THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 1064/2016

In the matter between:

BIG FIVE DUTY FREE (PTY) LIMITED	**APPELLANT**
and	
AIRPORTS COMPANY SOUTH AFRICA LIMITED	**FIRST RESPONDENT**
DFS FLEMINGO SA (PTY) LIMITED	**SECOND RESPONDENT**
TOURVEST HODINGS (PTY) LIMITED	**THIRD RESPONDENT**

Neutral citation: *Big Five Duty Free v ACSA* (1064/2016) [2017] ZASCA 110 (15 September 2017)

Coram: Lewis, Ponnan and Mathopo JJA and Lamont and Mbatha AJJA

Heard: 21 August 2017

Delivered: 15 September 2017

Summary: Interpretation of an agreement of settlement made an order of full court on appeal to it: agreement is binding on all the parties to the litigation, including one who has not participated but has chosen to abide the outcome of the appeal

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ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Hughes J sitting as court of first instance):

1 The appeal is upheld with costs, including those of two counsel.
2 The order of the Gauteng Division of the High Court is set aside and replaced with the following order:
'(a) It is declared that Airports Company South Africa Ltd (ACSA) is bound by its decision taken on 26 August 2009 to award to Big Five Duty Free (Pty) Ltd (Big Five) the right to operate Core Duty and VAT Free stores in the international departures and arrivals airside terminals at O R Tambo International Airport, Cape Town International Airport and King Shaka International Airport in terms of Bid Reference No CDF08.05/2009 on 26 August 2009.
(b) ACSA is directed to sign and implement the written agreement of lease with Big Five, in terms of the decision, within 30 days of this court's order.
(c) ACSA is ordered to pay Big Five's costs, including the costs of two counsel.'

JUDGMENT

Lewis JA (Ponnan and Mathopo JJA and Lamont and Mbatha AJJA concurring)

[1] On 26 August 2009, the first respondent, Airports Company South Africa Ltd (ACSA), pursuant to an invitation to tender issued on 29 May 2009, awarded a contract to operate duty-free shops for a ten-year period, in three of its international airports, to the appellant, Big Five Duty Free (Pty) Ltd (Big Five). The second respondent, DSF Flemingo SA (Pty) Ltd (Flemingo), an unsuccessful bidder, applied to the North Gauteng High Court, Pretoria, first for an urgent interdict precluding ACSA from implementing the terms of the lease, and secondly for the review and

setting aside of the award. The interdict was granted. Big Five and ACSA opposed the review application. However, Phatudi J upheld the review and set aside the award on the basis that it was unlawful because in the tender process ACSA had taken into account an irrelevant consideration, and the process was not transparent or fair. This court gave leave to appeal against that decision to the full court of the Gauteng High Court.

[2] ACSA abided the decision of the full court and did not participate in the appeal proceedings. Nor did Tourvest Holdings (Pty) Ltd (Tourvest), the third respondent, also an unsuccessful bidder, oppose the appeal. The appeal was fully argued by Big Five and Flemingo before a full court and judgment was reserved. However, before judgment was handed down, Big Five and Flemingo settled their dispute. Flemingo abandoned the Phatudi J judgment in its favour, and Big Five withdrew the review application. At the request of the parties, the full court made their settlement agreement an order of court. The terms of the settlement agreement and their interpretation lie at the heart of this appeal. The question that must be determined is whether the award in Big Five's favour stands and is binding, or is ACSA free to start the tender process anew, and is Tourvest entitled to bid again?

[3] ACSA took the view, after the settlement agreement was made an order of court, that as it was not a party to it, it was not bound. Phatudi J's order that the award to Big Five was unlawfully made thus stood and could not be given effect. ACSA contended that it was thus entitled to start the tender process again. Big Five accordingly sought an order from the Gauteng Division of the High Court, Pretoria, that ACSA was bound by the award it had made in 2009 and that it was obliged to conclude the written lease agreements anticipated (a pro forma lease agreement was included in the invitation to bid) with Big Five within 30 days of the order.

[4] Hughes J refused the application, holding that the order of Phatudi J was a 'public remedy' and could not be set aside by private parties; and that even though the full court had made the agreement between Big Five and Flemingo an order of court, she was not bound by that order because it was wrong, being 'at odds with the Constitution, the law and public policy'. It is against this order that Big Five appeals to this court with the leave of Hughes J.

The terms of the settlement agreement and the factual matrix

[5] The full court heard argument in the appeal against Phatudi J's order on 4 June 2014. It reserved judgment. A month before then, Big Five's attorneys advised ACSA that settlement negotiations between it and Flemingo were ongoing and that a draft of a settlement agreement would be sent to ACSA for signature. They advised ACSA that they wanted it to be a signatory to protect Flemingo from claims that ACSA might make for loss caused by the institution of the review proceedings by Flemingo. Mr Haroon Jeena, the Group Executive: Commercial, of ACSA, responded by email congratulating Mr Chris Harilaou, a director of Big Five, on achieving a settlement. Jeena followed this up on 2 June 2014 with an email stating that 'We are all on the same page'. Later in the day, however, Jeena advised Harilaou that the agreement could not be signed without Board approval and that the Board would not meet before the appeal hearing. Big Five accordingly proceeded with the appeal hearing on 4 June 2014.

[6] The settlement agreement between Big Five and Flemingo was concluded on 13 June 2014. It was forwarded to ACSA on 17 June 2014. Judgment in the matter had not yet been handed down. The parties recorded in the preamble that they had settled the litigation in respect of the interim interdict granted by the high court in December 2009 and the subsequent review application in which Phatudi J had set aside the award in May 2012, as well as the petition to this court in 2012 and the appeal hearing before the Gauteng Division.

[7] The salient terms of the agreement in so far as the review application was concerned are clauses:

3.1 '[Flemingo] abandons the order of Phatudi J granted on 17 May 2012 in the review application. Pursuant hereto and on signature hereof by [Flemingo] it will serve a notice of abandonment of this order in terms of Rule of Court 41(2). Without limiting the generality of the term "abandons" [Flemingo] in addition waives and abandons all right, title and interest in and to this order.'

. . .

3.3 '[Flemingo] hereby withdraws in its entirety the review application proceedings on the basis of and having the effect that these proceedings were never instituted and/or proceeded

with and will serve on signature hereof a notice of withdrawal reflecting therein that the matter is settled.'

. . .

3.8 'Upon signature of this agreement by the parties [Flemingo] acknowledges that ACSA is free to and can now implement the award of its tender . . . to [Big Five] without limitation or restriction and without any challenge thereto whatsoever by [Flemingo].'

. . .

6.4 'Insofar as is necessary [Big Five] and Flemingo do hereby consent to this Agreement being made an order of this Honourable Court.'

[8] On 19 June 2014, Flemingo filed notices in terms of Rule 41(2) formally abandoning the interdict and review judgments in their entirety. The day afterwards, 20 June, at the request of Big Five and Flemingo, the full court made the settlement agreement an order of court.

[9] Some seven months later, ACSA advised Big Five that, after taking legal advice and referring the matter to the ACSA Board, it had decided to start the tender proceedings afresh despite the order of the full court. Hence the application to court by Big Five to compel compliance by ACSA with the tender awarded in 2009.

[10] In the court a quo, ACSA and Tourvest resisted the application for an order that ACSA was bound by the award of the lease of the premises for duty free shops to Big Five, with effect from 20 June 2014, when the settlement agreement became an order of court, on the basis that they were not bound by that agreement, and that it was not open to private parties to abandon a judgment in rem. That was one of the reasons for the order made by Hughes J – a judgment that affects persons other than the litigants who have abandoned it cannot be set aside by that abandonment.

Was the settlement agreement binding on ACSA and Tourvest?

[11] On appeal, Big Five argues that it is of no consequence that the judgment of Phatudi J made a finding that the award of the tender was unlawful. Only Flemingo had sought the review and setting aside of the order. ACSA and Big Five had opposed Flemingo's review. Tourvest had not participated in the review or the appeal. Only Big Five had appealed against the decision. ACSA abided the decision

of the full court. The full court made the agreement of settlement an order of court. In the circumstances, Big Five argues that all the parties to the litigation before Phatudi J were bound by the full court order.

Public law judgments and judgments in rem

[12] ACSA and Tourvest argue, on the other hand, that a judgment in a public law matter, such as Phatudi J's judgment on the lawfulness of the exercise of public power (the award of a tender by an organ of state), cannot be set aside by private agreement between parties. It is for a court to determine the lawfulness of administrative action. Thus a private party cannot abandon a review judgment or settle matters pertaining to lawfulness where a court has held that the award was unlawful. Phatudi J's judgment setting aside the award stands until it is set aside by a court on appeal.

[13] ACSA relies in this regard on *Department of Transport & others v Tasima (Pty) Ltd* 2017 (2) SA 622 (CC) para 147 where the Constitutional Court said that the court is the sole arbiter of legality, and that it is not open to any party, 'private or public to annex this function. Our Constitution confers on the courts the role of arbiter of legality'. It argues that private parties cannot resuscitate an unlawful tender.

[14] ACSA and Tourvest both contend that a judgment granted in a review application has a public character – it is an objective determination of the validity of an impugned administrative act – independent of the parties who bring the action. The decision of the court on review operates against the public at large. It is thus argued to be a judgment in rem which cannot be abandoned by agreement between the parties, just as a decree of divorce cannot be abandoned by former spouses, or an order sequestrating a debtor cannot be abandoned by a creditor: third parties are affected by the orders. See *Ex parte Taljaard* 1975 (3) SA 106 (O) at 108C-109A. I shall approach the matter, as the parties did, on the assumption that the judgment of Phatudi J is one in rem.

A settlement agreement made an order of court

[15] ACSA and Tourvest contend that Flemingo's abandonment of Phatudi J's order had no legal effect as far as they are concerned. Only the parties to the agreement are bound. They argue that making the agreement of settlement, embodying the abandonment of the order and the withdrawal of the review, an order of the full court makes no difference. Tourvest contends that when a court makes a settlement an order of court it is concerned with the content of the agreement itself, and not the merits of the underlying dispute (*Fourie NO v Merchant Investors (Pty) Ltd & another* 2004 (3) SA 422 (C) at 424H-I). The court need do no more than satisfy itself that the agreement relates to the litigation in question.

[16] The principles governing the making of an agreement of settlement an order of court were recently restated by the Constitutional Court in *Eke v Parsons* 2016 (3) SA 37 (CC), paras 25 and 26. The court, pointing out that not everything agreed to by parties should be accepted by courts, said:

'The order can only be one that is competent and proper. A court must thus not be mechanical in its adoption of the terms of a settlement agreement. For an order to be competent and proper, it must, in the first place "relate directly or indirectly to an issue or *lis* between the parties'". Parties contracting outside of the context of litigation may not approach a court and ask that their agreement be made an order of court. . . .

Secondly, "the agreement must not be objectionable, that is, its terms must be capable, both from a legal and practical point of view, of being included in a court order". That means, its terms must accord with both the Constitution and the law. Also, they must not be at odds with public policy. Thirdly, the agreement must "hold some practical and legitimate advantage".' (Footnotes omitted.)

[17] The court making the agreement an order of court thus does not enter into the merits of the litigation: it must do no more than satisfy itself that the agreement relates to the litigation between the parties and that it is not contrary to policy or the law. The full court, in making the agreement between Group Five and Flemingo an order of court, so ACSA and Tourvest contend, did not make a finding that the Phatudi J order was wrong, or that it should be set aside. It did no more than endorse the ending of the lis between the parties.

[18] ACSA relies also on the decision of the House of Lords in *Jenkins v Robertson* (1867) LR 1 Sc & Div 117; (1867) 3 SLR 374 where a number of people who had contended for a public right of way settled their dispute and the agreement of settlement was made an order of the court. That matter became res judicata as between the litigants. When, later, different people contended for the same right of way, the court found that the settlement did not bind them as the court, in making the agreement an order, had exercised no judicial function. The court said that the application of the defence of res judicata implied that a judicial function had been exercised: where a court had done no more than sanction an agreement of settlement, it merely recorded the agreement between the parties.

[19] Similarly, in *Munster v Cox* (1885) 10 AC 680, the House of Lords held, where a third party had supported and even funded a suit for libel, but had not been party to the litigation himself, an order by consent to judgment did not bind him.

[20] Big Five does not take issue with the principles relied upon by ACSA and Tourvest in so far as the court's role in making an agreement an order of court is concerned, nor with the propositions in *Jenkins* and *Munster*. It points out, however, that *Jenkins* is to be distinguished on the basis that in the second suit, the parties claiming the right of way were not those who had been party to the earlier litigation and the agreement of settlement. And in *Munster*, the third party had not himself consented to judgment and could not thus be bound.

[21] Big Five argues that this matter is different from those in which third parties have not been party to a settlement agreement in respect of a judgment in rem and are thus not bound by it. The parties to the litigation before Phatudi J were Flemingo, which sought the review of the award, and Big Five and ACSA, which both opposed the application. ACSA chose to abide the outcome of the appeal. This meant that it was bound by the outcome. Where affected persons choose to abide by a decision on appeal they are bound by it: *Eden Village (Meadowbrook) (Pty) Ltd & another v Edwards & another* 1995 (4) SA 31 (A) at 48B-D and *MEC for Health, Kwazulu-Natal v Premier of KwaZulu-Natal: in re Minister of Health & others v Treatment Action Campaign & others* 2002 (5) 717 (CC) para 11.

[22] ACSA argues that since Phatudi J held that the award was unlawful, the full court order was unenforceable. It could therefore not give effect to the award as it would be in breach of its constitutional duty to uphold the rule of law. However, a court order incorporating a settlement agreement which possibly included a constitutionally invalid term is not necessarily rendered unlawful by reason of that fact alone. In *Gbenga-Oluwatoye v Reckitt Benckiser South Africa (Pty) Ltd & another* [2016] ZACC 33; 2016 (12) BCLR 1515 (CC) the Constitutional Court said (para 24):

'The public, and indeed our courts, have a powerful interest in enforcing agreements of this sort. . . . When parties settle an existing dispute in full and final settlement, none should be lightly released from an undertaking seriously and willingly embraced. This is particularly so if the agreement was, as here, for the benefit of the party seeking to escape the consequences of his own conduct. Even if the clause excluding access to courts were on its own invalid and unenforceable, the applicant must still fail. This is because he concluded an enforceable agreement that finally settled his dispute with his employer.'

The interpretation of the settlement agreement

[23] Big Five contends that the purpose of the agreement was to settle the dispute that had arisen before Phatudi J. The order endorsed the abandonment by Flemingo of the judgment and the withdrawal of the review proceedings. Had the agreement not been made an order of court, binding on ACSA, the abandonment and withdrawal would not, in themselves, have affected ACSA. Flemingo and Big Five, having settled the dispute, requested that it be made an order of court in order to bind ACSA, which had abided the outcome of the appeal. Accordingly, the dispute regarding the lawfulness of ACSA's award of the tender to Big Five was put to rest by the full court order, which had the effect of setting aside the judgment of Phatudi J.

[24] ACSA argues, however, that an examination of the agreement does not have the effect contended for by Big Five. First, it does not expressly state that the order of Phatudi J is set aside. It simply states that Flemingo abandons the order and waives and abandons all rights in the order; and that it withdraws the review proceedings in their entirety as if never instituted. Moreover, it is contended, the fact that the parties recorded that ACSA could implement the award, was no more than

the expression of a point of view. The merits of the judgment and order of Phatudi J were not considered by the full court that made the order. ACSA contended, therefore, that the judgment and order stood – it was not set aside on appeal. The full court intended to do no more than make a settlement an order of court. And that ACSA had agreed only to abide the outcome of the appeal, and not to abide by the terms of a settlement agreement.

[25] In my view, the agreement must be construed in the light of the circumstances attendant upon it – the factual matrix or context. This is now settled law and I do not propose to repeat the recent authorities that state that an agreement must be construed in context. The context here was that Flemingo and Big Five, amongst others, had made bids for the lease of the duty free shops at three international airports on the terms set out in ACSA's invitation to tender. ACSA awarded the tender to Big Five. One of the unsuccessful bidders, Flemingo, took the award on review. It argued that the award was unlawful. Phatudi J found that it was unlawful for reasons that may or may not be good. Big Five appealed against the order with the leave of this court. Before the appeal was heard, Flemingo and Big Five agreed that the appeal would not be prosecuted to finality but that Flemingo would abandon the order and withdraw the review proceedings – as if they had never happened.

[26] What was the purpose of the withdrawal and abandonment, coupled with the agreement of settlement, if not to set aside the order of Phatudi J? It could be none other than to agree that the award to Big Five by ACSA was to stand. There is no other purpose that the parties could have intended to achieve.

[27] The argument that the full court did not, independently of the parties, intend to set aside the Phatudi J order cannot be accepted. The court order was made to give effect to the agreement between Big Five and Flemingo. Any distinction between the parties' intention and that of the full court is thus obviously false. If one asks what the parties intended to achieve in context – the facts known to them, the reasons for the agreement, the clear statement of Flemingo that it withdrew the review application in its entirety and abandoned any right in the order – the only answer could be that the parties did not intend the Phatudi J order to stand. It was a necessary implication of

what they expressly stated. There is no other sensible construction of the agreement.

[28] It is not necessary to determine whether Hughes J in the court a quo was entitled to decide that the full court had erred in making the agreement of settlement an order of court. In my view it was not open to her to do so. She was bound by the doctrine of res judicata and her finding in relation to the doctrine of precedent was misplaced.

[29] Accordingly the appeal must be upheld. The following order is made:

1 The appeal is upheld with the costs, including those of two counsel.

2 The order of the Gauteng Division of the High Court is set aside and replaced with the following order:

'(a) It is declared that Airports Company South Africa Ltd (ACSA) is bound by its decision taken on 26 August 2009 to award to Big Five Duty Free (Pty) Ltd (Big Five) the right to operate Core Duty and VAT Free stores in the international departures and arrivals airside terminals at O R Tambo International Airport, Cape Town International Airport and King Shaka International Airport in terms of Bid Reference No CDF08.05/2009 on 26 August 2009.

(b) ACSA is directed to sign and implement the written agreement of lease with Big Five, in terms of the decision, within 30 days of this court's order.

(c) ACSA is ordered to pay Big Five's costs, including the costs of two counsel.'

C H Lewis

Judge of Appeal

APPEARANCES

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