

REPUBLIC OF SOUTH AFRICA



**IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG**

Case no: 42562/2015

(1)	REPORTABLE: Yes
(2)	OF INTEREST TO OTHER JUDGES: Yes
10-11-24	
DATE	SIGNATURE

In the matter between:

RIVERLAND HOLDINGS LIMITED

Applicant

and

ENRC MOZAMBIQUE LIMITADA

Respondent

This judgment was delivered by uploading it to the court online digital database of the Gauteng Division of the High Court of South Africa, Johannesburg, and by email to the attorneys of record of the parties on 10 November 2024.

JUDGMENT

Introduction

- [1] This is a judgment about an application for specific performance in terms of an oral agreement concluded in 2011. The applicant, Riverland, a company incorporated in the British Virgin Islands, seeks to enforce the oral agreement and payment for the performance of its obligations in terms of it. The respondent, ENRC, a Mozambican company, sought to raise a dispute about the agreement's terms and Riverland's performance of its obligations under them. The notice of motion issued in 2015. The matter comes before me after, among other things, a confirmation of this court's jurisdiction, extensive discovery and an application to dismiss the main application for delay.
- [2] Riverland's case as set out in its founding affidavit, deposed to by Mr Michael Gomes (who I will refer to as Mr Gomes), is simple: Riverland concluded an oral agreement with ENRC. The terms of that agreement were that Riverland would provide to ENRC labourers (or manpower), of diverse skills and skill levels, to work on ENRC's worksites in Mozambique. The agreement was amended a few times, but those amendments related only to arrangements about the sending of invoices and terms of payment. Riverland attached to its founding affidavit invoices, schedules and accounts that show the outstanding amount due to for the labourers provided to ENRC. As ENRC's main argument at the hearing was that there are disputes between the parties that cannot be resolved on the papers, I cannot otherwise but to set out the parties' cases as pleaded in the founding and answering affidavit in some detail.

The founding affidavit

- [3] The founding affidavit sets out background to the conclusion of the agreement. Mr Gomes had prior dealings with ENRC. He wore more than one hat at all relevant times. In addition to being an agent for Riverland, he was also a director of Servicos Atlântico (Pty) Ltd, a South African company. During the first half of 2011, Servicos, represented by Mr Gomes, held discussions with ENRC with the aim of providing all manner of services, building materials and labourers to ENRC at its sites in Mozambique. In these discussions, ENRC was represented by, among others, Mr Johan Van Straaten, a construction manager, and Mr Graham Soden, a senior project manager. On 26 July 2011, Mr Van Straaten telephonically told Mr Gomes that ENRC no longer required Servicos to provide it with labourers. ENRC and Servicos contracted accordingly.
- [4] During the same conversation, Mr Van Straaten enquired whether Riverland could provide the necessary labourers to ENRC. Mr Gomes answered in the affirmative and a contract was concluded telephonically between the two men in August 2011. The agreement was amended from time to time. In September 2011, ENRC's Mr Craven informed Mr Gomes that ENRC required Riverland's provision of labourers to be on a month-to-month basis. The agreement was amended accordingly. A further amendment was effected in November of 2012. It related to two of ENRC's worksites. The fee payable for labourers who worked at those sites, would be paid only at the end of the completion of the relevant projects. Further requests were made for payment to be delayed as ENRC faced financial constraints. Ultimately, the invoices were produced and submitted in March 2013 and were due for settlement at the end of April 2013. In the meantime, ENRC asked that Turner & Townsend, a construction and cost management consultant firm, be included in the invoicing process. From June 2012, therefore, Riverland sent its invoices and statements to Turner & Townsend. While this arrangement initially applied only to some of ENRC's worksites, Riverland eventually would send all invoices and statements to Turner & Townsend.

- [5] In May 2013 ENRC terminated the agreement with Riverland. ENRC had reports compiled about the work done on its sites. In November 2013, these reports were presented to Mr Gomes. At this stage, explains Mr Gomes, Riverland was in a severe and desperate financial situation as ENRC had not paid Riverland its due. In the circumstances, Mr Gomes thought it best to appease ENRC, attend their sites, and consider its complaints. He also offered to make good Riverland's defective performance, whatever there might have been.
- [6] The invoices attached to Riverland's founding affidavit are detailed. The statements and summaries of account less so. They include generally shorthand descriptions of the detail contained in the invoices, but contain more than enough information for the informed reader to know what the entries relate to. By way of illustration, one entry for instance reads "Invoice 0001014 – Services June 2012 – Ref: Vehicle maintenance". In the corresponding invoice, in a column headed "description of items", the two entries read "1 (One) Supervisor / Mechanic / Earthmoving: AndreOosthuizen" and "1 (One) Mechanic LDV & Truck: Willem Koekemoer." One summary of accounts (the bookkeeping was done in four accounts), on its face, relates to the provision of workers, including the flights to convey them to and from Mozambique. The first entry in the summary reads "Invoice E 00010001 – Provision of Construction Workers – January, 2013". The relevant invoice includes the entry "1 (One) Construction Supervisor: Pieter De Klerk – 31 Days". The last entry in the summary reads "Invoice 00010011 – Flights as per agreement – up to and including 30th June 2013". The invoice itself details flights, who they were for, their origins and destinations, and one entry that relates to "Transfers & Accommodation." The total amount outstanding according to the summary of accounts is US\$1 827 200.65.
- [7] Also attached to Riverland's founding affidavit is an e-mail, dated 29 July 2013, sent from Turner & Townsend to Riverland. Attached to the email are the "close out reports" relevant to Riverland. They are similar to the statements produced

by Riverland. When compared to the invoices, they are less detailed. They contain invoice numbers, and whether a payment certificate has been issued and payment has been made in respect of each invoice. According to these close-out reports, ENRC is indebted to Riverland in the amount of US\$1 955 229.40. Riverland explains why ENRC is indebted to it for a lesser amount. Firstly, Turner & Townsend failed to consider some of the funds received by Riverland from ENRC. Secondly, the close-out reports do not reflect invoices Riverland rendered between March 2013 until June 2013.

- [8] Prior to the issuance of the application, Riverland continued to seek payment from ENRC, but to no avail. There were attempts to settle the matter, but nothing came of them. During these discussions Mr Mulumba, the deponent to the answering affidavit, asserted that Riverland had committed fraud and that it was, in truth, the basis for ENRC's refusal to pay Riverland in accordance with its invoices. The allegation is not, however, to be found in the answering affidavit. Prescription was pleaded, but at the hearing it too was abandoned as a defence.

The answering affidavit

- [9] According to ENRC, the agreement concluded telephonically through Mr Van Straaten and Mr Gomes is somewhat more elaborate. Mr Mulumba sets out the terms of the agreement. His allegations in that regard are as follows:

“20.2.1. the Applicant would utilise the materials provided by Servicos Atlantico to erect the three camps in terms of the specifications referred to above and as set out in the original quotation of Servicos Atlantico, and in accordance with the design drawings to be done by the Applicant and approved by the Respondent;

20.2.2. the Applicant would provide all the required personnel (except unskilled labourers) who would be responsible for the design, erection, construction, supervision, maintenance and management of the camps at the three sites;

20.2.3. the Applicant would utilise local unskilled labourers and would be responsible for the supervision of such labourers;

20.2.4. the Applicant would comply with all the laws and regulations applicable in Mozambique;

20.2.5. the Applicant would not only construct and erect the buildings required, but the Applicant's scope of work included the provision of the perimeter fencing, the sewerage and water systems and plants and all the electrical power installations;

20.2.6. the Applicant would also provide the design drawings for all aspects of the camps.

....

the personnel which the Applicant was to provide included:

20.2.7.1. skilled artisans, professionals, managers, consultants; supervisors and

20.2.7.2. experts and technicians in the construction, maintenance, electrical, water and sewerage reticulation spheres as well as supervision, maintenance and management thereof;

20.2.7.3. electricians, air-conditioning experts, boilermakers, plumbers, tilers and master builders;

once the Applicant had completed the construction and handed over the camps, a final snag list and list of defects, determined by the Respondent, would be provided to the Applicant to be remedied and attended to by the Applicant;

20.2.9. the Respondent would only pay the Applicant for necessary personnel who attended at the site and worked on the sites to perform the services;

20.2.10. the Applicant would provide a proposal / quotation for the approval of the Respondent in respect of the personnel which it required on site.

...

20.2.11. the Respondent would approve the quote by issuing a purchase order in writing, by email, to Services Atlantico but addressed to the Applicant

20.2.12. after approving the quote, the personnel would be sent to the site and after the work was completed the Applicant would generate invoices in respect of the time actually spent on the site at the agreed rates stipulated in the proposal/quotation;

20.2.13. the Respondent would verify the invoices from the records on site and thereafter, subject to verification, would make payment to the Applicant."

- [10] Attached to the answering affidavit are documents described as the "confirmatory affidavits" of Mr Soden, Ms Wake, Mr Gettliffe and Ms Jackson. Mr Soden speaks to the terms of the agreement, some of the events prior to the conclusion of the agreement, the role of Turner & Townsend and the presentation to Riverland, around the time of the termination of the oral agreement, of written agreements in draft form. Ms Wake also speaks to those written agreements. Mr Gettliffe, who was one of the senior personnel on site for ENRC, speaks to what he "believed" Servicos' role was and Riverland's "scope of work". Ms Jackson speaks to when and how invoices became due

and payable after the involvement of Turner & Townsend, the role of Turner & Townsend generally, a meeting she had with Mr Gomes, and the invoices “actually received by the Respondent, represented by Turner and Townsend”.

- [11] In addition to making allegations about the terms of the agreement, Mr Mulumba gives evidence about documents produced and events that occurred, before and after its conclusion. They are said to be indicative of the terms of the agreement. Specifically, he says, that Riverland owed obligations other than merely providing manpower to ENRC’s sites in Mozambique. He relies on emails sent to ENRC between July and September 2011, by Messrs Dyllan and Patrick Gomes. They are said to show that Riverland agreed to provide design drawings for the work to be done. He points to an email written by Mr Dyllan Gomes on 15 October 2012. It is said to show that it was “always the intention and agreement of the parties” that defects would be remedied by Riverland. In this regard, he also refers to a “proposal” dated 20 October 2011 sent from Riverland to ENRC. His views, that the agreement related to more than the provision of manpower, are confirmed, he says, by the fact that the close-out reports prepared by Turner & Townsend contain phrases like “construction services” and “vehicle maintenance services”. He also points to a communication written in May 2013, when ENRC used the phrase “*regarding the provision by you of vehicle maintenance and repair services and construction consulting services*”. This, he says “clearly confirms that the version of the agreement between the parties, as alleged by the Applicant, is incorrect and does not in truth reflect the actual agreement between the parties.” As to the site meetings attended by Mr Gomes in Mozambique, Mr Mulumba says they came about as Riverland was obliged by the agreement to complete the works and remedy the defects in them. As proof of Riverland’s defective provision of services, Mr Mulumba attaches two reports to his affidavit. Each relates to a different worksite.

- [12] As the defence sought to be put up by Mr Mulumba focused on the terms of the agreement as originally concluded, the answering affidavit takes no real issue

with the content of the amendments as alleged by Riverland. It does however include allegations about Turner & Townsend's mandate and seems to suggest that the agreement, as amended or originally, it is not quite clear, included a term that ENRC would not be liable to pay Riverland for labourers provided to ENRC if any one of a number of administrative steps were not followed to the letter. ENRC also sought to cast doubt on whether it indeed received all Riverland's invoices. To this end, Ms Jackson produced a "reconciliation" of invoices sent by Riverland and those received by ENRC. Mr Mulumba does not take issue with the fact that ENRC received Riverland's monthly statements of account.

The replying affidavit

- [13] Riverland filed a lengthy replying affidavit. To it is attached an affidavit by Mr Van Straaten. He confirms that he worked for ENRC as a construction manager during the course of the agreement, that he was stationed at their worksites in Mozambique, and that the agreement was concluded as alleged by Mr Gomes.

Argument

- [14] Both parties made arguments about the other's affidavits, or documents purporting to be affidavits, and why the court should not accept them. ENRC also took issue with Mr Gomes' authority to have had the application issued. As far as the merits are concerned, ENRC's main argument was about the disputes of fact on the papers. I deal first with the arguments about the affidavits and authority, before I move on to the argument about the disputes of fact.

Hearsay

- [15] Riverland takes issue with the fact that all of Mr Mulumba's evidence is hearsay. It relies on section 3 of the Law of Evidence Amendment Act¹ in this regard. The Act defines "hearsay evidence" as "evidence, whether oral or in writing, the probative value of which depends upon the credibility of any person other than the person giving such evidence." Section 3(1) of the Act provides that "hearsay evidence shall not be admitted as evidence at criminal or civil proceedings, unless . . . (b) the person upon whose credibility the probative value of such evidence depends, himself testifies at such proceedings". Mr Mulumba's affidavit is not always clear on whether the averments made about the terms of the oral agreement are his own or that of Mr Soden. For the purposes of this argument, however, it does not matter. If it is so that Mr Mulumba makes the averments, the probative value of those averments does not depend on anyone's credibility but his. If it is so that the probative value of Mr Mulumba's evidence depends on Mr Soden's credibility, the argument also cannot be successful, because Mr Soden made an affidavit. Lastly, the only person, one might imagine, whose credibility Mr Mulumba and Mr Soden's evidence could ever have depended on, is that of Mr Van Straaten. He, of course, also made an affidavit, albeit confirming Riverland's case. Mr Mulumba's affidavit is not hearsay.

Technical issues with the confirmatory affidavits

- [16] Riverland also took issue with some of the technical aspects of Mr Soden, Ms Wake and Mr Gettliffe's affidavits. Mr Soden and Ms Wake's affidavits, it argues, fall foul of the regulations governing the administration of oaths and affirmations. Riverland relies specifically on Regulation 4(2) of the Regulations Governing the Administration of an Oath or Affirmation.² It provides a commissioner of oaths shall sign the declaration, and print on it his full name and business address below his signature. It also requires the commissioner

¹ Act 45 of 1988.

² Made in terms of section 10 of the Justices of the Peace and Commissioners of Oaths Act 16 of 1963 as published in GN R1258 of 21 July 1972, amended by GN R1648 of 19 August 1977, by GN R1428 of 11 July 1980 and by GN R774 of 23 April 1982.

to state on the declaration what his designation, or the office he holds, is and the area for which he holds that position.

[17] In respect of Mr Soden's affidavit, Riverland points out that the necessary particulars of the commissioner of oaths are absent. As I read the relevant part of the affidavit, it was signed by a commissioner of oaths. Below his signature is the commissioner's full name in manuscript. Below his name is a stamp of the South African Police Service station at Umhali, Kwazulu-Natal. It is also apparent that he is a police and designated firearms officer. It does not expressly provide for the area in which these offices are held, but that seems to me to be clear enough from the fact that he is a police officer at the Umhali police station.

[18] As to Ms Wake's affidavit, Riverland argues that it does not comply with Regulation 4(2) as the document is only certified as a true copy of the original. It is indeed so: the stamp, directly under the oath, includes the words "Certified a true copy of the original document laid before me". It, however, also includes the words "Commissioner of oaths", directly below the commissioner's name and above the commissioner's business address. The stamp, on its face, performs a dual function, allowing it to be used when the commissioner administers an oath or affirmation, and when the person using the stamp certifies a document as a true copy of the original. This is not prohibited by the regulation. I don't uphold the argument.

[19] The argument regarding Mr Gettliffe's affidavit goes beyond technicalities. Riverland submits that the affidavit does not comply with Regulation 4(2) and that no affirmation or oath was administered in respect of it. The document includes English and Portuguese versions of what purports to be an affidavit. While both versions provide space for it, a commissioner ostensibly did not certify that Mr Gettliffe acknowledged that he knew and understood the contents of his affidavit. The document also does not contain any details of a

commissioner of oaths, or someone acting in a similar capacity. As is apparent from the document, it is signed only by a translator. This means it falls foul of Regulation 4(2) and leads to the conclusion that no commissioner of oaths administered any form of affirmation or oath in respect of either version of the affidavit. The affidavit falls to be struck out. An order to that effect will follow.

The authorisation of the main application

- [20] In its answering affidavit, ENRC disputed Mr Gomes' authorisation to have had the application issued. It did not rely on Rule 7 of the Uniform Rules of Court in any way and did not at any point (over the 9 years since the notice of motion issued) assert its rights in terms of the Rule. Mr Gomes, to his replying affidavit, attached a resolution he said is that of Riverland. It reads as follows:

"Minutes of Meeting & Resolution of the Sole Director of Riverland Holdings Ltd ('the Company') held in Monaco on 20th January 2023

It was recorded, resolved, and confirmed that Michael Gomes and Rosemary Joyce have at all material times and remain authorized to commence and advance on behalf of the Company, and to represent the Company in, any and all legal proceedings as between the Company and ENRC Mozambique Ltd, especially as regards the litigation before the High Court of the Republic of South Africa (in Johannesburg) under case no. 42562/2015.

[Signed]

Antony Janse Van Vuuren"

As result of the filing of the resolution, ENRC's argument changed. In its heads of argument, it relied on Rule 63, attacking the authenticity of the resolution. At the hearing, the argument changed once more. While maintaining the attack on the authenticity of the resolution, ENRC also sought to attack the content (and efficacy) of the resolution.

- [21] Rule 7(1) of the Uniform Rules of Court provides that:

"the authority of anyone acting on behalf of a party may, within 10 days after it has come to the notice of a party that such person is so acting, or with the leave of the court on good cause shown at any time before judgment, be disputed, whereafter such person may no longer act unless he satisfies the

court that he is authorised so to act, and to enable him to do so the court may postpone the hearing of the action or application.”

The Rule exists for more than one reason. First, it is to avoid a cluttering of the pleadings unnecessarily with resolutions and powers of attorney. Secondly, it provides a safeguard against a person repudiating the process and denying the authority of the person who purported to represent it.³ Thirdly, it seems to me, the Rule, as it includes a time limit for these challenges and the leave of the court if the time limit isn’t abided, requires parties to make their cases about authority as soon as possible and be done with it, lest years of litigation ensue unnecessarily. Fourthly, it affords someone whose authority is challenged, the opportunity to satisfy the court that he is indeed properly authorised prior to the hearing of the main action or application.

- [22] It is established that the way to challenge the authority of anyone acting on behalf of a litigant, is to use Rule 7(1).⁴ ENRC did not do so and its arguments about authority, which includes the eventual attack on the authenticity of the resolution, fails for this reason alone. It must be said that, in any event, the facts as they are currently before me show Mr Gomes to have been properly authorised to represent Riverland. The resolution itself constitutes proof of the authorisation. ENRC placed no evidence before the court to doubt its efficacy to that end. I would imagine that it would have had to put before the court the law that applies to the resolutions of Riverland (a foreign company), and its founding documents, to show that in fact the resolution is ineffective in its authorisation of Mr Gomes to act on behalf of Riverland. As matters stand, all the facts before the court show that Mr Gomes was always properly authorised to represent Riverland in its dealings with ENRC. I have grave doubts about whether ENRC was convinced of the merits of its argument in this regard, in any event. It litigated for almost 10 years against Riverland, including taking and opposing interlocutory steps, seemingly without any pressing need properly to assert its point. It also never challenged Mr Gomes’ authority to

³ *Rural Maintenance (Pty) Ltd and Others v Eskom Holdings SOC Ltd and Another* (2023/027739) [2023] ZAGPJHC 354 (20 April 2023) par. 21.

⁴ *Limpopo Provincial Council of the South African Legal Practice Council v Chueu Incorporated Attorneys and Others* (459/22) [2023] ZASCA 112 (26 July 2023) par. 21.

have represented Riverland during the four years leading up to the litigation, or his authority to have concluded the agreement with ENRC on Riverland's behalf.

- [23] The Rule 63 challenge is part of the challenge to Mr Gomes' authority. It is also something that would have been ventilated long before the hearing of the main application had ENRC properly asserted its rights under Rule 7. The arguments based on Rule 63, therefore, are unsuccessful also because of ENRC's failure to apply Rule 7. The Rule 63 challenge would in any event not have been upheld. Rule 63 is a rule about the authenticity of documents. It defines "authentication" as "when applied to a document, the verification of any signature thereon."⁵ The provisions of the Rule are directory, not imperative and not exhaustive.⁶ Especially the fact that it is not exhaustive, is apparent from Rule 63(4), which provides:

"Notwithstanding anything in this rule contained, any court of law or public office may accept as sufficiently authenticated any document which is shown to the satisfaction of such court or the officer in charge of such public office, to have been actually signed by the person purporting to have signed such document."⁷

- [24] The resolution is ostensibly signed by Mr Van Vuuren. Mr Gomes, who has been acting as Riverland's agent for, at the time of the filing of the resolution, more than a decade, is certainly also well placed to identify Mr Van Vuuren's signature on the resolution, as he impliedly did.⁸ There is no reason to doubt him in that regard. I am satisfied that the document is sufficiently authenticated.

Specific paragraphs in Riverland's replying affidavit breached ENRC's legal privilege

⁵ Rule 63(1) of the Uniform Rules of Court.

⁶ *Blanchard, Krasner & French v Evans* 2004 (4) SA 427 (W) 432H-I.

⁷ Rule 63(4) of the Uniform Rules of Court.

⁸ DT Zeffert & AP Paizes, *The South African Law of Evidence* (3rd edn 2017, LexisNexis) 960.

- [25] ENRC argues that the content of paragraphs 48 to 53 of Riverland's replying affidavit is privileged. The paragraphs include communications between a Ms Brown, ENRC's legal manager, and Mr Dai, a director of ENRC, that were sent to one Mr Barend Jacobus Smit. The exchange between Mr Dai and Ms Brown occurred between 13 April 2022 and 10 May 2022. Ms Brown sent some of the documents filed in this matter to Mr Dai. Mr Dai then provides his views about the merits of the matter and informs Ms Brown how it should be conducted. The communications were sent to Mr Smit by Mr Dai. Mr Smit put them into evidence by way of an affidavit attached to the replying affidavit. He does not say why these messages were sent to him or in what capacity he received them.
- [26] Mr Eyles SC, for ENRC, argues that the content of the paragraphs is protected by the legal professional privilege and should be struck out. Mr Smith SC, for Riverland, argues that the privilege does not apply and, even if it does, that it has been waived. I do think these messages may very well be protected by the legal professional privilege or the litigation privilege. It would depend at least on the relationship between Mr Dai and Mr Smit, or the capacity in which Mr Smit received the messages, and what Mr Dai's intention in sending the messages to Mr Smit was. The court, however, does not have before it these facts or, for that matter, any affidavit by Mr Dai, let alone one explaining the circumstances of his communications with Mr Smit. Similarly, the court does not have sufficient facts before it to make any finding about whether or not ENRC waived a privilege, whichever might have obtained, to the content of the messages. In light of the important role privileges play in ensuring the fairness and efficiency of judicial proceedings, a role that gives effect to Constitutionally enshrined rights, matter in replying affidavits that may be privileged, should be struck out. An order to that effect will follow.

Disputes of fact

- [27] ENRC argues that there are disputes of fact between the parties about the terms of the oral agreement and whether Riverland properly has performed in

terms of them. It submits that that these disputes cannot be resolved on the papers and that the application is either to be referred to oral evidence or dismissed.

- [28] When, in proceedings on motion, disputes of fact have arisen, a final order generally may be granted only if the facts averred in the applicant's affidavit which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order.⁹ Courts, however, do have the power to make final orders in favour of applicants in some cases where disputes have, at least at face value, arisen on the papers. One such case is where the allegations or denials of the respondent are so far-fetched or clearly untenable that the court is justified in rejecting them on the papers. This power of the court in application proceedings was described by Botha AJA in *Associated South African Bakeries (Pty) Ltd v Oryx & Verenigde Backereien (Pty) Ltd en Ander* as follows:

“Op die algemene reël is daar wel uitsonderings, soos bv waar die bewerings of die ontkenning van die respondent so vergesog of klaarblyklik onhoudbaar is dat die verwerping daarvan bloot op die stukke geregverdig is.”¹⁰

The term “[k]laarblyklik onhoudbaar” or clearly untenable has not received much judicial treatment, but it seems to me that, for denials and averments to be tenable in a court of law, they must be made by witnesses and deponents who have knowledge of the facts they purport to speak to.

- [29] The case as pleaded by ENRC in respect of the terms of the agreement has two parts. First, averments are made about the terms of the agreement as they were agreed during the conversation between Mr Gomes and Mr Van Straaten. Second, references are made to documents produced and events that occurred

⁹ *Stellenbosch Farmers' Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) 235E – G; *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) 938A – B; *Tamarillo (Pty) Ltd v B N Aitken (Pty) Ltd* 1982 (1) SA 398 (A) 430 1; *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* B 1984 (3) SA 623 (A) 634E - 635C; and *Associated South African Bakeries (Pty) Ltd v Oryx & Vereingte F Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A) (Oryx) 923G - 924D.

¹⁰ *Oryx* 923G–924D.

before and after the actual conclusion of the oral agreement to evidence its terms. The averments made in support of both parts of the case are not made by deponents with knowledge of the events they purport to speak to.

[30] As to the first part of the case, the two men put forward by ENRC as having knowledge of the terms of the agreement are Messrs Mulumba and Soden. Neither of them, however, was on the call with Mr Gomes and Mr Van Straaten when the agreement was concluded. Nor were they with either Mr Van Straaten or Mr Gomes at the relevant time. They simply do not have any knowledge about the terms agreed to during that conversation. The documents put into evidence by Mr Mulumba takes the matter no further. Absent an attack on Mr Van Straaten and Mr Gomes' credibility, an interpretive exercise in respect of documents is irrelevant. Let alone an interpretive exercise conducted by persons who have no knowledge about the events described in these documents and who are not the scribes or recipients of the documents they interpret. I might also remark that the agreement pleaded by ENRC strikes one as overly elaborate for one concluded orally, perhaps even fanciful and wishful.

[31] Merely for the sake of completeness, I do address the documents ENRC relied on as "proof" of the terms of the oral agreement. Mr Mulumba placed specific reliance on a document produced on 22 August 2011. It, however, is produced on a Servicos letterhead. The fact that it was a document produced by Servicos, is perfectly reconcilable with Riverland's version of events, which is that initially Servicos would provide to ENRC labour and much besides. The emails written in September of 2011 that Mr Mulumba rely on were also received from Servicos, not Riverland. The email from Dyllan Gomes ostensible written in October of 2012, which is said to be proof that Riverland contracted for more than labourers, especially as it includes a reference to a "snag list" is, again, written on behalf of Servicos. He also throughout refers to "we", i.e. "us at Servicos". He writes for example that:

"Once we have completed the construction and handed over the project, we are aware that there will be a final snag list determined by you, and that this will then be attended to by us thereafter, as discussed.

. . . .
Kind regards,
Servicos Atlantico (Pty) Ltd
Dyllan Gomes"

- [32] The proposal dated 20 October 2011, also simply does not support Mr Mulumba's interpretation. While this document at least on its face emanates from Riverland and is headed "Proposal for Erection of Shed", the document continues and provides a quotation for "1 x Construction Team", comprising "1 Construction Supervisor" and "2 x Construction Artisans", at a "daily labour rate". As for the close-out reports produced by Turner & Townsend, they do indeed contain the phrases "construction services" and "vehicle maintenance services", but the documents contain phrases that go to show also that the agreement was only for labourers: labourers that could perform vehicle maintenance and construction services.
- [33] About the site meetings and the tender that followed them, it will be remembered, Mr Mulumba says that had Mr Gomes not been obliged to attend these site meetings it would not have done so. Yet again, there is simply no basis for this assertion. Mr Mulumba is in no position to make allegations about the intention with which these site meetings were attended by Mr Gomes. Mr Mulumba's assertions about why Riverland made a tender to rectify the defects in their malperformance, whatever there might have been, fall to be rejected also on this basis.
- [34] During the hearing Mr Eyles SC pointed me to sections of and phrases in various documents attached to the parties' affidavits, in addition to those emphasised by Mr Mulumba. Specific emphasis was placed on the statements and invoices produced by Riverland. I do not agree with these arguments. A party reading documents with an eye to find phrases and snippets that go to show that Riverland contracted for something other than merely manpower might find some, but a dispassionate and objective reading shows, on the whole, that also these documents relate to the provision of manpower.

- [35] ENRC's averments about the terms of the agreement fall to be rejected on the papers. Its deponents simply do not have, and could not have, knowledge of the terms of the agreement, concluded as it was through Mr Gomes and Mr Van Straaten.

The documents that go to defects in performance

- [36] The only averments about defects in Riverland's performance that are relevant are those that go to Riverland's provision of labourers to ENRC. The reports about Riverland's malperformance attached to the answering affidavit, that are intended to show that the buildings were defective, are irrelevant. They are in any event addressed to Servicos and are about Servicos' malperformance. In the one, for instance, the introduction reads: "An inspection was done in July 2013 on all Modular and Brick structure that was build (sic) by Servicos Atlantico (Pty) Ltd". In the other the introduction reads: "The following report was conducted to establish the workmanship on Estima Main Camp by Servico Atlantico".
- [37] Conspicuously absent from the answering affidavit is an allegation or, in accordance with the nature of the defence put up, correspondence from a site manager of ENRC or any other person with relevant knowledge, that labourers charged for by Riverland, as is apparent from the invoices and statements attached to the founding affidavit, did not attend the worksites. Instead, ENRC sought to allege that some of the invoices sent by Riverland were not received by ENRC (or Turner & Townsend).
- [38] These averments fall to be rejected for numerous reasons. They are made alongside an admission by Mr Mulumba that ENRC did in fact receive the statements sent by Riverland. The statements, it is to be remembered, list the invoices. Yet not once did ENRC, during the course of the agreement, at the time of its termination or shortly thereafter, question the content of the

statements, or ask for the invoices listed in the statements that it had not received. ENRC' case in this regard proceeds from the premise that the oral agreement contained a term that excludes the liability of ENRC to pay for labourers provided to it by Riverland and properly accounted for in the statements it received from Riverland, simply because an invoice was not received in respect of those labourers at the relevant time. According to the two men with knowledge of the oral agreement, it contained no such term. Nor was an amendment effected, on any one's version, that would have had the agreement include such a term.

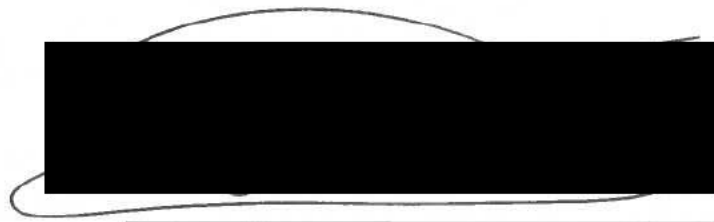
- [39] In any event, it is only once discovery was made by Riverland, more than a year a half after the notice of motion issued, that ENRC started to develop this part of its case. It is then that Turner & Townsend produced its reconciliation, which is said to show that some invoices sent five years before had not been received at that time. The reconciliation attached to the answering affidavit was made by Ms Jackson who was not the person responsible for ENRC and Riverland's account at the relevant times. She also does not explain exactly how the reconciliation was made. What is apparent, is that it was made with reference to documents discovered five years after the event. As such, the reconciliation seems to be nothing more than a comparison between two sets of documents, by someone with no personal knowledge of the events underlying either set, not only after the commencement of litigation, but indeed five years after the relevant events had occurred. These averments cannot be accepted. They were given no greater weight, to put it at its lowest, by ENRC's starkly contrasting attempt to disavow the close-out reports produced by Turner & Townsend. Other than the reconciliation, they were produced around the time of the agreement's termination, by the person appointed to administer the Riverland account. They, of course, showed ENRC to be indebted to Riverland for more than what it claimed in these proceedings.

Oral evidence

[40] ENRC's averments have been found to be clearly untenable and have been rejected on the papers. I am satisfied as to the inherent credibility of Riverland's averments and that Riverland is entitled to the relief sought on the basis of case made out in its founding affidavit. Rule 6(5)(g), which concerns the court's powers in terms of the rules to order the matter to be referred to oral evidence, is of application when "an application cannot properly be decided on affidavit". This matter can properly be decided on the papers as ENRC's case is clearly untenable. There is therefore no reason why the matter should be referred to oral evidence. To the contrary, the notice of motion issued nine years ago. The parties have both made discovery. Yet ENRC has not managed to lead evidence, whether by way of further affidavits or otherwise, of anyone with any relevant knowledge. A referral to oral evidence would make no difference in these circumstances.

[41] In the event, I make the following order:

1. The document attached to the answering affidavit purporting to be an affidavit by Mr Gettliffe is struck out.
2. Paragraphs 48 to 53 of the replying affidavit are struck out.
3. The respondent is to pay to the applicant USD 1 827 200.65 (one million eight hundred and twenty seven thousand two hundred United States Dollars and sixty five cents) and interest on that amount at the rate of 15.5% per annum calculated from the end of June 2013 to date of payment.
4. The main application is granted with costs on scale C, including costs of two counsel.



Nico van der Walt

Acting Judge, Gauteng Division,
Johannesburg.

Heard: 25 April 2024

Judgment: 10 November 2024

Appearances:

For the applicants

Adv H.J. Smith SC

with him A. Myers

Instructed by Myers Inc. Attorneys

For the respondent

Adv A. Eyles SC

Instructed by Eric van den Berg Attorneys Inc