

Corporate & Commercial ALERT

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INCORPORATING
KIETI LAW LLP, KENYA

IN THIS ISSUE

If you forgot, then it was not that important: Missing annexures and tacit terms in contracts

It is no surprise that in the fast-paced commercial world parties may miss an annexure or omit a term when concluding and executing contracts. This raises the question of how a court will interpret a contract where a party suddenly alleges that the missing annexure renders it uncertain and void, or that the parties intended for a tacit term to be imputed into it? These questions were answered in the Supreme Court of Appeal (SCA) judgment of *G Phadziri & Sons Proprietary Limited v Do Light Transport Proprietary Limited and Another* 20 February 2023 (765/2021).



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The facts

Phadziri & Sons Proprietary Limited (Phadziri) subcontracted the provision of bus services along certain routes to its competitor Do Light Transport Proprietary Limited (Do Light). Due to practical difficulties, Phadziri was unable to provide the services itself, as required by the licenses issued to it by the Limpopo Department of Transport (department). Annexure 1 and 3 to the agreement constituted a “timetable” that identified the fares and the routes that Do Light would provide bus services for. The agreement also stipulated that it would “*terminate when integrated public transport services are introduced for the Vhembe District of the Limpopo Province*” (integrated services). After implementing the agreement for eight years without issue, Phadziri abruptly claimed that the agreement had terminated, and the licenses ceded back to it. Do Light disagreed, since

the integrated services had not yet been implemented. In court, Phadziri claimed that (i) the agreement was void for vagueness, as Annexures 1 and 3 were never attached to it; and alternatively (ii) a tacit term should be read into the agreement to the effect that the parties could cancel the agreement after eight years in the event that the integrated services were not implemented.

As the foundation of its judgments, the SCA reiterated that contracts must be given a commercially sensible meaning and interpreted in the context of the contract as a whole. The context comprises the factual matrix in which the parties operated, the contract’s purpose, the circumstances leading up to its conclusion, and the knowledge of the parties when the contract was negotiated.



2023 RESULTS

Chambers Global 2021 - 2023
ranked our Corporate & Commercial practice in
Band 1: Corporate/M&A and in
Band 2 Capital Markets: Debt and Capital
Markets: Equity.

Ian Hayes ranked by
Chambers Global 2022 - 2023
in **Band 1:** Corporate/M&A.

David Pinnock ranked by
Chambers Global 2022 - 2023 in **Band 1:**
Corporate/M&A: Private Equity.

Peter Hesseling ranked by
Chambers Global 2022 - 2023
in **Band 2:** Corporate/M&A and in
Band 3 Capital Markets: Equity for **2023**.

Willem Jacobs ranked by
Chambers Global 2022 - 2023 in **Band 2:**
Corporate/M&A and in **Band 3:**
Corporate/M&A: Private Equity.

Sammy Ndolo ranked by
Chambers Global 2021 - 2023 in
Band 4: Corporate/M&A.

David Thompson ranked by
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The missing annexures

The law favours the preservation of contracts entered into with a serious intention by the parties and that are capable of being implemented. The agreement purported to prevent the public road transportation services on those routes from collapsing. Undoubtedly, given Phadziri's need to operate the services, and the department's desire to prevent the collapse of public transportation services, there was a serious intention by the parties to enter into the agreement. The agreement was also clearly capable of implementation, since the parties did exactly that for eight years.

Another answer to the argument of vagueness was to consider the subsequent conduct of the parties as evidence of "*how reasonable business persons construed a disputed provision in a contract*". The consideration of this evidence, however, "*must be relevant to an objective determination of the meaning of the words used in the contract*". The subsequent conduct of the parties in implementing the agreement demonstrated that they mutually understood their obligations even without the missing annexures.

The tacit term

When there is no evidence that the parties intended a contract to terminate at a time other than the one expressly stipulated, then a tacit term that conflicts with this express intention on duration cannot be read into the contract. Consequently,

Phadziri needed to produce evidence that the parties intended for a tacit term to allow the cancellation of the agreement before the expressly stated termination date. Phadziri relied on the National Land Transport Act 5 of 2009 (Act) and government resolutions on the implementation of the integrated services that existed when the agreement was concluded. Phadziri argued that this context created an impression that the integrated services would be implemented after five years (eight years if there were delays). Therefore, Phadziri claimed, an officious bystander would have realised that the duration of the agreement was linked to an event that might not occur, and would have suggested to the parties that the agreement be terminable on reasonable notice after eight years.

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However, the SCA disagreed, citing a lack of evidence as to the parties' intentions. The representative of Phadziri who negotiated the agreement did not depose to any affidavit in the proceedings, and thus his intentions during the negotiation and conclusion of the contract were unknown. Moreover, the government resolutions did not specify the area where the integrated services would be implemented, nor did they claim that these services would be implemented within five years after the Act came into operation. Since there was no evidence of the parties' intention at the time the agreement was concluded, the express terms of the agreement had to stand. Despite delays, there was no evidence that department's project was abandoned, and therefore the agreement would be enforceable until it was implemented.

The lesson

By using the context of a contract, courts have more freedom to lean on the factual matrix surrounding its conclusion, and the subsequent conduct of the parties in implementing it. A party will not convince a court that a contract is vague to the point of voidness where the parties seriously entered into that agreement for a clear purpose, understood their obligations, and had implemented the contract without issue since its conclusion.

Furthermore, a "*forgotten*" tacit term that conflicts with an express term cannot be read into a contract unless there is a solid foundation of evidence demonstrating that, at the time the contract was concluded, the parties intended that term to apply. A tacit term must have been within the contemplation of the parties when the contract was concluded, therefore it is important to lead evidence of the parties' intentions and the context at that time.

Brian Jennings and Keagan Hyslop

The graphic features a dark blue background with a subtle pattern of light blue lines. At the top left, the 'The LEGAL 500' logo is displayed in white, with 'The' in a small font above 'LEGAL' and '500' in a large, bold font. To the right of the logo, the text '2022 RESULTS' is written in a large, bold, white sans-serif font. Below the logo, the text 'EMEA' is written in a smaller, bold, white sans-serif font. The main body of the graphic contains four paragraphs of white text, each preceded by a small white icon of a document with a checkmark. The text describes the firm's performance in the 2022 Legal 500 EMEA rankings, including its Tier 1 ranking for Corporate & Commercial practice, its recommendation for Willem Jacobs and David Pinnock as leading individuals, its inclusion of Ian Hayes in the Hall of Fame, its recommendation for Peter Hesseling, Rachel Kelly, Vivien Chaplin, Roux van der Merwe, Roelof Bonnet, Brian Jennings, and David Thompson, and its recommendation of Justine Krige as a next generation lawyer.

The LEGAL 500
EMEA

The Legal 500 EMEA 2022 recommended our **Corporate & Commercial practice** in **Tier 1** for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Willem Jacobs** and **David Pinnock** as a leading individuals for commercial, corporate/M&A.

The Legal 500 EMEA 2022 included **Ian Hayes** in the 'Hall of Fame' for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Peter Hesseling, Rachel Kelly, Vivien Chaplin, Roux van der Merwe, Roelof Bonnet, Brian Jennings** and **David Thompson** for commercial, corporate/M&A.

The Legal 500 EMEA 2022 recommended **Justine Krige** as a next generation lawyer for corporate, commercial/M&A.

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BBBEE STATUS: LEVEL ONE CONTRIBUTOR

Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

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