IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

JUDGMENT

Reportable

Case no: 18777/18

In the matter between:

PABAR (PTY) LTD **PLAINTIFF**

and

AZOTEQ (PTY) LTD **DEFENDANT**

Coram: **JONKER AJ**

Heard: 26 to 29 January 2026 and 6 March 2026

Delivered: 18 March 2026

Summary: Contract - whether binding profit-sharing agreement concluded between parties - plaintiff alleging oral agreement partly reduced to writing in pricing email - defendant denying any concluded agreement - *Stellenbosch Farmers' Winery* approach applied in resolving factual disputes – applicable test for establishing whether negotiations have acquired contractual binding force - continuation of formal draft negotiations after alleged conclusion date -

commercial improbability of arrangement as alleged - plaintiff's onus not discharged - claim dismissed.

ORDER

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1. The plaintiff’s claim is dismissed with costs on scale C, including costs of two counsel, where so employed.

JUDGMENT

JONKER AJ:

Introduction

[1] This is a matter in which two businessmen engaged with each other over many months, pursuing what both understood to be a shared commercial opportunity. One believes a binding contract was concluded in the process. The other does not. Each holds his view with conviction, and neither is dishonest. The Court is called upon to determine, objectively and on the evidence, whether a contract was in fact concluded between them, and if so, on what terms.

[2] The plaintiff, Pabar (Pty) Ltd ('Pabar'), is a metal-forming manufacturer based in Krugersdorp. The defendant, Azoteq (Pty) Ltd ('Azoteq'), is an LED technology company based in Paarl. In 2016, Pabar approached Azoteq with the specific aim of sourcing LED tubes. Azoteq, however, saw the approach as an opportunity for a wider commercial collaboration, extending across a range of LED lighting products, and took an active role in advising Pabar on lighting solutions more broadly. This difference in the parties' respective intentions is reflected in the draft cooperation agreements that Azoteq prepared from August 2016 onwards, which were broader in scope than the specific tube-supply arrangement that Pabar had in mind. Running concurrently with those negotiations was a specific commercial opportunity: Pep Installations (Pty) Ltd ('Pep') was seeking to replace failing T5 fluorescent tubes across its retail store network, and Azoteq was positioned to procure suitable replacement tubes from its manufacturing base in China. Neither party wished to be unprepared in the event that Pep placed an order, and both accordingly pressed ahead with the practical steps of sourcing and pricing the tubes while the terms of any broader collaboration between them remained under negotiation.

[3] The central issue is whether a binding profit-sharing agreement was concluded between the parties in March 2017. Pabar contends that a binding agreement was reached, partly in writing and partly orally, in terms of which the parties would jointly supply LED tubes to Pep and share the resulting profits on a 60:40 basis. Azoteq denies that any binding agreement was ever concluded,

characterising all of the March 2017 communications as illustrative pricing within ongoing negotiations that were never finalised.

[4] The matter came to trial over four days in January 2026. The principal witnesses were Mr Michael Barbaglia, the managing director of Pabar, who testified for the plaintiff, and Dr Frederik Bruwer, the chief executive of Azoteq, who testified for the defendant. Legal argument was heard on 6 March 2026. At the commencement of argument, the plaintiff was granted leave to amend its particulars of claim, as no opposition thereto was received.

Undisputed facts

The parties and their initial relationship

[5] Pabar's primary business was the manufacture of metal light fittings and housings, which it supplied through an extensive distribution network to major wholesalers. Pabar was not in the LED lighting technology business.

[6] Azoteq specialised in electrical engineering innovation and had developed proprietary LED lighting technology, including an integrated circuit driver. It had a manufacturing relationship with factories in China that produced tubes to Azoteq's specifications. Azoteq had an exclusivity arrangement with a major electrical wholesaler, Ellies, which permitted certain defined exceptions, including doing business with Pabar.

[7] During 2016, Pabar identified a business opportunity in the supply of LED lighting to Pep, which was seeking to replace failing T5 fluorescent tubes across its retail store network. Pep was not interested in new integrated lighting products, it wanted direct replacement tubes that would fit its existing T5 housings. Pabar did not itself manufacture LED tubes. It approached Azoteq as a potential supplier of the LED technology required. It was through Pabar and LightMart that Azoteq was introduced to Pep. Prior to that introduction, Azoteq had no direct relationship with Pep. Pabar operated in association with LightMart, a retail company of which Mr Eric Gander was a director. LightMart had an existing commercial relationship with Pep and served as the retail-facing entity through which Pep business was channelled. Throughout the period of the collaboration, Mr Gander communicated actively with both Mr Barbaglia and Dr Bruwer, and was copied on or involved in correspondence whenever instructions or enquiries were received from Pep.

The draft cooperation agreements

[8] Between August 2016 and October 2017, Dr Bruwer prepared a series of draft cooperation agreements and sent them to Mr Barbaglia. None was signed by either party.

[9] The first draft, sent in August 2016, was a broad product-based cooperation agreement covering all LED lighting products that the parties proposed to develop and supply together, with a profit-sharing formula.

[10] The second draft, sent on 25 January 2017, was significantly different. It was headed 'PEP Stores Cooperation Agreement' and was expressly limited to Pep as a specific customer. It retained a profit-sharing formula: a 20% markup on cost to be shared equally between the parties, and a further margin, being the difference between the selling price and the marked-up cost, to be split 60% in favour of the party making the sale and 40% in favour of the other party.

[11] The third draft was sent in August 2017, some five months after the alleged agreement. It was a simplified hybrid arrangement covering a broader range of products. It still included Pep as an identified opportunity.

[12] A further email in October 2017 proposed revised terms on products where Pabar made the housing and Azoteq supplied components. This email made no reference to Pep tubes.

The March 2017 communications and the critical email

[13] The events of March 2017 are at the heart of this case. By early March 2017, the parties had been discussing proposed pricing to Pep and the basis on which profits would be split. On the evening of 9 March 2017, Dr Bruwer sent an email to Mr Barbaglia setting out proposed pricing.

[14] On 10 March 2017, a series of three emails was exchanged. At 11h59, Mr Barbaglia wrote to Dr Bruwer stating: '*I agree with your pricing … however we*

need to determine our landed cost as per your proposed agreement so we can determine our profits.' At 14h50, Dr Bruwer sent a further email with pricing and specifications. At 16h51, Dr Bruwer sent a detailed email ('POC1') setting out the specifications of the T5 LED tubes proposed for supply to Pep, pricing at different quantity levels, and a breakdown of how profits were to be shared between the parties. The pricing schedule showed a base cost, a 10% markup by each party, and a division of the resulting margin, 60% to Pabar and 40% to Azoteq.

[15] On 13 March 2017, the parties arranged via WhatsApp to meet the following day at OR Tambo International Airport, as Dr Bruwer was travelling to China on the evening of 14 March. On 14 March 2017, the parties met at approximately 16h00 at the Airport Brewery restaurant ('the Brewery meeting'), shortly before Dr Bruwer's international flight.

[16] On 15 March 2017, Dr Bruwer sent an email from China enquiring whether the pricing had been sent to Mr Derek Pieterson of Pep and reporting on tube testing progress. On 22 March 2017, in the context of a pricing comparison with a competing supplier, Dr Bruwer made reference in an email to '*our joint markup (20%) and Margins (18%).*'

Subsequent conduct

[17] Following the March 2017 events, the parties continued to pursue the Pep business jointly. In April 2017, Dr Bruwer sent revised pricing for a T6 LED tube incorporating Azoteq's proprietary integrated circuit technology, noting that Mr

Pieterson had chosen the higher lumen output option. In June 2017, Dr Bruwer placed an order with Azoteq's Chinese manufacturer for 1 000 T6 tubes for Pep and arranged for a provisional invoice so that Mr Barbaglia could place a purchase order for half the cost. In August 2017, Dr Bruwer wrote to Mr Gander confirming that '*Mike and I ordered 1 000 T6 tubes so that we can move fast with Derek.*'

[18] On 17 September 2017, Dr Bruwer wrote to Mr Barbaglia in relation to an enquiry from Mr Gander for track lights to be sold to Pep, proposing to handle the matter '*according to our agreed structure of 10% each (Pabar, Azq) ensuring the profit on a 60/40 basis*.'

[19] In November 2017, Dr Bruwer sent an email referring to '*a proposed agreement to cooperate*.' In January 2018, Dr Bruwer sent an email recording that Mr Barbaglia preferred '*a more arm's length relationship*' and stating that this '*kicks out the pricing mechanisms we worked on before*.'

[20] A Parow pilot store was supplied with LED tubes through LightMart during the period of the collaboration. Mr Gander was the operative contact for that supply. Pabar did not account to Azoteq for any profit arising from the Parow supply.

[21] Azoteq began supplying T6 LED tubes to Pep directly from approximately May 2018, with larger volume orders following later in 2018. The tubes supplied

were the T6 glass tube incorporating Azoteq's proprietary Crystal drive technology, a different product from the T5 tube to which the March 2017 pricing related.

[22] Mr Barbaglia came to know of Azoteq's supply to Pep in August 2018, through a third party. He wrote to Dr Bruwer in August 2018, asking about '*our PEP relationship going forward*.' Dr Bruwer's response was that the relationship had ended in January 2018 when Mr Barbaglia indicated his preference for an arm's length arrangement, and that he was flabbergasted at the suggestion that any profit-sharing obligation existed. Summons was issued in October 2018 and the litigation ensued.

The pleaded case and its amendments

[23] Before turning to the merits, it is necessary to record the history of the plaintiff's pleaded case.

[24] The original particulars of claim, filed in October 2018, pleaded an oral agreement concluded on 10 March 2017 at Krugersdorp, Johannesburg or Paarl, with POC1 as a subsequent written confirmation thereof.

[25] An amended particulars of claim filed in December 2025 made three material changes: the date of the oral agreement was changed to 14 March 2017; the place was narrowed to the OR Tambo Airport; and the sequence was

reversed, so that POC1 now preceded the oral agreement rather than following it. The joint venture characterisation was apparently abandoned.

[26] A notice of intention to amend was filed on 23 February 2026. This version reinstated the broader location ('Johannesburg, alternatively Paarl'), reverted to the original sequence in which POC1 follows the oral agreement, and reintroduced the description of the arrangement as '*akin to a joint venture*.' It also introduced a new alternative profit formula: '*60% in favour of the party making the sale and 40% in favour of the other party*.' At the commencement of argument on 6 March 2026, plaintiff's counsel moved the amendment from the bar. There was no opposition from the defendant, and the amendment was granted. The particulars of claim as so amended constitutes the operative pleading for purposes of this judgment.

The issues

[27] The following issues arise for determination:

(a) Whether a binding agreement was concluded between the parties in or about March 2017, in the terms alleged in the particulars of claim as amended.

(b) If so, on what terms and in particular, whether the profit formula was 60% fixed in favour of Pabar, or 60% in favour of the party making the sale.

(c) If a binding agreement was concluded, whether it was validly cancelled or terminated in January 2018.

(d) Whether, if an agreement or special relationship between the parties has been established, Azoteq owed a fiduciary duty to Pabar arising from that relationship, giving rise to an obligation to account.

[28] The first issue is dispositive. If the plaintiff fails to establish a binding agreement, issues two and three do not arise. The fourth issue, though pleaded as a freestanding alternative, is in substance dependent on the same factual foundation as the primary claim.

Legal framework

[29] For a valid contract to come into existence under South African law, it is trite that there must be consensus between the parties on the essential terms and each party must have the intention to be legally bound (*animus contrahendi*). While other requirements exist, such as contractual capacity, lawfulness, possibility of performance, and certainty of terms, only consensus, *animus contrahendi*, and certainty are in issue in this matter. The applicable legal principles governing each of these disputed requirements are set out below.

[30] There are no formalities required to conclude a valid contract in South African law. An agreement entered into seriously and with the necessary

intention is enforceable. The question in every case is whether the parties reached consensus on the essential terms with the requisite *animus contrahendi*, that is, the intention to be legally bound. In *Conradie*[1], Solomon ACJ, stated the general rule as follows:

> '*An agreement between two or more persons entered into seriously and deliberately is enforceable by action'*.

[31] The test for the existence of an agreement is an objective one. Contractual liability is not determined solely by the parties' subjective or hidden intentions. What matters is the objective and outward manifestation of the parties' conduct, assessed against the standard of a reasonable person in the position of the other party. This is the doctrine of quasi-mutual assent.

[32] As set out by Harms JA in *Sonap*[2]*:*

> *'the decisive question in a case like the present is this: did the party whose actual intention did not conform to the common intention expressed, lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?'.*

[33] Whether a binding agreement has been concluded during the course of negotiations is a question to be decided on the facts of each particular case. The Court must determine whether a specific communication constitutes an offer

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[1] *Conradie v Rossouw* 1919 AD 276 at 288A.
[2] *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 (3) SA 234 (A) at 239I-J.

made *animo contrahendi*, such that acceptance would give rise to an enforceable contract, or whether it is merely a step in the negotiating process as the parties feel their way towards a more comprehensive arrangement.

[34] The applicable test is that formulated by Corbett JA in *Pitout*[3]: the question is whether a specific communication made during uncompleted negotiations was made *animo contrahendi*, that is, with the genuine intention to be immediately bound on acceptance, or whether it was merely a proposal while the parties were feeling their way towards a more precise and comprehensive arrangement. That question is, as Corbett JA observed, essentially one to be decided on the facts of each particular case. It consists of a step-by-step analysis of the negotiations.

[35] The application of that test in cases where material matters remain outstanding was further considered by Corbett JA in *CGEE Alsthom Equipments*[4]. In that matter, the Court confirmed that the existence of outstanding material terms on which no agreement has yet been reached may prevent an agreement from acquiring contractual force.[5] This is so because the law will not recognise such force where the evidence shows that the parties contemplated that consensus on those outstanding matters had first to be achieved before a binding contract could come into existence. Such outstanding matters do not, however, necessarily deprive an agreement of contractual force,

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[3] *Pitout v North Cape Livestock Co-operative Ltd* 1977 (4) SA 842 (A) at 850C-D.
[4] *CGEE Alsthom Equipments et Enterprises Electriques, South African Division v GKN Sankey (Pty) Ltd* 1987 (1) SA 81 (A) at 93A-B.
[5] At 92A.

as the parties may intend to conclude a binding contract while leaving certain matters to future negotiation. Whether the initial agreement acquires contractual force therefore depends on the intention of the parties, to be gathered from their conduct, the terms of the agreement, and the surrounding circumstances. The court described the existence of outstanding matters as constituting a strong pointer in the direction of no binding contract, and held that, in the absence of cogent factors pointing in the opposite direction, the court would be inclined to find against the party alleging a concluded contract.[6]

[36] If there are two mutually destructive versions on the facts, the court must apply the approach described by Nienaber JA in *Stellenbosch Farmers' Winery*[7] ('*SFW*'), which provides the framework for assessing credibility, reliability, and the probabilities when evaluating contested evidence. The analysis proceeds in three layers: first, the credibility of each witness, assessed by reference to demeanour, candour, bias, internal contradictions, external contradictions with the pleaded case or the documents, and the inherent probability of particular aspects of the version; second, the reliability of each witness, assessed by reference to the quality of his opportunity to observe the relevant events and the integrity and independence of his recall; and third, the probabilities, by analysing and evaluating the probability or improbability of each party's version on each disputed issue.

[6] at 93A.
[7] *Stellenbosch Farmers' Winery Group Ltd v Martell et Cie* [2003] ZASCA 2; 2003 (1) SA 11 (SCA) para 5.

[37] Where a court's credibility findings point in one direction and the general probabilities in another, the more convincing the former the less convincing will be the latter; but where all factors are equipoised (balanced), probabilities prevail. The Court must therefore proceed to assess the credibility and reliability of the witnesses' recollections of events, and to evaluate the probabilities.

[38] Once the facts are determined, the step-by-step analysis set out in *Pitout* must be applied to determine whether a contract was concluded and thereafter the two-stage enquiry in *Jehring*[8] will be undertaken to determine what those terms were.

[39] Ultimately, the onus of proving the existence and terms of the alleged agreement rests on the plaintiff throughout. Where the probabilities are evenly balanced, the party who bears the onus fails. The onus and its consequences are confirmed by *Gany*[9]. Although this is not a case where one witness must be found to be lying, the principle remains applicable: where the Court, having considered all the relevant circumstances, is not persuaded that the plaintiff's version of events is more probable than the defendant's, the plaintiff fails.

Analysis of evidence

Was there a binding agreement?

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[8] *Jehring v Times Media Group* (A279/2017) [2018] ZAWCHC 190.

[9] *National Employers' Mutual General Insurance Association v Gany* 1931 AD 187 at 199A.

[40] For the most part, the parties do not dispute the underlying facts: the emails were exchanged, the Brewery meeting took place, and the stock was ordered jointly. Where they differ fundamentally is in their account of what transpired at the Brewery meeting and, more importantly, the legal effect of their outward manifestations. The central question is therefore whether the parties' conduct, viewed objectively, amounted to an offer and acceptance with immediate binding effect, or remained part of ongoing negotiations.

[41] Before the Court can apply the step-by-step analysis of the negotiations as described in *Pitout*, it is necessary for the court to resolve the factual dispute regarding the Brewery meeting by applying the principles of *SFW.*

Application of the SFW approach: the Brewery meeting

[42] The Court turns to consider the evidence of the respective witnesses with regard to their credibility and reliability.

Credibility

[43] Both witnesses presented as generally honest. They were testifying about events that occurred eight to nine years ago, in the context of a commercial relationship that did not produce the outcomes either had hoped for. Each therefore has an incentive to characterise the events of March 2017 in a manner

that supports his present legal position. The Court finds no fault with either witness's demeanour or candour.

[44] However, the evidence of Mr Barbaglia was marked by a degree of reconstruction. Certain aspects of his version shifted over time, particularly when measured against the pleadings and contemporaneous documentation. This diminishes the weight to be attached to his account where it is unsupported by objective evidence.

[45] According to him, Dr Bruwer showed him the same pricing spreadsheet that had been sent by email on Friday, 10 March 2017, which set out how the revenue split between the parties would operate, namely a 60:40 profit-share arrangement in Pabar's favour. Dr Bruwer also showed him the rand/dollar landed cost calculations. Dr Bruwer asked Mr Barbaglia to forward the pricing to Derek Petersen of Pep in order to determine whether an order would follow. They further agreed that whoever received an order from Pep would notify the other.

[46] Mr Barbaglia also testified that he had attended an earlier meeting with a client that day and met Dr Bruwer approximately an hour before Dr Bruwer's departure on an overseas flight.

[47] Dr Bruwer, by contrast, was a careful and precise witness who generally answered questions cautiously. He acknowledged that the Brewery meeting took place and that he had approximately one hour with Mr Barbaglia before proceeding through passport control for his 18h00 departure. He testified that he

only recalled the meeting after seeing the WhatsApp messages discovered in the litigation and that he had no independent recollection of its substance, although he remembered drinking a pale ale.

[48] When pressed about the purpose of the meeting, Dr Bruwer testified that he could find no indication that anything particularly important had been discussed. He was unable to confirm or deny whether the pricing structure or the draft agreement had been reviewed. He suggested that the meeting may simply have been a social encounter, noting that Mr Barbaglia lived in Sandton and the airport was conveniently on his route home.

[49] Dr Bruwer further testified that, had the meeting been intended as an important business meeting, he would have arranged a boardroom at an airport hotel rather than meeting at a brewery restaurant given the limited time available.

[50] He also pointed out that, in none of his post-meeting emails, despite it being his usual practice to record agreements in writing, did he write anything to the effect of '*as agreed at the Airport Brewer*y'. He maintained that he did not regard anything discussed at the meeting as having constituted a binding agreement.

Reliability

[51] Reliability concerns the accuracy of a witness's recollection, the quality of the opportunity to observe the events, and the integrity of the witness's recall, as distinct from his honesty.

[52] Mr Barbaglia's reliability is affected by material inconsistencies in the successive versions of his pleaded case. The earlier pleadings did not identify the Airport Brewery as the place where the agreement was concluded. That allegation appeared only in a later amendment made after the WhatsApp records had been discovered in the litigation, and it was subsequently abandoned in a further amendment.

[53] During cross-examination Mr Barbaglia was also unable to maintain a consistent chronology regarding the sequence of events. At one stage he suggested that the Brewery meeting occurred on approximately 4 March, before the pricing email of 10 March. This contradicted both his evidence-in-chief and the original particulars of claim, which stated that the parties had reduced certain material terms of the agreement into writing on or about 10 March. When confronted with this, he accepted that the latter date was correct but appeared to conflate the two dates, creating confusion as to whether the Brewery meeting occurred on 4 March or 14 March.

[54] Mr Barbaglia was further pressed on the fact that the original particulars of claim alleged that the agreement had been concluded at or near Krugersdorp, Johannesburg, alternatively Paarl, rather than at the airport. He attempted to

reconcile this by explaining that discussions about supplying Pep had taken place at several locations and that the Brewery meeting represented the final moment when the pricing was confirmed. He ultimately conceded that the agreement had not been concluded at Krugersdorp.

[55] Mr Barbaglia also conceded that several material matters, including warranties, insurance and product liability, had not been discussed at the Brewery meeting.

[56] I do not regard these inconsistencies as evidence of dishonesty. They do, however, indicate that Mr Barbaglia's account represents a reconstruction developed over time rather than a clear and settled recollection of a concluded agreement.

[57] Dr Bruwer's reliability is generally supported by the contemporaneous documents, most of which were generated by him at the time and which are largely consistent with his account that no Pep-specific agreement had been concluded.

[58] One aspect of his evidence in cross-examination nevertheless requires comment. Plaintiff's counsel put to Dr Bruwer that if a Pep order had been received at the time of the March 2017 emails, '*everybody would know exactly how the profits were going to be split, in accordance with the email that you had sent*.' Dr Bruwer responded: '*I think that is correct*.' When counsel immediately

followed up by suggesting that ‘*what transpired in March was an agreement?’*, Dr Bruwer answered unequivocally: ‘Oh no, not at all.’

[59] I treat Dr Bruwer’s initial answer as a concession concerning the content of the pricing formula only, namely that the March 2017 email would have provided the operative pricing mechanism had an order been placed at that time. It does not amount to a concession that a binding contract had been concluded. When the proposition was framed expressly in legal terms, Dr Bruwer rejected it immediately and without qualification.

Probabilities

[60] The objective probabilities must also be considered in assessing what likely occurred at the Brewery meeting.

[61] It is common cause that the meeting occurred shortly before Dr Bruwer’s international flight and that the parties had approximately an hour together in a brewery restaurant at the airport. The setting and limited time available make it inherently less probable that the parties would have concluded a detailed commercial agreement governing a prospective Pep supply arrangement.

[62] The probabilities are further informed by the documentary record. There is no contemporaneous written confirmation of an agreement having been reached at the meeting, despite Dr Bruwer’s established practice of recording agreements in follow-up correspondence.

[63] The absence of any written confirmation or signed cooperation agreement following the meeting is therefore significant. Dr Bruwer was meticulous in his record keeping, and the absence of any contemporaneous record of what would have been a pivotal agreement weighs against the probabilities that a binding agreement was concluded at the meeting.

[64] The probabilities therefore favour the defendant's version that no binding agreement was concluded at the Brewery meeting.

[65] The conclusion reached above resolves the factual dispute concerning what occurred at the Brewery meeting.

Applying *Pitout* to the facts

[66] Having resolved the factual dispute, the analysis of *Pitout* requires us to consider the negotiations between the parties, step-by-step. Do the parties' communications and conduct, viewed objectively, through the lens of the reasonable person, evince the requisite intention to be legally bound? What follows is therefore not a reconsideration of the factual probabilities in the narrow sense as undertaken under *SFW*, but a composite evaluation of the probabilities on the established facts in order to determine whether they cross the threshold from negotiation into a binding contract.

Points that favour the defendant on the probabilities

[67] An important point of departure is Mr Barbaglia's own evidence about the scope of his interest in the collaboration. He testified that he had no interest in sharing profits on products within his existing distribution network, because he already held a dominant position in those product categories. LED tubes, however, were not part of his existing business, that is precisely why he approached Azoteq in the first place. His evidence therefore establishes that he was, in principle, open to profit-sharing on the Pep tube opportunity, which fell outside his existing market. That concession does not assist the plaintiff. What it actually illuminates is why the negotiations took the shape they did, and why they failed. Azoteq consistently sought a broader umbrella arrangement that would span multiple product lines and opportunities. Mr Barbaglia was willing to engage on the Pep piece but not on the broader deal. Every draft that Azoteq produced reached beyond the Pep opportunity into territory that Mr Barbaglia was not prepared to commit to, which is why none of them were signed. The Pep-specific pricing in POC1 did not exist in isolation, it was part of Azoteq's sustained attempt to bring Pabar into a wider arrangement. Mr Barbaglia's resistance to that wider arrangement meant that the foundation on which the Pep terms made commercial sense to Azoteq was never established.

[68] Against that backdrop, the 60:40 profit split in Dr Bruwer's POC1 email of 10 March 2017 must be understood for what it was: an attempt by Azoteq to make the Pep opportunity commercially attractive to Pabar, not the written record

of a term already agreed. POC1 was sent by Dr Bruwer, not by Pabar. It was framed in terms that were deliberately favourable to Pabar (60% to Pabar and only 40% to Azoteq) in circumstances where Azoteq was bearing the burden of the technology, the Chinese manufacturing relationship, and the production costs. The commercial logic of that split makes sense only as an inducement, designed to bring Pabar into the broader cooperative arrangement that Azoteq was seeking to conclude and from which Azoteq expected to derive offsetting benefits across other product lines. Read in that context, POC1 is more naturally understood as a proposal intended to entice Pabar into commitment than as the confirmation of a deal already made.

[69] The most telling feature of the entire documentary record is what Mr Barbaglia did not write. Throughout the relationship, Azoteq communicated persistently and in detail. It produced successive drafts, each one reflecting the discussions that had preceded it. Its emails use phrases such as '*as discussed*' and '*I will amend the draft*', language that consistently treats the written agreement as a living instrument, still in progress, still awaiting finalisation. Each new draft introduced revised or expanded opportunities: the first covering LED products broadly, the second narrowed to Pep specifically, the third broadening again to incorporate new opportunities such as Growthpoint. Azoteq's pattern was one of sustained and documented effort to nail down the terms of a formal arrangement. Pabar's pattern was the opposite. Mr Barbaglia participated in meetings and conversations but left no corresponding paper trail. Where he did commit to writing, his emails conspicuously avoided engaging with the substance

of what Azoteq had put to him. He did not respond to any of the draft agreements to accept, reject, or propose amendments. He did not confirm in writing any understanding reached orally. He did not, at any stage, put his name to a document that committed him to anything. This is not the conduct of a man who was administratively disorganised. Mr Barbaglia ran a business with a dominant market position. The more plausible conclusion that more naturally arises is that he understood precisely what Azoteq was asking him to sign, and chose not to sign it, while remaining willing to benefit from the collaboration in practice for as long as it suited him.

[70] The most important single document in the defendant's favour is Mr Barbaglia's own 11h59 email of 10 March 2017, written before POC1 was sent. In that email, Mr Barbaglia wrote: '*however we need to determine our landed cost as per your proposed agreement so we can determine our profits*.' The phrase '*your proposed agreement*' is Mr Barbaglia's own language, used at the time, without knowledge of future litigation. The only proposed agreement in existence at that date was the second draft cooperation agreement of January 2017, which he had not signed. The natural and ordinary meaning of that phrase is that Mr Barbaglia understood he was working from a proposed, unaccepted draft. It is also significant that he refers to the need to determine profits, the language of a calculation still to be done, not of an obligation already settled. Plaintiff's counsel argued that '*proposed agreement*' referred loosely to the pricing methodology in

the draft rather than to its legal status. That interpretation is available, but it is strained. The more natural reading, on the objective test, is the defendant's.

[71] In August 2017, Dr Bruwer sent the third draft cooperation agreement to Mr Barbaglia. That draft still expressly covered Pep as an identified commercial opportunity. If the parties had concluded a binding Pep-specific agreement in March 2017, it is difficult to explain why both parties engaged substantively with a new written draft five months later that still treated Pep as open. The plaintiff's answer, that Draft #3 was Dr Bruwer's attempt to subsume the March 2017 Pep deal into a broader overarching arrangement, requires the Court to accept the very fact in issue. The simpler explanation, consistent with the defendant's case, is that Pep remained an unresolved matter and both parties knew it.

[72] Throughout the parties' relationship, Dr Bruwer's practice was to follow important discussions and understandings with written confirmation. He did so consistently in every significant interaction in the documentary record. There is no written confirmation from Dr Bruwer following the Brewery meeting of 14 March 2017, the meeting at which, on the plaintiff's version, the oral agreement was concluded, and none following POC1. The only communication from Dr Bruwer on 15 March 2017, sent from China, was a practical enquiry about whether pricing had been sent to Mr Pieterson. That email is consistent with a man who regards the Pep pricing as settled in principle and is pressing forward with practical steps, but it is not the written confirmation that Dr Bruwer produced

in every other important interaction. The significance of this practice is reinforced by the principle that where parties contemplate reducing their arrangement to writing, it follows that they do not intend to be bound until the written document is signed.[10] I do not apply this as an absolute rule, but the absence of any confirmatory document after the Brewery meeting is inconsistent with a binding agreement having been concluded there.

[73] The product ultimately supplied by Azoteq to Pep from May 2018 was the T6 glass tube incorporating Azoteq's proprietary Crystal drive integrated circuit technology. This is a materially different product from the T5 tube to which the March 2017 pricing, including POC1, related. The T6 tube had not been developed at the time of the March 2017 discussions; it emerged from Azoteq's own ongoing development work and was a product unique to Azoteq's technology. Even accepting that some form of understanding existed in March 2017 in relation to T5 tubes at the prices then discussed, the plaintiff has not established that this understanding extended to a materially different, proprietary product supplied some eighteen months later. No email, no communication, and no document in evidence expressly extends the March 2017 arrangement to the T6 tube.

[74] There is a further point that bears on the probabilities and that the plaintiff's evidence did not satisfactorily address. Under the alleged agreement, on either version of the profit formula, the obligation to account and share profits

[10] *Goldblatt v Freemantle* 1920 AD 123 at 128A–129B and *Woods v Walters* 1921 AD 303 at 305A.

ran both ways: the party making the sale to Pep was obliged to account to the other. The Parow pilot store was supplied through LightMart, an entity associated with Mr Barbaglia. Pabar did not account to Azoteq for the Parow supply. Barbaglia’s evidence that he did not know what had happened at Parow is not satisfactory. He was copied on the relevant emails. Furthermore, it was Mr Gander, associated with LightMart and with Pabar, who ran with that order. The suggestion that Barbaglia had no knowledge of business conducted through his own associate and through an entity in which he had an interest is implausible. If a binding 60:40 agreement existed from March 2017, Pabar was the first party to be in breach of it, and Barbaglia’s evidence that he knew nothing about the transaction that would have constituted that breach cannot be accepted. The conduct of the party who alleges a concluded agreement is itself evidence relevant to whether such an agreement existed.

[75] The commercial improbability of the arrangement as alleged must be assessed with greater precision than its face value suggests. The 60:40 split did not emerge from nowhere. It appeared first in the August 2016 draft, which defined the parties' roles in an integrated product with a specific commercial logic: Pabar would perform all aspects of metalwork, wiring, assembly, construction, and testing, secure Letters of Approval, and independently market the finished product to its client base; Azoteq would design, test, and produce the electronic parts including the LED lighting components and driver circuitry, and similarly market to its own client base. The 60:40 split in favour of the party

making the sale was calibrated to compensate for the logistical costs, storage, financing, and effort involved in bringing a jointly manufactured and assembled product to market. The second draft, the PEP Stores Cooperation Agreement, reproduced the same role allocations in materially identical terms. On both drafts, Pabar's entitlement to a 60% share rested on the premise that it would be doing physical work, manufacturing, assembling, testing, as its contribution to the joint product.

[76] The product that Azoteq supplied to Pep from May 2018 was not a jointly manufactured product of that description. It was a T6 glass tube, designed by Azoteq, manufactured in China through Azoteq's own production relationship, incorporating Azoteq's proprietary Crystal drive technology, and delivered directly to Pep by Azoteq. Pabar did none of the metalwork, assembly, testing, or LOA work contemplated in either draft. It was not in the supply chain at all. The commercial justification that underpinned the 60:40 ratio, Pabar's physical contribution to a jointly assembled product, was entirely absent. The argument that Azoteq agreed to a 60% entitlement for Pabar in that scenario, for no more than the original introduction to Pep, is commercially extraordinary. Azoteq's further position is that the 60:40 split made commercial sense only as part of a broader collaboration in which its concessions on the Pep margin would be offset by access to Pabar's distribution network across other product lines. Pabar declined to commit to that broader arrangement. The commercial foundation on which the split was premised therefore never materialised, which reinforces the

improbability of the arrangement as alleged. Commercial improbability of this kind is a recognised factor in assessing whether the parties' conduct reflects the necessary *animus contrahendi*.[11]

Points that favour the plaintiff on the probabilities

[77] The plaintiff relies on a number of probabilities said to support the existence of a concluded agreement. Each of them has been carefully considered. Some carry weight and require express engagement. The difficulty, however, is that most of them establish something short of what the plaintiff must prove. They demonstrate that both parties were actively pursuing the Pep opportunity and that practical steps were taken in anticipation of possible business. What they do not establish is that a binding agreement was in fact concluded in March 2017.

[78] The conduct of a party who confidently anticipates the formalisation of an arrangement is often objectively indistinguishable from the conduct of a party who has already concluded one. When each probability is evaluated against the controlling question, does this evidence prove a concluded agreement in March, or is it equally or better explained by Bruwer’s expectation that a deal would be cut, the plaintiff’s case loses most of its force.

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[11] R H Christie *The Law of Contract in South Africa* 8 ed (2022) at para 2.2.4.

[79] The most powerful point in the plaintiff’s favour is the September 2017 email in which Dr Bruwer used the phrase ‘*our agreed structure*’ in a Pep-related context. The phrase is unambiguous in ordinary usage and it appears in Dr Bruwer’s own hand, without knowledge of future litigation. The Court does not dismiss it. It does, however, evaluate it against the controlling question. What does this email tell us about whether a binding agreement was concluded in March 2017? The answer is that it tells us Dr Bruwer, by September, was using the pricing formula as a settled practical reference point. He was conducting himself as though the arrangement was operative, pressing forward with the Pep business on that basis. That conduct is consistent with a concluded agreement, but it is equally consistent with something else: a man who was confident that a formal arrangement would be concluded and was pressing forward on that basis. The objective test is not satisfied merely because conduct is consistent with a contract having been made. What is required is that the conduct be such that a reasonable person in Barbaglia's position would necessarily have understood it as an unequivocal manifestation of Bruwer's intention to be immediately bound. Bruwer's conduct falls short of that standard. A man who sends a third draft cooperation agreement to his counterpart in the same month that he jointly orders stock for their shared customer is not behaving as though a contract is already in place, he is behaving as though he expects one to be concluded and is doing everything in his power to make that outcome inevitable. Those two postures look similar from the outside but they are legally distinct, and the distinction is the one upon which this case turns. Six weeks later he referred to a

'*proposed agreement to cooperate*'. A man who believed himself bound by a concluded agreement in September does not, six weeks later, use the language of proposal. The two emails together describe a man who was anticipating and pressing for formalisation, not a man who knew the deal had been concluded months earlier. The September email, properly contextualised, does not discharge the plaintiff's onus.

[80] The joint ordering of 1 000 T6 tubes in June 2017 and Dr Bruwer's description of it as '*Mike and I ordered 1 000 T6 tubes so that we can move fast with Derek*' is the strongest point in the plaintiff's favour under the enquiry into what was done. It represents a real joint financial commitment, directed specifically at the Pep customer. This Court accepts that it is more consistent with a shared commercial understanding than with two parties operating entirely at arm's length with no arrangement of any kind. But it does not establish a concluded agreement in March 2017. Dr Bruwer ordered those tubes because he believed a deal would be cut, not because one had been cut. That is the conduct of a man who was pressing forward to make the arrangement inevitable, not the conduct of a man who was performing under an existing contract. Critically, the same Dr Bruwer who ordered those tubes in June 2017 sent a new draft cooperation agreement to Barbaglia in August 2017 that still treated Pep as an open, unsettled opportunity. A man who believed himself bound by a concluded Pep agreement does not, two months after jointly ordering tubes for Pep, send a draft that treats the Pep arrangement as still outstanding. The joint ordering

proves that both parties were in the Pep business together in anticipation. It does not prove they were already bound.

[81] The 15 March 2017 email from China, sent the morning after the alleged Brewery agreement, is evaluated against the same lens. Plaintiff's counsel argued that the absence of any reservation in that email, any suggestion that further agreement was needed, shows that both parties regarded the matter as concluded. That inference has force. But it is equally consistent with Bruwer pressing ahead with the practical next step in what he expected would crystallise into a formal arrangement. Indeed, if a binding agreement had been concluded at the Brewery meeting the previous afternoon, one would expect a confirmatory email acknowledging it. None was sent. The email is consistent with a man who regarded the Pep pricing as settled in principle and was moving forward on that basis, which is precisely what Bruwer's own evidence describes.

[82] The October 2017 email proposing new profit-sharing terms on other products made no reference to Pep tubes. Plaintiff's counsel contended that Pep was omitted because it was already settled as a separate arrangement and did not need to be revisited. That contention is supported by the evidence and carries more force than the defendant acknowledged in argument. The October email was the fourth document in the series of proposed arrangements, and it is notable not only for what it omitted but for what it reinstated. It reverted substantially to the product scope of the first August 2016 draft, troffer-type housings with integrated LED light sources using high-voltage driver solutions,

and made no reference to Pep whatsoever. If Pep remained an open and unresolved matter as at October 2017, one would expect it to appear. Its complete absence from a document that was otherwise broad in scope is a point that, taken alone, could support the plaintiff's case.

[83] I do not, however, find it determinative in either direction, for two reasons. First, the same argument of omission-because-settled is not available in respect of the August 2017 Draft #3, which was sent two months earlier and which expressly included Pep as an identified opportunity in its annexure. If the October email's silence on Pep is evidence that Pep was settled, Draft #3's express inclusion of Pep two months before is evidence that it was not. The two documents cannot be read selectively. Second, and more fundamentally, even if the October 2017 omission of Pep were accepted as consistent with the plaintiff's case, it does not establish that a binding agreement was concluded in March 2017 on the terms alleged. At most it supports the contention that by October 2017 both parties understood the Pep pricing formula to be a settled reference point. That is not the same as a concluded contract.

[84] Plaintiff’s counsel placed reliance on the June 2017 Ellies email in which Dr Bruwer requested a quotation ‘*based on our cost sharing formula*.’ Dr Bruwer conceded that if an Ellies order had eventuated, that email would have served as the operative basis for the profit split. This is said to show that the parties operated on the basis that ad hoc pricing emails could constitute binding arrangements. The argument, however, cuts both ways. If that is how binding

arrangements were made between these parties, through responsive, confirmatory email exchange, then the absence of any such email from Barbaglia at any stage is all the more significant. He never sent an email saying '*I agree*' or '*we are in*' or '*this is our deal*.' The very mechanism the plaintiff relies upon to show that informal arrangements are possible also highlights, with precision, what Barbaglia consistently and deliberately refused to do.

[85] Evaluating all twelve of the plaintiff's probabilities as a totality, and applying the principle in *Endumeni*[12] that communications and documents must be assessed in their context and against the relevant background, the probabilities as a whole do not favour the plaintiff. The evidence the plaintiff relies upon, the joint ordering, the September '*agreed structure*' email, the March email from China, the continued collaboration, establishes, at its highest, that Dr Bruwer was confident a deal would be concluded and was conducting himself accordingly. It does not establish that a deal was concluded in March 2017. The distinction between anticipating an agreement and having concluded one is precisely the distinction the law requires this Court to draw. On the evidence as a whole, the probabilities do not establish that the plaintiff has crossed that line.

[86] The approach taken in *CGEE Alsthom* is instructive. Corbett JA held that where material matters remain outstanding between the parties at the time of the alleged conclusion, this constitutes a strong pointer against a binding contract having been concluded. That pointer can be displaced, but only by cogent factors

[12] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] ZASCA 13; 2012 (4) SA 593 (SCA) para 18.

pointing clearly in the opposite direction. In *CGEE Alsthom*, such factors were found to exist. The critical communication was unqualified in its terms, its author was fully aware of the outstanding matters and had every opportunity to frame it conditionally but chose not to, there was acute commercial pressure that explained why commitment had been given before a formal agreement was signed, and the subsequent conduct of both parties was consistent only with a concluded contract.

[87] None of those features are present here. The communications relied upon by the plaintiff are not unqualified. Mr Barbaglia himself described the arrangement as a '*proposed agreement*' at the very time it is said to have been concluded. There was no commercial urgency requiring immediate commitment in the absence of a signed agreement. And the subsequent conduct of the parties, far from confirming a concluded contract, is equally consistent with two parties who expected to formalise their arrangement but never did. The strong pointer against a concluded contract therefore operates without displacement. There are no sufficiently cogent factors on the other side to overcome it.

[88] There were numerous issues contained in the draft agreements that were neither considered, addressed, nor agreed upon. These included matters such as risk, letters of authority, insurance, and related issues. In agreements of this nature, such matters would ordinarily be regarded as essential terms. This is a further indicator that a binding contract had not been concluded.

[89] Moreover, the two-stage enquiry articulated in *Jehring*, although applied in that case to determine the terms of a concluded agreement, is equally instructive when considering whether an agreement was concluded at all. That enquiry requires consideration of what was written, what was said, and what was done, viewed through the lens of the reasonable person.

[90] *As to what was written*: the contemporaneous documents do not record a concluded agreement. They also do not speak with one voice. Barbaglia's own '*proposed agreement*' language in his 10 March 2017 email, the succession of unsigned drafts, and Bruwer's November 2017 reference to a '*proposed agreement to cooperate*' all point against a concluded agreement. But Bruwer's September 2017 '*our agreed structure*' language and the pricing detail in POC1 point the other way.

[91] *As to what was said*: on the accepted facts, the discussions at the Brewery meeting did not culminate in a clear and unequivocal agreement. At most, the parties engaged in negotiations and explored potential terms. Mr Barbaglia himself acknowledged that material matters, warranties, risk, letters of authority, were not discussed at the meeting. The exchanges lack the certainty and finality required for contractual formation.

[92] *As to what was done*: the parties' subsequent conduct does not clearly demonstrate that either of them regarded a binding agreement as having been concluded in March 2017. No cooperation agreement was signed, no written

confirmation of the alleged agreement was sent after the meeting, and the draft agreements continued to circulate in unsigned form. The absence of any contemporaneous record confirming that a final agreement had been reached is particularly notable given Dr Bruwer's consistent practice of recording agreements in follow-up correspondence.

[93] Applying the test in *Jehring*, the probabilities favour the defendant's version that no binding profit-sharing agreement was concluded between the parties in March 2017. This was the case pleaded by the plaintiff. Accordingly, the plaintiff has failed to discharge its onus in establishing the pleaded contract.

Conclusion on whether binding agreement was concluded

[94] In conclusion, the probabilities, viewed as a whole, do not establish that a binding agreement was concluded in March 2017 on the terms alleged. The plaintiff has accordingly not discharged the onus of proving a binding agreement.

[95] The claim must therefore fail. Issues two and three in paragraph 27 above accordingly do not arise.

Plaintiff's alternative claim based on fiduciary duty

[96] Issue four in paragraph 27 remains to be addressed. The plaintiff pleads an alternative claim based on an alleged fiduciary duty owed by Azoteq to Pabar. Plaintiff's counsel confirmed at argument that this claim was not pursued in any substantive way and that no evidence was led in support of the specific fiduciary terms pleaded, namely a duty of loyalty, a duty to protect the plaintiff's interests, and a prohibition on secret profits.

[97] The alternative claim is in any event dependent on the same contractual foundation as the main claim. The fiduciary terms pleaded are not free-standing obligations, they are said to arise from and form part of the agreement alleged. Given the court's conclusion that no binding agreement was concluded, the alternative claim must suffer the same fate.

Costs

[98] Costs must follow the result. There is no reason to depart from the general rule that the unsuccessful party should pay the costs of the successful party. The defendant is entitled to its costs on scale C as requested. The complexity of the matter warrants scale C, including the costs of two counsel, where so employed. The trial extended over four days, required the Court to assess competing factual versions across a voluminous documentary record spanning some eighteen months of commercial dealings, and raised questions of contract formation that required careful analysis of the applicable legal principles.

Order

[99] In the result, the plaintiff's claim is dismissed with costs on scale C, including the costs of two counsel, where so employed.

EM JONKER

ACTING JUDGE OF THE HIGH COURT

Appearances:

For Plaintiff: JR Peter SC with RJ Bouwer

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For Defendant: RGL Stelzner SC with JR Whitaker

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