



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

CASE NO: 2024-075293

|                                                                                                 |                                 |
|-------------------------------------------------------------------------------------------------|---------------------------------|
| (1)                                                                                             | REPORTABLE: NO                  |
| (2)                                                                                             | OF INTEREST TO OTHER JUDGES: NO |
| (3)                                                                                             | REVISED: NO                     |
| <u>07/05/2025</u><br>DATE                                                                       |                                 |
| <br>SIGNATURE |                                 |

In the matter between

**NALEDI COAL & LOGISTICS PROPRIETARY LIMITED**

Applicant

And

**LI COAL CLEAN COAL GASIFICATION  
PROPRIETARY LIMITED**

Respondent

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**JUDGMENT**

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PEARSE AJ:

## **AN OVERVIEW**

1. This application concerns liability for a third party's costs of transporting coal supplied by the applicant to the respondent in terms of an agreement that is common cause on the papers. It is not in dispute that an executive of the respondent asked an executive of the applicant to arrange for the coal's transport from a mine to a port; and the applicant claims reimbursement of the costs incurred by it in doing so. Whether the request gave rise to a relationship of agency or mandate (as the applicant submits) or a contract between the applicant and the third party (as the respondent suggests) is the first issue in dispute in the matter. If the court finds that an agency or mandate relationship came into being, a second dispute concerns whether the applicant performed an alleged obligation to have the coal transported without causing or allowing its contamination.
2. For reasons that follow, I am unpersuaded that no contractual nexus came into being between the parties. It is probably unnecessary to decide whether that nexus is best characterised as one of agency or mandate, although the latter description accords most naturally with the facts established on the papers. I consider that the applicant acted within the scope of authority conferred on it by the respondent and is entitled to be reimbursed for the transport costs of the third party, which are not said to have been unnecessary, unreasonable and/or incurred in bad faith. Nor do I consider any contamination-related term of the transport arrangement to be

demonstrated on the papers. In the result, I conclude that the applicant should be reimbursed and the respondent should bear the costs of the application.

## THE SUPPLY AGREEMENT

3. Although its written memorial was signed only by the applicant, it is common cause that the applicant (represented by one Tlhalefo Mphuthi) and the respondent (represented by one Bongani Phillip) entered into a coal supply agreement on 08 May 2024 (**the supply agreement**). The terms of that agreement are reflected in a letter addressed by the applicant to the respondent on that date. The applicant agreed to sell and deliver and the respondent agreed to purchase and take delivery of coal based on the terms and conditions of the supply agreement, including that:
  - 3.1. A minimum of 5,000 metric tonnes of coal would be delivered in the period 08 to 31 May 2024.
  - 3.2. The coal would be delivered "*FCA, Exxaro Belfast Mine*", the term "*FCA*" being a reference to a "*free carrier agreement*" and meaning that the applicant would be responsible for delivering the coal to the respondent at that mine.
  - 3.3. The quality of the coal "*on an air-dried basis*" would be within minimum and maximum specifications tabulated in the agreement and be "*free of any contamination*".

- 3.4. *"Sampling Analysis" would be "determined by independent laboratory appointed by Exxaro at the Belfast Coal Mine, and will be final and binding for settlement, unless in case of fraud or manifest error."*
- 3.5. The purchase price would be R512.00 per metric tonne (plus VAT) for typical quality of coal reflected in the agreement.
- 3.6. *"Payment shall be made on an upfront basis against a tax invoices in batches of 5,000MT. Payment to be reflected in the Seller's bank account prior to any Coal being loaded."*
- 3.7. *"Risk shall pass to Buyer as the Coal is loaded into road trucks at the Exxaro Belfast Coal Mine. Ownership will transfer to the Buyer once payment has been affected in full for each road truck of Coal delivered."*
- 3.8. *"Transport will be by way of road. The Buyer will be responsible for providing and arranging the road logistics for the Coal from the Seller's Belfast Coal Mine. The Buyer and Seller will plan, schedule, and agree to the daily required despatches. All logistics cost will be for the Buyer's account."*
- 3.9. The respondent and its transporter would comply with and adhere to all health, safety, environmental and operational procedures, rules, requirements, policies, standards and instructions of the applicant's mine.

- 3.10. Any controversy or claim arising out of or relating to the agreement or any alleged breach thereof would be settled by an agreed or appointed expert arbitrator in Johannesburg.
4. On 09 May 2024 the respondent paid the applicant an amount of R2,944,000.00 in consideration for 5,000 metric tonnes of coal supplied and delivered pursuant to the supply agreement, on which date ownership passed from the applicant to the respondent. There is no pertinent denial of the applicant's assertion that, at the time of the sale, the respondent "*satisfied itself of all the terms of the sale*".

#### **THE TRANSPORT ARRANGEMENT**

5. At or about the same time, the respondent's chairperson and chief executive officer, Mr Phillip, asked a director of the applicant, Mr Mphuthi, for assistance in arranging for the coal to be transported from the mine in Belfast to the port in Richards Bay (**the transport arrangement**).
6. The respondent claims to have no knowledge of an assertion that, on its behalf, the applicant engaged the services of a third party transporter, Sekunjalo Engineering Solutions Proprietary Limited (**Sekunjalo**), which, between 12 and 22 May 2024, loaded and transported 1,867.52 metric tonnes of coal from Belfast to Richards Bay. This denial of knowledge is of dubious veracity in the light of the evidence traversed in paragraph 23 below.

7. Similarly questionably, the respondent disavows knowledge of an invoice, dated 21 May 2024, which the applicant describes as being “*for reimbursement to the Applicant of the transportation costs due to Sekunjalo*”, which:
  - 7.1. claims payment by the respondent to the applicant, by 04 June 2024, of the VAT-inclusive sum of R1,395,941.30, comprising 1,867.48 “*units*” at a VAT-inclusive price of R650 per unit; and
  - 7.2. remains unpaid.
8. Whereas the respondent admits that it was “*responsible for providing and arranging the road logistics for the delivery of the coal from the Applicant’s Belfast Coal Mine*” – see paragraphs 3.6 to 3.9 above – it denies that the applicant’s Mr Mphuthi “*acted for the Respondent as an agent*” or “*performed his obligations in accordance with the terms of the Contract*” in that “[*t*]he coal that he transported was contaminated and not aligned with the quality and standard that we had agreed on.” These denials and allegations appear to be the origin of the two-part defence summarised in paragraph 45 below.
9. By email dated 31 May 2024 (being the date on which one Kemelo Ramadje ceased to be employed by the respondent), a statement as at the end of May 2024 was forwarded by the applicant to the respondent with a “*kind reminder*” that the trucking invoice was due for payment on 04 June 2024 and that Sekunjalo was a small transporter that could not forebear late payment for its services.

10. The applicant emailed the respondent again on 04 June 2024 enquiring whether the trucking invoice would be paid on that day.

11. On the same day the respondent's Thabang Zondo responded to the applicant's Mr Mphuthi in the following terms:

*"Mr Phillip and I spoke about your payment. He is aware of it. Within the conversation, he mentioned that there was an issue with the product we got, as it was totally not what we agreed upon. Mr Phillip says he has been waiting on your findings on why the product we got was not in the quality specs. This speaks to our cash flow, as the client cannot accept this product."*

12. As far as I am aware, this email provides the first contemporaneous evidence of any dissatisfaction on the part of the respondent with the coal supplied by the applicant. It seems revealing. The reference to a cash flow problem is indicative not of an objection to paying for Sekunjalo's services *per se* but of an inability to pay for its services before the respondent is paid by its client for the coal.

13. Five further emails sent by Mr Mphuthi on behalf of the applicant between 06 and 28 June 2024 appear to have gone unanswered by either Mr Phillip or Mr Zondo on behalf of the respondent. The emails reflect mounting concern on the part of the applicant for the viability of Sekunjalo in the absence of payment for its services. On 12 and 13 June 2024 Mr Mphuthi implored Mr Phillip to make at least partial payment of the invoice to enable Sekunjalo to procure diesel for its trucks.

14. Save for what is noted in paragraph 15 below, the record contains no indication that the respondent was unaware of or took issue with the fact that, as arranged by the applicant, its coal had been transported by Sekunjalo from Belfast to Richards Bay. Indeed, the answering affidavit says only this:

**"AD PARAGRAPH 14**

15. *Save to admit receipt of various email correspondences from the Applicant, I have no knowledge of the allegations contained in this paragraph. Accordingly, I deny these allegations."*
15. It may be inferred from this correspondence that, towards the end of the month, the respondent queried the logistical integrity of the transport services rendered by Sekunjalo, to which the applicant responded on 28 June 2024 as follows:

*"We requested trucking reports from Sekunjalo for the loads from Belfast to the port.*

*Please see the tracker reports attached below.*

*Kindly review the reports and let us know if there is any part of the trips that you would like to see video footage of. The transporter has fleet cams and they are prepared to share fleetcam footage for any suspicious activity.*

*We have done a first review of the reports and have not picked up anything and we are busy with a second review.*

*We urgently need to settle the trucking invoice; they have lost all patience with us."*

16. Again, the record contains no response either to the tracker reports provided to the respondent or to the implicit averment by the applicant that Sekunjalo's services had been rendered on behalf of – and for the expense of – the respondent.

17. On 28 June 2024 the applicant's attorney addressed a letter of demand to the respondent asserting that:

*"4. You sought our client's assistance in arranging for the transportation of the coal from the mine to Richards Bay, which resulted in our client, as your agent, employing the services of Sekunjalo Engineering Solutions (Pty) Ltd which transported 1 867.52 metric tons of coal to the terminal, giving rise to a cost of R1 395 941.30.*

*5. You are accordingly indebted to our client in that sum of R1 395 941.30. payment of which must be made to our client, or to us on its behalf, by no later than close of business on Tuesday, 2 July 2024."*

18. Whereas the respondent admits receipt of the letter of demand, its deponent – Mr Phillip – denies its contents on the basis of having no knowledge of the applicant's allegations. Notably, there was no contemporaneous rejection of or other response by the respondent to the applicant's letter of demand.

## THIS APPLICATION

19. This application was initiated on 08 July 2024. In its notice of motion the applicant seeks payment of the sum of R1,395,941.30 with interest at the prescribed rate *tempore morae* and costs of suit.
20. The founding affidavit is deposed to by Mr Mphuthi, who describes himself as a director of the applicant. The nature of the claim is said by him to arise from “*the cost of transporting coal on behalf of the Respondent, which the Applicant has paid for, or for which it is responsible to the transporter on the Respondent’s behalf.*”
21. The respondent delivered an answering affidavit (deposed to by Mr Phillip) on 06 August 2024. What is admitted and averred by Mr Phillip on behalf of the respondent is set out in paragraphs 3 to 18 above. The thrust of the defence to the claim appears to be captured in the following paragraphs of the affidavit:

### **“AD PARAGRAPH 8**

8. *I deny that the Applicant performed its obligations in compliance with the terms of the Contract even though the Respondent paid for 5 000 (five thousand) metric tons. I submit that the coal supplied by the Applicant was contaminated and not of the quality agreed to between the Parties.*

### **AD PARAGRAPH 9**

9. *I admit that I asked Mr Tihalefo Bokgosi Kgoasa Mphuthi (**‘Mr Mphuthi’**) to assist the Respondent in arranging for the coal to be*

*transported from the Exxaro Mine Belfast to the Richards Bay Multipurpose Terminal.*

10. *However, I deny that Mr Mphuthi performed his obligations in accordance with the terms of the Contract. The coal that he transported was contaminated and not aligned with the quality and standard that we had agreed on.*

**AD PARAGRAPH 10**

11. *I admit that in terms of the Contract, the Respondent (in its capacity as the Buyer) is responsible for providing and arranging the road logistics for the delivery of the coal from the Applicant's Belfast Coal Mine, however, I deny that Mr Mphuthi acted for the Respondent as an agent and reiterate that he failed to perform in accordance with the Contract."*

22. The applicant delivered a replying affidavit (deposed to by Mr Mphuthi) on 16 August 2024. It confirms that the transport costs due to Sekunjalo were in fact paid by the applicant (para 10). The affidavit concludes as follows:

*"In summary, there are common cause facts between the parties which in my view, definitively support the Applicant's claim against the Respondent, that the only purported defence by the Respondent is that the coal was contaminated, but which defence does not hold water in accordance with the contract terms between the parties and, that the Respondent is therefore indebted to the Applicant as claimed."*

23. The replying affidavit refers to and annexes an affidavit by Mr Ramadje, who describes himself as a qualified geologist who was employed by the respondent for a two-year period ending 31 May 2024. His evidence is to the following effect:

- 23.1. In or about May 2024 Mr Ramadje was informed by colleagues that the respondent was negotiating the purchase of *"RB4 thermal coal"* from the applicant on an FCA contract, meaning that the respondent *"would need to arrange the logistics for transporting the coal and would need to be satisfied with the quality of the coal prior to concluding the contract and transporting the coal."*
- 23.2. In terms of the respondent's standard operating procedures for FCA contracts, the parties' teams inspected the RB4 stockpile to be procured under the supply agreement and submitted samples to SGS, an independent laboratory, for quality analysis on or about 07 May 2024.
- 23.3. On or about 08 May 2024 Mr Ramadje received and shared with the respondent's team an SGS certificate of analysis that confirmed the stockpile to be within RB4 specifications.
- 23.4. Mr Ramadje was requested to perform a *"composite qualities blending analysis"* to determine whether the 5,000 tonnes of RB4 coal from Exxaro, together with coal procured from other sources, would be suitable for the respondent's requirements, which analysis *"indicated that the Exxaro RB4 coal would be suitable to blend with our other sources for Li Coal's requirements"* and comforted it *"to proceed with the procurement of the RB4 coal from Exxaro."*

- 23.5. As part of the respondent's team responsible for coordinating the transport of the coal from Belfast to Richards Bay, Mr Ramadje confirms that the respondent used a combination of internal and third-party trucks for that purpose. When it became clear that those trucks would be insufficient to transport the coal within the respondent's timeframe, Mr Phillip asked Mr Mphuthi to assist the respondent in arranging trucks that would work alongside the internal and third-party trucks to transport the coal.
- 23.6. The applicant arranged Sekunjalo trucks to work alongside the internal and third-party trucks to transport the coal.
- 23.7. Mr Ramadje was responsible for conducting a daily reconciliation of the trucks that loaded at the mine and offloaded at the port, recording that a total of 5,033.50 tonnes of coal were transported from the mine to the port between 13 and 22 May 2024, of which 1,867.48 tonnes were transported by Sekunjalo.
- 23.8. The respondent had a team at the mine responsible for sealing the trailers of each truck despatched from the mine with unique numbers and a team at the port responsible for inspecting the seals when coal was offloaded by the trucks. According to Mr Ramadje, *"[t]he daily schedules, that I received from the ports team, of all the trucks from Exxaro Belfast that offloaded at the port had a record of the seal numbers for every truck."*

24. The replying affidavit of the applicant and the affidavit of Mr Ramadje appear to be a legitimate rebuttal of the contamination-related defence presented by the respondent in its answering affidavit. The rebuttal is not prejudicial in that the respondent was afforded an opportunity to deal with the allegations contained in paragraph 17 of the founding affidavit. I consider that it would be a proper exercise of my discretion to have regard to that evidence in the adjudication of this application.
25. However, I am satisfied that nothing of significance turns on this issue since, even if I were to disregard the evidence of Mr Ramadje, I would still be minded to grant the relief ordered in paragraph 70 below.
26. In other words, the application must succeed on what is alleged by the applicant and admitted and averred by the respondent as set out in paragraphs 3 to 18 above, as I explain in what follows.

## THE ISSUES

27. According to a joint practice note delivered by the parties' counsel on 07 April 2025, the issues to be determined in this application are:

*"7.1. Whether the applicant is entitled to approach the court in motion proceedings instead of action proceedings where disputes of fact exist.*

- 7.2. *Whether the applicant was the respondent's agent/mandated by the respondent for purposes of securing the services of a third party to transport the coal.*
- 7.3. *Whether the applicant acted as an agent of the respondent by engaging a third party to assist with the transportation of the coal."*

Notably, no contamination complaint is listed as a disputed issue.

28. The essence of the applicant's case is summarised in paragraph 9 of the joint practice note as follows:

- 28.1. It is common cause that the applicant was expressly authorised or mandated to secure trucking services on the respondents' behalf or that such authority or mandate is to be inferred from the common cause facts.
- 28.2. The applicant acted on such authority or mandate and secured trucking services that were used by the respondent.
- 28.3. The applicant has invoiced the respondent – but not been reimbursed – for the costs of the services.
- 28.4. The defence raised by the respondent "*concerning the quality and/or contamination of the coal*" is refuted by Messrs Mphuthi and Ramadje and, in any event, is not a valid defence to the applicant's claim.

29. The joint practice note summarises the respondent's main contentions as follows:
- 29.1. The applicant approached the court on motion when there are real and genuine disputes of fact that are incapable of resolution in such proceedings.
- 29.2. The respondent admits that it entered into the supply agreement but denies that the applicant acted as its agent when arranging trucking services for the transport of coal from Belfast to Richards Bay.
- 29.3. The applicant "*misunderstood the nature of the request relating to assistance with trucking services*" in that it "*was not mandated to act as an agent for the respondent nor to engage a service of a third party for the transportation of the coal.*"
- 29.4. In any event, "*the quality of the coal provided by the applicant was not of the quality agreed upon between the parties*" in that it "*was contaminated resulting in the contamination of its own existing stockpile.*"
30. This summary of the respondent's defence to the applicant's claim appears to be rooted in the following paragraph of Mr Phillip's answering affidavit:

**“AD PARAGRAPH 13**

15. *Save to admit that it was the Respondent's responsibility to provide and arrange the road logistics for transporting the coal from the Belfast Coal Mine as stipulated in the Contract, I submit that I asked Mr Mphuthi for assistance in transporting the coal and I reiterate my previous submission that he failed to perform according to the terms of the Contract on the basis that the coal he transported was contaminated."*

**The Agency Dispute**

**The Principles**

31. In an agreement of agency a party (the agent) seeks to conclude a juristic act on behalf of or in the name of another party (the principal), with the latter's express, implied or tacit authority, and with the intention of bringing about a contractual relationship between the principal and a third party, typically for remuneration or reward.<sup>1</sup> The agency relationship is fiduciary in nature and requires the agent to act in good faith, with care and diligence, in the sole interest of the principal.<sup>2</sup>

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<sup>1</sup> *Lind v Spicer Bros (Africa) Ltd* 1917 AD 147; *Inter-Continental Finance and Leasing Corp (Pty) Ltd v Stands 56 and 57 Industria Ltd and another* 1979 (3) SA 740 (W) 747H-749C; *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) [45]-[48]

<sup>2</sup> *S v Heller* 1971 (2) SA 29 (A) 44A-F; *Robinson v Randfontein Estates GM Co Ltd* 1921 AD 168 177-180; *R v Milne and Erleigh* (7) 1951 (1) SA 791 (A) 828D-E; *Lappeman Diamond Cutting Works (Pty) Ltd v MIB Group (Pty) Ltd and another* 2004 (2) SA 1 (SCA) [36]-[37]

32. As a rule, the principal is obliged in law to indemnify the agent for expenses necessarily or reasonably incurred on its behalf within the ambit of the agency.<sup>3</sup>
33. In a contract of mandate a mandatory is authorised and undertakes to perform a juristic act or other task for a mandator, at its instance or on its instruction. The scope of the mandate may be specific or general. The contract may or may not be for remuneration or reward.<sup>4</sup>
34. A contract of mandate creates rights and obligations only as between its parties.<sup>5</sup>
35. The existence of a mandate may be express or emerge by implication or inference from the facts of a case, including where a respondent knowingly, and without objection, permits an applicant to transact in its name or otherwise on its behalf.<sup>6</sup>
36. The law imposes on the mandator a duty to reimburse or compensate the mandatory for expenses incurred or losses sustained in executing the mandate, including sums paid on behalf of the mandator,<sup>7</sup> provided the mandatory performed

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<sup>3</sup> *Transvaal Storage Co Ltd v Palmer* 1904 TS 4 19-20, 24, 33; *Magua v Kahn and another* 1981 (1) SA 1239 (W) 1243F-H; *Blesbok Eiendomsagentskap v Cantamessa* 1991 (2) SA 712 (T) 716G-717F

<sup>4</sup> WA Joubert *The Law of South Africa* vol 28 part 1 ed 3 para 55-58

<sup>5</sup> LAWSA vol 28 part 1 ed 3 para 59

<sup>6</sup> *Coetzer v Mosenthals Ltd* 1963 (4) SA 22 (A) 23E-H

<sup>7</sup> *Blumenthal v Bond* 1916 AD 29 37

within the scope of the mandate, in good faith (given the fiduciary nature of the relationship) and not unnecessarily or unreasonably (including negligently).<sup>8</sup>

### The Submissions

37. At the hearing of the application, Ms Ashton appeared for the applicant and clarified that its cause of action relies not on the term of the supply agreement referred to in paragraph 3.8 above<sup>9</sup> but on an agent's entitlement to reimbursement of expenses incurred by it in carrying out a principal's mandate.
38. In Ms Ashton's submission, it is plain from what the respondent admits and avers that Mr Phillip asked Mr Mphuthi, *qua* representative of the applicant, to assist in arranging for the coal to be transported. In any event, she submitted, the respondent's defence to the claim is not that it contracted with Mr Mphuthi himself but that the coal transported by Sekunjalo was found to be contaminated.
39. With reference to *Durbach*,<sup>10</sup> Ms Ashton added that a principal's denial of the authority of an agent is a special defence that must be specifically and

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<sup>8</sup> *Alderson v Phillips and Evenary Ltd* 1949 (1) SA 663 (SR) 666; *Blesbok supra* 716G-717F; *David Trust and others v Aegis Insurance Co Ltd and others* 2000 (3) SA 289 (SCA) [20]-[21]; *LAWSA* vol 28 part 1 ed 3 para 67

<sup>9</sup> She reasoned that a dispute based on that term would require to be referred to arbitration.

<sup>10</sup> *Durbach v Fairway Hotel Ltd* 1949 (3) SA 1081 (SR) 1082; see too *Tuckers Land and Development Corp (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T) 16

unambiguously pleaded. She argued that Mr Phillip's testimony in respect of his engagement and agreement with Mr Mphuthi falls short of that mark.

40. Notwithstanding the vagueness of his testimony, Ms Ashton submitted that what is admitted and averred by the respondent supports the applicant's allegations that it was mandated to arrange the transport of the coal purchased under the supply agreement and incurred and paid the costs of a third-party transporter for which it is entitled to be reimbursed by the respondent.
41. Insofar as there are denials on the papers, her submission was that these are neither pertinent nor substantiated by contrary evidence but confined to professed lacks of knowledge of the applicant's allegations or linked to assertions of contamination. In her submission, the efficacy of such answers is poor in circumstances where what was or was not discussed and agreed with Mr Mphuthi lies within the personal knowledge of Mr Phillip.
42. Indeed, her further submission was that the respondent's awareness of transport by and payment due to Sekunjalo appears from the contemporaneous email quoted in paragraph 11 above. Hence the answers do not give rise to genuine disputes of fact that might disentitle an applicant to final relief on motion.
43. Ultimately, her submission on the nature of the parties' contractual relationship was such that the claim should succeed whether it was one of agency or mandate.

44. When questioned whether the respondent would be liable for any transport costs incurred by the applicant, Ms Ashton accepted that our law requires that reimbursable expenses be necessary or reasonable and incurred in good faith. In reply, she added that, where the scope of a mandate is not expressly circumscribed, the mandatory may act as it deems appropriate provided it exercises diligence and prudence in doing so. She acknowledged that allegations to that effect should have been pleaded in the founding affidavit but argued that they are implicit in the claim contended for by the applicant, not disputed by the respondent and, in any event, not essential for the viability of the application. If the respondent took issue with Sekunjalo's cost per truck or number of loads, in her submission, it was incumbent on the respondent to raise that defence as opposed to confining itself to the contamination complaint.
45. Mr Ntshangase, who appeared for the respondent at the hearing, noted that there had been a discussion between the parties' representatives regarding the transport of the coal but argued that the scope of any agreement between them was unclear on the papers and that any contract with Sekunjalo bound the applicant as opposed to the respondent. In his submission, if the parties concluded an agreement of agency, any claim against the respondent should have been brought by Sekunjalo and not the applicant. In summary, Mr Ntshangase submitted that the respondent's defence is of two parts: it had not authorised the applicant to act as its agent and, even if it had, the respondent did not perform within the mandate having regard to the contamination of the coal.

46. When pressed on the nature of any agreement reached between Messrs Phillip and Mphuthi, Mr Ntshangase responded:
- 46.1. that the former had asked the latter to arrange for the transport of the coal but it was unclear on the papers whether Mr Mphuthi was engaged in his personal or representative capacity; and
- 46.2. in either event, that any resultant agreement was between the applicant and Sekunjalo.
47. He added that the respondent denied that it had instructed the applicant generally to act as its agent, by which I understood Mr Ntshangase to mean that the applicant was obliged to revert to the respondent with one or more quotes before undertaking a commitment to Sekunjalo. However, he was unable to explain why, in such circumstances, Mr Phillip does not say as much in his answering affidavit.
48. In the course of argument, Mr Ntshangase accepted that there must have been an agreement in respect of transport, failing which there would have been no authority for the coal to be transported from Belfast to Richards Bay. Again, he was unable to explain why Mr Phillip's affidavit does not set out what was or was not discussed and agreed.
49. When asked whether non-contamination of the coal had been a term of the transport arrangement, Mr Ntshangase submitted that there would have been an

implied term to that effect. I understand this submission to accept that no express term of that sort is alleged by the respondent. In any event, he accepted that no such term – whether express or implied – is contended for in the answering affidavit and could not explain why that was the case if it is the basis on which the respondent resists the applicant's claim.

50. In these circumstances, Mr Ntshangase was unable to dispel an impression that the respondent is unwilling or unable to perform an obligation under the transport arrangement due to its belief that the applicant sold coal under the supply agreement that could not be on-sold to, or was not paid for by, a client.
51. It was volunteered by Mr Ntshangase that, independently of this application, an arbitration process is underway between the respondent and the applicant in respect of a contamination complaint. Although he accepted that this application concerns the transport rather than the supply of coal, he nonetheless submitted that the issue of contamination has a bearing also on this matter. However, this submission confronts the difficulty identified in paragraph 49 above.
52. Ultimately, Mr Ntshangase confirmed that what was really in dispute was not the existence of an agreement between the parties but the alleged contamination-related non-performance by the applicant of its obligations to the respondent. He confirmed too that there was and is no challenge to the costs incurred in respect of Sekunjalo's services, including the identity of the third-party transporter engaged by the applicant.

53. In my view, the terms of the supply agreement referred to in paragraphs 3.6 to 3.9 above form a backdrop against which the parties discussed and entered into the transport arrangement. If Mr Phillip harboured an expectation that the respondent would not be liable for, or should be afforded an opportunity to approve or reject, the transport costs, he should have conveyed that expectation to Mr Mphuthi before the applicant engaged the services of Sekunjalo and thereafter disclosed the expectation to this court in his answering affidavit.
54. The same may be said of any contention on the respondent's part that the applicant acted in bad faith or exceeded its mandate and/or that Sekunjalo raised charges that were unnecessary or unreasonable. It will be recalled that Sekunjalo's trucking resources served to supplement those of the respondent and other third parties and it may thus be inferred that Mr Phillip and his team were well placed to detect and take issue with any unnecessary services by and/or unreasonable prices of Sekunjalo.
55. In any event, the version of the applicant is supported by objective contemporaneous evidence and the respondent's own admissions and averments. The rule in *Plascon-Evans* does not shelter a party that raises insubstantial or immaterial disputes to resist a claim that is otherwise made out on the papers.<sup>11</sup> This is so where, as in this case, the court is required to scour the answering affidavit and probe counsel for clarity on the answer to the central contention that,

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<sup>11</sup> *Plascon-Evans Paints Ltd v Van Riebeeck Paints Ltd* 1984 (3) SA 623 (A) 634E-635C

at the instance or on the instruction of the respondent, and for its benefit, the applicant arranged – and paid for – the transport services of a third party.

56. A court is entitled to reject a respondent's version where a denial is not such as to raise a real, genuine or *bona fide* dispute of fact or the respondent fails to engage meaningfully with the applicant's averments, especially where the averments lie within the knowledge of the respondent. A bare denial, or failure seriously and unambiguously to address the substance of the applicant's case, is insufficient to trump the applicant's version.<sup>12</sup> Mr Phillip initiated and participated in the key engagement with Mr Mphuthi and could and should have told the court what was or was not discussed and agreed between the parties.
57. A court is entitled to adjudicate a dispute on the papers where the applicant's claim is substantiated by objective contemporaneous evidence and/or admissions and averments of the respondents whereas the respondent's residual denials are contradictory or lack credible support.<sup>13</sup> I am unable to find force to the (tentative) suggestions by the respondent that it was neither agent nor mandatory of the applicant, which contracted in its own right, for its own account, with Sekunjalo.

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<sup>12</sup> *Da Mata v Otto* NO 1972 3 SA 858 (A) 882H; *Wightman t/a JW Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) [13]

<sup>13</sup> *Platinum Holdings (Pty) Ltd and others v Victoria and Alfred Waterfront (Pty) Ltd and another* [2004] ZASCA 54 [14]-[15]

58. Equally, a respondent that fails to explain a contemporaneous document that differs from a version presented in an answering affidavit does not create a dispute of fact disentitling an applicant to final relief on motion.<sup>14</sup> Neither in evidence nor in argument does the respondent endeavour to explain or counter the impression – underscored by the email referred to in paragraphs 11 and 12 above – that the respondent is unwilling or unable to perform an obligation under the transport arrangement due to its belief that the applicant sold coal under the supply agreement that could not be on-sold to, or was not paid for by, a client.
59. In the circumstances, I discern no factual or legal basis for the (feint) suggestion by the respondent that the applicant contracted with Sekunjalo in its own right and is itself liable for Sekunjalo's costs of transporting the respondent's coal from the mine to the port. The applicant derived no benefit from the transport arrangement.
60. It remains to consider whether there is substance to the contamination complaint.

### **The Contamination Complaint**

61. As regards the defence that the coal supplied and delivered by the applicant to the respondent was contaminated, it is asserted in the founding affidavit that:

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<sup>14</sup> *Minister of Home Affairs and another v Fireblade Aviation Ltd and others* [2018] ZASCA 46 [6]

- 61.1. the coal was independently analysed and assessed at Belfast *“to match the quality requirements of the coal contract and with which the Respondent satisfied itself”*;
- 61.2. the risk in and ownership of the coal passed from the applicant to the respondent on delivery at the mine;
- 61.3. any contamination of the coal may have occurred on its discharge at Richards Bay, *“where the Respondent’s coal might have come into contact with a coal stockpile from another source”*; but
- 61.4. there was and is no evidence – beyond the say-so of the respondent – of any contamination of the coal, whether at Belfast or at Richards Bay.
62. Notably, the respondent’s answer to these assertions is in the following terms:

**“AD PARAGRAPH 17**

18. *I submit that the Applicant failed to perform its obligations in accordance with the terms of the Contract in that the coal that was delivered by the Applicant was contaminated and of poor quality, contrary to what was agreed to between the parties.*
19. *I deny the remainder of the allegations contained in this paragraph as mere speculation and pre-emption of the Respondent’s submissions.”*

63. In rebuttal of this submission and denial, the replying affidavit observes that "*Phillip on behalf of the Respondent, does not and cannot identify or suggest (i) where the coal may have suffered contamination; (ii) at whose hands such contamination may have occurred*" (para 4.6). In addition, the applicant puts up the evidence paraphrased in paragraph 23 above.
64. I am unaware of any attempt by the respondent either to strike out that evidence or to respond to it by means of a fourth affidavit. In any event, besides Mr Phillip's assertions of contamination, there is no evidence in the record supportive of a defence that the coal loaded and/or delivered was in fact contaminated.
65. In addition, in the absence of an averment by the respondent that a warranty or other term in respect of non-contamination applied in respect of the transport (as opposed to the supply) of coal, a contamination complaint is not a defence to the claim for reimbursement of expenses and does not preclude the relief sought in this application.
66. When questioned as regards the probative value of Mr Ramadje's affidavit, Mr Ntshangase's initial response was that it bore only on the quality of the coal at Belfast as opposed to Richards Bay. Having noted that it related to the quality of the coal at both sites, he submitted that the evidence of Mr Ramadje is irrelevant inasmuch as this court is not called on to determine whether and, if so, where the coal was contaminated. In favour of the respondent, I understand this submission to be that, whilst Mr Phillip's assertions of contamination are to be accepted for

purposes of these motion proceedings, they will be adjudicated in the arbitration proceedings.

67. My understanding is that, if there is substance to the contamination complaint, it will or may well have a bearing on the outcome of the arbitration proceedings (in which the supply agreement is the focus of the dispute). On the papers before this court, however, the issue is irrelevant to the proper adjudication of this application (in which the transport arrangement is the focus of the dispute).
68. In particular, even on the version of the respondent, the contamination complaint constitutes neither a defence to the applicant's claim under the transport agreement nor a genuine and material dispute of fact that precludes final relief on motion.

## **THE ORDER**

69. Counsel for the parties were agreed that the costs of this application should follow its outcome and be awarded on scale B.
70. In the circumstances, the respondent is ordered to pay to the applicant:
- 70.1. the sum of R1,395,941.30;

70.2. interest thereon reckoned at the prescribed rate *a tempore morae* from 28 June 2024 to date of final payment; and

70.3. costs of suit on scale B.

A handwritten signature in black ink, appearing to be 'PEARSE AJ', is written over a solid black rectangular redaction box. The signature is written in a cursive, slightly slanted style.

**PEARSE AJ**

This judgment is handed down by uploading it to CaseLines and emailing it to the parties or their legal representatives. The date of delivery of this judgment is 07 May 2025.

|                         |                           |
|-------------------------|---------------------------|
| Counsel for Applicant:  | AF Ashton                 |
| Instructed By:          | Darryl Ackerman Attorneys |
| Counsel for Respondent: | MC Ntshangase             |
| Instructed By:          | Mapongwana Attorneys Inc  |
| Date of Hearing:        | 29 April 2025             |
| Date of Judgment:       | 07 May 2025               |