



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable
Case no: 979/2022

In the matter between:

AFRICAN NATIONAL CONGRESS

APPELLANT

and

EZULWENI INVESTMENTS (PTY) LTD

RESPONDENT

Neutral citation: *African National Congress v Ezulweni Investments (Pty) Ltd*
(Case no 979/2022) [2023] ZASCA 159 (24 November 2023)

Coram: GORVEN, MEYER and WEINER JJA and CHETTY and
UNTERHALTER AJJA

Heard: 7 November 2023

Delivered: 24 November 2023

Summary: Contract – conclusion – authority to conclude – test for factual disputes – evaluation of evidence – bare denials coupled with untenable version – no *bona fide* factual disputes.

Civil procedure – evidence on appeal – test – requirements not met.

ORDER

On appeal from: Gauteng Division of the High Court, Johannesburg (Adams, Makume and Twala JJ, sitting as court of appeal):

- 1 The application to admit evidence on appeal is dismissed with costs.
 - 2 The appeal is dismissed with costs, including the costs of two counsel where so employed.
-

JUDGMENT

Gorven JA (Meyer and Weiner JJA and Chetty and Unterhalter AJJA concurring)

[1] The respondent, Ezulweni Investments (Pty) Ltd (Ezulweni), claimed to have concluded an agreement on 20 February 2019 with the appellant, the African National Congress (the ANC).¹ This the ANC denied. Ezulweni then applied to the Gauteng Division of the High Court, Johannesburg (the high court) for payment of R102 465 000, along with interest and costs. The high court, per Bhoola AJ, granted the relief sought by Ezulweni. The ANC was granted leave to appeal to the full court of that division. The full court, per Adams J, with Makume and Twala JJ concurring, turned down the appeal with costs. This court granted the ANC special leave to appeal and this is the resultant appeal.

¹ All of the events relevant to this matter took place in 2019. Unless reference is made to another year, all dates refer to 2019.

[2] Two initial matters bear mention. The first is that the appeal had lapsed and an application was made by the ANC for its reinstatement. After argument was heard, the panel adjourned briefly, and thereafter made an order reinstating the appeal. No costs order was sought or made.

[3] The second relates to an application to admit further evidence on appeal brought by the ANC. It was based on s 19(b) of the Superior Courts Act 10 of 2013. Once more, after hearing the submissions of the parties, the panel adjourned briefly, and then made an order dismissing that application with costs. It was indicated at the time that the reasons for that decision would be furnished along with the judgment in the appeal. Those reasons are given below after the appeal has been dealt with.

[4] For the sake of brevity, I shall refer to the persons who were involved by only their surnames after first mention. The undisputed facts follow. At all material times, the Chief Executive Officer of Ezulweni was one Mr Renash Ramdas. Ramdas described himself as a long-standing and loyal member of the ANC. Another company with which Ramdas was associated had provided election banners and materials to the ANC for the 2014 elections. Ramdas had dealt with Mr Mabaso, the Finance Manager of the ANC, on that occasion. A general election in South Africa was called for 8 May. During January, Ramdas approached Mabaso and asked him to arrange a meeting with Mr Mashatile, the Treasurer General of the ANC. He indicated that he wished to make a presentation for the supply of election banners, their placement and removal for the new election campaign. Mabaso arranged a meeting later in January at the headquarters of the ANC, Luthuli House. There he introduced Ramdas to Mr Nkholise, the Personal Assistant to the Head of the Elections Campaign, Mr Mbalula. Mabaso, Nkholise and Ramdas agreed to meet on 20 February.

[5] Thus far there was no dispute. Thereafter, the versions diverged somewhat. The primary submission of the ANC before us was that the papers exhibited factual disputes which could not be resolved in favour of Ezulweni. As a result, I shall summarise each of the versions, in turn, so as to evaluate that submission. Despite diverging in certain respects, the versions coincide at various points as will become clear.

[6] The version of Ezulweni was deposed to by Ramdas. In anticipation of the meeting of 20 February, he sent Nkholise a quote dated 11 February reflecting the prices of items which could be supplied. The first item was titled 'Banners'. These were described as '230 cm x 100 cm PVC banner including 2 metal rod U-bolts & nuts that fit onto street pole' and the unit price was R2 900.

[7] The 20 February meeting took place at the Garden Court Hotel in Eastgate. The same three persons met on that occasion, along with an additional person from Ezulweni. An oral agreement was concluded. Mabaso and Nkholise placed an order for 30 000 branded PVC banners at an agreed price of R2 900 per banner. In addition, a price of R70 per banner was agreed for their placement and removal. These would be employed as a final push to attract voters to the polling stations. Ezulweni would send designs for approval and place the banners shortly before the elections. It would remove them thereafter.

[8] After the meeting, Ezulweni set about filling the order. This included designing and ordering the printing of the banners from entities in Durban and China, ordering the material for the metal hangers and employing additional staff to assist in the production. Because some of the suppliers required deposits, Ramdas initially approached Nkholise, requesting assistance from the ANC in this regard. Nkholise

said that this was not possible due to cash-flow constraints caused by the general election, but he assured Ramdas that Ezulweni would be paid immediately after the election campaign. The interim funding was then provided by one Mr Motlekar and the directors of Ezulweni personally.

[9] Thereafter, Ramdas ‘constantly communicated with [Nkholise and Mabaso] and kept them abreast of the progress of the project’. He put up photographs ‘which were shared with’ them and which showed such progress. These two sets of averments were not denied by the ANC, they were simply ‘noted’.

[10] On 4 April, Ezulweni sent an invoice to Nkholise for R87 million for the 30 000 PVC banners.² The legend was that these were ‘[as] per samples provided’. The ANC admitted receipt. After the election, final invoices for R100 050 000 and R2 415 000 respectively were sent.³

[11] On 9 April, Mabaso and Nkholise forwarded three documents to Ramdas. The first was an email containing the final design for the ‘Call to Vote’ banners. The second document was a photograph of a letter dated 2 April over the signature of Mbalula, addressed to Mashatile, and copied to one Mahlalela and to Mabaso. The letter was headed ‘Re: Signing of Election’s money’ (the 2 April letter). It informed Mashatile and the others as follows:

‘This communiqué serves to inform the Finance department that Comrade Lebohang Nkholise has been assigned as the signatory for bookings and money for the duration of the Elections Campaign’.

² This was a VAT exclusive amount. The final invoices included VAT.

³ On this occasion, both included VAT. The second invoice was for the placement and removal of the banners.

The third document was a photograph of a letter dated 9 April (the 9 April letter) addressed to Mashatile containing the signature of Mbalula which requested assistance with the payment of the invoice of 4 April for R87 million and attached the invoice. I shall return to these letters in due course.

[12] Ramdas had set up a dedicated WhatsApp group for the project comprising Mabaso, Nkholise and him. Between 29 April and 3 May, Ramdas sent a large number of WhatsApp messages (the messages) to the other two. These included:

- (a) Photographs of the banners;
- (b) A message saying that Ezulweni had paid for the airfreight in the sum of R1.2 million for importing the PVC banners from China and proof of that payment;
- (c) Photographs of the finished brackets of the banners and a message advising that the banners would be distributed throughout the country, excluding Cape Town;
- (d) Photographs of the banners in various locations;
- (e) A message advising that, due to the nature of the logistics involved, Ezulweni had employed 100 teams and that each team would place 300 banners.

The ANC admitted that such a group had been set up and that Mabaso and Nkholise had received the messages and photographs sent by Ramdas to the group.

[13] On 4 May, four days before election day, a meeting was held at the Garden Court Hotel between Ramdas, Mabaso and Nkholise. This was admitted. The meeting included a progress report by Ramdas. By the date of this meeting, the banners and hangers had all been made. Two days later, on 6 May, Ramdas sent a message to the other two advising them of the areas where the banners had been placed along with photographs of them *in situ*. After the election, Ezulweni had the banners removed and informed Mabaso and Nkholise to that effect, supplying photographs of the stored banners.

[14] The final two invoices were sent but remained unpaid. Various approaches to the ANC elicited unfulfilled promises. On 11 June, Ramdas and Mabaso met at the Holiday Inn in Eastgate. Ramdas requested payment and claimed that Mabaso acknowledged indebtedness. By letter dated 1 July, Ezulweni wrote to the Secretary-General of the ANC, Mr Magashule, requesting resolution of the matter. No response was received. By letter dated 25 July, Ezulweni wrote to the President of the ANC requesting payment. No response was received. Two letters, dated 6 and 13 August respectively, were sent to the ANC by Ezulweni's attorneys demanding payment. Only the second of these received a response from Mashatile. He acknowledged receipt and said the 'matter is receiving attention, I will revert to you in due course.' The promised response did not materialise. The ANC admitted the averments concerning these letters.

[15] The version of the ANC follows. It admitted that the meetings testified to by Ramdas were held with Mabaso and Nkholise, but contended that no agreement was either negotiated or concluded at any of those meetings. The sole content of the meetings, and the sole purpose of Mabaso and Nkholise attending them, was to convey to Ramdas that only Mashatile could authorise election material, and that a purchase order had to be issued before any agreement could be concluded. In support of this contention, the answering affidavit placed heavy reliance on the Supply Chain Policy of the ANC which was said to provide that such was the case. It had no such provisions. The ANC abandoned reliance on the Supply Chain Policy in the full court and did not rely on it in this court. It is safe to say that this aspect was the main basis on which the ANC sought to meet the claim of Ezulweni in the court of first instance.

[16] The ANC denied that the quotation dated 11 February had been sent to Nkholise prior to the 20 February meeting. It admitted receiving all of the messages sent by Ramdas on the dedicated WhatsApp group he set up. It said that no responses were ever sent because none were required. It admitted receipt of the photographs showing the progress and the installed banners. It admitted sending the email to Ramdas on 9 April containing the final design for the 'Call to Vote' poster. This, it said, was sent for information purposes and not 'to confirm approval of any agreement between the parties.'

[17] It gave no explanation for its denial that Nkholise had sent Ramdas a copy of the 2 April letter assigning Nkholise as 'signatory for bookings and money for the duration of the Elections Campaign.' It did not explain how this came into the possession of Ramdas. As regards the 9 April letter, the following explanation was given. Nkholise wrote this letter after being approached by Ramdas on 9 April with an oral proposal. The nature of the proposal was not disclosed. In the letter, Nkholise requested Mashatile to make payment to Ezulweni of R87 million for 30 000 banners and attached the invoice of 2 April with the legend 'As per samples provided'. The letter was not signed by Mbalula. His electronic signature was inserted by Nkholise, who intended to put it before Mbalula for his consideration. This never happened. Nor did Nkholise send a copy to Ramdas. 'As far as [Nkholise] knows, the letter stayed in his office' because he 'never got the opportunity to discuss the letter with Mbalula before the elections.'

[18] The ANC made much of a letter dated 8 March addressed by Ramdas to 'The Executive Council Elections'. The letter thanked that body 'for the opportunity of having been requested to quote for the 2019 elections'. It requested the issue of a formal order 'so that manufacturing and delivery can begin in earnest'. It said that

Ezulweni could not ‘stress the urgency of our request enough’. The ANC submitted that this document showed that no agreement had been concluded. In reply, Ezulweni indicated that it sought assurance in this communication which was provided by the forwarding of the 2 April letter and the 9 April letter, along with the final banner design.

[19] The ANC admitted that Mabaso and Nkholise met with Ramdas on 11 June. It admitted that, at that meeting, Ramdas asked for payment of the invoices. It said that, although he did so, Mabaso told him that ‘payment would not be possible without a purchase order and that a purchase order was never issued because there was no approval by [Mashatile]’. The ANC further admitted that no responses were given to the various letters requesting payment sent by Ezulweni, apart from the last one indicating that the ANC would revert to Ezulweni. This, it admits, was not done. Instead, the ANC stated that the Finance Department had investigated and decided that there was no agreement. Significantly, no communication emanating from the ANC denied that the banners were supplied, placed, and taken down as averred by Ezulweni.

[20] The question arises whether the version of the ANC raises *bona fide* factual disputes such that the matter should not have been resolved in favour of Ezulweni on the papers. The test is a well-worn one. In *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd*, it was held that:

‘. . . where there is a dispute as to the facts a final interdict should only be granted in notice of motion proceedings if the facts as stated by the respondents together with the admitted facts in the applicant’s affidavits justify such an order . . . Where it is clear that facts, though not formally admitted, cannot be denied, they must be regarded as admitted.’⁴

⁴ *Stellenbosch Farmers’ Winery Ltd v Stellenvale Winery (Pty) Ltd* 1957 (4) SA 234 (C) at 235E-F.

This approach was later clarified and qualified by Corbett JA in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*:

‘It seems to me, however, that this formulation of the general rule, and particularly the second sentence thereof, requires some clarification and, perhaps, qualification. . . [T]here may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers . . .’.⁵

Harms DP elaborated, holding that where a ‘version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is palpably implausible, far-fetched or . . . clearly untenable’,⁶ the court is justified in rejecting it merely on the papers. And Heher JA explained that a ‘real, genuine and *bona fide* dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed’.⁷ With that in mind, the version of the ANC must be evaluated.

[21] It is not disputed that meetings between the three persons involved took place in January, 20 February, 4 May and 11 June. The ANC denied that the purpose of the meetings was to negotiate an agreement and denied that Mabaso or Nkholise were authorised to conclude the agreement contended for by Ezulweni. At all of the meetings, the two of them simply informed Ezulweni of the need to obtain a purchase order and that only Mashatile could authorise the conclusion of an agreement.

⁵ *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] ZASCA 51; 1984 (3) SA 623 (A) at 634H-635D; [1984] 2 All SA 366 (SCA).

⁶ *National Director of Public Prosecutions v Zuma* [2009] ZASCA 1; 2009 (2) SA 277 (SCA); 2009 (1) SACR 361; 2009 (4) BCLR 393; [2008] 1 All SA 197 para 26.

⁷ *Wightman t/a JW Construction v Headfour (Pty) Ltd* [2008] ZASCA 6; 2008 (3) SA 371 (SCA); [2008] 2 All SA 512 para 13.

[22] There are serious difficulties with this version. If such was the case, it begs the question why:

- (a) Any further meetings were held after the initial one if they explained the clear position at that meeting.
- (b) In the face of that communication, Ezulweni went to the expense of ordering materials and printing for the banners.
- (c) Ezulweni 'constantly communicated with' Mabaso and Nkholise to keep them abreast of progress.
- (d) Mabaso and Nkholise did not respond to those messages by immediately disabusing Ramdas of his belief that there was an agreement to supply the banners.
- (e) Ezulweni sent photographs of the progress of the project.
- (f) The photographs did not elicit a response from Mabaso and Nkholise denying the agreement.
- (g) Ezulweni sent an invoice for R87 million to Nkholise on 4 April.
- (h) In response Nkholise drafted the 9 April letter to Mashatile requesting payment of the R87 million rather than enquiring from Ramdas why an invoice had been sent when no agreement had been concluded.
- (i) Despite having said that he intended to raise this with Mbalula, Nkholise did not do so.
- (j) Nkholise intended to raise the letter with Mbalula if there was no agreement.
- (k) A copy of the 9 April letter was sent by WhatsApp from Mabaso to Ramdas that day.
- (l) An email was sent to Ramdas on 9 April containing the final design for the 'Call to Vote' banners if it was sent for information purposes only.
- (m) Ezulweni would have had any interest in this design if there was no agreement.
- (n) The 2 April letter came into the possession of Ramdas.

(o) Ramdas sent Mabaso and Nkholise numerous messages between 29 April and 3 May with photographs of the banners, information that Ezulweni had paid the airfreight charges for them to be sent from China, photographs of the finished brackets, information that Ezulweni had employed 100 teams which would each place 300 banners, and photographs of the banners in various locations.

(p) The meeting which took place between the three of them on 4 May was for the sole purpose of informing Ramdas that any agreement for the supply of such material required a purchase order and the approval of Mashatile. This only four days before the elections.

(q) It was claimed that there was no response to the message with photographs sent in early May but Ezulweni was able to put up in reply an emoji sent by Mabaso of a clenched fist in response to that message. This did not prompt an application to put up a further affidavit in order to rebut this.

(r) The three of them held a meeting on 11 June where Ramdas requested payment and Mabaso told him that no payment would be forthcoming because no purchase order had been issued and Mashatile had not approved the agreement.

(s) The letters requesting payment were not immediately responded to stating that there was no agreement between the parties. The only letter sent in response said that the matter would be looked into.

[23] All of these factors, and more besides, demonstrate overwhelmingly that the version put up by the ANC as to the interaction between Ramdas, Mabaso and Nkholise is utterly untenable and without veracity. The ANC's version is not capable of belief in face of the cascade of communications from Ramdas that were met with deafening silence from the ANC. The only credible response of an entity in the position of the ANC, if its version was true, would have been immediately to set the record straight so as to prevent Ezulweni proceeding at risk. This is especially so

since it was submitted before us that the relationship between the ANC and Ramdas was a warm one. Those responsible for the election were provided evidence of the work that was being done to produce the banners and then instal them. How did these officials imagine this was happening, save on the basis of an agreement with Ezulweni?

[24] The denials of the ANC fall into the category of bald, uncreditworthy denials designed to create fictitious disputes of fact. The version of the ANC accordingly does not raise *bona fide* factual disputes. It does not warrant the approach that the matter should have been decided on its version. On the contrary, the court of first instance and the full court were amply justified in basing their findings on the version of Ezulweni where the two versions conflicted.

[25] One must therefore proceed on the basis that an agreement was reached on 20 February on the terms contended for between Ramdas, on the one part, and Mabaso and Nkholise, on the other. That does not lead ineluctably to the conclusion that a binding agreement between the parties was struck. It leads to the enquiry as to whether Ezulweni made out the case that Nkholise was authorised to conclude such an agreement on behalf of the ANC. The ANC submitted that Ezulweni failed to prove either express or ostensible authority on the part of Nkholise to conclude such agreement.

[26] The 2 April letter is central to the submission of Ezulweni that Nkholise had actual authority to conclude the agreement. The ANC raised two arguments to counter this:

(a) Properly construed, the 2 April letter did not confer authority on Nkholise;

(b) If it did so, the authority was conferred after 20 February, the date on which Ezulweni claimed that the agreement was reached.

These shall be dealt with in turn.

[27] The first question relates to the interpretation of the 2 April letter. The letter was titled, ‘Re: Signing of Elections Money’ and reads in its body:

‘This communiqué serves to inform the Finance department that Comrade Lebohang Nkholise has been assigned as the signatory for bookings and money for the duration of the Elections Campaign.’

The document stated that Nkholise ‘has been assigned’. The task to which he was assigned was to be the ‘signatory for bookings and money’ relating to the election campaign. The agreement clearly fell within that framework. The assignation clearly took place prior to the date on which the letter was drafted or sent. No specific date was given as to when the assignation took place, but it was said to be ‘for the duration of the Elections Campaign’. The campaign had begun well before Ramdas met Mabaso and Nkholise. On the face of it, then, Nkholise had been assigned to this task for the entire duration of the election campaign.

[28] The context supports this textual interpretation. It was drafted and sent during the election campaign. It appeared over the signature of Mbalula, the Head of Elections, and was addressed to Mashatile, the Treasurer General, to Mabaso, the finance manager and to one Mr Mahlalela whose position was not explained. It was not denied that the 2 April letter was sent to those addressees.

[29] That Nkholise was authorised for the entire campaign is buttressed by other facts. The meeting in January, where Mabaso introduced Ramdas to Nkholise, was arranged because Ramdas requested a meeting with Mashatile. Ramdas told Mabaso

that he wanted to ‘make a presentation on behalf of the [respondent] for the supply of branded goods to the ANC for the 2019 election campaign.’ Mabaso brought Nkholise to the meeting for that purpose. Mabaso did not bring Mashatile. The ANC did not explain why this was done if Mashatile alone could conclude agreements on behalf of the ANC. The overwhelming probability is that Nkholise was brought to that meeting because he was the person authorised at that time to conclude an agreement concerning election campaign related matters.

[30] The subsequent events also bear out this conclusion. At the meeting, Nkholise placed an order, based on the quotation sent on 11 February, for the election banners. Nkholise and Mabaso were kept abreast of the steps taken by Ezulweni to fulfil its obligations under the agreement by way of numerous uncontradicted messages. Ramdas sent an invoice dated 4 April based on the existence of the agreement. That prompted Nkholise to draft the 9 April letter to Mashatile saying:

‘This letter serves to request your office to assist us with the payment for 30 000 PVC Banners required for the elections campaign. The total cost is R87 000 000.00 (R2 900 per PVC banner). This letter is accompanied by an invoice from Ezulweni Investments.’

That was clearly a letter which assumes an agreement. It annexed the invoice without in any way disputing that it had been furnished pursuant to a binding agreement. It simply requested payment from the Treasurer General. That is not the action of an unauthorised official. If Nkholise had not been authorised at the time the agreement was concluded, the letter was likely to have requested Mashatile to ratify his actions or would, at the least, have explained the background to his submission of the invoice for payment.

[31] Both the 2 April letter and that of 9 April were sent to Ramdas in order to reassure him that the agreement would be fulfilled and that Ezulweni would be paid.

If the case of the ANC was that Nkholise was authorised to conclude agreements only after 2 April, it lay in the mouths of the officials of the ANC to say so. There would presumably have been a resolution or, if not, a minute of a meeting at which the decision took place. Both would have shown the date on which the decision was arrived at. The ANC put up no such evidence. The inference is irresistible that, by 20 February, Nkholise was authorised to conclude agreements such as the present one on behalf of the ANC.

[32] In the result, I find that on 20 February Nkholise had actual authority to conclude the agreement in question. That is the end of the matter. No purpose would be served in considering the submissions on the alternatives of ostensible authority or estoppel raised by Ezulweni. These were only relied upon if this court did not find that Nkholise had actual authority.

[33] It remains to deal with the reasons why the application to lead further evidence brought by the ANC was dismissed with costs. As indicated, it was based on s 19(b) of the Superior Courts Act 10 of 2013. This empowers this court to ‘receive further evidence’ on appeal.⁸ The further evidence sought to be introduced was the ‘forensic report and findings prepared by ENS Forensics (Pty) Ltd (ENS) which investigated the procurement process involving’ the two parties. The report itself was not put up in the papers. Only the executive summary (the summary) was put up. The summary was neither signed nor dated and the author was not identified in the founding affidavit. Neither the author, nor the persons to whom statements in the report were attributed, put up affidavits confirming those statements.

⁸ It also empowers high courts exercising appeal jurisdiction to do so.

[34] The nub of the application appears from the following sentence in the summary:

‘On 23 February 2019, Mr Ramdas sent a WhatsApp message to Mr Mabaso in which he stated that if the ANC confirmed two orders with Ezulweni Mr Ramdas had worked out the figures and that they could all make “ten million each”.’

That was stated as a fact. The conclusion drawn was that this ‘appears to be indicative of a corrupt relationship between Mr Mabaso and Mr Ramdas’. The ultimate conclusion was that the conduct of Mr Mabaso appeared ‘to be negligent and/or irregular and/or potentially corrupt’. Both of these conclusions are founded on the statement of fact mentioned above. If there was no evidence supporting that statement, the conclusions would of necessity fall away. There was no verification that the message was authentic, or, indeed, sent in the form in which it appeared in the report. Nor was the entire message set out in the summary.

[35] The test for the admission of evidence on appeal was stated in *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others*:

‘There must be a reasonably sufficient explanation why the evidence was not tendered earlier in the proceedings. The evidence “must be weighty and material and presumably to be believed”.’⁹

These principles followed time-honoured ones set out in *S v De Jager*:

‘(a) There should be some reasonably sufficient explanation, based on allegations which may be true, why the evidence which it is sought to lead was not led at the trial.

(b) There should be a *prima facie* likelihood of the truth of the evidence.

(c) The evidence should be materially relevant to the outcome of the trial.’¹⁰

⁹ *Pepkor Holdings Ltd and Others v AJVH Holdings (Pty) Ltd and Others* [2020] ZASCA 134; 2021 (5) SA 115 (SCA); [2021] 1 All SA 42 (SCA) para 49. The quote is from *Colman v Dunbar* 1933 AD 141 at 161–163. It is noted in this matter that the Constitutional Court adopted a similar approach in the matter of *Rail Commuters Action Group v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 paras 42 and 43 under the Supreme Court Act 59 of 1959.

¹⁰ *S v De Jager* 1965 (2) SA 612 (A) at 613C-D.

[36] As to why the evidence was not led at the outset, the ANC submitted that the report only came to light recently. There was no evidence as to when the final report had been completed. The ANC testified that there had been a delay in obtaining the report because payment for the report had been delayed. That may be so but it fails to account for the fact that Mabaso, who testified in the main application, was the person said to have received the message. Mabaso was reported to have said that he ‘did not respond to the message and stated during our interview that he did not recall this message’.

[37] The answering affidavit of Mabaso was deposed to on 11 October 2019, less than eight months after the message was said to have been received by him. It is highly unlikely that Mabaso would not have been able to recall the message at the time he deposed to the answering affidavit. After all, it must be supposed that an invitation to participate in a corrupt transaction was not an everyday occurrence for him. Despite this, Mabaso was silent on the receipt of the message. This can hardly be said to make out a case that the evidence was not available at the time the application was argued. As has already been noted, he actively mounted the case that no agreement had been concluded rather than that he had received this message. He was totally silent on that point. That evidence was available to the ANC in the mouth of its chief witness, Mabaso.

[38] This leads to the next question of whether the evidence was *prima facie* truthful. There are a number of difficulties with this aspect. In the first place, the evidence proffered was all hearsay. Secondly, in application papers, the pleadings are made up of the notice of motion and affidavits. The existing pleaded defence was that no agreement had been concluded. The alternative defence was that, if it was found that a deal was struck, Nkholise did not have the requisite authority to bind

the ANC. To aver that a corrupt relationship gave rise to the agreement presupposes the existence of an agreement and would be destructive of this pleaded case. The ANC was not able to say how this new defence could stand alongside of the pleaded case. It would amount to pleading not alternative, complementary, defences, as was done in the existing papers, but one which fundamentally contradicted those defences. That is impermissible.

[39] Thirdly, Ezulweni requested access to Mabaso's device on which the message was supposedly received. The response was that it was not in the possession of Mabaso, the ANC or ENS. This begs the question how ENS obtained access to the message which found its way into the summary. No such information was forthcoming. Nor was any evidence led as to why the device in question was not available for analysis. Ezulweni had contracted a person for the purpose of assessing the authenticity of the message. The person contacted was an expert in IT matters, including the forensic analysis of electronic information, transmission, storage and the like. As a result, he was not in a position to assess its authenticity. He did testify, without challenge, that historic WhatsApp messages can be amended, edited or faked. He stated that information on how to do so is widely available and can be achieved reasonably easily. In the light of the above, the ANC failed to show the *prima facie* truthfulness of the factual assertion relied upon.

[40] The final enquiry is whether the evidence, if admitted, would be materially relevant to the outcome of the application. In this regard, the message was purportedly sent on 23 February. The agreement has been found to have been concluded on 20 February. That being so, any such message cannot have led to the conclusion of the agreement, even accepting the executive summary at face value.

[41] These factors present insuperable difficulties in the way of the application to admit the report as evidence on appeal on each of the three requirements. All of this means that the case mounted by the ANC for the admission of this evidence on appeal fell woefully short of the accepted test. It is for these reasons that the order was made dismissing the application with costs.

[42] Dealing, then, with the costs in the main application, it is appropriate that costs should follow the result. Both parties employed two counsel and this was warranted. The costs of two counsel will be awarded where two counsel were employed.

[43] In the result, the following order issues:

- 1 The application to admit evidence on appeal is dismissed with costs.
- 2 The appeal is dismissed with costs, including the costs of two counsel where so employed.

T R GORVEN
JUDGE OF APPEAL

Appearances

For the appellant:

F J Nalane SC with E Muller

Instructed by:

AMMM Incorporated, Alberton

Moroka Attorneys, Bloemfontein

For the respondent:

A R Bhana SC with J Lubbe (Heads of argument prepared by A Dodson SC and J Lubbe)

Instructed by:

Sarlie & Associates Incorporated, Johannesburg

Symington De Kok Incorporated, Bloemfontein