THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Not Reportable

Case no: 765/2021

In the matter between:

G PHADZIRI & SONS (PTY) LTD **APPELLANT**

and

DO LIGHT TRANSPORT (PTY) LTD **FIRST RESPONDENT**

DEPARTMENT OF TRANSPORT,
LIMPOPO PROVINCE **SECOND RESPONDENT**

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

Bench: PETSE AP, MOCUMIE and MAKGOKA JJA and SALIE and SIWENDU AJJA

Heard: 10 November 2022

Delivered: 20 February 2023

Summary: Contract law – written agreement referring to annexures, but same not attached – whether such renders the agreement void for vagueness.

Tacit term – duration of agreement subject to occurrence of a specified event – whether tacit term can be read in to allow a party to terminate the agreement on reasonable notice.

ORDER

On appeal from: Limpopo Division of the High Court, Thohoyandou (Ledwaba AJ, sitting as a court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Makgoka JA (Petse AP, Mocumie JA and Salie and Siwendu AJJA concurring):

[1] The issue in this appeal is whether an agreement concluded between the appellant, the first respondent and the second respondent is: (a) void for vagueness; and (b) necessitates a tacit term to be read into it as to its duration. The Limpopo Division of the High Court, Thohoyandou (the high court) answered both questions in the negative, and made an order enforcing the agreement. Aggrieved by that order, the appellant appeals against the decision with the leave of the high court. The second respondent did not take part in the proceedings in the high court, and does not participate in this appeal.

[2] The facts which gave rise to the dispute are as follows. The appellant, Phadziri & Sons (Pty) Ltd (Phadziri), and the first respondent, Do Light Transport (Pty) Ltd (Do Light), are bus service companies offering public transport services in the Vhembe district of Limpopo. Phadziri is 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). Up until September 2010, Phadziri used its licences for public transport services on those routes. However, due to its aging bus fleet and other problems, Phadziri was unable to offer effective and reliable public transport services as required in terms of the licences.

[3] As a result, on 15 September 2010, Phadziri concluded a written agreement with Do Light (the bilateral agreement) in terms of which Do Light would, as a sub-contractor, render the public transport services in Phadziri's stead in terms of some of those licences. The duration of the bilateral agreement was five years, 'with a grace period of 3 (three) years'; thus, potentially totalling eight years. The bilateral agreement was subject to the approval of the Department, which subsequently disapproved it.

[4] Over a week later, 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'.

[5] In terms of the tripartite agreement, Phadziri undertook to: (i) allow Do Light to operate on the affected routes in terms of an agreed timetable, or as amended by agreement between the Department and Do Light; (ii) cede the licences pertaining to the affected routes for the duration of the agreement; and (iii) provide Do Light with the necessary equipment required to enable it to operate on the affected routes. Do Light's obligations included, among other things, to take over the affected routes and offer the required transportation services, as well as ancillary operational issues. For its part, the Department undertook to pay the subsidy claims directly to Phadziri and Do Light in respect of the areas operated by the parties, respectively.

[6] 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, and pointed out that the tripartite agreement would only terminate upon the implementation by the Department of the integrated public transport services. Efforts to resolve the impasse between the parties, including interventions by the Department, failed to bear fruit.

[7] 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 granted an order declaring that the tripartite agreement: (a) was valid and enforceable until the introduction of the integrated public transport services by the Department, or until it was lawfully terminated; and (b) had superseded the bilateral agreement. In coming to that conclusion, the high court rejected the thrust of Phadziri's two-pronged submission, namely that the tripartite agreement was void for vagueness, alternatively that a tacit term should be read into it as to its duration to remedy the perceived vagueness.

[8] In this Court, Phadziri persisted with these submissions. 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.

[9] Annexure 1 is referred to in clause 3.1 of the tripartite agreement under Phadziri's obligations. The clause provides:

'To allow [Do Light] to operate from Vleifontein and Maila to Makhado (Louis Trichardt) in terms of the timetable as attached as annexure 1, or as amended by agreement between the Department and Do Light.'

Annexure 3 appears in clause 4.8[1] of the tripartite agreement under Do Light's obligations, and it reads as follows:

'Cash journey tickets will be sold to passengers on the affected routes as per the fare tables as attached in . . . annexure 3, or as agreed to.'

[10] These two annexures clearly refer to a timetable in terms of which Do Light would operate its busses on the affected routes. 'Timetable' as defined in s 1 of the National Land Transport Act 5 of 2009 (the Act) means:

[1] Clause 4.5 refers to annexure 2, which in turn deals with the rates at which passengers would purchase tickets from Do Light. There does not seem to be any dispute around this.

'[A] published document informing passengers of headways (intervals between departures or the passing of vehicles), or times when and places where public transport services are available, indicating at least origin and destination points and significant intermediate locations along the route.'

[11] The question to be determined is whether the omission of the annexures renders the agreement not capable of implementation. To answer that question, the clauses in which the annexures are mentioned should not be read in isolation, but as part of the whole agreement. On a plain reading of the tripartite agreement, what was to be ceded were the licences, which reflected the affected routes, identified in clause 3.1 as 'Vleifontein and Maila to Makhado (Louis Trichardt)'. Clause 3.2 obliged Phadziri to 'cede the permits/operating licences pertaining to the affected routes' for the duration of the agreement. The effect of Phadziri ceding the licences in terms of clause 3.2 to Do Light was that the latter would step into the shoes of Phadziri and transport passengers in terms of the licences, as Phadziri had done before the conclusion of the tripartite agreement.

[12] It is trite that a provision in a contract must be interpreted not only in the context of the contract as a whole, but also to give it a commercially sensible meaning.[2] The principle requires a court to construe a contract in context – within the factual matrix in which the parties operated.[3] Recently, in *University of Johannesburg v Auckland Park Theological Seminary*,[4] the Constitutional Court emphasised that a court interpreting a contract has to, from the onset, consider the contract's factual matrix, its purpose, the circumstances leading up to its conclusion, and the knowledge at the time of those who negotiated and produced the contract.[5]

[13] In the present case, before the tripartite agreement was concluded, Phadziri and Do Light were competitors in the public transportation services sector. Phadziri was at the risk of losing the licences issued to it by the Department, because of its inability to deliver effective services. To avoid that eventuality, Phadziri approached

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[2] *Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* [2009] ZASCA 154; 2010 (2) SA 498 (SCA); [2010] 2 All SA 195 (SCA) (*Germiston Municipal Retirement Fund*) para 13.
[3] Ibid.
[4] *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 66.
[5] Ibid.

Do Light to come to its rescue as a sub-contractor. It follows that it was in Phadziri's interest that the agreement was implementable.

[14] Thus, when the tripartite agreement was concluded, Phadziri must have had a timetable used in conjunction with its licences. Accordingly, it knew of the 'origin and destination points and significant intermediate locations along the route'. It is therefore contrived for it to now suggest that the routes were not known, because the timetable was not attached to the tripartite agreement. 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. As to the purpose of the tripartite agreement, apart from the commercial efficacy it afforded to Phadziri, its overall purpose was to avoid the collapse of public road transportation services on the affected routes.

[15] Furthermore, our law inclines to preserving, instead of destroying, a contract which the parties seriously entered into and considered capable of implementation.[6] In *Hoffmann and Carvalho v Minister of Agriculture*,[7] the court observed:

'. . . [T]he Courts are very willing to treat a contract as having been concluded if the parties think they have made a binding contract (as they undoubtedly did in this case). Where parties intend to conclude a contract, think they have concluded a contract, and proceed to act as if the contract were binding and complete, I think the Court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all that he has intended; except, of course, where parties have not observed statutory formalities required in certain contracts, such as in a contract for the sale of fixed property.'[8]

[16] This approach was also emphasised in *Soteriou v Retco Poyntons (Pty) Ltd*,[9] where it was remarked that courts are 'reluctant to hold void for uncertainty any provision that was intended to have legal effect'. With reference to English cases, this Court said that: '. . . [t]he problem for a Court of construction must always be so to balance matters that, without the violation of essential principles, the dealings of men

[6] *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (A) at 579F-H.
[7] *Hoffmann and Carvalho v Minister of Agriculture* 1947 (2) SA 855 (T) (*Hoffmann*).
[8] Ibid at 860.
[9] *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A).

may as far as possible be treated as effective, and that the law may not incur the reproach of being a destroyer of bargains'.[10]

[17] There is also authority for the proposition that the conduct of the parties in implementing an agreement may provide clear evidence as to how reasonable business persons construed a disputed provision in a contract. This Court explained this in *Comwezi Security Services v Cape Empowerment Trust*[11] (*Comwezi*) thus:

'In the past, where there was perceived ambiguity in a contract, the courts held that the subsequent conduct of the parties in implementing their agreement was a factor that could be taken into account in preferring one interpretation to another. Now that regard is had to all relevant context, irrespective of whether there is a perceived ambiguity, there is no reason not to look at the conduct of the parties in implementing the agreement. Where it is clear that they have both taken the same approach to its implementation, and hence the meaning of the provision in dispute, their conduct provides clear evidence of how reasonable business people situated as they were and knowing what they knew, would construe the disputed provision.'[12] (Footnotes omitted.)

[18] In *Capitec Bank v Coral Lagoon Investments*[13] (*Coral Lagoon*), this Court cautioned that the passage in *Comwezi* referred to above, should not be understood 'as an invitation to harvest evidence, on an indiscriminate basis, of what the parties did after they concluded their agreement',[14] and pointed out that such evidence 'must be relevant to an objective determination of the meaning of the words used in the contract'.[15]

[19] The upshot of these authorities is that the tripartite agreement should be preserved and enforced. I have no doubt that the parties seriously entered into the tripartite agreement and considered it capable of implementation, and, in fact, implemented it. I also consider, on the authority of *Comwezi* and *Coral Lagoon*, that the evidence of how the parties conducted themselves in implementing the tripartite

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[10] Ibid at 931G-H.
[11] *Comwezi Security Services (Pty) Ltd and Another v Cape Empowerment Trust Ltd* [2012] ZASCA 126 (SCA).
[12] Ibid para 15.
[13] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* [2021] ZASCA 99; [2021] 3 All SA 647 (SCA); 2022 (1) SA 100 (SCA).
[14] Ibid para 48.
[15] Ibid.

agreement is relevant to the determination of how they understood their obligations in terms thereof, despite the missing annexures.

[20] Save for the timetable in respect of route 7, which was rectified per the order of 18 May 2020 at the instance of Phadziri, the parties had a meeting of the minds as to the routes in respect of which licences had to be ceded. Phadziri relied on this rectification to support its assertion that the routes could not be identified. I disagree. In my view, it points in the opposite direction, when one considers that a total of eight licences were ceded, and it was only in respect of one that clarity had to be sought from the court. What is more, if Phadziri is correct in its stance, it would have approached the court to rectify the routes in respect of all the licences. The fact that it sought rectification in respect of only one, erodes its assertion. As mentioned already, the tripartite agreement was concluded in September 2010, and for close to eight years thereafter, it was implemented without any issues.

[21] In my judgment, this is a case where 'the Court ought rather to try to help the parties towards what they both intended rather than obstruct them by legal subtleties and assist one of the parties to escape the consequences of all that he has done and all that he has intended'.[16] Clauses 3.1 and 4.8 must be read so as to give them, and the tripartite agreement, a commercially sensible meaning.[17]

[22] For all of the above reasons, and on the basis of the authorities referred to, I conclude that the high court was correct in holding that the tripartite agreement is not void for vagueness.

[23] Turning now to whether a tacit term should be read into the agreement as to its duration, I consider first the approach adopted in *Transnet Ltd v Rubenstein*[18] (*Rubenstein*). There, this Court considered an agreement with a termination clause similar to the one in the present case. The respondent was given the exclusive right to operate a jewellery boutique on one of the businesses of the appellant, the Blue Train. The contract specifically provided for termination on the privatisation of the Blue

[16] *Hoffmann* at 860.
[17] *Germiston Municipality Retirement Fund* fn 9 above, para 13.
[18] *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA); [2005] 3 All SA 425 (SCA).

Train. It later became apparent that the privatisation was not going to happen. The appellant argued that it was necessary to read into the contract a term that if privatisation did not occur, the contract would be terminable on reasonable notice. This, the respondent submitted, was to avoid locking the parties in an indefinite contract, which was clearly never their intention.

[24] This Court explained that when a contract was terminable upon the happening of an uncertain future event, in the absence of evidence as to what the parties intended, it was not possible to impute into such a contract a term which was in conflict with the parties' express agreement as to its duration. This followed from the principle that a tacit term may not be imputed into a contract if it would be in conflict with its express provisions.[19] On the facts, it was found that there was thus no common underlying supposition or assumption as to the termination of the contract, should privatisation not occur. Accordingly, the appeal was dismissed.

[25] In the present case, the tacit term which Phadziri maintains should be read into the tripartite agreement is that its duration was terminable on reasonable notice after eight years. Initially, Phadziri predicated this on its stance that the tripartite agreement was based on the bilateral agreement, which, as mentioned already, had a duration of eight years. In the high court, Phadziri abandoned this stance, correctly in my view, and accepted that the tripartite agreement had superseded the bilateral agreement. The significance of this is that the premise of the initial argument (that the tripartite agreement was based on the bilateral agreement) was no longer open to Phadziri.

[26] However, that did not deter Phadziri. In this Court, it had a further string to its bow. As mentioned already, in *Auckland Park Theological Seminary* it was held that in interpreting a contract, reliance may be placed on the evidence of the circumstances leading to its conclusion, and the context in which it was concluded. Relying on that principle, Phadziri held up: (a) the provisions of the National Land Transport Act 5 of 2009 (the Act); and (b) government resolutions on the implementation of the integrated public transport system, as the contextual setting within which the tripartite agreement was concluded, to press for a tacit term to be read in thereto.

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[19] Ibid paras 13, 18 and 19.

[27] As to (a), Phadziri's argument was this. Sections 34 and 35 of the Act provide for five-year National Strategic Frameworks and five-year Provincial Strategic Frameworks, respectively, to be put in place with a view to preparing integrated public transport plans. The plans must be developed in terms of s 36 of the Act with a view to establish a public transport system. Section 40 of the Act obliges provinces to take steps as soon as possible after the commencement of the Act to integrate contracted bus services in their areas into the larger public transport system.

[28] According to Phadziri, these provisions envisaged that an integrated public transport system could be put in place not long after the coming into force of the Act in 2009. This would be relatively shortly before the tripartite agreement was concluded in September 2010. This, it submitted, 'created an impression which all the persons in the position of the three parties would have been aware of that the integrated transport services might be implemented not long after a period of five years' if all went smoothly, with three additional years, with delays.

[29] It was then submitted that the officious bystander[20] would have detected that when the parties opted for the duration linked to the implementation of the integrated public transport system, they had failed to discuss the possibility of long and repeated delays, as the implementation required co-operation of all three tiers of government. According to Phadziri, it is not unrealistic that the officious bystander would have foreseen delays, and suggested a tacit clause to the effect that the duration of the tripartite agreement would be terminable on reasonable notice by any of the parties after eight years.

[30] I do not think that these provisions support the tacit term agitated for by Phadziri. It has simply failed to furnish evidence that the minds of those who represented the parties at the conclusion of the agreement were directed to these provisions. In the negotiations leading to the conclusion of the agreement, Phadziri was represented by Mr Tshikume Phadziri. But he did not depose to any affidavit to

[20] The so-called 'officious bystander' test is often applied, which originates from English law and has found application in our law. The essence of which is that were an officious bystander to suggest some express provision for a term in their agreement, it would be one which the parties would readily agree was their intention.

support Phadziri's submissions. Instead, the answering affidavit, which is silent on the tacit term, was deposed to by Mr Khangweni Patrick Phadziri. When the issue was first raised in Phadziri's supplementary answering affidavit, the deponent was its attorney, Mr André Naudé. None of the deponents was part of those negotiations. The result is that there is no evidence that the parties had meant for the duration of the tripartite agreement to be anything other than what it expressly says.

[31] As to (b), Phadziri referred to the resolutions taken at a meeting on 6 May 2015, held between the Minister of Transport (the Minister) and provincial members of the executive committee (MECs) responsible for transport. The resolutions are summarised in a letter dated 1 June 2015 from the Minister to the relevant MEC in Limpopo. However, a simple regard to those resolutions shows that they have no bearing whatsoever on the negotiations which preceded the conclusion of the tripartite agreement. The resolutions refer in general terms to the government's policy of introducing an integrated public transport system throughout the country and the provinces' role in it. They do not specifically refer to any area, like the Vhembe district, where the affected routes are. There is also no suggestion in any of the resolutions that the integrated public transport system in any given province or district would be implemented within five years after the Act had come into force. They therefore shed no light on the intention of the parties.

[32] Thus, as was the case in *Rubenstein*, in the absence of evidence as to what the parties intended, the express duration term of the tripartite agreement should be preserved and honoured. The term which Phadziri seeks to impute into the agreement is in conflict with its express term as to its duration. It follows that the tripartite agreement is enforceable until the implementation of the integrated public transport services by the Department. Although there has been a delay in implementation, unlike in *Rubenstein*, there is no evidence that the Department has abandoned the project.

[33] In all the circumstances, the appeal must fail. As to costs, Do Light employed, and sought costs of, three counsel. However, I do not think that this matter warranted the employment of more than one counsel.

[34] In the result, the following order is made:

The appeal is dismissed with costs.

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T M MAKGOKA

JUDGE OF APPEAL

Appearances

For appellant:	J L van der Merwe SC (with him I M Hlalethoa)
Instructed by:	Coxwell, Steyn, Vise and Naudé, Thohoyandou
	Horn & Van Rensburg Attorneys, Bloemfontein
For first respondent:	U B Makuya (with him M C Netshiendeulu and L M Magau)
Instructed by:	Erasmus Motaung Incorporated, Roodepoort
	Phatshoane Henney Attorneys, Bloemfontein