureinfo in Midrand to satisfy himself that indeed Secureinfo does exist and is operating a viable business. His evidence is that he was impressed by what he saw at SAC's premises. He established that Secureinfo in fact did exist and was not a business in name only but had about 30 employees with well-equipped computers. He was impressed by the business and happy to have Secureinfo as a business partner. That is the reason why BHP Billiton continued using Secureinfo until 2010 when SAP stopped using Secureinfo but instead decided to utilize Virsa's product.

[171] None of the witnesses who testified on behalf of SAP disputed or challenged the evidence of both Messrs Tattersall and Pelser on this point.

[172] Prof Wagner's opinion that SAP was free to deal with its own subsidiary, SAP SI, and not Secureinfo, and thus its conduct was not unlawful, misses the point. In the present matter, SAP is indeed free to deal with SAP SI, but it is not, for the purposes of fair play and the rules of the game, to induce SAP SI to breach the terms of the SDA and thus not to deal with Secureinfo in terms of the contract.

[173] At the time SAP interfered with SAP SI's marketing and promotion of Secureinfo in 2005, Secureinfo as a company, had conducted business in partnership with SAP SI for about 15 months. During this period Secureinfo, as a product, had been licensed for TRW, BHP Billiton, Syngenta and Infenion. Secureinfo, as a corporate entity, earned substantial license revenue and consulting income totaling R5 453 831.87 and R14 397 798.32 respectively. That Secureinfo, as an established and operating business was a viable company is confirmed by the Management Summary prepared by SAP's Solution Management as well as Mr Tattersall's evidence.

[174] By the end of 2005 to February 2007 Secureinfo's business, prior to partnering with SAP SI, its software product constituted 98% of its business. As a result of the interference by SAP for SAP SI to terminate and cease promoting its software product, its business cease to exist. According to Mr Tattersall, the interference by SAP, and the latter's promotion and ultimately acquisition of Virsa, resulted in the total destruction of SAC's business that was reliant on its software product.

[175] In argument much was made of the fact that Secureinfo, as an entity, could still do business outside SAP and that Secureinfo's established business was not destroyed as a result of the unlawful conduct of SAP. In fact, it was suggested that SAP made its platform available to SAC for utilization of its software product with the result that no unlawful conduct could be attributed to SAP. The suggestion is wrong and is not supported by the German jurisprudence.

[176] In the Figure Skating Case, BGH NJW 15.05.2012 VI ZR 117/11 where the German army prevailed upon its soldiers not to engage the services of a figure skating coach with a history in the Secret Police of the former East Germany and although the coach was no longer a sports soldier but an independent trainer and teacher who earned income from this activity and could still earn income somewhere else, the Court reasoned that as long as his undertakings would be significantly affected "*It is not relevant that he can achieve adequate returns by training elsewhere"*

[177] In the present matter, the fact that SAC is supported by SAP and could still earn income from elsewhere, is irrelevant. So is the fact that SAP was still supportive of Secureinfo and was still permitting Secureinfo to utilize its platform. The undeniable fact is that SAC's established business was significantly affected by SAP's conduct in interfering with SAP SI's contractual obligation to promote SAC's software product but to instead promote Virsa.

[178] Prof Wagner's opinion in his second report, that because SAP was the holding company of SAP SI, and was in a position to direct SAP SI's activities with the result that the triangle situation such as one found in boycott cases is lacking, misses the point. Although SAP may direct SAP SI's activities, this does not mean that by doing so, SAP SI loses its independent corporate legal status. It remains an independent corporate legal entity with its own board of directors. In this situation, the triangular relationship, as is found in boycott cases, in my view, is still applicable. In the present matter, one is not only dealing with SAP and Secureinfo but SAP SI as well. In this context, the triangle situation alluded to by prof Wagner, is applicable.

[179] In any event, boycott not being a legal concept, is of no consequence. In the Figure Skating case referred to above, the Court reasoned that “boycott –like” situations, such as the one present in the present matter, would suffice for the purposes of s 823(1) BGB.

[180]. Prof Wagner’s reasoning that the “direct” interference must be by the contracting party, in the present matter, that is to say SAP SI, is incorrect. What s 823(1) BGB envisaged is the direct interference with the business of the contracting party but not that the other contracting party must be directly involved. This reasoning accords with the opinion of Prof Dauner-Lieb. She opines that the conduct complained of, must be aimed directly at the business itself. In any event, the two experts, in the joint minute, agree that the unlawful conduct for the purposes of s 823(1) BGB must “directly aimed at the business itself”.

[181] “Business as such” in the present matter refers to SAC’s promotion and licensing of its software product, namely, Secureinfo. That SAP’s conduct in inducing SAP SI to terminate the SDA and to no longer promote and license Secureinfo, and thus interfered in its business, is more that clear. The sole business of SAC was its promotion and marketing of its software product and nothing else. In this context, SAC ‘s business is covered by the provisions of s 823(1) BGB. That SAC’s software product is not “separate and identifiable assets” as referred to in that section, is also obvious. In fact, the Figure Skating case referred to above, makes this clear when it reasoned that *“The right to the existing business is determined by Section 823(1) BGB not only in respect of its actual existence, but also in its individual manifestations, to which the entire sphere of business is to be reckoned, which is protected from direct interference”*

[182] The two experts agree that the unlawfulness in the context of section 823(1) BGB entails the balancing interests of the contracting parties though Prof Dauner-Lieb was more vocal in this regard than Prof Wagner. The former relied on the Figure Skating case referred to above, and pointed out that the harm to the plaintiff must be weighed against that of the defendant resulting in the court finding that the harm caused to the plaintiff outweighed the harm caused to the defendant. In this case, the harm caused to SAP, if any, a big and international conglomerate, is negligible compared to the harm caused to this small South African company whose main source of revenue was generated from the exploitation of its product, Secureinfo.

[183] For the purposes of fair play and the rules of the game, for SAP to induce SAP SI to breach the terms of the SDA and not to deal with Secureinfo, particularly where there is an existing valid contract, would, in my view, be unlawful. This would be so even where SAP was at liberty to deal with its own subsidiary, SAP SI.

[184] As to whether the courts would intervene only where a business decision does not serve any other purpose but to harm others, Prof Dauner-Lieb pointed out that for the purposes of s 823(1) BGB, it mattered not what the purpose of the decision was. She pointed out that the courts' intervention with a business decision that harmed others relied upon by SAP was in the context of the Unfair Competition Act and not in terms of s 823(1) BGB. This, Prof Wagner agreed with.

[185] The conclusion reached is that SAP's conduct was unlawful in terms of s 832(1) BGB as the conduct was directly to interfere with SAC's business as such, which business as pointed above, was an established and operative business.

[186] The state of mind and knowledge attribution under section 823(1) BGB is similar to that required for the purposes of the provisions of s 826 BGB. The state of mind is that of the senior personnel of SAP, which would also be attributed to SAP. This would be so whether SAP was aware or not, as SAP, being a legal entity, is deemed to have knowledge of its appointed representatives and employees.

[187] In the present matter, as already pointed out above, it is undeniable that Mr Apotheker and Mr Robertson had regular meetings and exchanged emails with regard to the issue of Virsa's Compliance Calibrator. The GBD headed by Mr Robertson reported directly to Mr Apotheker, a board member of SAP. For the success of Virsa, Mr Robertson, who knew that there was a reseller agreement between SAP SI and Secureinfo, wanted this reseller agreement to be terminated. Virsa's Compliance Calibrator, despite its lack of functionality compared to that of Secureinfo, this product was promoted instead.

[188] Whenever customers demanded Secureinfo, Virsa was to be recommended instead. Any reference on SAP's and SAP SI's websites of Secureinfo, were to be deleted. Any reference of Secureinfo in the book Mr Linkies was writing was also to be ommited. It is thus inevitable, that SAP intentionally or negligently and unlawfully trespassed or infringed upon SAC's right to an established and operative business in terms of section 823(1) BGB. Accordingly, SAP is liable, in the alternative, to SAC

for any damages it may be able to prove for breach of contract as provided for in terms of section 823(1) BGB.

SAP's Application to Amend its Plea and the late Discovery of the Cooperation Agreement.

[189] According to the rules of this court, in particular Rule 28 of the Uniform Rules of Court, any party is entitled to bring an application for amendment at any time but before judgment is given. That SAP's application is within the Rules and on time, is undeniable.

[190] At the time of the introduction of the proposed amendment, the trial had progressed to the stage that SAC had closed its case and SAP had led some of its witnesses to prove its defenses. The crux of the amendment is to raise a new defense, namely, that on the basis of the Cooperation Agreement between SAP SI and SAP Deutschland, no SDA could have been concluded between SAP SI and SAC as the SDA, in particular clause 9 thereof, contained an exclusivity clause which offended the terms of the Cooperation Agreement.

[191] In essence, SAP seeks to prove that its promotion of Virsa' Compliance Calibrator and the breach of the SDA, could not have been unlawful as the promotion was in terms of the said Cooperation Agreement. In other words, SAP SI's consultants in promoting Virsa instead of Secureinfo, from the effective date, namely 1 January 2005, were thus acting lawfully, and that SAP, in the circumstances, could not have committed any delict in terms of German Law entitling SAC to any damages. In

addition, SAP seeks to belatedly, discover the Cooperation Agreement. The application for the amendment of the plea and the late discovery of the Cooperation Agreement is vehemently opposed by SAC.

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[192] The decision to grant or refuse an application to amend, such as the one brought by SAP, lies within the discretion of the Court. The discretion must, however be exercised judicially bearing in mind that the parties are entitled to properly ventilate the issues between them in pursuance of justice.

[193] As a general rule, an application for amendment would be granted so that the parties would be put back to the same position as they were when the pleadings, which are sought to be amended, were filed. In addition, the application must be bona fide and should not cause an injustice or prejudice to the other party, which prejudice cannot be compensated by an order of costs. See Moolman v Estate Moolman and Another 1927 CPD 27 at p29; Greyling v Niewoudt 1951 (1) SA 88(0) at 91H to 92A and Trans- Drakensberg Bank Ltd (under Judicial Management) v Combined Engineering (Pty) Ltd and Another 1967(3) SA 632(D) at 642 H.

[194] Prior to determining whether the application for the amendment of the plea is bona fide or not, it is necessary to relate what SAP says in its Heads of Argument. It is SAP's stance that the amendment is merely to align its Plea with the Cooperation Agreement with the result that no new issues are raised in the application. SAC, on the other hand, is of a different view.

[195] If indeed the application is merely to align its existing plea with the Cooperation Agreement, the inevitable question is why then the need for the present application, which application is opposed, as the issues addressed by the Cooperation Agreement are already on record, and the parties have already addressed themselves thereon? The real objective of the application, in my view, is to introduce a new defense, which defense is to nullify the SDA and thus SAC's claims against SAP.

[196] SAP's application for amendment is mala fide. In spite of knowing the existence of the Cooperation Agreement prior to the commencement of the trial in October 2020, none of the witnesses who testified, alluded to its existence. Neither the two German Law experts were requested to express an opinion thereon. It was only late in the day, when Messrs Geiger, Kleinemeier and Prof Kagermann thought about the Cooperation Agreement and its relevance in the pleaded issues between the parties.

[197] A late application for amendment, such as the present one, must be fully explained. The explanation quite often comes from the litigant himself or herself. Surprisingly, the person explaining the late delay and its discovery is SAP's legal representatives instead of SAP. SAP, who all along knew of the existence and importance of the Cooperation Agreement, is silent in fully explaining the late discovering of the Cooperation Agreement and its relevant to the pleaded issues. In spite of the prior knowledge of its existence and relevance, SAP did not deem it necessary to discover the Cooperation Agreement and thus base its Plea thereon, which Plea, was, incidentally, amended on several occasions.

[198] The Cooperation Agreement is indisputably between SAP SI and SAP Deutschland. Its effective date is 1 January 2005, long after the SDA was, according to SAC, concluded by conduct. Perusal of the terms of the agreement, reveal that the duties imposed by the Cooperation Agreement are between the two contracting parties and not between SAP SI or its consultants and SAC.

[199] It must be borne in mind that according to SAC, the SDA was concluded in 2004. There is no provision in the Cooperation Agreement that suggests that its terms are retrogressive with the result that anything done by SAP SI prior to 1 January 2005 is invalid and ineffectual.

[200] In addition, the Cooperation Agreement imposes no duty upon SAP SI or its consultants to promote the interest of SAP in the promotion of Virsa and to downplay the role of Secureinfo amongst SAP SI's customers. That the application for amendment and its discovery is therefore not bona fide but mala fide, admits no doubt.

[201] SAC's objection is that if the application for amendment and its discovery is allowed, it would suffer irreparable prejudice that cannot be addressed by postponement and an order for appropriate costs.

[202] SAC's complaint appears to be well-founded. The trial commenced in October 2020. SAC's witnesses including its experts have already testified and in fact its case against SAP has since been closed. Not only that, some of SAP's witnesses

had already testified when the application was brought. That the trial that had ran for almost 12 months before its conclusion had to start all over again, in the event the application is granted, and again with the probabilities that SAC's claim would be opposed in any manner possible, would be prejudicial to SAC, is more than obvious.

[203] Sight should not be lost that the Summons in this matter was issued in 2008, a period of some13 years ago. The saying that justice delayed is justice denied would be proved correct should the application be granted and the trial start de novo to enable SAC to plead a new cause of action addressing the issues now being raised in the Cooperation Agreement.

[204] SAP’s contention that the application to amend its plea, as alluded to in its Head of Argument, is merely to align its plea with the terms of the Cooperation Agreement, is therefore not true. Its true purpose and aim is to pursue its contention that in 2004 SAP SI could not have concluded the SDA as same was not in alignment with the provisions of the Cooperation Agreement. And that SAP SI, including its employees, and, in particular, its consultants, were legally obliged with effect from 1January 2005, to promote Virsa instead of Secureinfo. In this context, the suggestion is that neither SAP nor SAP SI acted unlawfully thereby committed delict entitling SAC to damages, if any.

[205] That the real purpose and objective of the application is the introduction of a new defense, is more than clear. The new defense, if the application was to be granted, would be prejudicial to the cause of action of SAC. The prejudice caused to SAC

cannot be cured by a postponement of the trial and the order for payment of costs by SAP. Such prejudice, in my view, is irreparable, bearing in mind that the trial in this matter has already taken an inordinate time before completion. SAC spent, undeniably, a lot of money to ensure that the trial in this matter is run to its completion. Vast amount of court resources, during these difficult times of Covid-19, have been taken up in ensuring that the trial is run and completed.

[206] It is apt to refer to the decision in Tengwa v Metrorail 2002 (1) SA 739(C) at 745H to 746A, where the court, in refusing an application for amendment reasoned thus-

> *"It is evident that, should the amendment be allowed, the matter would have to be postponed to give the defendant (SAC) an opportunity to investigate the facts and the issues in the light of the new grounds envisaged in the amendment and, after such investigation perhaps to amend its plea (cause of action). In that connection, for example, Ms Mazimba herself (SAC's witnesses) may have to be consulted again in order to canvass with her (them) the issue now raised by the amendment and, at a later date, he (Mr Tattersall) may be required to testify. Again, the defendant (SAC) may need to search for and consult with other witnesses who, at the relevant time, were passengers in the train (were aware of the Cooperation Agreement) and which it had not thought necessary to consult in view of the plaintiff's claim (SAC's claim) as originally pleaded. Because of effluxion of time it (SAC) may find it difficult, if not impossible, to identify and find those passengers (witnesses). In my view, therefore, to allow the amendment would cause the defendant (SAC) irreparable damage"*

[207] So is the position in the present matter. The amendment now sought by SAP, at this late stage of the trial, would cause irreparable prejudice to SAC. The prejudice, as pointed above, cannot be overcome by an order for a postponement or a suitable order for costs. In any event, the application for amendment is not bona fide but male fide. In the result, the application must be dismissed with costs. Accordingly, it is dismissed with costs.

[208] SAP contends that as SAC cross-examined the former's witnesses regarding the Cooperation Agreement, and despite the fact that it reserved its right to object to the introduction of the Cooperation Agreement, the cross-examination and the non-exercising of the reserved right have been waived.

[209] The contention of SAP is far from the truth. SAC was entitled to cross-examined SAP's witness regarding the Cooperation Agreement. The cross-examination, in my view, did not suggest that the right to object has been waived. The cross examination was merely to show that the Cooperation Agreement does not say what SAP wish it to say. Nothing more. The objection and reservation of the right meant nothing else but that at the relevant time the application is brought, same would be objected to. In this context, no waiver could be raised and be relied upon by SAP. To reiterate, the application for amendment and the discovery of the Cooperation Agreement is dismissed with costs.

[210] With regard to the determination of the issue of merits that in terms of Rule 33(4) have been separated from the issue of quantum, SAP contends that, in the event

SAC succeeds, the issue of costs should be reserved for later determination together with the issue of quantum.

[211] The contention of SAP to reserve the issue of costs is without merit. The separated issue of the merits disposes of this issue entirely rendering it final and appealable. There is therefore neither factual nor legal basis to reserve the issue of costs at this stage. The costs must, accordingly, follow the results.

[212] It is further SAP's contention that the costs of three counsel, where three counsel were so employed, should not be allowed as this is unreasonable and that only the costs of two counsel should be granted. SAP's contention in this regard is also without merit.

[213] The issues raised in the determination of the merits is not only complex but difficult as well. The determination of the merits involved foreign law, in the present matter codified German Law. Most of the issues raised at this stage are contained in voluminous emails written by Germans and in the German language. Utilization of three counsel, one or some of whom speak German, was not only reasonable but necessary and warranted as well. In my view, the employment of three counsel, where such counsel were so employed, cannot, in the circumstances of this matter, be regarded as unreasonable.

[214] In the result, the following order is made-

214.1 It is declared that the firsts defendant, SAP SE, is in breach of its legal duties to the plaintiff, SAC, as provided for in section 826 alternatively section 823 of the BGB;

214.2 In consequence of paragraph 1 above, the first defendant, SAP SE, is liable to the plaintiff, SAC, for such damages as may be shown to have been suffered by the plaintiff as a consequence of such breaches;

214.3 The first defendant, SAP SE, is liable to pay the plaintiff's costs of suit, including the costs of three counsel where three counsel were so employed;

214.4 The first defendant, SAP SE, is liable to pay the plaintiff's qualifying costs of the plaintiff's expert, Professor Dauner-Lieb;

214.5 The first defendant, SAP SE, is liable to pay the costs reserved by Satchwell J on 25 May 2011.

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M.TSOKA
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION
JOHANNESBURG

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Date of Hearing 24 May 2021 – 17 September 2021

Date of Judgment: 7 December 2021