THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

REPORTABLE

Case No: 418/13

In the matters between:

GOLDEN ARROW BUS SERVICES (PTY) LTD	**APPELLANT**

And

CITY OF CAPE TOWN	**FIRST RESPONDENT**
MEC FOR TRANSPORT AND PUBLIC WORKS, WESTERN CAPE GOVERNMENT	**SECOND RESPONDENT**
TRANSPENINSULA INVESTMENTS (PTY) LTD	**THIRD RESPONDENT**
KIDROGEN (PTY) LTD	**FOURTH RESPONDENT**
MINISTER OF TRANSPORT	**FIFTH RESPONDENT**

Neutral citation: *Golden Arrow Bus Services v City of Cape Town* (418/13) [2013] ZASCA 154 (22 November 2013)

Coram: Lewis, Cachalia, Majiedt, Willis and Saldulker JJA

Heard: **05 November 2013**

Delivered: **22 November 2013**

Summary: Where a municipality is negotiating with a vehicle operator to enter into a contract in respect of the provision of an Integrated Public Transport Plan, in terms of s 41 of the National Land Transport Act 5 of 2009, neither party is entitled to refer any dispute over the proposed terms of the contract to mediation or arbitration.

ORDER

On appeal from Western Cape High Court, Cape Town (Griesel J sitting as court of first instance)

The appeal is dismissed with costs including those of two counsel.

JUDGMENT

Lewis JA (Cachalia, Majiedt, Willis and Saldulker JJA concurring):

[1] The City of Cape Town (the City), the first respondent in this appeal, is a metropolitan municipality established in terms of the Local Government Municipal Structures Act 117 of 1998. The City is in the process of introducing throughout the area of its jurisdiction an 'Integrated Public Transport Network' (IPTN), part of which is a new bus service, MyCiTi. The appellant, Golden Arrow Bus Services (Pty) Ltd (GABS), has since 1861 operated transport systems in Cape Town, and currently operates scheduled and charter bus services throughout Cape Town and the Cape Flats areas. The dispute between these parties, and the subject of the appeal, concerns GABS' participation in the MyCiTi bus service. The third and fourth respondents, who have not participated in these proceedings, are also transport companies (in effect groupings of minibus taxi operators) who are negotiating to become part of the service. The second respondent is the MEC for Transport and Public Works in the Western Cape, and the fifth respondent is the Minister of Transport: they support the City in its stance in the proceedings.

[2] The City has been engaged in the process of setting up the IPTN for several years and proposes the transformation of the road transport system in phases over a

period ending in 2032. The dispute arises from the process relating to the first phase. The National Land Transport Act 5 of 2009 (the NLTA) empowers the City to enter into negotiated contracts with public transport service operators such as GABS in order to integrate services as part of the IPTN. The contractual negotiations over the MyCiTi bus service have been complex and have extended over some four years.

[3] GABS is aggrieved about various aspects of the process, maintaining that there has not been genuine negotiation over important issues: the City, it alleges, has purported to determine terms of the anticipated contracts unilaterally. Most importantly it considers that the questions of market share percentage and compensation for decommissioned vehicles have not been negotiated as required by the NLTA. It therefore sought an order in the High Court, Cape Town compelling the City to have these questions referred in the first instance to mediation, and failing a successful outcome, to arbitration (prayer 1). It also sought an order declaring that in relation to its inclusion in phase 1 of the IPTN, it was entitled in terms of s 46(2) to mediation as prescribed in the Regulations to the NLTA, and failing settlement by mediation, to arbitration (prayer 1A).

[4] GABS applied in the alternative (prayers 2 and 3) for an order directing the City to negotiate with it in good faith and reasonably in relation to the disputed issues, and interdicting the City from concluding a contract with either of the third or fourth respondents pending either mediation and possibly arbitration, or the finalization of good faith negotiations and compliance with the City's statutory obligations.

[5] The Western Cape High Court (Griesel J) dismissed the application. It also declined to deal with the City's counter application seeking the declaration of a regulation to be invalid since the refusal to grant the orders sought by GABS rendered that order unnecessary. The appeal against the dismissal of the application lies with the leave of the High Court.

[6] On appeal GABS, in accordance with an agreement with the City, persisted only with an appeal against the refusal of prayers 1 and 1A. In effect, it sought a referral to mediation, failing which, arbitration, by the court, and a declaration that it was entitled to refer its disputes to mediation or arbitration in terms of s 46 of the NLTA. And at the end

of the hearing of the appeal GABS abandoned its application for arbitration in the event of mediation failing, although much of the hearing and the heads of argument for both parties were devoted to the issue of arbitration.

[7] Accordingly the issues to be determined on appeal are whether GABS is entitled to have the disputed issues (market share, compensation and statutory compliance) referred to mediation and to the declaration sought as the second form of relief. The determination of the appeal depends on the construction of ss 41 and 46 of the NLTA and of the NLTA Regulations. Before turning to these provisions I shall set out briefly the background relating to the contractual arrangements governing the GABS bus services in Cape Town.

[8] As I have said, GABS currently provides bus services across the entire metropolitan area of Cape Town. Since 1997 these services have been regulated by an interim contract concluded in terms of the National Land Transport Transition Act 22 of 2000 (the Transition Act) between GABS and the National Department of Transport. The interim contract remains operative in terms of the NLTA. In May 2007 the National Department ceded and assigned its rights and obligations under the interim contract to the Western Cape Province. The Province remains party to the contract.

[9] The introduction by the City of MyCiTi bus services on routes along the West Coast in 2010 has had an impact on GABS in that some of its services along particular routes were stopped. A dispute between GABS and the City was resolved through the conclusion of an addendum to the interim contract (there was another addendum that preceded it but it is of no moment to the present dispute so I shall not refer to it again) concluded on 20 April 2011. The addendum was signed by a representative of the Province, GABS and the City. Its purpose was to provide for the inclusion of GABS in the MyCiti service and to achieve the integration of existing bus services into the IPTN. GABS undertook to render services in respect of ‘Milestone 0 Routes’ and to cease providing services along the West Coast routes. Importantly, the addendum provided that if any of the services then provided by GABS were integrated into the IPTN, the routes affected could be excised by the Province from the interim contract. That anticipated the conclusion of contracts between GABS and the City in terms of the

NLTA. GABS was agreed to be an interested party in respect of contracts to be negotiated, and entitled to negotiate under s 41 of the NLTA.

[10] Following on the conclusion of the addendum, GABS, together with other vehicle operator companies, engaged in discussions with the City in respect of further phases of the MyCiTi project. Its expectation was that it would conclude a contract with the City for a period of 12 years in respect of phase 1 of MyCiTi. GABS and the City have different views as to whether there have been negotiations between them, or whether the City has simply called for comments and then made unilateral decisions. It is not necessary to deal with their respective versions of events since the issue before this court is simply whether, since there is no agreement on the terms of a contract between them, GABS is entitled to require that their disputes be referred to mediation.

[11] I turn now to the statutory provisions in issue. Section 40 of the NLTA, in chapter 5 of the Act which regulates 'Contracting for Public Transport Services', requires provinces and 'planning authorities' (a municipality is a planning authority in relation to planning functions) to take steps as soon as possible after the commencement of the Act to 'integrate services subject to contracts in their areas' 'into the larger public transport system'. The City's IPTN is that system. Sections 41 and 46 of the NLTA govern GABS's contractual relationships with the City. These sections deal with entirely different situations. Section 46 regulates the position where there are 'Existing contracting arrangements'. So the addendum to which GABS and the City are party is subject to its provisions. Section 41 deals with 'Negotiated contracts', and therefore governs contracts to be entered into after the commencement of the NLTA between the City and vehicle operator companies such as GABS. That section itself provides that the City may negotiate a contract with an operator only once, and that for a maximum period of 12 years. It thus allows a deviation from the government norm in respect of private services, which is that procurement is put out to tender. In effect, it facilitates the quick implementation of a transport system within a municipality.

[12] Section 41 provides:

'(1) Contracting authorities may enter into negotiated contracts with operators in their areas, once only, with a view to—

(a) integrating services forming part of integrated public transport networks in terms of their integrated transport plans;
(b) promoting the economic empowerment of small business or of persons previously disadvantaged by unfair discrimination; or
(c) facilitating the restructuring of a parastatal or municipal transport operator to discourage monopolies.

(2) The negotiations envisaged by subsections (1) and (2) must where appropriate include operators in the area subject to interim contracts, subsidized service contracts, commercial service contracts, existing negotiated contracts and operators of unscheduled services and non-contracted services.

(3) A negotiated contract contemplated in subsection (1) and (2) shall be for a period of not longer than 12 years.

(4) The contracts contemplated in subsection (1) shall not preclude a contracting authority from inviting tenders for services forming part of the relevant network.

(5) Contracting authorities must take appropriate steps on a timeous basis before expiry of such negotiated contract to ensure that the services are put out to tender in terms of section 42 in such a way as to ensure unbroken service delivery to passengers.'

[13] Section 46, as I have said, deals with contracts concluded before the commencement of the NLTA and regulates existing rights. It reads:

'(1) Where there is an existing interim contract, current tendered contract or negotiated contract as defined in the Transition Act in the area of the relevant contracting authority, that authority may—

(a) allow the contract to run its course; or

(b) negotiate with the operator to amend the contract to provide for inclusion of the operator in an integrated public transport network; or

(c) make a reasonable offer to the operator of alternative services, or of a monetary settlement, which offer must bear relation to the value of the unexpired portion of the contract, if any.

(2) If the parties cannot agree on amendment of the contract or on inclusion of the operator in the network, or the operator fails or refuses to accept such an offer, the matter must be referred to mediation or arbitration in the prescribed manner to resolve the issue.

(3) The Minister may make regulations providing for the transition of existing contracting arrangements and the transfer of the contracting function in terms of this section or section 41 . . .

(4) . . . .'

[14] Before I deal with the Regulations I would point out that the obvious reason for providing for a referral to mediation or arbitration in this section is that the parties to the contracts envisaged by s 46 already have rights: the section does not deal with contracts that have yet to be concluded (although it does make provision for the inclusion of an operator in an existing contract). So the resort to mediation or arbitration is not to find a way of creating or imposing contracts on the parties: it is for the purpose of resolving disputes that may arise when changes to vested rights are proposed. Nonetheless GABS argued that because it was a party to an existing contract with the City (the addendum) it was entitled to rely on s 46(2) in requiring the City to embark upon a mediation, and (at least before the hearing of the appeal) if that failed, to arbitration so that an arbitrator would determine the terms of the negotiated contract.

[15] The City maintained that the only contract regulated by s 46 was the addendum to the interim contract. There was no dispute in respect of that. It was concluded and implemented. And accordingly a referral of any dispute about that contract to mediation or arbitration was not required. The only negotiations that have taken place subsequent to the conclusion of the addendum are in terms of s 41, in respect of phase 1 of the MyCiTi service. The high court found, correctly in my view, that that was indeed the case.

[16] The City has balked at the prospect of mediation or arbitration playing any role in the negotiation of s 41 contracts with vehicle operators. Apart from the obvious consideration that contracting parties may not wish to have the terms of their contracts facilitated by a mediator or determined by an arbitrator, the City argued that because of the complexity of the IPTN and the negotiations with several different operators with

different and competing interests, the potential for conflict was considerable. If any of those parties could demand mediation or arbitration in respect of any disagreement over a term, the objects of the NLTA could be defeated.

[17] Constant referrals of disputes over contractual terms, the City argued, would delay the conclusion of contracts, which would impede the implementation of the IPTN. Section 41 allows for 'negotiated' contracts: not contracts to which the parties would not have agreed, and which might not be in the public interest, imposed on them. As the City argued, GABS or any other operator could delay the conclusion of negotiated contracts for as long as it suited it.

[18] GABS's response was that not every operator was entitled to refer disputes to mediation or arbitration. But it was entitled to do so because it had existing rights against the City under the addendum, and those rights would be affected by new negotiated contracts under s 41. Other operators who had no existing rights, and had not been expressly recognized as having a right to negotiate (as GABS was in terms of the addendum), did not need to protect rights through the processes of mediation and arbitration. Moreover, argued GABS, the services it offered were affected by both ss 41 and 46. The negotiations between it and the City were not separately boxed, or sealed off from each other. Its s 46 rights would be affected by contracts concluded in terms of s 41. It did not matter, therefore, that s 46(2) expressly refers to mediation or arbitration whereas s 41 makes no mention of the possibility of either. As I indicated earlier, however, the City argued that those processes were necessary dispute resolution mechanisms where existing rights were implicated but were not appropriate to the process of negotiating new contracts.

[19] GABS argued also, however, that even if mediation and arbitration were not possible by way of a referral under s 46(2), it was possible to require such referral by virtue of reg 2(5) of the NLTA Regulations. Section 8 of the NLTA confers on the Minister the power to make regulations relating to a number of matters governed by the Act, including, under s 8*(u),* the 'requirements and procedures for *negotiated contracts* and their conversion to tendered contracts'. GABS argued that reg 2, which deals with

negotiated contracts, provides for referrals of disputes to mediation and arbitration under s 41 as well.

[20] Regulation 2 as a whole (with the exception of reg 2(4)) deals with the process of negotiating contracts where there are already contractual arrangements in place between an authority and operators. Regulation 2(1) provides that where a contracting authority has concluded one of a number of contracts in terms of the Transition Act, that contract will remain in force until it expires or is terminated. But, it provides, the authority will not be precluded from concluding a negotiated contract in terms of s 41 in the same area or on the same routes. The authority may also conclude other contracts with different operators on the same or different routes provided that the duration of such contract does not exceed 12 years.

[21] Regulation 2(2) governs the processes to be followed where there is an interim contract or other contracts under the Transition Act or a contract contemplated in s 46(1) of the NLTA in place. It regulates the rights of the authority and operators where the latter already have rights to negotiate contracts in terms of s 41 of the NLTA. It provides for negotiations 'with a view to involving' operators in IPTNs. Regulation 2(4) provides that where a municipality is establishing an IPTN it must make reasonable efforts to involve existing scheduled bus operators in proposed negotiated contracts. But, it states, 'where the municipality has made an offer in writing, either individually or by notice in the press to such operators and some of the operators have rejected the offer' or failed to respond to it, the municipality may conclude one or more negotiated contracts with other operators in terms of s 41(1), or subsidized service contracts or commercial service contracts instead.

[22] That, argued the City, is the procedure to be followed where agreement cannot be reached in respect of negotiated contracts. If an operator does not accept an offer the municipality can enter into contracts with operators who do accept such offer, or conclude different types of contracts. On the other hand, argued GABS, reg 2(5) permits it to refer its disputes about the proposed terms of the contract (in this instance, in respect of market share and compensation in respect of phase 1 of MyCiTi) to mediation or arbitration. Regulation 2(5) reads:

‘Any dispute with regard to the matters contemplated in this regulation must be resolved in terms of the procedures set out in regulations 6 to 9.’

[23] As I see it, the subregulation deals only with disputes in relation to contracts that are already in existence under the Interim Act and s 46(1) contracts. Save for reg 2(4), reg 2 deals with negotiations where operators are already party to contracts with the authority. Regulation 2(4), which governs negotiations with a municipality to establish an IPTN, contemplated in ss 40 and 41 of the NLTA as I have said, sets out the steps to be taken when an operator does not agree to the terms proposed by the authority. It envisages that there may be no agreement on those terms. It does not envisage that an operator, if it does not like the terms, can refer its dispute with the authority to a third party to facilitate agreement or to an arbitrator to decide what terms he or she would impose. This reading is reinforced by reg 2(6): ‘The fact that mediation or arbitration is in progress will not prevent or delay a contracting authority from continuing with its activities to rationalize services or to establish IPTNs and conclude contracts with other operators for this purpose, in the interests of improving public transport in the relevant area.’

[24] Regulation 6 also supports this interpretation: where the authority and operator *cannot reach agreement under s 46(1)* the matter must be referred to mediation under reg 7, if not urgent, or to arbitration under reg 8 where the authority decides that the matter is urgent. Regulation 7 governs the mediation process. Regulation 8 deals with the arbitration process in urgent matters. Regulation 8(1) expressly refers to arbitration under s 46(2). No mention is made of s 41.

[25] It is clear, therefore, having regard to the whole of reg 2, that reg 2(5) does not permit the referral of a dispute to either mediation or arbitration where the dispute relates to terms to be agreed in a new contract negotiated under s 41. The City’s counter application before the high court to set reg 2(5) aside as being ultra vires in permitting such references was not necessary. The high court did not deal with it because it found that such a reading was in any event not permissible. As Griesel J said, reg 2 ‘mirrors the framework of ss 41 and 46’. It regulates the process of concluding contracts where operators already have existing contractual arrangements with the authority. Regulation 2(2) repeats the three options available under s 46:

negotiating an amendment to a contract or concluding a new contract (46(1)*(b)*); or allowing an existing contract to run its course (s 46(1)*(a)*); or allowing the authority to offer a monetary settlement (s 46(1)*(c)*).

[26] As the City argued, reg 2(5) must be read in context and subject to the NLTA. Regulation 2 as a whole, although headed 'Negotiated Contracts', governs the processes to be followed where operators already have rights and are negotiating new rights under s 41. And reg 2(4) makes plain that where an operator does not agree to terms offered in respect of new contracts, the authority need not contract with it at all. The regulation must be read subject to the NLTA. The respective purposes of ss 41 and 46 are different. They provide for different procedures. Reading the right to refer disputes over terms of a contract being negotiated to mediation or arbitration into s 41 would fail to recognize the different objects of the respective provisions. And it would allow for the imposition of a contract on parties who have not agreed to its terms. That could never have been intended by the legislature. As Griesel J said, imposing terms on the parties to a contract, when they would never voluntarily have agreed to them, is 'inimical to the scheme of s 41'.

[27] GABS, as I have said, at the end of the appeal hearing, withdrew its application for an order that the disputes were arbitrable, and persisted only with the application for an order referring the disputes to mediation. The NLTA and the regulations made under it do not require or permit such a referral. Even the attenuated relief sought by GABS can thus not be granted.

[28] The appeal is accordingly dismissed with costs, including those of two counsel.

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C H LEWIS

JUDGE OF APPEAL

APPEARANCES:

For the Appellant: A P H Cockrell SC (with him P B J Farlam)

Instructed by:

Edward Nathan Sonnenbergs, Cape Town

Lovius Block, Bloemfontein

For the first Respondent: A Breitenbach SC (with him R Paschke)

Instructed by:

Webber Wentzel, Cape Town

Webbers Attorneys, Bloemfontein

For the Second and Fifth Respondent: State Attorney, Cape Town

For the Third Respondent: Corporate Law Alliance, Cape Town

For the Fourth Respondent: Bowman Gilfillian Attorneys, Cape Town