THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 20 February 2023

Status: Immediate

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G Phadziri & Sons (Pty) Ltd v Do Light Transport (Pty) Ltd and Another (765/2021) [2023] ZASCA 16 (20 February 2023)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal with costs brought by the appellant, Phadziri & Sons (Pty) Ltd (Phadziri), against the judgment of the Limpopo Division of the High Court, Thohoyandou (the high court).

The issue in the appeal was whether an agreement concluded between the appellant, the first respondent and the second respondent was: (a) void for vagueness; and (b) necessitated a tacit term to be read into it as to its duration.

The facts which gave rise to the dispute were as follows. Phadziri and the first respondent, Do Light Transport (Pty) Ltd (Do Light), were bus service companies offering public transport services in the Vhembe district of Limpopo. Phadziri was the holder of a number of licences in respect of specific routes, issued to it by the second respondent, the Limpopo Department of Transport (the Department). On 23 September 2010, Phadziri, Do Light and the Department concluded a tripartite agreement. In terms thereof, Do Light would be Phadziri's sub-contractor for the road public passenger services in respect of certain routes. Those were identified in the agreement as the Maila and Vleifontein routes – both to and from Louis Trichardt (the affected routes). As to its duration, the tripartite agreement would 'terminate when integrated public transport services are introduced for the Vhembe District of the Limpopo Province'.

For about eight years after it was concluded, the tripartite agreement was implemented without any problems. However, towards the end of September 2018, Phadziri asserted that the agreement had terminated. It demanded back the licences it had ceded to Do Light, as well as the right to operate on the affected routes. Do Light rebuffed Phadziri's demands. At the beginning of August 2019, Phadziri commenced operating on the affected routes in competition with Do Light. In response, Do Light launched a two-part application in the high court, and obtained, in part A, an urgent interim order interdicting Phadziri's conduct. The interim order was to operate with immediate effect pending the determination of part B of that application. When part B came before it, the high court made an order enforcing the agreement.

The thrust of Phadziri's two-pronged submission was that the tripartite agreement was void for vagueness, alternatively that a tacit term had to be read into it as to its duration to remedy the perceived vagueness. In support of the contention for vagueness, Phadziri relied on the

fact that two documents referred to as annexures 1 and 3 in the tripartite agreement were not attached to it. Because of this omission, asserted Phadziri, the routes which it had ceded to Do Light in terms of the tripartite agreement could not be identified. The tacit term which Phadziri maintained should have been read into the tripartite agreement was that its duration was terminable on reasonable notice after eight years.

The SCA found that the question to be determined was whether the omission of the annexures rendered the agreement not capable of implementation. And to answer that question, the clauses in which the annexures were mentioned had to be read not in isolation, but as part of the whole agreement.

In this regard, the SCA concluded that the high court was correct in holding that the tripartite agreement was not void for vagueness. This was because on any conceivable basis, when Phadziri invited Do Light to be its sub-contractor, both knew about the timetable for Do Light's scheduled trips on the affected routes. It was therefore contrived for Phadziri to then suggest that the routes were not known, because the timetable was not attached to the tripartite agreement. The SCA had no doubt that the parties seriously entered into the tripartite agreement and considered it capable of implementation, and, in fact, implemented it. Further, the SCA found that clauses 3.1 and 4.8 had to be read so as to give them, and the tripartite agreement, a commercially sensible meaning. Thus, the SCA, in considering the relevant authorities, held that the tripartite agreement had to be preserved and enforced.

Turning to whether a tacit term was to be read into the agreement as to its duration, the SCA held that the express duration term of the tripartite agreement had to be preserved and honoured. This was because there was no evidence that the parties had meant for the duration of the tripartite agreement to be anything other than what it expressly said. Further, the SCA found that the term which Phadziri sought to impute into the agreement was in conflict with its express term as to its duration. It followed that the tripartite agreement was enforceable until the implementation of the integrated public transport services by the Department.

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