

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 50547/21

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED: NO

Date: 2 September 2022

In the matter between:

VURHONGA SHUTTLE SERVICES

First Applicant

NYIKO ASHER MNISI

Second Applicant

and

AFGRI POULTRY (PTY) LTD t/a

DAYBREAK FARMS

Respondent

JUDGMENT

DE VOS AJ

Introduction

[1] The respondent ("Afgri") runs two abattoirs. Afgri's employees have to be transported from their homes to the abattoirs for their shifts. The applicant ("Vurhonga") provides this service in the form of shuttles. The dispute between the parties is how much

Vurhonga must be paid for this service. Vurhonga asserts a right to be paid per shuttle and Afgri, in turn, asserts a right to pay per person transported. Vurhonga makes significantly more if paid per shuttle than if paid per person.

- [2] Whilst the dispute plays out in the context of the law of contract, Vurhonga has framed its relief in the form of a declarator and an interdict. Despite the framing, Vurhonga seeks¹ to enforce a contractual right to be paid per shuttle.
- [3] The original agreement between the parties provided Vurhonga would be paid per shuttle. Vurhonga contends this original agreement persists. Afgri contends the original agreement to pay per shuttle has been terminated and subsequently replaced by a new tacit agreement to pay per person.
- [4] The Court has to determine whether the original agreement subsists and whether a tacit agreement has been concluded.

FACTS

Per shuttle 2017 - 2020

- [5] The parties agree that during 2017 a written agreement² was concluded. In terms of the written agreement Vurhonga was to be paid per shuttle.³ The written agreement expired in February 2020.⁴ As the written agreement had expired, the parties sought to negotiate a new contract.

¹ The exact relief sought is -

- a) an order interdicting the respondent from implementing alternatively proceeding with, further alternatively, continuing with the amendment and/or adjustment of the fee structure that the respondent has introduced during March 2020.
- b) The respondent is directed to comply with the oral / verbal agreement entered into between the first applicant and respondent during 2016;
- c) The respondent is directed to pay the first applicant the balances of all invoices issued from March 2020 until finalization of the matter;
- d) The unilateral amendment to the oral / verbal agreement entered into between the first applicant and respondent is declared unlawful; and
- e) Costs of the application on an attorney and own client scale.

² Whilst the applicant originally relied on an oral agreement, it changed and in reply alleged that the 2016 verbal agreement was "reduced to writing during 2017".

³ The other clauses of the agreement are not part of the dispute between the parties.

⁴ Whilst Vurhonga denied the expiration of the written agreement in its replying affidavit, counsel conceded during oral submissions that the written agreement terminated three years after its conclusion. The agreement provides that it terminates after 3 years unless expressly extended. There is no factual basis provided for the argument that the agreement was extended. Vurhonga's pleadings on the extension of the written agreement does not provide a basis to conclude that the written agreement has been extended, see CL6-9, replying affidavit para 13.

- [6] The negotiations kicked off in March 2020 with Afgri proposing a new fee structure ("the 2020 fee structure") which boils down to payment per person.⁵ Afgri provided Vurhonga, and the other operators an opportunity to make a counter proposal. Vurhonga and the other operators missed the deadline for the counter proposal.

Termination of the payment per shuttle arrangement

- [7] After receiving no counter-proposal, on 1 April 2020⁶ Afgri wrote to Vurhonga advising that the 2020 fee structure would be imposed and that Vurhonga has three days to accept this offer.
- [8] On 14 April 2020 Vurhonga then presented a counter-proposal. The counter-proposal stated that Vurhonga (and the other operators) have a business model premised on staff per shuttle and not a business that runs on "fairs per passenger".⁷ The letter indicates it is received from several operators, including Vurhonga Shuttle & Tours and refers specifically to Mr M Mnisi, the second applicant.
- [9] On 16 April 2020 the parties met. At the meeting Afgri informed Vurhonga that it could not agree to the counter-proposal as it was unaffordable. Afgri made the point that the employees' transport was so expensive that it was more than double the employees' salaries. Afgri made clear to Vurhonga that it can only "pay per person as communicated in the 1 April 2020 letter" and that should Vurhonga "continue to provide transport services to the respondent, which it was at liberty to also cease doing, it would be paid per shuttle".⁸

⁵ On 16 March 2020 the respondent met with the taxi operators and explained that going forward a new fee structure would be imposed. The new fee structure would be based on payment per person transported, not per shuttle. The respondent provided the taxi operators an opportunity to respond and provide a counter proposal before 1 April 2020. The taxi operators, including the applicant did not respond before 1 April 2020. The applicant denies that it was present at this meeting. However, it concedes the respondent delivered the 1 April 2020 letter which set out the contents of this meeting and nothing turns on this dispute of fact. Consequently, on 1 April 2020 the respondent wrote to the applicants informing them that the new fee structure would be imposed from 1 April 2020. The 1 April 2020 letter set out in detail the new fee structure. In terms of this letter, the first applicant and other taxi operators were offered R800.00 per employee per month transported from Springs (which translates to R40 per person per round-trip), and R1600.00 per employee per month transported from Kwa-Thema (which translates to R80 per person per round-trip), to the different plants of the respondent. The essence was payment per person instead of the previous fee structure of payment per shuttle ("the 2020 fee structure").

⁶ The letter is undated but appears as annexure D4 to the answering affidavit

⁷ CL5-59 Annexure D7 to the answering affidavit.

⁸ The pleaded case refers to this as the "2020 fee structure". The import of the 2020 fee structure was payment per shuttle. Vurhonga pleads a bare denial to the proposal, the meetings and contends that Afgri has not provided proof of these meetings (CL6-12 para 22) These denials are contradicted by the objective

- [10] On 21 April 2020 Vurhonga's legal representatives wrote to Afgri. The letter objects to Afgri's position to only pay per person going forward. The letter ends with a "request" that the "current status quo remain" and that Vurhonga be paid per shuttle.⁹
- [11] On 24 April 2020 Afgri's legal representatives responded to Vurhonga's letter of 21 April 2020. The letter sets out in detail the history of the matter.¹⁰ Afgri repeated its offer - essentially to pay per person which "offer will be open for acceptance until 30 April 2020". The letter¹¹ concludes with the following -
- "Should your clients fail to accept our client's offer on/before 30 April 2020 our client will terminate the agreements with your client and seek alternative service providers or alternative transport solutions".¹²
- [12] Afgri's position is that after this letter, Vurhonga continued to provide transport services. Afgri paid them in terms of the number of passengers transported and in terms of the 2020 fee structure. Vurhonga would render its invoices fortnightly. However, Afgri adjusted Vurhonga's invoices to only pay per person transported.¹³
- [13] Towards the end of 2020, Afgri offered Vurhonga a new three-year written transport agreement. The offer was in similar terms to the previous arrangement, but vitally provided for the 2020 fee structure, ie to be paid per person. The agreement was to commence in August 2020. Vurhonga rejected the new proposal. As a result of

evidence and the Vurhonga's own allegations. In the letter from the respondent's attorneys (attached to the answering affidavit as annexure D9) in answer to annexure D8 reference was made to the meeting of 16 March 2020, the 1 April 2020 letter, the applicants' rejection of the respondent's proposal while the proposal was repeated and opened for acceptance until 30 April 2020. The applicants admit to receiving the 1 April 2020 letter containing the new fee structure. The applicants' names appear on the counter-proposal made to the respondent and attached as annexure D7 to the answering affidavit. In the founding affidavit in an urgent application in which the second applicant was a co-applicant and also deposed to a confirmatory affidavit, reference is made to the 1 April letter and the 2020 fee structure being received by the applicants, meetings held with the respondent and the applicants' submissions during previous meetings with the respondent. In any event, the dispute about whether or not Vurhonga was at the meetings or not is overtaken by events, as next event was Vurhonga's lawyers writing to Afgri clearly in response to Afgri's position that it would only pay Vurhonga per person transported.

⁹ Annexure D8 CL 5-60.

¹⁰ The letter refers to the meeting of March 2020, the invitation for a counter-proposal, Vurhonga's failure to timeously respond to the invitation, Vurhonga's counter-proposal and Afgri's rejection of the counter-proposal.

¹¹ Vurhonga's response to this allegation is unclear as it notes these allegations in one paragraph (23.1 CL 6-12) and then denies the allegations in the following paragraph (24.1 CL6-12). Again, nothing turns on this dispute as it relates to the content of a letter.

¹² CL5-64 annexure D9 to answering affidavit.

¹³ Afgri calculated the number of passengers in excel D10 para 41.

Vurhonga's rejection of the offer, Afgri terminated the existing relationship between the parties. The letter of termination¹⁴ provides -

"Afgri Poultry t/a Daybreak Farms would like to inform you that we will no longer require the services of Vurhonga Shuttle and Tours, as of 1 January 2021. This document serves as notification to you of our intention to terminate your services. This is in compliance with the prescribed minimum notice period required by law. We have reached the decision to terminate your contract as a result of overcharging and irretrievable breakdown of our business relationship".

[14] The termination letter is pivotal to the determination of the dispute. Vurhonga does not deny that it was issued with the termination letter.¹⁵

[15] Based on the common cause facts, Afgri terminated the relationship as from 1 January 2021.

The tacit agreement 2020 onwards

[16] The timeline presented to the Court by Vurhonga ends there. Vurhonga provides no version subsequent to the termination letter.

[17] Afgri, however, presented a detailed pleaded case of events subsequent to the letter of termination. Afgri pleaded that following the letter of termination, Mr Mnisi of Vurhonga came to see the deponent to the answering affidavit. Mr Mnisi was very apologetic about past events and indicated that he does not wish for Afgri to terminate Vurhonga's services. Mr Mnisi was asked to confirm the number of passengers that Vurhonga transports for Afgri. Mr Mnisi indicated that he had two 22-seater and one 15-seater minibus, and that Mr Mnisi would confirm the number of passengers.

[18] Mr Mnisi later returned and confirmed the number of passengers that Vurhonga transports. It was reiterated that Afgri is not going to change the 2020 fee structure, and Mr Mnisi understood this. Subsequent to this, Vurhonga continued to transport the employees and Afgri continued to pay in terms of the 2020 fee structure - per person.

CONSIDERATION

Law on tacit agreements

¹⁴ The letter is undated, a copy of which is attached to the answering affidavit as annexure D10.2 CL 5-86

¹⁵ CL 6-13 para 26.1

[19] In *Butters v Mncora*¹⁶ Heher JA held that in cases involving tacit agreements the court searches the "evidence for manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue that is the crux of the agreement."¹⁷ The court also searches "any indication which cannot be reconciled"¹⁸ with the proposed tacit agreement. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, "on a conspectus of all the evidence, that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement."¹⁹ The test in *Butters* has been recently re-affirmed by the Supreme Court of Appeal in *Buffalo City Metropolitan Municipality v Nurcha Development Finance (Pty) Ltd and Others ("Narchu")*.²⁰

[20] In *Narchu* the approach used by the Supreme Court of Appeal was to ascertain whether, on a balance of probabilities, the party asserting a tacit agreement, had shown unequivocal conduct that proves that it intended to enter into a contract."²¹

[21] The case law aligns with the academics who identify the test as proof on a preponderance of probabilities, conduct and circumstances that are so unequivocal that the parties must have been satisfied that they were in agreement. If the court concludes on the "preponderance of probabilities that the parties reached agreement in that manner, it may find the tacit contract established."²²

[22] It is then to the conduct of the parties the Court turns.

Conduct

[23] Vurhonga contends that its rejection of the 2020 fee structure in early 2020 is sufficient to prevent the conclusion of a tacit agreement - regardless of any subsequent conduct. Vurhonga's case is as it had "rejected the new fee structure, no agreement came into existence".²³

¹⁶ 2012 (4) SA 1 (SCA) ([2012] ZASCA 29)

¹⁷ *Id* at para 34

¹⁸ *Id* at para 34

¹⁹ *Id* at para 34

²⁰ 2019 (3) SA 379 (SCA) paras 17 - 18

²¹ *Narchu* at para 22

²² *Christie's Law of Contract in South Africa* (7 ed) by GB Bradfield a 'synthesized approach' is suggested (pp 100 – 101)

²³ CL8 - 16

[24] Vurhonga's approach ignores the entirety of the subsequent events, all of which are common cause. In particular, Vurhonga does not deny the two visits by Mr Mnisi towards the end of 2020, on which Afgri pins the tacit agreement. Vurhonga ignores Afgri's pleaded case that Mr Mnisi understood that going forward the 2020 fee structure would apply and that Mr Mnisi continued to provide transport services in light of this understanding.

[25] Vurhonga's submission ignores the entirety of the events subsequent to the negotiations - all of which is are common cause.

[26] In fact, the entirety of the facts pleaded by Afgri to ground the tacit agreement reached in the latter part of 2020 is admitted by Vurhonga. As these allegations go to the core of the tacit agreement, the pleadings will be replicated here. The respondent pleaded:

"[42] Towards the end of 2020 the first applicant was provided with an opportunity to enter into a new three-year transport agreement with the respondent in terms of a draft written agreement. The first applicant rejected the new agreement and was subsequently issued with a letter of termination of the tacit transport agreement.

[43] Following the letter of termination, the second applicant came to see me. He was very apologetic about past events and indicated to me that he does not wish for the respondent to terminate the first applicant's services. I asked him to confirm the number of passengers that the first applicant transport for the respondent. He indicated that he had two 22-seater and one 15-seater minibus, and the would confirm the number of passengers.

[44] The second applicant returned to me and confirmed the number of passengers that the first applicant transports. **I reiterated that the respondent is not going to change the 2020 fee structure, and the second applicant understood this.** The first applicant failed to sign the new written transport agreement, **whilst the tacit transport agreement continued, and the respondent continued to pay the first applicant in terms thereof.**" (emphasis added)

[27] With the exception of whether Mr Mnisi apologised, Vurhonga expressly admits the these allegations.²⁴

²⁴ Vurhonga pleads to these paragraph as follows -

"Ad paragraph 42

26.1 The contents therein are admitted.

Ad paragraph 43 thereof

27. Save to deny that I had apologised for any alleged past events, the remainder of the allegations therein contained are admitted.

Ad paragraph 44

28. In as far as the confirmation of the number of persons transported is concerned, I admit. The remainder of the allegations therein contained are admitted."

[28] It is therefore common cause on the pleaded facts that:

- a) The previous relationship, providing for payment per shuttle, between the parties was terminated.
- b) Vurhonga understood that Afgri would be paying in terms of the 2020 fee structure, which is payment per person.
- c) Vurhonga, with this understanding, continued to provide transport to Afgri.
- d) Afgri paid in terms of the 2020 fee structure.

[29] Vurhonga admits every fact relied on by Afgri for the conclusion of the tacit agreement. Vurhonga admits that towards the latter part of 2020 Afgri terminated the previous relationship, made Mr Mnisi understand that the new fee structure would apply and that Vurhonga then continued to provide transport services. Vurhonga's subsequent conduct overrides its previous rejection of the 2020 fee structure.

[30] As the case law discussed above indicates it is the conduct of the parties that the Court must consider in determining whether or not a tacit agreement has come into force. Vurhonga has admitted, unreservedly, the conduct relied on by the respondent to ground the tacit transport agreement. Whilst Vurhonga rejected the 2020 fee structure in the early part of 2020, it is Vurhonga's subsequent conduct which gives rise to the tacit agreement. This conduct is not disputed.

[31] The applicants accordingly have no clear right to assert a contractual right to be paid per shuttle.

COSTS

[32] The Court has been provided with no basis to deviate from the usual rules relating to costs. Costs will follow the result.

ORDER

[33] The Court therefore orders -

1. The application is dismissed with costs.



I de Vos

Acting Judge of the High Court

Delivered: This judgement is handed down electronically by uploading it to the electronic file of this matter on CaseLines. As a courtesy gesture, it will be sent to the parties/their legal representatives by email.

Counsel for the applicant:	Charles Tshepo Malatji
Instructed by:	Ngobeni M Attorneys
Counsel for the respondent:	E Furstenburg
Instructed by:	VZLR Attorneys
Date of the hearing:	01 August 2022
Date of judgment:	02 September 2022