THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20229/2014

In the matter between:

NOVARTIS SOUTH AFRICA (PTY) LTD **APPELLANT**

And

MAPHIL TRADING (PTY) LTD **RESPONDENT**

Neutral Citation: *Novartis v Maphil* (20229/2014) [2015] ZASCA 111 (3 September 2015)

Coram: Lewis, Majiedt, Pillay, Zondi and Mathopo JJA

Heard: 18 August 2015

Delivered: 3 September 2015

Summary: Contract comprising written document, oral agreement and emails enforceable: evidence demonstrated intention to conclude contract in this way, as well as actual authority of representatives to bind the appellant. Principles of contractual intepretation considered.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Boruchowitz J sitting as court of first instance).

The appeal is dismissed with costs including the costs of two counsel where so employed.

JUDGMENT

Lewis JA (Majiedt, Pillay, Zondi and Mathopo JJA concurring)

[1] The question to be answered in this appeal is whether a contract between the parties was concluded: if so, the appellant, Novartis South Africa (Pty) Ltd (Novartis), would be guilty of repudiation of the contract, and the respondent, Maphil Trading (Pty) Ltd (Maphil), would be entitled to damages. The contract alleged by Maphil was in fact negotiated by representatives of a company, Hiline Medical (Pty) Ltd (Hiline), the shares of which were sold after the events that I shall describe. The name of the company was changed to Maphil subsequently. All references to Hiline in what follows apply thus to Maphil as well.

[2] Novartis is a subsidiary of a pharmaceutical drug manufacturer and supplier based in Switzerland. It operated ‘divisions’ (separate trading entities, but not companies themselves) in South Africa, which in turn supplied medicines to pharmacies and hospitals. The Sandoz Division supplied generic pharmaceutical products and the Sandoz Specialty Division (SSD) supplied ‘ethical’ or non-generic products.

[3] In 2004 the Medicines and Related Substances Act 101 of 1965 was amended to introduce, amongst other provisions, a prohibition on the supply of medicines according to a bonus or rebate system, or any other incentive scheme. Regulations under the amended Act provided stringent controls for the pricing of

medicines and the marketing, sale and distribution of pharmaceutical products. Consequently, Novartis and its divisions had to change their marketing strategies.

[4] The uncontroverted facts were these. The director of the SSD, Mr Ian van der Spuy, and the business manager, Ms Annie van Jaarsveld, in consultation with other members of the SSD, came up with the idea of putting the Sandoz brand and logo on packaging for medical devices (not medicines themselves) that would be seen by health professionals. The idea was to market the Sandoz brand (its name), particularly in hospitals, since the medicines themselves could not be advertised. The strategy was approved not only by SSD but also by the executive committee of Sandoz (EXCO), and its chairman, Mr John Hallam.

[5] Van Jaarsveld, with the approval of members of SSD which met on 3 August 2004, approached Mr Martin Lambrecht, a director of Hiline, some time in August 2004 and met him in Cape Town in September 2004: she suggested that SSD and Hiline enter into an arrangement in terms of which Hiline would receive a fee for putting Sandoz branding on the packaging of devices supplied by Hiline to hospitals. Lambrecht was amenable to this.

[6] The timing of the approach was fortunate because Hiline was about to put in a bid for the supply of medical devices to Mediclinic, a national private hospital group. If SSD committed to paying a fee for the marketing proposed, Lambrecht would be able to reduce the prices of the items that Hiline was tendering to supply by some R3 million. Lambrecht's tender documents had to be submitted to Disa-Med, the procurement department for Mediclinic. The proposed marketing strategy had been discussed with the procurement manager of Disa-Med, Ms Anita Hamilton. Indeed, it was she who had suggested Hiline to SSD as a potential partner in a marketing arrangement.

[7] The deadline for submitting the tender was 14 October 2004. Lambrecht had, before then, indicated to Van Jaarsveld that unless he had a commitment from SSD, he could not give the discounted prices to Mediclinic. On 14 October, Van Jaarsveld and Van der Spuy went to Cape Town (they were based in the Novartis offices in Johannesburg) with a draft marketing agreement between SSD and Hiline, signed by Van Jaarsveld and Van der Spuy for SSD, offering a marketing fee of R3.5 million for the year 2005. After some amendments effected to it by the SSD representatives at Lambrecht's request, he orally accepted the commitment. I shall discuss the terms of the marketing agreement itself in due course since Hiline alleged that it formed part of the contract, the balance of which was concluded orally and by email exchange.

[8] Lambrecht, when testifying for Hiline, explained that the full contract could not be concluded on 14 October 2014 because Hiline and SSD had yet to agree upon the exact items on which the Sandoz name would be used and on the details of logos and naming. Moreover, Hiline did not yet know what items tendered for would be accepted by Disa-Med. Addendum A to the agreement presented to Hiline by SSD was headed 'Marketing Agreement', and typed below that were the words 'To be finalized by 30 November 2004'. There was never any formalized addition to the addendum. The marketing arrangements were agreed over the telephone, in emails, and at a meeting on 12 November 2004, on Hiline's version. The marketing agreement presented to Hiline on 14 October, signed by van Jaarsveld and Van der Spuy for SSD, was at some time signed by Lambrecht and his brother for Hiline, but Lambrecht could not remember if the document with their signatures on it was ever sent to SSD.

[9] The tender by Hiline, in which the prices had been reduced by some R3 million, was in due course accepted by Disa-Med. Hiline proceeded as if there were a contract with SSD as did SSD. By February of the following year, Hallam had second thoughts about the feasibility of the contract and after a meeting with a representative of Mediclinic, at which he discovered that SSD would not get rebates on medicines. On 4 March 2005 Hallam wrote a letter to Hiline stating that there was no contract between Novartis and Hiline and that the invoice (with the Sandoz logo

already printed on it) that Hiline had submitted to it for the first monthly payment would not be paid.

[10] Hiline treated Novartis's conduct as a repudiation of the contract between them, and instituted action in the Gauteng Local Division for damages for breach of contract. Boruchowitz J found for Maphil (which had, as buyer of the Hiline shares, taken over the claim) and awarded the sum claimed – the fee that Hiline would have been entitled to had the contract been performed – and interest. Novartis appeals with the leave of the trial court. That, in broad outline, is the background to this appeal.

The contract relied on by Hiline

[11] It is necessary at this point to consider the way in which Hiline pleaded its claim against Novartis. It alleged that there were two components to the contract on which it relied: first, the partly written marketing agreement signed by Van der Spuy and Van Jaarsveld on behalf of SSD and presented to Lambrecht on 14 October 2004, which he accepted for Hiline that day. The written part was annexed to the particulars of claim. Second, a subsequent partly oral and partly written agreement in terms of which the marketing activities were agreed, as contemplated in the document accepted on 14 October 2004. That agreement, Hiline alleged, was reached on 12 November 2004 at a meeting held in Cape Town with Lambrecht and his brother Phillip, and Van der Spuy and Ms L Biel, the product manager of SSD, for SSD.

[12] At that meeting, it was alleged, the parties reached agreement on the Hiline products that would bear the Sandoz logo, and on putting the logo on Hiline's delivery vehicles. The written part of the agreement on marketing activities comprised three emails: one from Van Jaarsveld, sent on 30 November 2004 to Lambrecht; a response from the latter later in the same day, and a further email from her to Lambrecht, also on the same day.

[13] The first email asked for details of Hiline's registration number and banking account, and set out the Hiline products on which Sandoz logos would be advertised. It was confirmed that the logo would be put on the Hiline invoices as well. Van Jaarsveld also advised that a new vendor application form should be completed by a representative of SSD and sent to her by fax.

[14] It should be noted that Van Jaarsveld also said in that email that she intended to send a draft agreement for Lambrecht's attention and that of Hiline's attorney, Mr Adriaan Hoeben of the firm Sonnenberg Hoffman and Galombik (as it was known then) in Cape Town. Lambrecht responded saying that the detail for the logo on the invoices that Hiline used had changed. He attached a document confirming the details of the marketing activities. The third email confirmed details and said that Van Jaarsveld would be seeing SSD's attorney, Mr Neil Kirby of Werksmans attorneys, the following day and did not want to 'get any of the detail wrong'.

[15] Hiline pleaded, accordingly, that the marketing agreement on which it relied, comprising both written and oral agreements, was concluded in the meetings and by the exchange of emails, ending on 30 November 2004. The material terms of the agreement were that Hiline would perform marketing activities for SSD at a fee of R3.5 million for the year 2005, payable in monthly instalments on receipt of an invoice issued by Hiline to SSD.

[16] Novartis raised a number of defences in its plea: no contract had been proved; the document signed on 14 October 2004 was inchoate and lacked exigible content; the parties had intended to conclude a contract only when one was drafted by an attorney; and none of the representatives of Novartis who purported to bind it had authority to do so.

The terms of the written document

[17] The preamble stated that the agreement, dated 1 January 2005 to 31 December 2005, was between Hiline and SSD; that Hiline is a medical supplies company; and that SSD manufactures and sells pharmaceutical products. It was followed by a heading 'Sandoz [SSD] obligations', and continued:

'A. Marketing Fee

Sandoz agrees to pay Hiline a marketing fee of R3.5 million per annum. This will be paid as a fixed monthly marketing fee on receipt of a tax invoice from Hiline, confirming marketing activities carried out during the previous month.

B. Legal

Sandoz confirms that should the marketing activities under this agreement be challenged with possible litigation, Sandoz undertakes responsibility of defending this action in total.'

Under the heading 'Hiline Medical Obligations' the document continued:

'A. Marketing Activities

1 Hiline agrees to adhere to the marketing activities as outlined in Addendum A.

2 These activities will be confirmed by a tax invoice on a monthly basis.

3 Should Hiline be in a position not to provide these marketing services, Sandoz will be timeously advised.

4 Hiline agrees that all marketing activities contemplated above, will be in accordance to the Novartis Code of Conduct (supplied by Sandoz).

B. Payment

Payment of marketing fee will take place thirty (30) days from receipt of tax invoice.'

[18] There followed various general provisions which included a clause stating that the agreement could not be amended or modified except by a written instrument signed by both parties; that the agreement, including addenda, constituted the 'entire agreement and understanding between the parties . . . and shall supersede all prior

oral or written negotiations, agreements or understandings between the parties with respect to the subject matter of this Agreement'.

[19] Addendum A, headed marketing agreement, stated no more than that it would be 'finalized by 30 November 2004'. Addendum B, that dealt with SSD products, listed four drugs.

The findings of the trial court

[20] Boruchowitz J found that the contract pleaded had been proved. The documents on which Hiline relied, and the oral evidence of Lambrecht and Van Jaarsveld, who testified for Hiline, as well as the evidence of Hallam, who gave evidence for Novartis, supported the conclusion that Hiline and SSD had intended to enter into a contract on the terms set out in the document styled a marketing agreement which was concluded when the marketing activities had been agreed by 30 November 2004. The conclusion was supported by the fact that, despite Novartis's argument that the contract had no exigible content, both Hiline and SSD had started to perform their obligations in terms of the contract. This was the evidence of Lambrecht, Van Jaarsveld and even Hallam for SSD, who regarded the contract as binding. I shall deal with their evidence shortly.

[21] Boruchowitz J also considered that the subsequent agreement on marketing activities was not precluded by the clause that provided that the agreement and addenda constituted the entire agreement – that referred to prior oral and written agreements, not to those agreed subsequently, and to which Addendum A expressly referred. That entailed, in turn, that the agreement was not inchoate since the marketing activities were in fact agreed by 30 November as contemplated. And the fact that both parties proceeded to perform their obligations under the contract necessarily meant that the agreement was not vague, lacking exigible content.

[22] In its plea, as I have said, SSD alleged that none of Van Jaarsveld, Van der Spuy or Biel had the authority to bind SSD. It was made clear in her evidence that Van Jaarsveld did not have the authority to bind SSD, but Van der Spuy was the head of the division and the trial court concluded that even if he did not have actual authority to bind SSD, he at least had the ostensible authority to do so.

Novartis's arguments on appeal

[23] Novartis challenges all of these findings on appeal and contends that the trial court materially misdirected itself in assessing some of the evidence. Its principal argument, however, is that the trial court did not properly apply the rules relating to the interpretation of contracts. I shall turn to that argument briefly although, in my view, the question before us is not what the contract alleged meant. The question, as I said at the outset, is whether there was a contract at all on the terms alleged by Hiline.

Interpretation of the contract

[24] The argument of Novartis, as I understand it, is that interpretation is an entirely objective process: in deciding what a contract means, a court must have regard to the words used and construe them objectively. Novartis cites in this regard passages from *KPMG Chartered Accountants (SA) v Securefin Ltd & another* [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39, and *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18 (*Endumeni*).

[25] The relevant passage in *KPMG* reads:

'First, the integration (or parol evidence) rule remains part of our law. However, it is frequently ignored by practitioners and seldom enforced by trial courts. If a document was intended to provide a complete memorial of a jural act, extrinsic evidence may not contradict, add to or modify its meaning (*Johnson v Leal* 1980 (3) SA 927 (A) at 943B). Second, interpretation is a matter of law and not of fact and, accordingly, interpretation is a matter for

the court and not for witnesses (or, as said in common-law jurisprudence, it is not a jury question: Hodge M Malek (ed) *Phipson on Evidence* (16 ED 2005) para 33-64). Third, the rules about admissibility of evidence in this regard do not depend on the nature of the document, whether statute, contract or patent (*Johnson & Johnson (Pty) Ltd v Kimberly-Clark Corp* [1985] ZASCZ 132 (at www.saflii.org.za), 1985 Burrell Patent Cases 126 (A)). Fourth, to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible" (*Delmas Milling Co Ltd v du Plessis* 1955 (3) SA 447 (A) at 455B-C). The time has arrived for us to accept that there is no merit in trying to distinguish between "background circumstances" and "surrounding circumstances". The distinction is artificial and, in addition, both terms are vague and confusing. Consequently, everything tends to be admitted. The terms "context" or "factual matrix" ought to suffice. (See *Van der Westhuizen v Arnold* 2002 (6) SA 453 (SCA) paras 22 and 23 and *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* 2008 (6) SA 654 (SCA) para 7.)'

[26] The passage relied on by Novartis in *Endumeni* reads (footnotes omitted):

'Over the last century there have been significant developments in the law relating to the interpretation of documents, both in this country and in others that follow similar rules to our own. It is unnecessary to add unduly to the burden of annotations by trawling through the case law on the construction of documents in order to trace those developments. The relevant authorities are collected and summarised in *Bastian Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* [[2008] ZASCA 70; 2008 (5) SA 1 (SCA) paras 16-19.] The present state of the law can be expressed as follows. Interpretation is the process of attributing meaning to the word used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what

they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself” [a reference to *Re Sigma Finance Corp* [2008] EWCA Civ 1303 (CA) para 98], read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.’

[27] I do not understand these judgments to mean that interpretation is a process that takes into account only the objective meaning of the words (if that is ascertainable), and does not have regard to the contract as a whole or the circumstances in which it was entered into. This court has consistently held, for many decades, that the interpretative process is one of ascertaining the intention of the parties – what they meant to achieve. And in doing that, the court must consider all the circumstances surrounding the contract to determine what their intention was in concluding it. *KPMG*, in the passage cited, explains that parol evidence is inadmissible to modify, vary or add to the written terms of the agreement, and that it is the role of the court, and not witnesses, to interpret a document. It adds, importantly, that there is no real distinction between background circumstances, and surrounding circumstances, and that a court should always consider the factual matrix in which the contract is concluded – the context – to determine the parties’ intention.

[28] The passage cited from the judgment of Wallis JA in *Endumeni* summarizes the state of the law as it was in 2012. This court did not change the law, and it certainly did not introduce an objective approach in the sense argued by Novartis, which was to have regard only to the words on the paper. That much was made clear in a subsequent judgment of Wallis JA in *Bothma-Botha Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* [2013] ZASCA 176; 2014 (2) SA 494 (SCA), paras 10 to 12 and in *North East Finance (Pty) Ltd v Standard Bank of South Africa Ltd* [2013] ZASCA 76; 2013 (5) SA 1 (SCA) paras 24 and 25. A court must examine all the facts - the context - in order to determine what the parties intended. And it

must do that whether or not the words of the contract are ambiguous or lack clarity. Words without context mean nothing.

[29] Referring to the earlier approach to interpretation adopted by this court in *Coopers & Lybrand & others v Bryant* [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768A-E, where Joubert JA had drawn a distinction between background and surrounding circumstances, and held that only where there is an ambiguity in the language, should a court look to surrounding circumstances, Wallis JA said (para 12 of *Bothma-Botha*):

'That summary is no longer consistent with the approach to interpretation now adopted by South African courts in relation to contracts or other documents, such as statutory instruments or patents. While the starting point remains the words of the document, which are the only relevant medium through which the parties have expressed their contractual intentions, the process of interpretation does not stop at a perceived literal meaning of those words, but considers them in the light of all relevant and admissible context, including the circumstances in which the document came into being. The former distinction between permissible background and surrounding circumstances, never very clear, has fallen away. Interpretation is no longer a process that occurs in stages but is "essentially one unitary exercise" [a reference to a statement of Lord Clarke SCJ in *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50, [2012] Lloyd's Rep 34 (SC) para 21].

[30] Lord Clarke in *Rainy Sky* in turn referred to a passage in *Society of Lloyd's v Robinson* [1999] 1 All ER (Comm) at 545, 551 which I consider useful.

'Loyalty to the text of a commercial contract, instrument, or document read in its contextual setting is the paramount principle of interpretation. But in the process of interpreting the meaning of the language of a commercial document the court ought generally to favour a commercially sensible construction. The reason for this approach is that a commercial construction is likely to give effect to the intention of the parties. Words ought therefore to be interpreted in the way in which the reasonable person would construe them. And the reasonable commercial person can safely be assumed to be unimpressed with technical interpretations and undue emphasis on niceties of language.'

[31] This was also the approach of this court in *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA) para 13. A further principle to be applied in a case such as this is that a commercial document executed by the parties with the intention that it should have commercial operation should not lightly be held unenforceable because the parties have not expressed themselves as clearly as they might have done. In this regard see *Murray & Roberts Construction Ltd v Finat Properties (Pty) Ltd* [1991] ZASCA 130; 1991 (1) SA 508 (A) at 514B-F, where Hoexter JA repeated the dictum of Lord Wright in *Hillas & Co Ltd v Arcos Ltd* 147 LTR 503 at 514:

‘Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is accordingly the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects.’

[32] Novartis argued that the purpose of Addendum A was to provide clarity and certainty as to the marketing activities to be performed by Hiline. When completed it would define its obligations. To allow for the substitution of an oral agreement or one concluded by the exchange of emails, without a formal amendment to the document to which A was an addendum, would be ungrammatical and would be in disregard of the purpose to be served by the addendum. The plain meaning of clause II A 1, cited above, was unambiguous: Addendum A would be the source of Hiline’s obligations. There could be no other. Reference to another document was impermissible. Nothing was set out in Addendum A: thus, it contended, the contract had no exigible content.

[33] Furthermore, the argument went, what is meant by the words in Addendum A, ‘To be finalized by 30 November’? They could mean only that Addendum A had to be completed by a written instrument defining the marketing activities. And that was in turn precluded by the provision of the document that it was the sole memorial of the agreement. Parol evidence was impermissible to add to the document, it was

contended, and Addendum A could only have been completed with a written instrument signed by both parties.

[34] That argument can be disposed of by having regard to what the parties expressly excluded: any variation or addition to the marketing agreement. But that agreement expressly provided that the marketing activities had to be finalized in the future – before 30 November 2004. In agreeing such activities in a meeting and by way of email the parties did exactly what they contemplated in agreeing to the content of the document. And nothing in the document required that the future agreement should comply with any formality. Absent a statutory requirement that particular formalities be adhered to, or an agreement that an instrument will have no force unless particular formalities are followed, as long as the terms of a contract satisfy other requirements for contractual validity, the parties may conclude their contract in any manner they choose. See, most recently in this regard, *Pillay & another v Shaik & others* [2008] ZASCA 159; 2009 (4) SA 74 (SCA) para 50.

[35] The argument that the words of the document, signed by Van Jaarsveld and Van der Spuy on 14 October 2004, must be examined only linguistically, and that the genesis of the document, subsequent conduct and other facts relevant to the conclusion of the contract be ignored, is directly contrary to the decisions of this court cited above, and many others. But, as I have said, the issue here is not what the parties intended their contract to mean, but whether they intended to bind themselves contractually. That inevitably requires an examination of the factual matrix – all the facts proven that show what their intention was in respect of entering into a contract: the contemporaneous documents, their conduct in negotiating and communicating with each other, and, importantly, the steps taken to implement the contract.

Novartis's contentions based on the evidence

[36] Novartis contends that a number of undisputed and contemporaneous matters require the court to infer that, on the probabilities, an agreement was not concluded. The document presented by SSD to Hiline on 14 October 2014 made provision for

the signature of the representatives of both parties, yet only the SSD representatives, Van Jaarsveld and Van der Spuy, signed on that day. Lambrecht said that he accepted the SSD commitment orally, and only signed the document for record purposes (to complete the paperwork, in his words) subsequently. Yet he also said that he was not ready to 'conclude' the contract then – the marketing activities could not at that stage be finalized.

[37] Moreover, Lambrecht wanted to ensure that any agreement reached would not be in contravention of the Act, and wanted to check it with Hiline's attorney. That he did – asking Hoeben to give comments on the lawfulness of the 'proposed agreement'. Hoeben responded on 28 October 2004, dealing primarily with the regulatory regime, but he also expressed the view that the proposed agreement with which he had been provided needed significant changes and additions in order to get clarity on the marketing activities.

[38] None of that is inconsistent with Lambrecht's evidence that he wanted a commitment from SSD before he reduced the prices in the tender to Disa-Med and that the marketing activities had still to be finalized before 30 November. In the face of persistent cross-examination to the effect that he had not concluded a contract on 14 October, he consistently said that SSD had made a commitment – but that he wanted still to get legal advice and to see the terms on which the tender would be awarded before taking the steps to agree on the marketing activities. Hiline's case, as pleaded from the start, was that the contract relied upon was concluded only on 30 November 2004. As at 14 October, therefore, he would not have told Hoeben that the agreement was concluded. He did not think it was.

[39] Novartis places considerable emphasis on the parties' respective dealings with their attorneys, and draft agreements that were prepared for them to sign. Hiline did not dispute that it wanted an attorney to draft a contract to govern the relationship with SSD. Lambrecht wanted the assurance that their venture was lawful. There were meetings between their respective attorneys in Cape Town. Mr Neil Kirby of

Werksmans attorneys went to Cape Town to meet Hoeben. It was agreed that a colleague of Kirby, with expertise in the drafting of contracts, would draft the agreement. In fact, there were regular exchanges between Van Jaarsveld, Kirby and Hoeben about getting the agreement finalized. It became apparent that the attorney's draft would not be completed before the end of 2004, but it was anticipated that Kirby would attend to it early in 2005 when business resumed after the festive season.

[40] Lambrecht and Van Jaarsveld were taxed with the question why they wanted a contract drafted by an attorney if, as Hiline argued, one was already in place. Van Jaarsveld had written several emails to SSD indicating that the delay was hampering the project. On 8 December 2004, for example, she said, in an internal email:

'We cannot finalize our legal agreement until such time that all advertising activities are completely final and I am getting really worried about the delays and cost implications with the backwards and forwards and constant tweaking of artwork.'

[41] She also wrote to Hoeben on the same day stating that there had been 'delay finalizing our agreement'. She added:

'Remember when you said the most important and most difficult part would be the listing of marketing/advertising activities? And how vehemently I disagreed?? . . . I won't argue with you again!!' . . . Neil will send a draft agreement to you, probably early in January 2005.'

[42] When testifying, both Lambrecht and Van Jaarsveld said that they had anticipated a second agreement that would supersede the current one. They had hoped to have a contract drafted by a lawyer. And since that did not materialize the contract concluded on 30 November 2004 remained in force. Counsel for Novartis argued that this was a 'stratagem (contrivance)' to explain their ongoing meetings and correspondence with Hoeben and Kirby, and was inconsistent with the correspondence such as that quoted above.

[43] In my view that criticism is unfair. Both parties did want a lawyer's contract to replace the one drafted by SSD, signed by Van Jaarsveld and Van der Spuy, and concluded orally and by email correspondence. But they nonetheless regarded the latter as binding, and took steps to implement it on that understanding. Lambrecht's evidence that the contract was not concluded on 14 October when he was given the undertaking by van Jaarsveld and Van der Spuy does not assist Novartis. He made it clear that he wanted legal advice and to know the outcome of Hiline's tender to Disa-Med: but these matters had been resolved by 30 November when the marketing activities were confirmed.

[44] And complaints about the artwork were of no moment to Hiline: it was entirely up to SSD to determine how they wanted their logos and name to appear on packaging and vehicles. In fact SSD had prepared and approved the artwork for packaging, Hiline invoices, and for Hiline delivery vehicles by the time SSD repudiated the contract. In rejecting Novartis's argument that the agreement was inchoate because not all of its terms were agreed by 30 November 2004, Boruchowitz J in the trial court relied on dicta of Corbett JA in *CGEE Alsthom Equipments et Enterprises Electrique, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 92A-E:

'There is no doubt that, where in the course of negotiating a contract the parties reach an agreement by offer and acceptance, the fact that there are still a number of outstanding matters material to the contract upon which the parties have not yet agreed may well prevent the agreement from having contractual force. A good example of this kind of situation is provided by the case of *OK Bazaars v Bloch* . . .[1929 WLD 37] (see also *Pitout v North Cape Livestock Co-operative Ltd* . . . [1977 (4) SA 842 (A)] Where the law denies such an agreement contractual force it is because the evidence shows that the parties contemplated that *consensus* on the outstanding matters would have to be reached before a binding contract could come into existence (see *Pitout's* case *supra* at 851B-C). The existence of such outstanding matters does not, however, necessarily deprive an agreement of contractual force. The parties may well intend by their agreement to conclude a binding contract, while agreeing, either expressly or by implication, to leave the outstanding matters to future negotiation with a view to a comprehensive contract. In the event of agreement being reached on all outstanding matters the comprehensive contract would incorporate and

supersede the original agreement. If, however, the parties should fail to reach agreement on the outstanding matters, then the original contract would stand. (See generally Christie *The Law of Contract in South Africa* at 27-8.) Whether in a particular case the initial agreement acquires contractual force or not depends upon the intention of the parties, which is to be gathered from their conduct, the terms of the agreement and the surrounding circumstances (see *Pitout's* case *supra* at 815D-G).'

[45] I agree that these principles are germane, but would limit their application to the arrangements in respect of artwork, which was in SSD's domain. The material terms of the contract had in fact been agreed, and I consider that the contract pleaded and relied on by Hiline was concluded by 30 November 2004 as the trial court found. It remains to consider whether Van Jaarsveld and Van der Spuy had the authority to conclude a contract for Hiline.

Authority to conclude the contract

[46] Novartis raised the question of the authority of its representatives in its plea. Hiline replicated that both Van Jaarsveld and Van der Spuy had authority to conclude the contract. In giving particulars for trial, Hiline averred that Novartis operated the two divisions referred to earlier. Van der Spuy was the director of the SSD. Each division was authorized to perform all actions relevant to its business, and was conducted by particular committees. Sandoz had an executive committee, the EXCO, of which Hallam was the chair and Van der Spuy a member. SSD had a management committee of which Van der Spuy was the chair, and Van Jaarsveld, the business manager of SSD, a member. Novartis had structured SSD as a separate business entity.

[47] Van Jaarsveld testified that she did not herself have the authority to conclude an agreement: her function was to initiate and negotiate agreements. She had to get the authorization of Van der Spuy for the purpose of making the undertaking to pay a marketing fee to Hiline.

[48] Hiline argued that the structure of the separate divisions itself gave rise to the inference that Van der Spuy, at least, had actual authority to conclude the marketing agreement. That document recorded that it was concluded on behalf of SSD by Van der Spuy and Van Jaarsveld. Van Jaarsveld was mandated by the SSD Management Committee, at its meeting on 3 August 2004, to approach Hiline. And even before then, she and Reinhold Just, who was on the EXCO, had consulted with their attorney Kirby to get advice on the legality of the venture that the SSD had approved.

[49] On 22 October 2004, the management committee met and it was minuted that Hiline would be paid R3.5 million and that the marketing activities would be finalized by 30 November 2004. At the EXCO meeting of November 2004 it was minuted that the 'JV campaign [the joint venture between SSD and Hiline] utilizing a Surgical Supplier has been initiated and vetted in depth by Werksmans [Kirby] from a legal point of view.' It would be implemented from January 2005. Hallem chaired that meeting. Just and Van der Spuy would have been present although the minute in the record does not reflect who was there.

[50] Another fact supporting the inference that the contract was actually authorized is that a positive performance appraisal of Van Jaarsveld was done by Van der Spuy early in February 2005. It was noted that she 'did a good job keeping Sandoz on the map'. Hallam approved the appraisal. This, as Hiline argued, was irreconcilable with her having acted without authority. And Hallam, when meeting Mr J Ludorf of Mediclinic in February 2005 indicated that SSD had a contract with Hiline, a fact that was uncontroverted.

[51] Nonetheless, Novartis relied on a document setting out the manner in which contracts could be authorized within the company. Neither of Hallam or Van der Spuy had that authority in terms of this document. Van Jaarsveld testified that she had not been aware of its existence and Hallam conceded when being cross-examined that it was not followed in general. He accepted also that he had decided to treat the marketing agreement as binding. And when he made that decision in November

2004 it was a ‘Sandoz’ decision, that he did not refer for approval to the directors of the Novartis board: despite that he conceded that it was an authorized decision.

[52] Van Jaarsveld wrote to Kirby of Werksmans on 15 February 2005, asking again when he would furnish the agreement that was being drafted by his colleague, and said that Hallam had requested a written legal opinion ‘on the current agreement with Hiline being binding. He said he had no doubt that it would be, but he would like expert opinion on this. He knows that they have lowered tender prices on the R3.5 mill from Sandoz.’

[53] Kirby responded with a letter written on 23 February, addressed to Novartis, stating that his view was that ‘a partly-written partly-oral agreement currently exists between Sandoz and Hiline, which is regulating the relationship between the parties;’ he further advised that Hiline would be entitled to rely on this agreement to enforce the obligation to pay the amount of R3.5 million.

[54] On 25 February Van der Spuy, Van Jaarsveld and Just met with Kirby to discuss the opinion. The only matter they asked to be corrected was to make clear that the R3.5 million was payable in monthly instalments and not as a lump sum, as Kirby had indicated. Kirby issued a revised opinion correcting the manner of payment. None of the Sandoz representatives suggested that the agreement was unauthorized. Hallam terminated Kirby’s mandate on 2 March 2005 and asked for a return of his file. When asked during cross-examination why he had done this, he responded ‘he did not tell me the story I wanted to hear and secondly I just felt that we should try to see if there was another way that we could address the matter’.

[55] And tellingly, the financial director of Novartis, Ms Maria-Dolores Solè, when she heard about the joint venture, wrote an email to Hallam complaining that she was told that commitments had been made. And when, in February 2005, Novartis repudiated the agreement, Solè instituted disciplinary charges against both Van der

Spuy and Van Jaarsveld. Initially Van Jaarsveld was charged with having been instrumental in SSD 'entering into a contract with Hiline'. That charge was withdrawn, because, as Hallam said, if it got out, it would damage Novartis's case. A new charge was laid after Hiline had sent its letter of demand, the complaint being that Van Jaarsveld had acted without authority. She resigned before the disciplinary inquiry began. Van der Spuy also resigned from Novartis.

[56] Novartis argued, however, that Van Jaarsveld alone was not authorized to conclude a contact on her own. Indeed, she said as much. But Van der Spuy, she said, had such authority and he had not only gone to Cape Town with her to present the marketing agreement but had also signed it. He was not, thereafter, involved with the negotiations about marketing activities, and had not been at the meeting of 12 November when Biel and Van Jaarsveld had finalized those activities orally. Nor had he sent the emails of 30 November. So, the argument went, he had not authorized the contract as a whole.

[57] The argument is, in my view, absurd. The whole transaction was known about by members of the SSD, and discussed at management meetings, and Van der Spuy had certainly approved it in that body. Van der Spuy had signed the new vendor application form for Hiline, referred to by Van Jaarsveld in her email to Lambrecht on 30 November, referred to earlier.

[58] So too, Hallam knew about it and approved throughout. Even in the absence of any company resolution authorizing the contract, it was clearly authorized by implication by EXCO, chaired by Hallam, as reflected earlier. It is trite that implied authority, which is actual authority, can arise from the conduct of a person in a position to represent the company, as Van der Spuy, as divisional director of the SSD, would have been. As Jennifer A Kunst, Professor Piet Delport & Professor Quintus Voster *Henochsberg on the Companies Act* 5 ed (2011), 128-129 (dealing with the Companies Act 61 of 1973, in force at the relevant times) states, authority may be implied –

‘when it is inferred from the conduct of the parties and the circumstances of the case, such as when the board of directors appoint one of their number to be a managing director. They thereby impliedly authorize him to do all things as fall within the usual scope of that office’.

[59] Van der Spuy was not a director of Novartis. But he was the director of the SSD, which operated as an independent business entity. He undoubtedly had implied, actual authority to conclude the contract, which he did. Boruchowitz J found that SSD’s representatives were in fact authorized to enter into the marketing agreement, but nonetheless went on to consider whether Novartis was bound by its agents’ ostensible authority – whether it had misrepresented that Van Jaarsveld and Van der Spuy had authority to conclude the contract, and that Hiline had acted to its detriment in reasonably relying on that misrepresentation. He found that Novartis was bound by its representations as to Van der Spuy’s authority.

[60] I do not think it necessary to consider the issue of ostensible authority. Hallam and Van der Spuy had actual authority to conclude the contract. And the decision to treat the contract as binding by Hallam was admittedly authorized.

[61] In all the circumstances, I conclude that the trial court correctly found that there was an enforceable contract between the parties, repudiated by Novartis. The order that Novartis pay damages in the sum of R3 418 000 plus interest, and the costs of suit, must thus be upheld.

[62] Accordingly, the appeal is dismissed with costs including the costs of two counsel where so employed.

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C H Lewis

Judge of Appeal

APPEARANCES

For Appellant:	M v R Potgieter SC
Instructed by:	Webber Wentzel Attorneys, Sandton Honey Attorneys, Bloemfontein
For Respondents:	M J Fitzgerald SC (with him R M G Fitzgerald**)** Heads of argument drawn by J G Dickerson SC
Instructed by:	Bowman Gilfillan Inc, Sandton Matsepes Inc, Bloemfontein