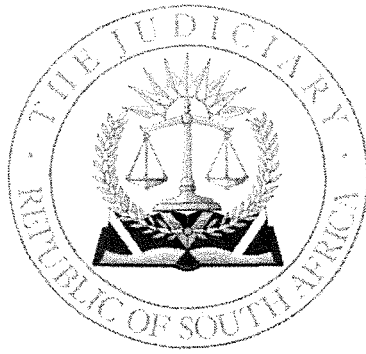




**IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)**

Case No: A279/2017

In the matter between:

DAVID ERIC JEHRING

First Appellant

COLD BLUE INVESTMENTS (PTY) LTD

Second Appellant

STAX BLACK BOX (PTY) LTD

Third Appellant

STAX PROPERTY INVESTMENTS (PTY) LTD

Fourth Appellant

and

TIMES MEDIA GROUP (PTY) LTD

Respondent

Before: Bozalek, Boqwana et Savage, JJ

Delivered: 21 August 2018

JUDGMENT

THE COURT

Introduction

[1] This is an appeal, with the leave of the Supreme Court of Appeal, against the judgment of this Court (Cossie AJ) handed down on 23 November 2016 in which it was found *inter alia* that no oral agreement had been concluded on 4 September 2012 between the appellants and the respondent and the appellants' action was dismissed with costs.

[2] The first appellant, Mr David Jehring, conducted a business through the second appellant, Cold Blue Investments (Pty) Ltd ("Cold Blue") which distributed and rented out DVD and Blu-Ray films under the name and style of Stax Black Box to the public via 13 free-standing kiosks placed on the premises of third parties to which the public had access. A further six kiosks were due to be installed in September 2012 at identified Caltex service station Fresh Stop convenience stores, in terms of a preferred supplier agreement which was being negotiated.

[3] The third appellant, Stax Black Box (Pty) Ltd, a company controlled by Mr Jehring, was the vehicle through which Mr Jehring intended that a joint venture with Avusa Media Limited (“Avusa”), before Avusa’s sale to the respondent, Times Media Group (Pty) Ltd (“Times Media”), would operate once established. The fourth appellant, Stax Property Investments (Pty) Ltd, was the entity through which Mr Jehring undertook to provide services to Nu Metro Home Entertainment (“NMHE”), a business which was wholly owned by Avusa.

[4] During 2012 Mr Jehring was approached by Mr Richard Benedetti, an employee of NMHE, to explore a possible joint venture between NMHE and Cold Blue to distribute DVD’s through kiosks. A first confidentiality agreement was signed between Mr Jehring and Mr Benedetti and following its cancellation on 8 June 2012, a second confidentiality agreement was entered into on 23 August 2012 between Ms Fay Amaral, the managing director of NMHE, acting on behalf of NMHE, and Mr Jehring. As a business relationship between the parties was explored, Mr Benedetti prepared a document concerning the rebranding of Mr Jehring’s Stax Black Box kiosks, while Mr Jehring assessed the DVD-dispensing kiosks already purchased by NMHE, which remained in storage.

[5] On 4 September 2012, Ms Amaral and Mr Adam Curtis, also of NMHE, attended a meeting at Avusa’s offices with Mr Jehring and his attorney Mr Brett Carnegie. The issue central to this appeal is whether an oral agreement was concluded between the parties at this meeting in terms of which it was agreed that they would carry on business together.

[6] Following the meeting, Ms Amaral sent an email to Mr Benedetti, Ms Jacqueline Crosby and Mr Adam Curtis of NMHE in which she stated:

“Given go ahead in principle – His lawyer-Brett going to have a stab at HOA

- *Settled on 25% share tbc our side*
- *No upfront*

- *Management fee ok – R55k*
- *Take on debt*
- *Take on vehicles*
- *Take on 2 x staff*
- *Targets to incentive – rather than upfront tbc*
- *Standard put and call – 5 years*
- *Needs to sustain business*
- *Fresh stop contract in*
- *Dave manages business*
- *Brand NU Metro Black Box*
- *Need potentially 2 x containers by dec – need to request CAPEX*
- *Placing new stock orders for 16 machines now*
- *Sorting boxes and 2 x box leg repairs – you aware... Dave let me know today. Way he explained it to me is that has had problem before with transport damage. Am following up with him as to what exactly is the easy fix he referred to.*
- *Sale of Assets to New Co*
- *New Co – got empty shelf co – will provide detail and indemnify on tax etc. past?*
- *Employee contracts*
- *Implementation date 1 Sept 2012 – back date*
- *Need to start*
- *Bank account – new account at std ?? JC to confirm*

[7] Mr Carnegie also detailed “*the gist of what was discussed at the meeting*” in an email dated 6 August 2012, in which it common cause the reference to “*tbc*” stands for “*to be confirmed*”. Mr Jehring immediately began working on the project, rebranding the kiosks he owned through Cold Blue and exploring the roll-out of the NMHE kiosks in storage. In doing so, he earned an agreed management fee of R55 000,00 plus VAT per month. In addition, staff and vehicles were made available to the project by NMHE. On 7 September 2012 Mr Benedetti provided Mr Carnegie with a draft shareholders’ agreement, a draft cession of assets agreement and a draft consultancy agreement. Over the next months amended versions of these draft agreements were exchanged between the parties until on 5 December 2012 Mr Carnegie indicated that the agreements were acceptable to his client, subject to certain final outstanding issues which still required resolution. With these issues resolved, on 28 January

2013 Avusa's attorney forwarded copies of the Sale of Business Agreement, the Shareholders' Agreement and the Consultancy Agreement to Mr Carnegie for Mr Jehring's signature, noting that the agreements were subject to the approval of the respondent's board of directors. The following day, on 29 January 2013, Mr Jehring signed the agreements. The same day Mrs Amaral sent an email to Mr Carnegie in which she indicated that negotiations were terminated.

[8] The appellant accepted the repudiation of the agreement and instituted action against the respondent claiming damages from the respondent arising from the respondent's repudiation of the agreement to carry out business together, which he contended had been concluded on 4 September 2012.

The pleadings

Appellant's pleaded case

[9] In the final incarnation of the appellants' amended particulars of claim, the case advanced was that when Mr Benedetti approached Mr Jehring and Cold Blue in August 2012, he advised that negotiations for Times Media to take over Avusa, including NMHE, were at an advanced stage. He proposed that NMHE, "*which would soon be taken over by Times Media*", Mr Jehring and Cold Blue enter into a joint venture business with NMHE similar to Cold Blue's Stax Black Box business. It was pleaded that negotiations ensued between the parties with a view to concluding an agreement, during which Mr Jehring represented himself and Cold Blue and that Mr Benedetti "*held himself out to be representing Times Media Group alternatively Nu Metro*". It was pleaded further that:

11. On or about 4 September 2012 an oral agreement was concluded between [Mr Jehring] and/or [Cold Blue] and/or [Stax Black Box] of the one part and the [respondent] of the other in terms of which the parties thereto agreed to commence carrying on business together.

11.A In the alternative to paragraph 11 the [appellants] plead that it was expressly alternatively impliedly agreed between [Mr Jehring] and [Cold Blue] of the one part and the [respondent] of the other part that:

11A.1 [Mr Jehring] and [Cold Blue] and the [respondent] would go into business together using a company which [Mr Jehring] would make available for this purpose (“the Shelf Company”);

11A.2 The Shelf Company would be entitled to accept the benefits of the agreement referred to in paragraph 11A and thus become a party to such contract, and it would be entitled to:

11A2.1 Receive from [Mr Jehring] and [Cold Blue] the benefits referred to in paragraph 14.3;

11A2.2 Receive from [Times Media] the benefits which are referred to in paragraph 14.4;

11A2.3 Conduct the business referred to in paragraph 14.1;

12. In concluding this agreement [Mr Jehring] and [Cold Blue] were represented by [Mr Jehring] and [Times Media] was duly represented by Fay Amaral and/or Adam Curtis.

12A In the event that it is held that the agreement which was concluded on 4 September 2012 (“the September Contract”) was concluded between [Mr Jehring] and/or [Cold Blue] and/or [Stax Black Box] of the one part and [NMHE] alternatively Avusa Media Ltd further alternatively Avusa Ltd (“the Contracting Party”) of the other part, the Plaintiffs plead that:

12A.1 To the knowledge of both [Mr Jehring] and [Cold Blue] and the Contracting Party [Times Media] had taken over or was in the process of taking over NMHE and/or Avusa Media Ltd and/or Avusa Ltd;

12A.2 It was a tacit term of the agreement that:

12A.2.1 [Times Media] would cause the Contracting Party to nominate an entity which would conduct the business venture contemplated by the September agreement with the Plaintiffs;

12A.2.2 The rights and obligations which the Contracting Party had acquired under the September Agreement would be transferred to the entity which was so nominated, alternatively the said entity would be substituted as the contracting party;

- 12A.3 At all material times hereto [the respondent] has been a wholly owned subsidiary of [Times Media] which it intended to use as an operating company to conduct certain businesses which were subsidiaries of Avusa Media Ltd and/or Avusa Ltd;
- 12.A4 At a time date and place to the [appellants] unknown the [respondent] entered into a sale of business agreement with the Contracting Party and in so doing the [respondent] acquired the business of the Contracting Party, including the contract which had been concluded with [Mr Jehring] and/or [Cold Blue] and/or [Stax Black Box].
- 12A.5 On 14 September 2012 the [appellants] requested the Contracting Party to advise who the contracting party would be from Nu Metro's side. A copy of the request is attached hereto marked "PC1A".
- 12A.6 On 14 September 2012 the Contracting Party, which was duly represented by Mr Riccardo Benedetti, indicated that [Times Media] would be the contracting party. A copy of the response is attached hereto marked "PC1B".
- 12A.7 The [appellants] at all times accepted that [Times Media] was the contracting party of the purposes of the September Agreement.
- 12A.8 [Times Media] was thereby substituted as the contracting party for the purposes of the September Agreement, it is apparent from the context that [Times Media] became the contracting party on 14 September 2012 when Riccardo Benedetti indicated that it would be the contracting party.
13. At the time of contracting, the parties were aware of the following facts and circumstances and the contract was concluded on this basis:
- 13.1 [Cold Blue] would desist from trading under the name and style of Stax Black Box, and it would in so doing suffer loss to its established goodwill and brand-name;
- 13.2 The [appellants] could not financially afford to take over the entire project in the event that the defendant withdrew;
- 13.3 The [appellants] would be committing resources to the venture which they would not otherwise have committed;

- 13.4 The [appellants] would suffer a loss of revenue in the event that the combined project contemplated by the agreement was terminated and/or not proceeded with;
- 13.5 [Cold Blue] had entered into agreements with certain franchisees who had purchased between 25% and 30% of the income from certain of the Cold Blue Kiosks.
 - 13.5.1 [Cold Blue] was required to pay the monthly amount of 25% to 30% of the said income to the said person.
 - 13.5.2 In the event that [Times Media] did not proceed with the contract [Cold Blue] would still be liable to pay the amounts, including the capital amounts, to the said franchisees.
14. The following were the express, alternatively implied, and in either case material terms of the said agreement:
 - 14.1 The parties would go into business together in order to distribute and rent DVD and Blu-Ray films to the general public via free-standing kiosks placed on the premises of third parties to which the general public has access. The business would initially be conducted in the Western Cape and in Gauteng, but the intention was to expand into other areas, countrywide, and into neighbouring countries including Namibia, Botswana and Zimbabwe.
 - 14.2 Notwithstanding that the agreement was concluded on 4 September 2012, the agreement would be deemed to have commenced on 1 September 2012;
 - 14.3 [Mr Jehring] and/or [Cold Blue] would make the following contributions to the business:
 - 14.3.1 The Shelf Company referred to in para 11A above which was done by making available the shareholding of the third plaintiff being Stax Black Box (Pty) Ltd, an existing company 75% of which would be registered in the name of the Defendant and 25% of which would be registered in the name of the Plaintiff's nominee;
 - 14.3.2 The business conducted by [Cold Blue], including:
 - (1) the 19 Cold Blue Kiosks, including:
 - (a) the sites on which these would be located; including

- (b) the right to place the kiosks at the Fresh Stop sites once the preferred supplier agreement had been concluded.
- (c) a Nissan bakkie.

14.3.3 [Mr Jehring] would consult to the business through a corporate entity in which he had an interest for a monthly consultancy fee of R55,000.0 (plus VAT) and he would, in so doing, devote no less than 40 hours to the business each week;

14.3.4 [Cold Blue] would make at least 4 employees available who would thereafter be employed and paid by the Nu Metro Black Box business.

14.4 [Times Media] would provide:

14.4.1 the Nu Metro branding and intellectual property;

14.4.2 all of the necessary financial support required by the business, more particularly:

- (1) the operating costs; and
- (2) the capital costs, which would include making the necessary payments due in respect of the finance agreements which [Mr Jehring] had concluded in relation to the acquisition of the Cold Blue Kiosks namely to settle the amounts outstanding in full to:
 - (a) Wesbank, which was owed amounts of R149 066.59, R97 723.37, R97 723.37 and R323 365.68;
 - (b) First National Bank, which was owed R740 545.04;
 - (c) Anaya Trading, which was owed an amount of R643 200.15;
 - (d) VideoSystem, which was owed R905 437.44.
 - (e) The franchisees referred to in paragraph 13.5 above.

14.4.3 The necessary DVD and Blue Ray stock (until such time as the business was able to cover this cost itself);

14.4.4 16 dispensing kiosks;

14.4.5 A further 464 dispensing kiosks;

14.4.6 The general manager, financial manager, and such further members of staff as were required.

14.5 [Times Media] would have a so-called “call option” in terms of which:

14.5.1 [Times Media] would have the right to give [Mr Jehring] (or his nominee, if the shares were held by one) written notice of its intention to purchase the latter’s shares at any time after 1 September 2018 and before 31 August 2021;

14.5.2 If such notice was given [Mr Jehring] (or his nominee) would be obliged to sell to the defendant:

- (1) the shares at their fair and reasonable market value;
- (2) its loan accounts at face value.

14.6 [Mr Jehring] (or his nominee) would have a so-called “put option” in terms of which:

14.6.1 [Mr Jehring] (or his nominee) would have the right to give [Times Media] notice to purchase the shares of first plaintiff (or his nominee) at any time after 1 September 2018 and before 31 August 2021;

14.6.2 If such notice was given [Mr Jehring] (or his nominee) would be obliged to sell to the defendant:

- (1) the shares at their fair and reasonable market value;
- (2) its loan accounts at face value.

14.7 The parties would in the future negotiate with each other in good faith for the purposes of concluding certain further agreements necessary in order to structure Nu Metro Black Box (Pty) Ltd.

[10] The appellants pleaded that they complied with their obligations under the agreement and in so doing *inter alia* during the period from 4 September 2012 to February 2013 Stax Black Box ceased trading; and the respondent was permitted to take control and rebrand the business of the third appellant as Nu Metro Black Box. The appellants stated that the business of Cold Blue, including 19 kiosks plus the sites and the agreement with Fresh Stop had been transferred to the third appellant. Furthermore, Mr Jehring consulted to the Nu Metro Black Box business through the fourth appellant, Stax Property Investment (Pty) Ltd, in which he had an interest, for a monthly consultancy

fee of R55 000.00 (plus VAT), devoting no less than 40 hours to the business each week and making four employees available to Nu Metro Black Box. The appellants pleaded that negotiations had been entered into in good faith and that Mr Jehring nominated a company, Matrinamix, to hold his shares.

[11] It was pleaded further that Times Media initially complied with its obligations under the agreement by assuming control of the Stax Black Box business of the third appellant, rebranding it as Nu Metro Black Box. It transferred its 16 kiosks to Stax Black Box and adjusted the asset register of the third appellant accordingly. It also provided the necessary financial support required by the business, particularly the capital and operating costs, and by 28 February 2013 had paid the amount of R3 961 128.17 to the account of Stax Black Box, including Mr Jehring's monthly consultancy fee. In addition, the respondent provided the general manager, financial manager and certain further staff members as were required.

[12] Further pleaded was that if it was held that Stax Black Box was not a party to the agreement, by their conduct Mr Jehring, Cold Blue and Times Media agreed to accept it as a contracting party. Stax Black Box, by accepting the performance of Mr Jehring, Cold Blue and Times Media, tacitly agreed to and did become a party to the agreement and accepted the benefits conferred on it by the agreement. As a consequence, Times Media incurred an obligation to render performance to Stax Black Box, which became entitled in law to enforce such performance by Times Media.

[13] The appellants claimed that the respondent thereafter "*materially and unlawfully breached and/or repudiated the terms of the said agreement by sending a letter to the plaintiff on 29 January 2013*" in which it "*gave notice of its intention not to proceed with the terms of the contract which had been concluded on or before 4 September 2012*"; and indicated that its focus had shifted to ensure maximised financial returns for shareholders and that it was unable "*to continue with the discussions around the Shareholding arrangement*

on Black Box”.

[14] The appellants accepted the repudiation of the agreement in an email sent on 22 February 2013, subject to their rights to claim damages. The appellants pleaded the damages claimed from Times Media, suffered as a consequence of the respondent’s repudiation of the contract, which included R2 970,000.00 (plus VAT) in respect of the monthly consultancy fee which it had been agreed that Mr Jehring, alternatively the fourth appellant, would be paid over a 54-month period from March 2013 through September 2018; R1 792 719.00 payable to franchisees; R244 375 000.00, being the value of the Stax Black Box business as at 1 September 2019 “*valued on a non-marketable, controlling basis*”; R119 109 852.00 being the difference between the value of the business prior to the repudiation by Times Media (R120 299 852.00) and the value thereafter (R1 190 000.00); alternatively, damages in the amount of R29 777 463, being 25% of the value of the shares in Stax Black Box.

Respondent’s plea

[15] The respondent admitted in its plea that it had entered into a written sale of business agreement on 19 September 2012 with Avusa, in terms of which it purchased the businesses and rights of Avusa under all contracts, and all liabilities of Avusa Media Limited. It stated that Mr Benedetti informed Mr Jehring of the advanced negotiations between the respondent and Avusa in this regard.

[16] It was admitted that Mr Benedetti held discussions with Mr Jehring with a view to a possible DVD rental kiosk joint venture. The meeting held on 4 September 2012 was pleaded to be “*an introductory meeting between the management of Nu Metro and the first plaintiff, following the discussion as referred to in paragraph 4.1 above and with the view to the potential structure of an agreement to be concluded between Nu Metro and Stax Black Box, but subject to executive committee approval...*”. The parties present left the meeting on the basis that Mr Carnegie would prepare draft agreements for

consideration, with it “*intimated that no final agreement between the parties could be concluded without the consent of the Avusa Exco first being obtained*”. While the “*exploration of the project*” continued, the respondent pleaded that no written agreement was concluded between the parties, nor were Ms Amaral, Mr Curtis or Mr Benedetti authorised to represent Avusa in entering into such an agreement.

[17] The respondent admitted that “*R3 961 128,17 was paid in contemplation of the parties concluding valid and binding agreements*” but denied the remainder of the appellants’ averments. It was pleaded that “*in any event, the first plaintiff, alternatively the fourth plaintiff should have mitigated its losses by providing consultancy services to third parties during the period March 2013 through September 2018, and in that way earning consultancy fees*”.

[18] In its claim in reconvention the respondent claimed that the appellants were in possession of 16 automated rental kiosks belonging to the respondent, having been purchased by Avusa following a capital expenditure approval of R2.9 million for this purpose.

Judgment of Court a quo

[19] At trial, the appellants relied on the evidence of two witnesses: Mr Jehring and his attorney, Mr Brett Carnegie. Three witnesses testified for the respondent: Mr Adam Curtis; Ms Amaral; and Dr Neil Croft, an expert witness, who was led to rebut allegations of tampering raised by the appellants pertaining to certain documents discovered by the respondent.

[20] From the evidence at the trial it was apparent that the NMHE had purchased 16 kiosks, with the purchase of further kiosks intended to follow, but that problems and delays had been encountered in the rollout of these initial kiosks, which had been in storage from May 2012. The NMHE engaged Mr Jehring given its need to rollout the kiosks in storage and Mr Jehring’s experience with kiosk DVD and film rentals. At the meeting on 4 September

2012 it was agreed that Mr Jehring would assist with this rollout and would receive a monthly consultancy fee of R55 000.00 plus VAT and that both parties would allocate staff and other resources to facilitate the rollout the 16 kiosks. The evidence of the respondent was that neither Ms Amaral, nor Mr Curtis, who attended the September meeting and represented NMHE, had the necessary authority to conclude a long term multi-million rand agreement on behalf of Avusa, more so given the imminent takeover of Avusa by the respondent. Furthermore, the performance of the 16 kiosks was intended to serve as motivation for a further 32 kiosks to be purchased in the event that agreement was reached in future between the parties.

[21] Mr Jehring understood the position differently. He stated that following the meeting on 4 September 2012, there was an agreement to go into business together to distribute and rent DVD and Blue Ray films to the public, with the respondent having agreed to provide all the necessary financial support required by the business, including the provision of a further 464 kiosks. Mr Jehring stated that it had been agreed that he would have a “put and call option” in terms of which he, or his nominee, would have the right to give the respondent notice to purchase his shares, or his nominee, at any time after 1 September 2018 and before 31 August 2021; and that if such notice was given, Mr Jehring, or his nominee, would be obliged to sell the shares to the respondent at their fair and reasonable market value, with the loan accounts to be accepted at face value. In addition, Mr Jehring understood that the parties would in the future negotiate with each other in good faith to conclude further agreements necessary to structure Nu Metro Black Box (Pty) Ltd.

[22] At the trial the appellants repeatedly contended that certain documents, mainly emails, discovered by the respondent had been “*tampered with*” by the respondent. In spite of this view, the appellants elected not to call their expert witness on the issue and in support of such claim, although an expert summary had been filed. The appellants nevertheless persisted with their attack against

the authenticity of the documents. Consequently, the respondent was required to answer to the allegations raised and in doing so relied on the evidence of an expert witness, Dr Croft, who testified before the trial court. The respondent denied any manipulation of any emails and Dr Croft's evidence supported a conclusion that distinctions between the printouts of various emails could be attributed to different formats being involved and the printing process. The Court accepted the evidence of Dr Croft, which went unchallenged, that there had been no manipulation of emails and that the difference between the printouts in the appellants and respondent's bundles was "*a possible result of printing inconsistencies from the Mimecast portal*". The Court viewed the appellants' persistence that tampering had occurred in a "*dim light*" and of such a nature that it warranted the imposition of a special costs order against the appellants.

[23] As to the claim that an agreement on the terms pleaded had been concluded on 4 September 2012 between the parties, the Court found that there was an "*arrangement*" arrived at between the parties on 4 September 2012 that Mr Jehring would assist in rolling out the 16 Nu Metro kiosks which had been warehoused, since both Ms Amaral and Mr Curtis were anxious that such rollout should occur. In agreeing to this arrangement, Ms Amaral and Mr Curtis were found to have represented Avusa, but, since they were not employed by the respondent, the Court found that they could not have represented the respondent and could therefore not have represented to Mr Jehring that the respondent had become the contracting party.

[24] The Court found that many of the material terms which Mr Jehring claimed had been agreed at the September meeting, save for those related to the rollout of the 16 kiosks, had not been discussed at the meeting. Mr Jehring was found to be a poor witness, unreliable and evasive, whose version was contradicted by the appellants' pleaded case and by Mr Carnegie. He was found to have put up no coherent version as to the terms of the oral agreement, who

the contracting parties were, the budget agreed or the period for which the business was to run. Mr Carnegie, the Court found, did not take the appellants' case any further.

[25] It was consequently concluded that the appellants had failed to establish either a legal or factual basis for the allegations that an oral agreement had been concluded on 4 September 2012 and had failed to establish the terms of any such agreement on which they relied; and that the respondent was not a party to any such agreement. The appellants' action was therefore dismissed with costs, to be paid jointly and severally on the scale as between attorney and client, including the costs of two counsel.

Evaluation

[26] As a general proposition a contract exists where there is consensus reached between the offeror and the offeree,¹ brought about through offer and acceptance, with the intention of creating a legal obligation between the parties. An agreement may be concluded expressly, by words, or tacitly, by conduct,² with the onus resting on the party who alleges the existence of a contract to prove it. A determination of the true agreement between parties is revealed by its external manifestations, in that the court can only judge from external facts whether or not a meeting of minds has occurred.³ A court will enforce an agreement if there is sufficient information to enable its object to be accurately ascertained⁴ and where it is sufficiently definite –

“...to enable the court to give it a practical meaning. Its terms must be so definite, or capable of being made definite without further agreement

¹ *Withok Small Farms (Pty) Ltd v Amber Sunrise Properties 5 (Pty) Ltd* 2009 2 All SA 65 (SCA); 2009 2 SA 504 (SCA) par 10.

² *Wessels Contract* pars 68–70.

³ *Bradfield The Law of Contract in South Africa* (7th Ed) 2016 at 2.1.2; *Jordaan v Trollip* (1960) 1 PH A25 (T); *Rooyendal (Pty) Ltd v Minister of Land Affairs* 2013 3 All SA 588 (LCC) par 64.

⁴ *Pattison v Fell* 1963 3 SA 277 (N) 279.

*of the parties, that the promises and performances to be rendered by each party are reasonably certain”.*⁵

[27] In *SA Forestry Co Ltd v York Timbers*⁶ it was stated:

“... In the interpretation process, the notions of fairness and good faith that underlie the law of contract again have a role to play. While a court is not entitled to superimpose on the clearly expressed intention of the parties its notion of fairness, the position is different when a contract is ambiguous. In such a case, the principle that all contracts are governed by good faith is applied and the intention of the parties is determined on the basis that they negotiated with one another in good faith.”

[28] Uniform Rule 18(4) requires that:

“Every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, defence or answer to any pleading, as the case may be, with sufficient particularity to enable the opposite party to reply thereto.”

[29] The function of pleadings is to give fair notice of the case which has to be met, define the issues on which the court will have to adjudicate in order to determine the matters upon which reliance is to be placed and which are in dispute between the parties; and enable the parties to decide in advance of the trial the evidence that will be needed.⁷ While a party cannot *“direct the attention of the other party to one issue and then, at the trial, attempt to canvass another”*,⁸ the degree of precision required in pleadings depends on the

⁵ *Registrar of Deeds v Ferreira Deep Ltd* 1930 AD 180.

⁶ 2005 (3) SA 323 (SCA) at para 32.

⁷ Herbstein & Van Winsen Civil Practice of The High Courts of South Africa, Vol 1 (Juta) at Page 558; *Jowell v Brandwell-Jones* 1998 (1) SA 836 (W) at 899; *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) at 1082; *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.

⁸ *Kali v Incorporated General Insurances Ltd* 1976 (2) SA 179 (D) at 182A.

circumstances of each case,⁹ with the formalistic requirements not to be over-emphasised and the substance of the allegations to be properly considered.¹⁰ The importance of pleadings should not be unduly heightened since it is common for pleadings not to be correct in each material respect and for mistakes to be made.¹¹

[30] However, as was stated in *Robinson v Randfontein Estates GM Co Ltd*:
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“...parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for the pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for interference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been.”

[31] In *Sentrachem Bpk v Wenhold*¹³ it was made clear that where a court has all the relevant evidence before it, it should not place undue emphasis on the pleadings, but should rather decide the case on the real issues canvassed during the course of the trial in the Court *a quo*. In doing so, the issue remains whether prejudice will be suffered.¹⁴

[32] Central to this appeal is whether a binding oral agreement was concluded on 4 September 2012, and if so, on what terms. The appellants

⁹ *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H; *MN v AJ* 2013 (3) SA 26 (WCC) at para 24.

¹⁰ *MN v AJ* 2013 (3) SA 26 (WCC) at para 24.

¹¹ See *Shill v Milner* 1937 AD 101 at 105; *Myers v Abramson* 1951 (3) SA 438 (C); *Middeldorf v Zipper NO* 1947(1) SA 545 (SR); *Makate v Vodacom* [2014] ZAGPJHC 135 at para 124.

¹² *Robinson v Randfontein Estates GM Co Ltd* 1925 AD 173 at 198.

¹³ *Sentrachem Bpk v Wenhold* 1995 (4) SA 312 (A) at 320A-B.

¹⁴ *EC Chenia and Sons CC v Lamé and Van Blerk* 2006 (4) SA 574 (SCA) at para 13.

pleaded case was that the parties to the agreement were, on the one part, Mr Jehring “*and/or*” Cold Blue “*and/or*” the third appellant, or Mr Jehring and Cold Blue; and on the other part, was “*Nu Metro alternatively Avusa Media Ltd alternatively Avusa Ltd*”. Avusa Ltd was not cited as a defendant in the proceedings before the Court *a quo*. The agreement contended for was an extensive one, which, it was claimed, had been concluded between Mr Jehring, representing the appellants, and Ms Amaral and Mr Curtis, representing Avusa on the day. The respondents dispute that this was so.

Times Media or Avusa?

[33] The Court *a quo* found that since Ms Amaral and Mr Curtis represented Avusa at the meeting of 4 September 2012, but not Times Media, any rights and obligations which may have arisen in terms of any agreement entered into with the appellants, did not transfer to the respondent on the sale and transfer of the business of Avusa to the respondent.

[34] While the respondent disputed that the kiosk business formed part of the businesses listed under the NMHE schedule of businesses, there appears to be little substance in this contention. NMHE owned the kiosks it had purchased and it entered into an agreement, to which we will return, which at its minimum saw Mr Jehring undertaking the rollout for NMHE of those kiosks immediately after the 4 September 2012.

[35] It is common cause that after the meeting of 4 September 2012, a sale of business agreement was entered into between Avusa and Times Media in late September 2012 in terms of which Times Media purchased the businesses, rights and obligations of Avusa and all of its divisions. NMHE was a division of Avusa before the sale of the business of Avusa to Times Media. The evidence indicated that Ms Amaral and Mr Curtis, as employees of NMHE, represented NMHE in concluding, at least, the limited oral agreement of 4 September 2012. It follows that when Times Media took over the rights and obligations of Avusa, it took over the rights and obligations arising from, at

least, that limited oral agreement. The fact that Times Media performed in terms of the limited oral agreement confirms as much in, *inter alia*, making payments to Mr Jehring, allocating staff to the business involved with the rollout of the kiosks and covering certain costs associated with that business. Furthermore, the fact that various incarnations of draft agreements, directed at achieving agreement between the parties on a more expensive kiosk business, were thereafter exchanged between with the appellants and representatives of Times Media confirms the involvement of Times Media in the kiosk venture. Consequently, the Court *a quo* erred in failing to find that Times Media, by virtue of its acquisition of Avusa, including NMHE, took over the obligations of Avusa arising from, at least, the limited oral agreement concluded on 4 September 2012.

What agreement was entered into?

[36] Mr Jehring, Mr Carnegie, Ms Amaral and Mr Curtis attended the meeting on 4 September 2012, following which Ms Amaral sent an email in which it was she stated *inter alia*: “...Given go ahead in principle – His lawyer - Brett going to have a stab at HOA...”. There is no dispute that no written agreement was concluded between the parties on 4 September 2012, nor that the consultancy agreement, shareholders agreement and transfer of assets agreement, which were the subject of later negotiations, and which may have been necessary to structure any company which might have been established to undertake the contemplated business of Nu Metro Black Box, were concluded. Subsequent negotiations aimed at concluding agreements to structure the joint venture contemplated on 4 September 2012 were called off in January 2013, with no written agreements concluded. This followed the draft agreements having been accompanied by a letter addressed to the appellants’ attorney from the respondent’s attorney, dated 28 January 2013, in which it was stated that the draft agreements were still subject to approval by the respondent’s board of directors.

[37] While the appellants' pleaded case was that an expansive agreement was entered into on 4 September 2012, the respondent contended that only a limited "arrangement" was agreed in terms of which Mr Jehring would assist in getting 16 dispensing kiosks operational, which had been purchased by NMHE, for which Mr Jehring would receive a monthly salary of R55 000 plus VAT; that NMHE would appoint two staff members to assist in the roll-out of the kiosks; and that the performance of the 16 kiosks would be used as a motivation for capex approval for the next tranche of 32 kiosks, which, it was anticipated, might be required if a more comprehensive agreement could be reached.

[38] Ascertaining the terms of an oral agreement "*is always likely to be be-devilled by faulty memory, dishonesty and genuine misunderstanding, and the technique summarised in [Stellenbosch Farmers' Winery Group Ltd] will come into play*".¹⁵ This "*does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except insofar as there are appropriate implications of law...*".¹⁶ An apparently informal agreement may yet be binding where agreement is shown to exist, even when further issues are to be resolved in due course. This is distinguishable from a situation in which parties are negotiating with the view to concluding an agreement, even though those negotiations may have reached an advanced stage, but where they fail to agree.

[39] As for the exact terms of an agreement:¹⁷

"The terms of the contract are the promises agreed on by the parties that together make up the contract. When there is doubt or dispute about what statements, oral or written, or conduct should be included in the contract as terms a court may have to carry out a two-

¹⁵ Bradfield *The Law of Contract in South Africa* (7th Ed) 2016 at 5.1.1.

¹⁶ *Hillas & Co Ltd 1947 LTR 503 at 514* referred to in *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd 1964 (1) SA 669 (W)* at 671B.

¹⁷ *Id* at 5.1.

stage inquiry to decide first, what was said, written or done and second, whether it must be included among the terms of the contract.”

[40] In *Command Protection Services (Gauteng) (Pty) Ltd t/a Maxi Security v South African Post Office Ltd*,¹⁸ the Court stated that:

“Our case law recognises that in these situations there are two possibilities. The first is that the agreement reached by the acceptance of the offer lacked animus contrahendi, because it was conditional upon consensus being reached, after further negotiations, on the outstanding issues. In that event that law will recognise no contractual relationship, the offer and acceptance notwithstanding, unless and until the outstanding issues have been settled by agreement. The second possibility is that the parties intended that the acceptance of the offer would give rise to a binding contract and that the outstanding issues would merely be left for later negotiation. If in this event the parties should fail to reach agreement on the outstanding issues, the original contract would prevail...”

[41] Step-by-step analysis of the negotiations is necessary to decide whether an agreement has been concluded:¹⁹

“The question which arises, accordingly, is whether the undertaking, given as it was during the course of uncompleted negotiations, had, or has been shown to have had, contractual force. Was the undertaking an offer made, animus contrahendi, which upon acceptance would give rise to an enforceable contract, or was it merely a proposal made by the appellant while the parties were in the process of negotiating and were feeling their way towards a more precise and comprehensive agreement? This is essentially a question to be decided upon the facts of the particular case.”

¹⁸ 2013 (2) SA 133 (SCA).

¹⁹ *Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A) at 850C-D.

[42] In *Hillas & Co. Ltd v Arcos Ltd*²⁰ it was recognised that in business important agreements are often recorded “*in crude and summary fashion*” and are “*far from complete or precise*”, with the caution sounded that it is not for the Court to make a contract for the parties, but “*to construe such documents fairly and broadly, without being too astute or subtle in finding defects*”.

[43] The contemporaneous emails of Ms Amaral and Mr Carnegie, record what transpired at the meeting of 4 September 2012. These emails indicated clear areas still to be negotiated between the parties and are destructive of the appellants’ contention that agreement had been reached on the fundamental material terms of the expansive oral agreement pleaded and that all that was outstanding was the signature of the agreements and a determination of the value to be accorded to the assets for purposes of a share swap.

[44] The parties agreed on 4 September 2012 that they would in future negotiate with each other in good faith to conclude further agreements necessary to structure the anticipated joint venture. The evidence was that the ensuing negotiations concerned fundamental terms of the proposed venture and were not limited to simply putting into effect an agreement reached on 4 September 2012 that the parties go into business together on the terms contended by the appellants. None of the draft written agreements prepared from September 2012 until January 2013 recorded that negotiations had been finalised. On 4 September 2012 no agreement had been reached regarding the long-term financial obligations of Avusa, nor could such agreement have been reached without the requisite approvals of the Avusa board. Mr Jehring knew that no agreement regarding 464 additional kiosks, or even a further 32 kiosks, could be reached without the appropriate capital expenditure approvals having been obtained by Avusa and that no such approval had been obtained on 4 September 2012.

²⁰ 147 L.T.R. 503. At p. 514. See too *Burroughs Machines Ltd v Chenille Corporation of SA (Pty) Ltd* 1964 (1) SA 669 (W); *Heathfield v Maqelepo* 2004 (2) SA 636 (SCA) at 670G-H.

[45] Yet, it was pleaded that the “*express, alternatively implied, and in either case material terms*” of the expansive agreement, which the appellants claim was entered into on 4 September 2012, included *inter alia* that:

- i. “*the parties would go into business together in order to distribute and rent DVD and Blue Ray films to the general public via free-standing kiosks placed on the premises of third parties to which the general public has access*” in agreed areas;
- ii. the respondent would provide the Nu Metro branding and intellectual property, all of the necessary financial support required by the business, particularly the operating and capital costs, which included payments due in respect of the finance agreements concluded by Mr Jehring in relation to the acquisition of the Cold Blue kiosks, as well as payments to franchisees;
- iii. Mr Jehring would, with immediate effect, commence with the rollout of the business, for which he would receive payment of a management fee of R55 000,00 plus VAT per month;
- iv. the respondent would provide the necessary DVD and Blue Ray stock until the business was able to cover this cost itself, 16 dispensing kiosks and a further 464 dispensing kiosks, the general manager, financial manager, and further employees as required;
- v. Cold Blue would “*desist from trading under the name and style of Stax Black Box, and it would in so doing suffer loss to its established goodwill and brand-name*” and revenue;
- vi. Mr Jehring and Cold Blue would contribute a shelf company, Cold Blue’s business including 19 kiosks and kiosk sites which included the Fresh Stop sites, a vehicle, at least 4 employees “*who would thereafter be employed and paid by the Nu Metro Black Box business*”;
- vii. the respondent was to have a “call option” in which it had the right to

give Mr Jehring, or his nominee, notice of its intention to purchase his shares “at any time after 1 September 2018 and before 31 August 2021” in which case he would be obliged to sell to the shares at respondent “their fair and reasonable market value; its loan accounts at face value”; and

- viii. Mr Jehring, or his nominee, would have a “put option” on terms stated and the parties agreed to “*in the future negotiate with each other in good faith for the purposes of concluding certain further agreements necessary in order to structure Nu Metro Black Box (Pty) Ltd.*”

[46] In spite of pleading such agreement, Mr Jehring in his evidence recognised that on 4 September 2012 “*it was agreed that we would work in good faith to try and conclude an agreement*”. The evidence of Mr Carnegie also did not support the appellants’ claim that there was agreement reached on 4 September 2012 on the far-reaching terms pleaded by the appellants, and, according to Mr Carnegie, there had been no discussions about budget, cash flow or the duration of the venture at that meeting. Mr Carnegie indicated that had such an agreement been reached, he would have recorded as much in his email in which he detailed his impressions as to what had been discussed.

[47] Ms Amaral’s reference to a “*go ahead in principle*” in her email following the 4 September 2012 meeting, indicated expressly that Mr Carnegie was to “*have a stab at HOA...*”. She recorded that Mr Jehring was to manage the project, for which he was to receive a management fee “*of R55k*”, that the implementation date was to be backdated so as to be immediate, backdated to 1 Sept 2012, on the basis that there was a “*(n)eed to start*”. There was no dispute that Mr Jehring, immediately after the meeting of 4 September 2012, began the roll out of the NMHE warehoused kiosks. This accorded with Ms Amaral’s recordal of the issues agreed at the meeting, including that work would begin immediately; that the Fresh Stop contract was “*in*”; and that the branding of kiosks was to reflect as “*NU Metro Black Box*”. However, what the facts show

is that, save for agreement on a limited number of issues which allowed for the immediate rollout of the NMHE kiosks, the remainder of the terms of the contemplated joint venture agreement were yet to be agreed.

[48] While the appellants' case was that it was a term of the agreement reached on 4 September 2012 that the respondent would provide all the necessary financial support required by the business, this was not supported by either Ms Amaral or Mr Carnegie in either of their respective emails. There was no evidence that a budget was discussed or that Ms Amaral or Mr Curtis had already received approval to enter into a wide-ranging agreement with the appellants, more so given the imminent sale of business agreement between Avusa and the respondent.

[49] There was also no agreement between the parties as to what shares the parties would hold in any future business, with it expressly noted that this was an issue to be confirmed. Likewise, the issue of “(t)argets to incentive” was recorded as an issue to be confirmed. Ms Amaral made it clear that there was a “need to request CAPEX” in respect “potentially” of 2 containers to be ordered by December. It was not proved that the respondent, or Avusa, agreed on 4 September 2012 to provide all necessary financial support required by the joint venture. Furthermore, from the contents of the unfinalised draft agreements put up it is evident that the material terms contained in such agreements intended to determine and structure the relationship between the parties, which terms did not feature in Ms Amaral's email, had not been agreed on 4 September 2012.

[50] The fact that a budget was prepared by Mr Benedetti for 499 kiosks, also does not permit a finding that the rollout of 499 kiosks had been agreed, more so when Ms Amaral, Mr Curtis and Mr Carnegie testified that no budget was either tabled or agreed at the September meeting, nor would there have been the requisite capital expenditure or higher-level Avusa approval to do so. The material terms which would define the relationship between the parties and embed the structure of any future joint venture business were yet to be

resolved, including shareholding, funding and the duration of the proposed joint venture. Mr Carnegie stated that the allocation of shares was “*yet to be decided*” and that any agreement was “*to include protection of minority rights, put and call, tag along clauses*”. In any event, there was no evidence before the trial court to contradict the fact that any draft agreements prepared would have to be approved by the respondent’s executive committee prior to any person being authorised to conclude any such agreement.

[51] What is clear is that the oral agreement entered into on 4 September 2012 was one which was constrained by more limited terms, entered into on an interim basis whilst negotiations ensued. The evidence showed that the limited oral agreement and subsequent negotiations were pursued in good faith, with the hope that an agreement, perhaps such as the one pleaded, would be finalised between the parties in due course. The 4 September 2012 oral agreement put in place an interim arrangement between the parties, which provided them time to begin a limited roll out of the NMHE kiosks, rebrand certain of the appellants’ kiosks and explore entering into a more expansive joint venture together in due course. Ms Amaral was entitled to enter into such limited agreement on behalf of NMHE on 4 September 2012 given the limits of her authority provided by Avusa; and in doing so allowed for time to explore a more expansive business arrangement.

[52] From the evidence put up, the terms of the oral agreement of 4 September 2012 can be summarised as follows:

- i. Pending negotiations on the terms of a long terms and large-scale joint venture between the parties, Mr Jehring would, with immediate effect and backdated to 1 September 2012, provide services to a business venture between the appellants and NMHE to rollout 16 warehoused kiosks owned by NMHE;
- ii. Mr Jehring would earn a management fee of R55 000,00 plus VAT per month.

- iii. the appellants' Fresh Stop contract would be included in the interim business venture;
- iv. all kiosks, including those of the appellants, would be altered to "*NU Metro Black Box*";
- v. certain staff and vehicles would be provided to the business venture by the appellants; and
- vi. the respondent would pay certain capital and operating costs in respect of the business (which by 28 February 2013 amounted to R3 961 128.17, including Mr Jehring's monthly consultancy fee).

[53] These were not the terms of the expansive agreement pleaded by the appellants and the appellants' claim was not one related to the limited interim agreement entered into. The limited terms agreed were done so on risk, for an interim period, during which time negotiations would proceed towards the contemplated conclusion of a more far-reaching agreement aimed at structuring an anticipated joint venture between the parties.

[54] Late in his argument the appellants' counsel urged this Court, if it was not inclined to find that the full agreement pleaded had been proved, to hold that, in effect, a much less ambitious agreement had been established. To this end he put up a draft order embodying the terms of such an agreement, which, although similar in many respects to the agreement initially pleaded, was now limited to a total of 35 kiosks (as opposed to around 500); and that the parties "*would negotiate with each other, in good faith, for the purpose of concluding certain further agreements in order to structure the business of Nu Metro Black Box (Pty) Ltd*". Apart from the inherent vagueness of this last term, it is clear that the scope of this alternative agreement is dramatically smaller than the extensive agreement pleaded. Notably, as was repeatedly emphasised by the respondent's counsel, not only was this new agreement not the case the respondent was ever called upon to meet, but were this Court to make the

proposed order embodying this much scaled down agreement, it would be tantamount to making an agreement between the parties in the absence of the appellants having proved, at least substantially, the agreement initially pleaded. The appellants' counsel suggested that a finding that a reduced agreement had been concluded would have the effect of rectifying an injustice which had been committed against the appellants. The facts of this case, however, do not allow such a finding since the conclusion of the expansive agreement pleaded hinged on a number of important issues being agreed which were yet to be finalised between the parties, approved by the respondent's executive committee and were not agreed on 4 September 2012. Without such issues shown to have been agreed, it is not possible to find that the pleaded agreement was proved.

[55] It can reasonably be assumed that, as an experienced business man, Mr Jehring and the appellant companies he controlled, comprehended the real risk, when entering into an agreement to proceed with a limited business relationship, that no future agreement might be entered into, more so when matters of prime importance to the parties were left open for later negotiation. The decision to proceed with the venture on the limited basis agreed on 4 September 2012, can only have been made cognisant of this risk.

[56] It follows for all of these reasons that the appellants failed to prove their claim as to the existence of the agreement pleaded and the Court *a quo* consequently correctly determined that the claim fell to be dismissed.

[57] As to the punitive costs order granted in respect of the appellants' unnecessary and unfounded challenge to the authenticity of certain documents produced by the respondent, it is material that the appellants persisted with this attack although they produced no evidence in support of it, relying solely on the cross examination of the respondent's expert witness. In the absence of any such evidence, the appellants can reasonably have been expected to withdraw this challenge, thereby obviating the respondent's need to call its expert witness. Given the failure to do so and the seriousness of the tampering

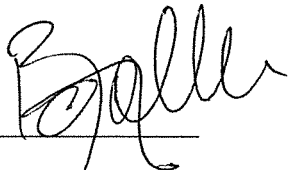
charges, which clearly imputed dishonesty to the respondent's employees, there is no reason why the appellants should not bear the costs of such challenge on a punitive scale. The trial court was correct in finding as much.

[58] For all of these reasons, the appeal falls to be dismissed. There is no reason why costs should not follow the result.

Order

[59] In the result, the following order is made:

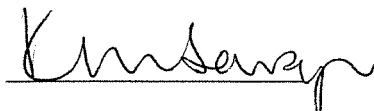
1. The appeal is dismissed with costs.



 BOZALEK J



 BOQWANA J



 SAVAGE J

Appearances:

Appellants: Mr RGL Stelzner SC and Mr P Tredoux

Instructed by Van der Spuy & Partners

Respondents: Mr S Burger and Mr G Girdwood

Instructed by Edward Nathan Sonnenbergs Inc.