

Is an agreement referring to unannexed annexures void for vagueness?

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The courts have held that at times when agreements are being interpreted, the proper meaning of words may initially appear to be ambiguous, ill-defined or otherwise vague, however when such words are considered within their context, against the background to which transaction applies or even when linked by relevant admissible evidence, the proper meaning of the words often emerges.

For the purposes of this article, the question answered by the Supreme Court of Appeal of South Africa (“SCA”) was whether the omission of the annexures to the agreement renders such agreement incapable of implementation.

In the case of *Gandhi v SMP Properties (Pty) Ltd* 1983 (1) SA 1154 (D), the court observed that *“It is notorious that the confusion experienced by, or the host of possible alternatives foreseen by, a party seeking to resile from an agreement can at times be exaggerated and unreal”*.

A recent SCA decision in *G Phadziri & Sons (Pty) Ltd v Do Light Transport (Pty) Ltd and Another* (765/2021) [2023] ZASCA 16 (20 February 2023) considered the question in the title of this article.

In this case, 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 (“**LDT**”). Around September 2010, Phadziri was unable to offer effective and reliable public transport services as required in terms of the licences due to its aging bus fleet and other problems.

As a result, on or about 23 September 2010, Phadziri, Do Light and the LDT concluded a tripartite agreement in terms of which, in summary, Do Light would be Phadziri’s sub-contractor for the performance of road public passenger services in certain routes and Phadziri ceded the licences pertaining to the affected routes for the duration of the agreement to Do Light (the “**Tripartite Agreement**”).

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, the Tripartite Agreement was implemented without any problems.

However, towards the end of September 2018, Phadziri asserted that the Tripartite Agreement had terminated on the basis that the agreement was void for vagueness, alternatively that a tacit term should be read into it as to its duration to remedy the perceived vagueness.

In support of its contentions, Phadziri relied on the fact that two documents referred to as annexures in the Tripartite Agreement were not attached to the agreement.

These annexures refer to a timetable in terms of which Do Light would operate its busses on the affected routes. Therefore, because of this omission, Phadziri asserted that the routes which it had ceded to Do Light in terms of the Tripartite Agreement could not be identified.

Do Light rejected Phadziri’s assertion pointing out that the Tripartite Agreement would only terminate upon the implementation by the LDT of the integrated public transport services.

The High Court as the court of first instance rejected Phadziri's two-pronged submissions and declared the Tripartite Agreement was valid and enforceable until the introduction of the integrated public transport services by the LDT, or until it was lawfully terminated. In appeal in the SCA, Phadziri persisted with these submissions.

The SCA acknowledged that 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. This principle requires a court to construe a contract in context, within the factual matrix in which the parties operated when the contract was concluded.

The SCA pointed out that clauses in an agreement in which the annexures are mentioned should not be read in isolation, but as part of the whole agreement.

Furthermore, in *Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992 (1) SA 566 (A), the court held "*our law inclines to preserving, instead of destroying, a contract which the parties seriously entered into and considered capable of implementation*".

Considering the facts of this case, the SCA held when the Tripartite Agreement was concluded, Phadziri must have had a timetable used in conjunction with its licences and therefore knew the origin and destination points of the routes when the licenses were ceded to Do Light.

It is now contrived for Phadziri to suggest that the routes were not known, because the timetable was not attached to the Tripartite Agreement. It is undeniable that Do Light came to the rescue as a sub-contractor (of Phadziri, being unable to deliver the affected services), to avoid the collapse of public road transportation services on the affected routes.

The SCA explained there is established authority for the subsequent conduct of the parties in implementing an agreement to be a factor to be considered to provide clear evidence in preferring one interpretation to another.

In answering the question in the heading of this article, the SCA held that the Tripartite Agreement should be preserved and enforced. There was no doubt that the parties entered into the Tripartite Agreement considering it capable of implementation and having regard to the relevant context, irrespective of whether there is a perceived ambiguity or not.

The SCA held the manner in which the parties to the Tripartite Agreement conducted themselves in implementing the agreement was relevant to the determination of whether the parties understood their obligations despite the missing annexures.

The SCA concluded that the court of first instance was correct in holding that the Tripartite Agreement is not void for vagueness. The SCA also rejected Phadziri contention that a tacit term should be read into the Tripartite Agreement that its duration was terminable on reasonable notice after eight years, a term that would be in conflict with the parties' express agreement as to its duration.

Notwithstanding the above, it is preferable for parties, prior to concluding an agreement, to ensure that all information and provisions governing such an agreement are actually included and/or annexured in such agreement prior to its signature.



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