THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not reportable

Case no. 509/20

In the matter between:

TRAXYS AFRICA HOLDINGS LTD
(formerly METMAR LTD) **First Appellant**

TRAXYS AFRICA HOLDINGS (PTY) LTD
(formerly METMAR (PTY) LTD) **Second Appellant**

and

WESTBROOK RESOURCES LTD **Respondent**

Neutral citation: *Traxys Africa Holdings Ltd and Another v Westbrook Resources Ltd* (509/2020) [2021] ZASCA 122 (23 September 2021)

Coram: Ponnan, Van der Merwe, Mokgohloa and Plasket JJA and Molefe AJA

Heard: 26 August 2021

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email. It has been published on the Supreme Court of Appeal website and released to SAFLII. The date and time for hand-down is deemed to be 09h45 on 23 September 2021.

Summary: Partly oral and partly written agreements – whether the terms of the oral parts of the agreements included an obligation on the part of the defendant to commission the equipment it had sold to the plaintiff – whether the oral parts of the agreements offended the parol evidence rule.

ORDER

On appeal from: Gauteng Local Division of the High Court, Johannesburg (Mabesele J, Notshe and Maenetje AJJ sitting as court of appeal):

1. The appellant's appeal is dismissed with costs, including the costs of two counsel.
2. The respondent's cross-appeal is upheld with costs, including the costs of two counsel.
3. The order of the court below is set aside and replaced with the following order.

'1. The appellant's appeal is dismissed with costs, including the costs of two counsel.
2. The respondent's cross-appeal is upheld with costs, including the costs of two counsel.
3. The order of the court below that appears at paragraph 199.1 of its judgment is set aside and replaced with the following order.

"It is declared that:

(a) Metmar was obliged to commission the equipment sold by it to Westbrook, in Croatia, as alleged in paragraphs 10 and 12 of the particulars of claim;
(b) neither Westbrook nor De Beer was required to attend to the commissioning of the equipment at their own cost and risk, without any assistance from or involvement of Metmar, as alleged in paragraphs 8.13.5 and 8.20 of the plea; and
(c) neither Westbrook nor De Beer attended to the commissioning of the equipment at their own cost and risk, without any assistance from or involvement of Metmar, as alleged in paragraph 8.21 of the plea."'

JUDGMENT

Plasket JA (Ponnan, Van der Merwe and Mokgohloa JJA and Molefe AJA concurring):

[1] The respondent, Westbrook Resources Ltd (Westbrook), conducted a mineral refining operation in Croatia which involved the extraction of manganese from slag. Its efforts were not as successful as it had wished, principally because its equipment was not operating, or being operated, optimally. As a result, it entered into three agreements with the second appellant, now known as Traxys Africa Holdings (Pty) Ltd, but then known as Metmar (Pty) Ltd (Metmar). In terms of these agreements, Metmar undertook to supply Westbrook with three jigs for the refining of the manganese.[1]

[2] While Metmar supplied the jigs, a dispute arose as to whether Metmar was required, in addition, to commission them – to make them operational according to specifications – or whether Westbrook was required to do so. In due course, Westbrook instituted an action against Metmar in the Gauteng Local Division of the High Court, Johannesburg in which it claimed damages arising inter alia from Metmar's failure to commission the jigs. It was agreed that the trial would run only in respect of the following separated issues:

'4.2.1 whether Metmar was obliged to commission the equipment sold by it to Westbrook in Croatia, as alleged in paragraphs 10 and 12 of the particulars of claim; or

4.2.2 whether Westbrook and/or De Beer would attend to the commissioning of the equipment at their own cost and risk, without any assistance from or involvement of Metmar, as alleged in paragraphs 8.13.5 and 8.20 of Metmar's plea; and

[1] In this judgment I shall, for the sake of consistency with the pleadings and the record, refer to the appellant as Metmar, rather than Traxys.

4.2.3 whether Westbrook and/or De Beer attended to the commissioning of the equipment on site at their own cost and risk without any assistance from or involvement of Metmar, as alleged in paragraph 8.21 of Metmar's plea.'[2]

[3] The trial of these issues commenced before Satchwell J. Before the first witness had completed his evidence, however, she recused herself after an application for this relief had been brought by Metmar. It was agreed by the parties that when the matter proceeded before another judge, the evidence already given 'would be admitted into evidence before the (new) trial court', whereupon the cross-examination of the first witness would continue. The trial resumed anew before Makume J. He found that Westbrook had proved partly oral and partly written agreements that included terms that Metmar was obliged to commission the jigs. Instead of making appropriate orders to answer the separated issues, however, he issued a declarator that Metmar was liable for whatever damages Westbrook was able to prove. He thus found in favour of Westbrook on the merits despite the fact that at least one further significant issue still had to be determined. In that, he ranged beyond the separated issues that had been specifically agreed upon by the parties as requiring adjudication.

[4] This error resulted in applications for leave to appeal and to cross-appeal by Metmar and Westbrook respectively. Appreciating that he had erred and misdirected himself, Makume J granted leave to both parties to appeal and to cross-appeal respectively to a full court of the Gauteng Local Division of the High Court, Johannesburg. After concluding that Metmar was indeed obliged in terms of the agreements to commission the jigs, Mabesele J, with Notshe and Maenetje AJJ concurring, made the following order:

'1 The appellants' appeal is dismissed.

2 The respondent's cross-appeal is upheld.

3. The order of the court a quo is set aside and substituted as follows:

"The appellants are ordered to pay the costs of the action and the appeal, as well as the costs of their unsuccessful application for amendment, including the costs of two counsel."'

As a result, the full court also did not answer, as it was required to do, the questions posed for determination.

[2] The role of Mr Hendrik de Beer will be explained below. He was originally the third defendant in the trial. Westbrook withdrew against him during the course of the trial.

[5] It is apparent that the order of the full court compounded the error of the court of first instance. Despite both having considered the separated issues in their judgments, and having expressed views in that regard, neither issued any substantive order concerning those findings. At the core of the problem thus created is the trite principle that an appeal lies against the order made by the court, not against its reasoning.

[6] For Westbrook, as plaintiff in the court of first instance, to ultimately succeed in its claim against Metmar, it was necessary that the questions posed for determination be answered in its favour. That had not occurred in either of the courts below. In the absence of a finding in its favour, that was effectively the end of the road for Westbrook: it would not have been able to prosecute its claim to finality. The separated issues not having been answered at all (and certainly not against Metmar), it could very well have been content, in the event of its appeal succeeding, with no more than the adverse costs order of the full court being set aside. It was not necessary for it to insist that the questions posed be answered at all, much less that they be answered in its favour. In Westbrook's heads of argument, it was submitted that the appeal should be dismissed. In the absence of a cross-appeal, however, no further relief could have been sought by it from this court. In the hearing of the appeal, which was with the special leave of this court, the difficulty was pointed out to counsel that in the absence of a cross-appeal, the two possible outcomes would have been that the order of the full court would either have been set aside or would have remained in place. That would have the unsatisfactory result that, through no fault of the parties and despite a lengthy trial and two appeals, the separated issues would remain unresolved. In the face of this predicament, both counsel assured us that both parties wanted the separated issues to be decided. That being so, the matter proceeded on the basis that Westbrook would be granted leave to file a notice of cross-appeal. The effect was that in the event of Westbrook being successful, it could obtain an answer in its favour on the separated issues, rather than a meaningless costs order that would still leave the substantive dispute between the parties unresolved. The notice of cross-appeal has since been filed.

The pleadings

[7] The original particulars of claim cited De Beer as the third defendant. Those particulars of claim were amended when the claim against De Beer was withdrawn. I shall now examine Westbrook's amended particulars of claim and the amended plea filed by Metmar.

[8] The crux of Westbrook's claim is that between August and November 2008 it, represented by Mr Shaun Walton and Mr Ian Howe, and Metmar, represented by Mr Piet Boshoff, 'concluded a partly oral, partly written agreement in terms of which Metmar would sell, deliver and commission certain mine equipment to and for [Westbrook]'. (In truth, as I have indicated above, there were three separate agreements containing essentially similar terms.)

[9] Westbrook's particulars of claim set out the material express, implied or tacit terms of the agreements in detail. The agreements entailed the following: (a) Metmar undertook to sell and deliver to Westbrook three metal recovery plants, or jigs, as well as certain ancillary equipment; (b) Metmar undertook to commission the jigs at the mining site (in Croatia) on delivery or within a reasonable time thereafter; (c) payments would be made by Westbrook to Metmar in accordance with the written part of the agreements, contained in three pro forma invoices, the terms of which will be set out below; and (d) the purchase price of each jig was $450 000, totaling $1 350 000 for the three jigs.

[10] Westbrook pleaded that Metmar delivered the jigs – one in December 2008 and the other two in March 2009 – and that Metmar breached the agreements by failing to commission the jigs on delivery or within a reasonable time thereafter. Westbrook paid all amounts due to Metmar in terms of the agreements except for the final payments payable on the commissioning of the jigs.

[11] As a result of the breach of the agreements, Westbrook averred, it was unable to complete its mining operations timeously. It ceased those operations in May 2011, when they ought to have been concluded by October 2009. It suffered damage because of the breach of the agreements, comprising loss of profit and the additional

cost that it incurred in conducting its mining operations 'at a reduced efficiency and output'. It claimed $6 910 112 in damages from Metmar.

[12] In its plea, Metmar admitted that between August and November 2008 it, represented by Boshoff, concluded partly oral and partly written agreements with Westbrook, represented by Walton and Howe, in terms of which it sold the jigs to Westbrook. It pleaded that the express, implied or tacit terms of the agreements were that: (a) the equipment and its price were as reflected in the pro forma invoices – the written part of the agreements; and (b) that Westbrook and De Beer 'would attend to the commissioning of the specified equipment on site at their own cost and risk, without any assistance or involvement of Metmar'.

[13] Although Metmar pleaded that it had 'placed' the jigs 'at the disposal' of Westbrook, it denied that it was a term of the agreements that it was required to deliver the equipment to Westbrook's site in Croatia. Instead, it said, it had 'arranged for the transport and delivery of the specified equipment, at [Westbrook's] cost, ex works the supplier's plant, to Rotterdam'. Westbrook then arranged for the transport of the jigs to its site in Croatia.

[14] Finally, Metmar denied that it was a term of the agreements that it would commission the jigs. Instead, it pleaded, Westbrook and De Beer 'attended to the commissioning of the specified equipment on site at their own cost and risk, without any assistance from or involvement of Metmar'.

[15] An attempt was made by Metmar to amend its plea to withdraw its admission of a partly oral and partly written agreement having been concluded with Westbrook. Its application to amend its plea was dismissed on the basis that it had not been brought in good faith.

The agreements

The written part of the agreements

[16] It is common cause that during the period from August to November 2008, Westbrook and Metmar concluded three agreements, which were partly oral and partly written, in terms of which Metmar sold three jigs to Westbrook. The issues that require

determination in this appeal relate to the terms of those agreements, in particular, whether the obligation to commission the jigs fell on Metmar or Westbrook.

[17] It is common cause that the written part of the agreements is embodied in the three pro forma invoices. The first invoice was dated 13 October 2008. It stated that the equipment was to be shipped from Durban. Next to the heading 'INCO TERMS' the invoice provided:

'EX WORKS Supplier Plant South Africa for shipment to Sibernik via Rotterdam.'

[18] The total purchase price specified in the invoice was $450 000. Next to the heading 'PAYMENT TERMS', the following appears:

'35% = US$157 500.00 – On Containerization in South Africa

35% = US$157 500.00 – On Advice of Bill of Lading Date

30% = US135 000.00 – On Plant Commissioning in Croatia.'

For the rest, the invoice contained Metmar's banking details, a description of the equipment and the number of containers in which the equipment was packed. It also stated that the country of origin was South Africa.

[19] The second and third invoices, both dated 14 November 2008, were essentially similar. They differed in one noteworthy respect. Although the purchase price for the second and third jigs was also $450 000 each, the payment terms differed from the first invoice. Four payments were envisaged as follows:[3]

'25% = US$112 500.00 Deposit on Order (19.11.2008)

25% = US$112 000.00 On Containerization in South Africa

20% = US$90 000.00 On Advice of Bill of Lading Date

30% = US$135 000.00 On Plant Commissioning in Croatia.'

[20] There is no material uncertainty as to the meaning of the written part of the agreements. It is evident that they contain terms relating to delivery, purchase price and payment. It is not suggested that the commissioning obligation is a tacit term of the written part of the agreements.

[3] The total of the payments in each of the second and third invoices amounts to $449 500. Nothing turns on this discrepancy between the payment schedule and the total.

The oral part of the agreements

[21] The evidence concerning the terms agreed to orally is, however, contested. It is to that evidence, tendered by Walton for Westbrook, and Boshoff for Metmar, that I now turn. This evidence traverses the period prior to Metmar's involvement in Westbrook's Croatian operation until some time after the delivery of the three jigs.

[22] Walton testified that both Westbrook and Metmar were commodity traders. Westbrook was also involved in the operation in Croatia where it was refining manganese. Walton and Boshoff were close friends and business associates. When they met by chance in Hong Kong in March or April 2008, Walton told Boshoff of the problems of inefficiency that Westbrook was experiencing in its Croatian operation. Part of the problem appeared to be that Westbrook did not have an experienced operator to run and to manage the operation.

[23] Boshoff suggested that De Beer may be the ideal person to fulfil this role and undertook to speak to him. He also saw an opportunity for Metmar: if the efficiency of the plant could be improved, Metmar could purchase the enhanced production that was not committed for sale to existing clients. On 16 April 2008, Boshoff sent an e-mail to Walton in which he said that he had spoken to De Beer and that he suggested a meeting with De Beer. He also said that he was keen to assist Westbrook with technical people and, in return, hoped to obtain for Metmar 'material for sale'. The next day Boshoff e-mailed Walton to tell him that De Beer thought it best for him to inspect the plant before meeting with Walton. Later, Boshoff and De Beer went to inspect the plant. Walton said that he had suggested that Boshoff visit the plant because he 'got the feeling that he wanted to be involved more than just taking tonnage from the output of the equipment, new equipment'.

[24] It was made clear in later correspondence that De Beer's function at that stage was to assess the Croatian operation and that Metmar would obtain 'a portion of the saleable tonnage' produced by the plant in due course. Boshoff gave a great deal of advice to Walton and sang the praises of De Beer as the person who would solve all of Westbrook's problems in respect of both the acquisition of new equipment and the management of the plant.

[25] A meeting took place in Croatia in August 2008 between Walton and Howe, on the one hand, and Boshoff and De Beer, on the other. They identified two problems with the jig that was being used: it did not operate efficiently and it was not able to process slag that had been broken down to a fine size. This resulted in a large amount of wastage in the refining process. De Beer's advice was that Westbrook should purchase a jig that could process the fine material. He also suggested that the plant's efficiency and output could be further enhanced by Westbrook purchasing more jigs.

[26] It was decided that Westbrook and De Beer should enter into a management agreement. Negotiations followed. It was agreed that De Beer would be paid a management fee of $17 500 a month by Westbrook to manage the site.

[27] De Beer began to look for jigs to purchase. In all of his correspondence with Westbrook on this issue, Boshoff was copied. Walton did not know why this was so but assumed that there was an agreement of some sort between Metmar and De Beer. His assumption proved to be correct, as I shall explain shortly.

[28] De Beer found one Mathys Prinsloo to erect and commission the jigs that were still to be purchased. Walton's understanding was that the process would entail a 'back to back purchase' by De Beer of the first jig (for processing fine material) and that De Beer was 'effectively going to have the equipment commissioned onsite' by Prinsloo. In this scenario, Westbrook would pay for the commissioning.

[29] Metmar entered the picture at this point. Boshoff telephoned Walton in early September 2008. He said that Metmar wanted to be involved in the purchase of the jig. Walton testified that '[Boshoff] wanted us to contract with Metmar for the supply of the commissioned jig'. This suited Walton because he trusted Boshoff implicitly and was not entirely trusting of De Beer. He said of Boshoff that he knew that 'we would get that piece commissioned in Croatia if he said so'. The oral part of the agreement in respect of the first jig was thus concluded.

[30] On 10 October 2008, Metmar and Haba Services CC, the entity through which De Beer conducted his business, concluded a profit-sharing agreement in relation to Westbrook's operation in Croatia and another operation in Iran. It provided for a 65

percent/35 percent split of the net profits on ‘capital equipment’ in both Iran and Croatia and the same split in respect of performance bonuses earned by De Beer in Iran and Croatia. There would, however, be no sharing of De Beer’s management fee of $17 500 paid by Westbrook.

[31] On the same day, Metmar sent the invoice for the first jig to Westbrook. Walton described the agreement as a ‘contract with effectively progress payments and as you hit the various trigger points, then you make payments’. He described it as a ‘normal commercial agreement’.

[32] On 16 October 2008, De Beer e-mailed Walton to inform him that two further jigs had been ordered and that they would be ready for shipping by mid-December 2008. He asked whether Westbrook wanted Metmar or himself to ‘handle this deal and the logistics’. Walton said that he far preferred Metmar to De Beer, stating that ‘I definitely wanted to deal with someone I trusted and I wanted to deal with Metmar’. He informed De Beer of his choice and also discussed the matter with Boshoff.

[33] During his cross-examination, Walton furnished more detail. He clarified that the agreement concluded in September 2008 in respect of the first jig did not include the second and third jigs. After De Beer had informed him of the availability of the second and third jigs, he spoke to Boshoff because, following from the first agreement, Westbrook wanted Metmar to assume responsibility for the second and third jigs too.

[34] Walton stressed that Westbrook purchased all three jigs from Metmar on ‘a commission basis in Croatia’. When he spoke to Boshoff, he said that ‘we agreed that we wanted to carry on in the same way’. He made it clear that this occurred in October 2008 and that Metmar agreed to ‘take on the supply of the commissioned equipment’ – that it would, in other words, ‘supply equipment commissioned on site in Croatia’.

[35] On 17 November 2008, Boshoff sent an e-mail to Walton in which he confirmed the purchase of the two jigs, confirmed that orders had been placed and said that the payment of deposits was required. He suggested a payment scheme that involved four payment events. They were that 25 percent of the purchase price was to be paid immediately, 25 percent on containerization, 20 percent on the date of the bill of lading

and the final 30 percent ‘on plant commissioning in Croatia’. Boshoff asked Walton to confirm Westbrook’s acceptance ‘so that invoicing can be done’. Westbrook’s acceptance was communicated to Metmar on the same day.

[36] Walton was asked about an invoice submitted by Haba Services to Metmar dated 4 December 2008. It related to ‘Project management in Croatia Jig 2 & 3 Partial payment’. He said that Metmar was not involved in any other project in Croatia apart from Westbrook’s, and that therefore the invoice ‘can only be talking about work that Hendrik de Beer was doing on Metmar’s behalf with relation to the jigs in Croatia’.

[37] On 30 January 2009, Walton received an e-mail from Boshoff who wrote that he had met with De Beer and that ‘everything is going according to schedule although I believe delays were caused due to the foundations for the first jig’. As far as the second and third jigs were concerned, he said that ‘[c]ontainerisation is taking place for both and shipment will also take place soon’. He reminded Walton that payment would be required on containerisation and ‘once again on Bill of Lading date’. He suggested that ‘on final commissioning of the three recovery plants in Croatia’ they go to Bosnia to explore possibilities there.

[38] A Metmar general ledger showed that on 22 December 2008, Metmar paid Haba Services two identical amounts of R132 467.98. Both payments were described as ‘PROJECT MANAGEMENT IN CROATIA’ with references of ‘JIG ML 8021B’ and ‘JIG ML 8021C’. These references are the references that appear on the invoices for the second and third jigs. Walton said that the payments were for the commissioning of these jigs by Haba Services on behalf of Metmar. Similar entries were made for 28 February 2009.

[39] By May 2009, all three of the jigs had been delivered but problems had been experienced with their commissioning. None were working. This resulted in a meeting in Zurich between Walton and Boshoff in which Walton explained the dire state of affairs to Boshoff. When Walton was asked whether Boshoff had ever denied that Metmar was responsible for the commissioning of the jigs, his answer was:

'No, Mr Boshoff never denied they are responsible for commissioning to me. Only when these proceedings started did he deny that they are responsible for commissioning. Never ever has he denied . . . has he made that assumption to me.'

[40] Boshoff undertook to 'get hold of Hendrik de Beer and find out what the hell was going on and put it right'. On 14 May 2009, he e-mailed Walton to say that he appreciated the fact that Walton had come to Switzerland to discuss the problems with him. He reported that teething problems had been experienced with commissioning the first jig, but he believed they had been resolved. He said that according to his information, the other two jigs had been commissioned and 'should you confirm this, will get these jigs invoiced'. Walton said that this e-mail was not correct because the jigs had not been commissioned in that 'one did not operate at all' and the others 'just did not function'.

[41] That there were problems with the commissioning of the jigs appears to have been accepted by Metmar in its correspondence with Westbrook. De Beer was not paid his management fee for September 2009 by Westbrook because he simply left the project, having been remiss in the execution of his duties before he walked out.

[42] A meeting was held in Monte Carlo in early November 2009 to try to resolve the problems in respect of the commissioning of the jigs. It was agreed that Boshoff, who did not deny that the jigs were still not commissioned, would revert with proposals. When he did, in an e-mail to Howe dated 11 November 2009, it was to demand payment of the outstanding amounts, being the last tranches in respect of each jig – the final, post-commissioning payments. Walton described this response as being 'just unreal' because it ignored what had been discussed at the meeting. Westbrook refused to pay because the jigs were not in working order.

[43] On 13 January 2010, a meeting was held at Bryanston, Johannesburg between representatives of Westbrook and Metmar. From the minutes it is clear that it was accepted by all that the first jig had still not been commissioned. The aim of the meeting was to explore how this problem would be resolved by Metmar. They agreed to a number of steps that Metmar would take in order to make the first jig operational. The minutes of the meeting recorded, in relation to the list of steps, that '[a]ll costs for

Metmar's account relating to the above'. The parties accepted that the second and third jigs had been commissioned, because they were being used. When Izak Dippenaar inspected the plant, however, he reported that the jigs were in fact extracting very little manganese and that these jigs were not in working order. This was communicated to Boshoff on 17 February 2010.

[44] Metmar continued, throughout 2010 and into 2011, to address the problem of the three jigs not functioning properly. On 23 April 2010, for instance, Boshoff sent an e-mail to Walton in which he assured him that 'I am trying my level best to ensure the correct equipment is purchased for Croatia'; on 19 July 2010, he sent an e-mail to Walton in which he said that he had been informed that the necessary equipment had arrived at the plant and that 'Matt Prinsloo is there for the commissioning'; in mid-August 2010, Boshoff was still assuring Walton of 'Metmar's commitment to take us to the final stage of commissioning Jig 1'; and in an e-mail dated 23 September 2010, Mr Jacques Porter of Metmar wrote to Howe to inform him that he, Porter, had been 'tasked to handle the final stage of commissioning'. Despite all of these assurances, Metmar's efforts did not meet with success as far as Westbrook was concerned.

[45] By April 2011, all attempts to find a solution had come to an end. By then, the battle lines had been drawn and the parties were set on an inexorable path to the doors of the high court.

[46] I turn now to the evidence of Boshoff. I shall not spend as much time on it as I did on the evidence of Walton because his version is simply a denial of the major building blocks of Westbrook's claim.

[47] In accordance with Metmar's plea, Boshoff testified that the commissioning of the jigs was arranged between Westbrook and De Beer. As far as he was concerned, De Beer had been required to commission the jigs and Westbrook was required to pay him in terms of the management agreement concluded by them. Despite this, Metmar was asked by De Beer to attend to the shipping of the jigs. The reason for this was that, De Beer, being a one-person operation, did not have the capacity to deal with this aspect of the transaction.

[48] When Boshoff was asked to comment on Walton's evidence that Boshoff had telephoned him and agreed to take over the sale of the first jig from De Beer, he said: 'M'Lord, firstly with regards to the call [in] September 2008 on a Friday night. I cannot confirm there was a call, nor was not. It is a long time ago. There was obviously telephone discussions on shipping, on various other matters, but I cannot . . . cannot confirm whether there was a call or not. With regards to the content and specifically . . . where it is stated that Metmar wanted to contract for the supply of the [indistinct] and you know was happy. I deny that there was such a discussion on commission.'

[49] In respect of the second and third jigs, Boshoff denied that he spoke to Walton and assumed responsibility on behalf of Metmar for their commissioning. His evidence seems to be that the commissioning of these jigs was also to be done by De Beer in terms of his management agreement with Westbrook. He testified that, for the most part, he had no knowledge of the difficulties that were being experienced by Westbrook.

[50] In dealing with the evidence and the documents that suggested that Metmar was more than a mere shipper of the jigs, and that pointed to it having assumed the obligation to commission the jigs, Boshoff's evidence left much to be desired. He was simply unable to answer this evidence with any measure of credibility and his evidence often verged on the absurd. For the most part, however, he would not commit himself to answer questions if he could not find the answer in the trial bundle. He refused to answer the simplest and most obvious of questions, often by saying that he did not want to speculate or comment on probabilities. He admitted to having a very limited independent recollection of events. He relied on this tactic even when he obviously had knowledge, such as of the profit sharing agreement between Metmar and De Beer.

The trial court's evaluation of the evidence

[51] The trial court made strong credibility findings in favour of Walton. It said of him that he had 'withstood long cross-examination' and had 'remained steadfast that Metmar together with De Beer undertook to commission the jigs in Croatia'. He was described as a 'reliable and calm witness who did not exaggerate issues'.

[52] Makume J made equally strong credibility findings against Boshoff. He was described as 'evasive'. He 'could not respond to simple questions relating to the commissioning issue'. His evidence was 'unnecessarily longwinded which in the end did not produce any credible answer'.

[53] Makume J concluded his evaluation of the evidence with a consideration of the probabilities. He held:

'An examination of the probabilities in this matter strongly point out to and support the version of the Plaintiff. The most glaring one being that why did Metmar credit Westbrook with various amounts incurred as commissioning expenses and which had been paid to De Beer. Also after the departure of Hendrik De Beer they fully assumed that role and paid for the travelling and other expenses of Matt Prinsloo and Izak [Dippenaar]. Thirdly, as early as 2009 when De Beer was still on site Walton complained to Boshoff about the jigs not having been commissioned and this caused them loss. Boshoff did not on a single day say to Walton that it was not their responsibility to commission the jigs. He Boshoff instead told Walton that he will speak to De Beer and see to it that the work is done properly. This clearly was in accordance with their joint venture agreement and to cap it all long after April 2010 when they had drawn the final joint venture account they still communicated with De Beer about expenses incurred after April 2010 and those were commissioning expenses.'

[54] On the basis of all of these findings, Makume J was satisfied that Westbrook had proved both the oral and the written parts of the agreements that it relied upon for its claim. The full court agreed with the trial court's factual findings.

[55] An appeal court is bound by the factual findings of a trial court in the absence of misdirection on the part of the trial court.[4] The trial court's factual findings are not tainted by any misdirection that I can detect. They are therefore presumed to be correct. The result is that the matter must be decided on the basis of the credibility findings in favour of Walton and against Boshoff, and in accordance with the probabilities that the trial court highlighted.

[4] *R v Dhlumayo and Another* 1948 (2) SA 705-706.

[56] Makume J is correct that the probabilities in favour of Metmar having undertaken the commissioning obligation in relation to all three jigs is overwhelming. The evidence is consistent, from the time when Metmar stepped in to supply the first jig until the Bryanston agreement, that, far from denying the commissioning obligation, Metmar embraced it throughout.

[57] The trial court found correctly that the written and oral parts of the agreements, as pleaded by Westbrook, had been proved. Metmar argue, however, that the evidence of the oral agreements offends against the parol evidence rule.

The parol evidence rule

[58] The parol evidence rule, although perhaps reduced somewhat in its operation in recent times, remains part of our law. Unterhalter AJA, in *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others*,[5] explained that 'the parol evidence rule or integration rule requires that, save in exceptional circumstances such as fraud or duress, where the parties to a contract have reduced their agreement to writing and assented to that writing as a complete and accurate integration of the contract, extrinsic evidence is inadmissible to contradict, add to or modify the contract'.

[59] The parol evidence rule requires modification when an agreement is partly oral and partly written. The partial integration rule comes into play in such instances. Its operation was set out thus by this court in *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail*:[6]

'The parol evidence rule applies only where the written agreement is or was intended to be the exclusive memorial of the agreement between the parties. Where the written agreement is intended merely to record a portion of the agreed transaction, leaving the remainder as an

[5] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] (3) All SA 647 (SCA) para 38.
[6] *Affirmative Portfolios CC v Transnet Ltd t/a Metrorail* [2008] ZASCA 127; 2009 (1) SA 196 (SCA) para 14. See too *Mike Ness Agencies CC t/a Promech Boreholes v Lourensford Fruit Company (Pty) Ltd* [2019] ZASCA 159; [2020] 1 All SA 314 (SCA) paras 18-19.

oral agreement, then the rule prevents the admission only of extrinsic evidence to contradict or vary the written portion without precluding proof of the additional or supplemental oral agreement.'

[60] That is the position in this case. The written agreements deal with delivery, purchase price and payment and say nothing as to who bore the obligation to commission the jigs. The oral agreements do not contradict or vary the written agreements but rather supplements them by placing the obligation to commission on Metmar. The parol evidence rule is not infringed in this case by receipt of the evidence of the oral agreements.

Conclusion

[61] As the evidence established that an obligation was borne by Metmar to commission the jigs on site in Croatia, the result is that Metmar's appeal must fail, Westbrook's cross-appeal must succeed and the questions posed by the separated issues must be answered in favour of Westbrook. I make the following order.

1. The appellant's appeal is dismissed with costs, including the costs of two counsel.
2. The respondent's cross-appeal is upheld with costs, including the costs of two counsel.
3. The order of the court below is set aside and replaced with the following order.

'1. The appellant's appeal is dismissed with costs, including the costs of two counsel.
2. The respondent's cross-appeal is upheld with costs, including the costs of two counsel.
3. The order of the court below that appears at paragraph 199.1 of its judgment is set aside and replaced with the following order.

"It is declared that:

(a) Metmar was obliged to commission the equipment sold by it to Westbrook, in Croatia, as alleged in paragraphs 10 and 12 of the particulars of claim;
(b) neither Westbrook nor De Beer was required to attend to the commissioning of the equipment at their own cost and risk, without any assistance from or involvement of Metmar, as alleged in paragraphs 8.13.5 and 8.20 of the plea; and

(c) neither Westbrook nor De Beer attended to the commissioning of the equipment at their own cost and risk, without any assistance from or involvement of Metmar, as alleged in paragraph 8.21 of the plea."'

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C Plasket

Judge of Appeal

APPEARANCES

For the appellant:	C H J Badenhorst SC and J A Booyse
Instructed by:	Adams & Adams, Pretoria

	Symington & De Kok, Bloemfontein
For the respondent:	A J Eyles SC and L Choate
Instructed by:	Fasken Martineau, Johannesburg
	Webbers Attorneys, Bloemfontein