IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~/NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~/NO
(3) REVISED NO

DATE: 31 AUGUST 2022

SIGNATURE: .....

Case No. 2022-012044

In the matter between:

PUTCO (PTY) LTD	FIRST APPLICANT
And	
HEAD OF DEPARTMENT OF THE GAUTENG DEPARTMENT OF ROADS AND TRANSPORT	FIRST RESPONDENT
MEMBER OF THE EXECUTIVE COUNCIL OF GAUTENG FOR ROADS AND TRANSPORT	SECOND RESPONDENT
MINISTER OF TRANSPORT	THIRD RESPONDENT

JUDGMENT

MILLAR J

1. This is an urgent application brought by the applicant ("Putco") against the first and second respondents ("Gauteng Transport") to compel performance by payment of transport subsidies which it contends are due.

2. It is not in issue that there is an operable agreement between Putco and Gauteng Transport in terms whereof Putco provides passenger bus services in designated areas and for which Gauteng Transport pays it a subsidy. Broadly speaking the agreement provides for payment to be made in two parts – a base subsidy and an annual escalation.

3. There is no dispute regarding payment of the base subsidy – it is a dispute about the annual escalation that brings the parties before the court.

4. There were three agreements, described as IC48/97, IC51/97, and IC52/97 respectively, entered into at the same time. All the agreements contain the same terms and conditions although each relates to the provision of bus passenger services to different areas and at different rates.

5. This is not in issue. Each provided for the calculation of the annual escalation of the subsidy according to a formula – the same formula. It is the application of this formula and the calculation of the subsidies due on each of the agreements that is in dispute.

6. Putco argues that that the agreements, which are in writing and were entered into in 1997 are extant and have been extended periodically as provided for in the agreements. There have been no less than 76 occasions since 1997 that the agreements have been extended.

7. Gauteng Transport has periodically disputed the basis upon which the subsidy is to be calculated and paid and has compelled Putco on each occasion to approach the Court for an order enforcing the contractual obligations.

8. Over time the disputes have been ventilated in Court and on each occasion the grounds of dispute considered and dismissed. The most recent dispute[1] resulted in a judgment delivered by Prinsloo J[2] delivered on 31 March 2016 in which it was held:

> *"[60] Consequently, despite the demise of clause 10.3E, a general reading of clause 21 of the Second Addendum demonstrates, with particular reference to clause 21.2, which introduced new clauses 10.3A to 10.3D, that the "DORA cap" did not extend, in terms of the agreement, the Second Addendum, beyond the financial year 2010/2011.*
> *After that financial year, the contracting parties would then revert to clause 10.3 of the Interim Contract (amended by clause 21.1 of the Second Addendum as illustrated) which provided, post amendment, that "the Employer shall adjust the Contract Rate at least once a year, with effect from 1 April, in accordance with the formula set out below.*
>
> *That is the formula (which was not amended) contemplated in clause 10.3 of the Interim Contract, on which the calculation of the plaintiff's claims is based."*

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[1] The parties have litigated against each other on other issues, most recently in regard to a tender process - see Putco (Pty) Ltd v MEC for Roads and Transport, Gauteng and Others – an unreported judgment under case no 49674/2021 handed down on 11 April 2022 In the Gauteng Division Johannesburg.
[2] Putco Limited v Gauteng MEC for Roads and Transport and Another (20468/2014) - unreported

9. The first leg of the argument for the respondents is that the judgment handed down on 31 March 2016 is not a judgment *in rem* and ought not for that reason to stand as dispositive of the dispute regarding the calculation of the subsidy in accordance with the formula set out in clause 10.3.

10. The second leg is that in consequence of an offer made in a letter of 28 January 2022, the applicant entered into unwritten tacit contracts – the terms of which were identical to those of the original contracts entered into in 1997 as amended in 2009, save that clause 10.3 would fix the amount of the annual escalation, not in accordance with the formula but rather in accordance with the amount determined in accordance with the allocation to the Gauteng Province of its equitable share of revenue and supplementary revenue as provided for in the Division of Revenue Act[3] (DORA).It was argued that clause 10.3 which has been applied for the last 25 years falls fouls of the Constitution, the Public Finance Management Act[4] (PFMA) and DORA.

11. The respondents also brought a conditional counterclaim for a declaratory order that clause 10.3 must provide for annual escalations in accordance with DORA alternative formulations were proposed - if the respondent's arguments on the two-basis contended above did not find favour.

12. In other words, the respondents sought to re-argue the enforceability of clause 10.3 and in the alternative, that the true and extant agreement between the parties, at least from April 2020, was a tacit one that provided for annual escalations calculated in accordance with DORA.

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[3] 6 of 2011
[4] 1 of 1999

13. Firstly, as to the judgment handed down on 31 March 2016. Is the judgment *in rem* or put differently, is it open to the applicant to plead res judicata in the present matter?

14. In Mulaudzi v Old Mutual Life Assurance Co (South Africa) LTD and Others[5] the requirements for such a defence to succeed were succinctly expressed as follows:

> *"[38] The requirements for the defence of res judicata are that there must be: (i) concluded litigation; (ii) between the same parties; (iii) in relation to the same thing; and (iv) based on the same cause of action."*

15. By all accounts, all the requirements for the defence of res judicata have been met -the parties were the same as in the present instance, the subject matter of the litigation was the interpretation and enforceability of the same clause in the contracts and the applicability of both the PFMA[6] and DORA with regards to the calculation of the annual subsidy. Furthermore, the parties acquiesced to that judgment for at least a further 3 years until the 2020 renewal. The argument that the judgment of 31 March 2016 is not *in rem* must fail.

16. Secondly, was there a tacit contract? For consideration of this issue, a useful starting point is the content of the letter of 28 January 2020. The letter read as follows:

> "1. *We make reference to the above subject.*
>
> 2. *Please take notice that your contracts with reference number: IC 48\97, IC51\97 and IC 52\97 have been extended for a further period of thirty-six (36)*

[5] 2017 (6) SA 90 (SCA) at 107E-F
[6] Dealt with pertinently and found not to apply by Prinsloo J in para

months. This is whilst the Department proceeds with the process of publishing new bus contracts.

3. *Please take further notice that if the process above is completed prior to the expiry of the extended period, this extended period shall be terminated. A 60 days' notice will be provided to you in advance informing you of the discontinued extension.*

4. *Further to the extension above, the Department will appoint Supervisory Monitoring Firms in due course to monitor all subsidized bus contracts using an electronic monitoring system.*

5. *The annual subsidy Allocations and the Contract Rates of the Interim Contracts for the extended period from the 1st April 2020 to 31 March 2023 shall be escalated on the basis of the formula set out in clause 10.3 on page 8 of the Interim Contract concluded with National Department of Transport in 1997.*

6. *The budget allocation including the escalation percentage is subject to the amount that the National Department of transport will make available on the annual basis.*

7. *Should you agree with the contents of the document please accept in writing within three days of receipt."*

14. During argument I asked counsel for the respondents whether the letter should be construed indivisibly. The answer was unequivocally (and correctly in my view) in the negative – the invitation to extend the extant contract as set out in paragraph 2 was to be considered entirely separately from the 'terms' of the tacit contract set out in paragraphs 5 and 6 which the respondents sought to introduce in the creation of 'new tacit'[7] agreements between themselves and the applicant.

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[7] "*...in deciding whether a tacit contract, or a tacit term, has been proved the court is undertaking an inquiry that involves three stages instead of the usual two. In reasoning by inference in the normal civil case the*

15. In the present matter the respondents contend that the letter of 27 January 2020 together with the subsequent conduct of the parties – evidenced by the payment of the annual escalations, establish tacit contracts – contracts that, so it was argued were identical in all respects to the extant written contracts save in respect of clause 10.3 and the formula for the calculation of the annual escalation set out therein.

16. Insofar as there was any conduct on the part of the applicants in regard to the content of the letter of 28 January 2020 and the invitation in paragraphs 4 and 5 of it, in a letter of 13 February 2020 they accepted the extension of the existing contracts on the terms contained in those contracts but specifically refused to accept any invitation to amend the terms – drawing to the respondents attention that the extant contracts could not be amended without their agreement. Furthermore, they did not within 3 days or at any stage thereafter convey any acceptance of the proposed new formula as provided for in paragraph 7 of the letter.

17. There was no response to the letter of 13 February 2020 and the parties continued with the renewal as they had done for prior periods, and at least after the judgment on 30 March 2016.

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first stage is to decide on the preponderance of probabilities, what facts have been established. The second, and final, stage is to decide, also on the preponderance of probabilities, what conclusion consistent with those facts is most likely to be correct.
When deciding whether a tacit contract has been proved a third stage has to be interposed between these two. This is to decide how the proved facts, that is, the conduct of each party and the relevant circumstances, must have been interpreted by the other. The word 'must' is used advisedly, because at this intermediate stage of the inquiry the court is not concerned with the resolution of an issue of fact, but with the effect of the parties' conduct and the surrounding circumstances on the mind of each party. Our law of contract is based on true agreement, and a party whose state of mind is 'On balance I think we are probably in agreement', does not have a contract. So at this stage of the inquiry the court is looking through the eyes of the parties at their conduct and the circumstances, and unless that conduct and those circumstances were so clear, so unequivocal, so unambiguous that the parties must have regarded themselves as being in agreement there is no contract.", Christie's Law of Contract in South Africa, GB Bradfield, 7th Edition, Lexis Nexis, 2016 at page 100–101

18. Accordingly, insofar as the applicant was concerned, the extant contracts had been extended on the same terms and conditions as they had been previously, and it continued its dealings with the respondents on that basis.

19. It is most telling that for the period 2020 and 2021, and effective from 1 April of the respective years, the applicant sought and was granted increases calculated in accordance with the formula as set out in clause 10.3. Coincidentally, for these two years the amount of the increase fell within the amount of the DORA supplementary allocation and no objection was raised by the respondents to the method of calculation in accordance with the formula. The position with effect from 1 April 2022 differs in that the calculation of the escalation differs from the DORA supplementary allocation.

20. It is not open to the respondents to attempt to resile from their obligations in terms of the extant agreements simply because the annual increase in a particular year exceeds the DORA supplementary allocation or because they are no longer satisfied[8] with the basis upon which they have contracted with the applicant.

21. In the present matter, the respondents were at the very least required to have *"to have produced evidence of conduct of the parties which justified a reasonable inference that the parties intended to, and did, contract on the terms alleged, in other words, that there was in fact consensus ad idem."*[9]

22. The conduct of the parties unequivocally establishes to my mind that the written agreements remained extant and that no tacit agreement as contended for by the respondents ever came into existence.

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[8] And it is apparent that they have not been for some time.
[9] Gordon Lloyd Page & Associates v Rivera and Another 2001 (1) SA 88 (SCA) at 95I-96A

23. Does clause 10.3 fall foul of the Constitution, the PFMA and DORA? Prinsloo J dealt with this argument at length in his judgment. I do not intend to repeat the arguments and findings set out in the judgment save to say I that I agree that the contract in which the clause appears predates the PFMA which does not apply to it, is extant and has been consistently applied over the last 25 years. By agreement DORA was only to apply for a specified period and it cannot, absent agreement, be imposed upon the applicant as a new term of the contract.

24. The applicants sought a punitive order for costs on the basis that the conduct of the respondents in raising disputes that have already been ventilated and decided in the applicants' favour was in bad faith.

25. This had put the applicant to what was clearly unnecessary and avoidable litigation in circumstances where service delivery, to the bus passengers for whose ultimate benefit the contracts were entered into, was imperiled. I was referred to National Gambling Board v Premier, KwaZulu-Natal and Others[10] in which it was held *"organs of State's obligations to avoid litigation entails much more than an effort to settle a pending court case."*

26. There is on a consideration of the matter as a whole, merit to the applicant's argument in this regard and it is for this reason that I am persuaded that a punitive order for costs was warranted. The matter was of sufficient importance to both parties to warrant the engagement of more than one counsel.

27. For the reasons set out above I granted the order that I did on 26 August 2022, a copy of which is annexed marked "X".

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[10] 2002 (2) SA 715 (CC) at para 36

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A MILLAR

JUDGE OF THE HIGH COURT

GAUTENG DIVISION, PRETORIA

HEARD ON:	23 AUGUST 2022
JUDGMENT DELIVERED ON:	26 AUGUST 2022
REASONS REQUESTED:	30 AUGUST 2022
REASONS FURNISHED:	31 AUGUST 2022
COUNSEL FOR THE APPLICANTS:	ADV. A FRANKLIN SC
	ADV C AVIDON
INSTRUCTED BY:	BOWMAN GILFILLAN INC.
REFERENCE:	MR. R CARR
COUNSEL FOR THE 1ST & 2ND RESPONDENTS:	ADV. J MOTEPE SC
	ADV. K MVUBU
	ADV. T MAKOLA
INSTRUCTED BY:	MALATJI & CO. ATTORNEYS
REFERENCE:	MR. T MALATJI

NO APPEARANCE FOR THE THIRD RESPONDENT

"X" enees
26/8/2022

IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

CASE NUMBER: 012044/2022

BEFORE THE HONOURABLE JUDGE MILLAR

PRETORIA, ON THE 26TH AUGUST 2022.

COURT 4G

In the matter between:

PUTCO (PTY) LTD **PLAINTIFF**

AND

HEAD OF DEPARTMENT OF THE GOUTENG DEPARTMENT OF ROADS AND TRANSPORT **FIRST RESPONDENT.**

MEMBER OF THE EXECUTIVE COUNCIL OF GAUTENG FOR ROADS AND TRANSPORT **SECOND RESPONDENT**

MINSTER OF TRANSPORT **THIRD RESPONDENT.**

DRAFT ORDER

HAVING READ DOCUMENTS FILED OF RECORD AND HAVING HEARD SUBMISSIONS BY COUNSEL FOR THE PARTIES;

IT IS ORDERED.

1. The rules, time limits, forms, and procedures provided for in the Uniform Rules of Court are dispensed with in terms of Rule 6(12), to the extent necessary, and this application is heard as a matter of urgency.

2022 -08- 26

2. It is declared that in terms of interim Contract IC 48/97, Interim Contract IC51/97 and interim Contract IC 52/97, the first and second Respondent are obliged to annually increase the subsidy payable to the Applicant with effect from 1 April each year in accordance with the formula specified in clause 10.3 of Part 1 of Interim Contract IC 48/97, Interim Contract IC 51/97, and Interim Contract IC 52/97;

3. The First and Second Respondents are directed to pay the sum of R28,375,809,94 to the Applicant on or before 01 September 2022, being the sum of the amounts which have fallen due for payment as at the date of this application.

4. The First and Second Respondents are directed to comply with their obligations in terms of clause 10.3 of Part 1 of Interim Contract IC 48/97, Interim Contract IC 51/97, and Interim Contract IC 52/97, by paying to the Applicant the subsidy as increased by 8.75% for the 2022/2023 financial year from July 2022 as and when such amounts fall due for payment each month, for the remainder of the financial year.

5. The costs of this application are to be paid by the First and Second Respondent, jointly and severally, on the scale as between attorney and client scale including costs of two counsel.

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

Private Bag X57, Pretoria 0001

2022 -08- 26

GD-PRET-009

REGISTRAR OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION,
PRETORIA

BY ORDER

REGISTRAR

2022 -08- 26