
SOUTH AFRICA / JUDGMENT

Botha v Uniqon Wonings (Pty) Ltd (9751/2016) [2019] ZAGPPHC 501 (9 October 2019) [2019] ZAGPPHC 501

COURT

North Gauteng High Court, Pretoria

BEFORE

AC Basson

CASE / FILE NUMBER

9751/2016

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THE REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

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

Case no: 9751/2016

9/10/2019

In the matter between:

MARTHINUS THEUNIS STEYN BOTHA

Plaintiff/ Respondent

and

UNIQUON WONINGS (PTY) LTD

Defendant/ Excipient

JUDGMENT:

EXCEPTION

AC BASSON, J

- [1] The matter before the court concerns an exception raised by the defendant (the excipient) against the plaintiff's particulars of claim and, more in particular, whether the plaintiff's particulars of claim disclose valid causes of action in the main and the alternative claims.
- [2] The parties agreed that the court will, in terms of Rule 33(4) of the Rules, separate for initial determination, the legal issues raised in paragraph 2.2 of the defendant's plea.
- [3] Pursuant to the exception taken, the plaintiff amended its particulars of claim. The amendment was granted.

Exception

- [4] The law pertaining to exceptions are clear and need not be repeated. Suffice to state that, in considering whether the plaintiff's particulars of claim disclose a cause of action, the factual allegations made in the particulars of claim must, for purposes of determination of the legal question, be regarded as if they would be proved in evidence.[1]
- [5] The plaintiff in this matter relies, in his particulars of claim, upon a written agreement concluded between himself and the defendant. Three schedules are attached to the agreement and form part of the agreement. It is not in dispute that the agreement is extant and of full force and effect.
- [6] In terms of the agreement, the plaintiff was appointed as a Director of Development and Planning and Financial Manager. Further in terms of the agreement the plaintiff would be remunerated on the basis of 5% profit based remuneration on the projects concerned.[2]
- [7] Schedule B to the agreement originally listed six projects and as such formed part of the agreement at the time of the conclusion of the agreement. Schedule B, however, envisages that additional projects may be added onto the list of projects (already) listed in schedule B. To this end, this schedule provides for blank spaces where any further projects may be added. The schedule further provides for a space next to each (newly added) project where both parties must attach their signatures.
- [8] The plaintiff claims that the agreement would also apply to all (further) projects initiated by the plaintiff (in addition to the first six projects that were already listed in schedule B to the agreement). He further pleads that all further/ new projects subject to the agreement would from time to time be added onto schedule B and that the parties would sign the recordal of the new projects, in order to prove that the agreement was so amplified.

[9] The defendant disputes that the adding of new projects merely constitutes a recordal of the new projects and submitted that any further additions to schedule B, in fact amounts to an amendment of the agreement. I agree. An interpretation that further additions of projects to schedule B merely constitutes a recordal of an agreement having been reached in respect of new projects, will, in my view conflict with the clear wording contained in clause 11 of the agreement (the non-variation clause).

The non-variation clause

[10] The non-variation clause contained in clause 11 of the agreement reads as follows (translated into English:)

"This is the entire agreement between the parties and no proposals, alterations or additions will be enforceable against each other unless they are reduced to writing and signed by both parties. No indulgence which the one party grant to the other party will prejudice their respective rights in terms thereof." [3]

[11] Clause 11 of the agreement emulates similar clauses that have become known as the "Shifren principle". In essence this means that it is an express provision of the agreement that no alteration or addition to the agreement will be binding on the parties, unless reduced to writing and signed by them. This precludes any oral or tacit amendment or addition to the agreement. Non-variation clauses, form part of an agreement and are thus enforceable. [4] The Appellate Division (as it then was) in *SA Sentrale Ko-Op Graanmaatskappy BPK v Shifren en Andere* [5] had to consider a similar provision wherein it was provided that: -

"19. Any variations in the terms of this agreement as may be agreed upon between the parties shall be in writing otherwise the same shall be of no force or effect."

[12] That non-variation clauses further generally entrench themselves [6] was also confirmed by the court in *Shifren*. The court went on to explain the effect of such a clause as follows: [7]

"Dit is duidelik, meen ek, en dit word ook nie betwis nie, dat partye geldiglik aan hulself die beperking kan ople dat hulle 'n bepaalde kontrak nie anders dan skriftelik sal sluit nie... Dit is ook duidelik dat hulle later so 'n beperking kan ophef deur mondeling ooreen te kom dat hulle die kontrak tog mondeling sal sluit. Dit kan hulle doen omdat die latere ooreenkoms 'n herroeping is van die desbetreffende afspraak en omdat daar niks tussen hulle bestaan wat 'n mondelinge herroeping daarvan sou kan verhinder nie. Uit die feit dat dit die partye ender sulke omstandighede vrystaan om hul afspraak mondeling te herroep, kan nie afgelei word dat hulle dieselfde vryheid ten aansien van wysigings behou waar hulle hulself gebind het om hul skriftelike kontrak, met inbegrip van die verskansende bepaling, nie anders dan skriftelik te wysig nie. Aan die ander kant kan uit genoemde feit ook nie afgelei word nie dat die partye ender laasbedoelde omstandighede vryelik kan wysig sender inagneming van die formele vereiste. Dit is twee heeltemal verskillende gevalle. Waar die partye hul soks gemeld verbind het, kom hulle nie slegs ooreen, soks in eersbedoelde geval, dat die transaksie tussen hulle skriftelik sal wees

nie, maar dat 'n wysigende ooreenkoms skriftelik sal wees en geensins mondeling gesluit kan word nie.

Waar partye so 'n bepaling in hul kontrak ingelyf het, d.w.s. 'n bepaling wat nie slegs ander bedinge nie, maar ook homself teen mondelinge wysiging heet te beveilig, kan ek geen rede vind waarom die een party nie die ander daaraan gebonde kan hou nie. Hui klaarblyklike doel met so 'n bepaling is om te waak teen die geskille en bewysmoeilikhede wat by mondelinge ooreenkomste kan ontstaan. Om albei daarteen te beskerm kom hulle uitdruklik ooreen dat mondelinge wysigende ooreenkomste, ook wat die verskansende beding self betref, al word hul animo contrahendi aangegaan, tussen hul van nul en gener waarde sal wees. Indien 'n party, uit hoofde juis van 'n mondelinge wysiging, belet sou word om horn op so 'n beding te beroep, sou ens hier met 'n soort kontrak te doen he wat sonder meer nie deur 'n hof afgedwing word nie. Dit sou 'n opvallende afwyking wees van die elementere en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle ems deur bevoegde partye aangegaan is, in die openbare belang afgedwing word... Dit is geen antwoord hierop om aan te voer dat dieselfde van die latere mondelinge ooreenkoms gese kan word nie. Dit staan op 'n ander voet, want die partye het self hul eie bevoegdheid aan bande gele deur hulle aan 'n formele vereiste te bind, en vooruit bepaal dat so 'n ooreenkoms nie afgedwing kan word nie. Deur so 'n ooreenkoms ten spyte daarvan in stand te hou, sou die Hof aan die party wat horn op ongeldigheid beroep, juis die voordeel ontnem wat hy met die verskansende bepaling vir homself wou verseker en waarop hy luidens daardie bepaling geregtig is. Dit gaan ook nie op om te beweer dat dit strydig met die openbare belang sou wees om so 'n beperking te erken nie. Die beperking sluit nie kontraktuele vryheid uit nie. Die partye sou hul kontrak nog na willekeur kan wysig, mits hulle aan die self-opgelegde formele vereiste voldoen.

Om genoemde redes moet die eerste vraag hierbo genoem, nl. of hierdie kontrak mondeling gewysig kan word, na my mening ontkennend

beantwoord word."

[13] It is common cause that the plaintiff (in addition to the six projects already recorded onto schedule B to the agreement, and as contemplated in clause 3 of the agreement), initiated eleven further development projects for the defendant. The plaintiff pleads that, as contemplated in clause 3 of the agreement, these eleven new projects were to be added onto schedule B and that the parties were to have initialled with their signatures the inclusion of the projects in schedule B "in order to prove that the agreement was so supplemented". By pleading in this manner, the plaintiff recognised in my view that the inclusion of further projects onto schedule B to the agreement and the signature of the amended schedule B, would constitute a written amendment or addition to the agreement as contemplated in clause 11 of the agreement.

- [14] It is common cause that, although the plaintiff signed the updated schedule B, the defendant did not. On 27 September 2016, the plaintiff demanded that the defendant sign the updated version of schedule B. In this regard the plaintiff pleads that it has a contractual right to compel the defendant to add the eleven new projects, in writing to schedule B and to initial the amended schedule B.
- [15] In respect of the latter submission, it is important to point out that there is no express provision in the agreement, nor does the plaintiff seek to rely on any tacit or implied term, to the effect that, if further projects are initiated by the plaintiff, the defendant will be obliged to add those projects in writing to schedule 8 and to forthwith sign the amended schedule 8. This is not what clause 3 of the contract states: Clause 3 requires that all new projects subject to the agreement would be added onto schedule 8 and that the parties would then sign the amended schedule.
- [16] On the main claim, the exception is therefore upheld.

Alternative claim

- [17] In terms of paragraph 15A of the particulars of claim, the plaintiff, in the alternative, and only in the event of a finding that the plaintiff is, by virtue of the wording of causes 3 and 11 of the agreement, not entitled to demand from the defendant that the eleven new projects be included onto schedule 8, and that the plaintiff is furthermore not entitled to demand from the defendant that the defendant signs the inclusion of the eleven new projects, the defendant allowed the plaintiff to initiate the eleven further development projects and continued with those developments and by doing so, waived the requirements contained in clauses 3 and 11 of the agreement that further development projects had to be added in writing onto schedule 8 and signed by the parties.
- [18] From paragraph 17 and further of the particulars of claim, the plaintiff then pleads a number of alternative causes of action in respect of the eleven (additional) projects. In each case the claim is based upon an alleged oral agreement concluded between the plaintiff and the defendant. The terms of the eleven oral agreements are identical except for the dates which differ in regards to when each of the various contracts were concluded. More importantly, the terms of these agreements are allegedly concluded on essentially the same terms as those already contained in the written agreement. For example, the plaintiff claims in paragraph 19.1 of the particulars of claim that he was appointed (in respect of each of these eleven separate oral agreements) as director of development and planning of the defendant in which capacity he will assist and advise the defendant on the development by the defendant of a project (in this instance the Sacramento project). As remuneration for his services, the defendant will share with the plaintiff 5% of the profits made by the defendant on the said Sacramento project.

- [19] I am in agreement with the defendant's submission in respect of the alleged eleven additional oral contracts that the plaintiff is seeking to circumvent the express terms of the written agreement which was of full force and effect at the time of the conclusion of the further alleged eleven oral agreements. It simply makes no sense to appoint the plaintiff as the director of development and planning of the defendant in eleven further contracts whilst the plaintiff has already been appointed to this position in terms of an extant agreement.
- [20] Clause 11 further states that the parties cannot - whilst the written agreement is in force - conclude any enforceable agreement on the same subject matter other than in writing. In light of the principles set out in *Shifren*, the oral contracts cannot therefore be relied upon: the oral agreements deal with precisely the same subject matter as the written agreement (which contains a non-variation clause) and contain terms that are virtually identical to that contained in the written agreement which was extant at the time of the conclusion of the alleged oral agreements.
- [21] These alternative claims are thus unsustainable in law and the exception in respect of the alternative claims is likewise upheld.

Waiver

- [22] The plaintiff also pleaded that the defendant, by allowing the plaintiff to initiate and to commence with the development of the eleven further development projects, as if the agreement is applicable to the eleven further development projects, waived the requirements contained in clauses 3 and 11 of the agreement namely, that the further development projects have to be added in writing to schedule B and that the plaintiff and the defendant must sign the inclusion of the eleven new projects onto schedule B.
- [23] Having regard to the non-variation clause, the plaintiff can, in my view, likewise not rely on an alleged waiver of the express provisions of clause 11 of the contract. This much was made clear by the Supreme Court of Appeal in *HNR Properties CC & another v Standard Bank of SA Ltd*[8]:

"[19] The further grounds upon which the appellants rely in support of their contention that they were released as sureties are waiver, estoppel and the reliance theory of contract. I shall deal with each in turn. Clause 16 of the suretyship agreements provides as follows:

'No cancellation or variation of this suretyship shall be of any force or effect whatsoever unless and until it is recorded in writing signed by or on behalf of the bank and the surety.'

In *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964

- (4) SA 760 (A) this Court held that a term in a written contract providing that all amendments to the contract have to comply with specified formalities is binding. The principle has been consistently reaffirmed, most recently by this Court in *Brisley v Drotsky* 2002

- (4) SA 1 (SCA). (A non-variation clause is not necessary in a contract of suretyship by reason of the provisions of s 6 of Act 50 of 1956
- Tsaperas and Others v Boland Bank Ltd (supra at 7258
 - C) - but that does not detract from the legal force of such a clause where it exists.) Courts have in the past, often on dubious grounds, attempted to avoid the Shifren principle where its application would result in what has been perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. No doubt in particular circumstances a waiver of rights under a contract containing a non- variation clause may not involve a violation of the Shifren principle, for example, where it amounts to a pactum de non petendo or an indulgence in relation to previous imperfect performance. (For an interesting discussion on the topic, see Hutchison 'Non-variation Clauses in Contract: Any Escape from the Shifren Straitjacket' (2001) 118 SALJ 720.) But nothing like that arises in the present case.
- [20] The appellants contend that they were released as sureties by virtue of the conduct of the bank, coupled with a consensual waiver of the provisions of clause 15. In my view, a factual basis for such a contention was not established on the evidence. But even if it had been, it would have amounted, in the circumstances of the present case, to no more than a variation of clause 15 which was not in writing. This is precluded by clause 16. To hold otherwise, would be to render the principle in Shifren wholly ineffective.
- [21] The same applies to the appellants' reliance on estoppel. In their plea, the appellants alleged that Linnell had represented to Berthold that the appellants were released from their suretyship obligations and that, relying on such a representation, the appellants had acted to their prejudice. The representation was clearly not established and in argument counsel sought to rely on a representation based more generally on the bank's conduct together with the letter dated 20 April 1998. But even if there had been such a representation, it would not assist the appellants. Where a release is required to be in writing, as in the present case, it may perhaps be possible, in limited circumstances, to frame an estoppel in such a way as not to violate the Shifren principle. It is unnecessary to consider what those circumstances would have to be.

What is clear is that an estoppel cannot be upheld when the effect would be to sanction a non-compliance with provisions in a suretyship

agreement of the kind contained in clauses 15 and 16. It follows that the appellants' reliance on waiver and estoppel must similarly

fail."[9]

[24] The plaintiff should be granted an opportunity to amend. In the event the following order is made:

1. In terms of Rule 33(4), the legal issues raised in paragraph 2.2 of the defendant's plea are separated for initial determination and the remaining issues are postponed sine die.

2. The defendant's exception is upheld.
3. The plaintiff is granted leave to deliver a notice of intention to amend the particulars of claim within fifteen (15) days after the date of this order.
4. The plaintiff to pay the costs of the exception such costs to include the costs pursuant to the employment of senior counsel.

A.C BASSON

JUDGE OF THE HIGH COURT

GAUTENG DIVISION

Appearances:

For the plaintiff:

Adv J Vorster SC

Instructed by:

Tim du Toit and Co Inc

For the defendant /excipient: Adv NGO Maritz SC

Instructed by:

Van der Merwe & Associates

[1] Voget and Others v Kleynhans 2003 (2) SA 148 (C) at [9].

[2] Clauses 3 and 4 of the agreement provide for the remuneration regime.

[3] " 3 . PROJEKTE Hierdie ooreenkoms is van toepassing op a/le projekte wat deur Theuns geïnnisieer word in die eerste ses waarvan aangeteken is op

die /ys van projekte hierby aangeheg as Bylae "B". Alie nuwe projekte wat hieraan onderworpe is sal van tyd tot tyd op gemelde bylae bygevoeg word en die inskrywing deur die partye

onderteken word as bewys dat die ooreenkoms daarmee aangevul is. Geen vergoeding sat deur UNIQON aan THEUNS betaalbaar wees nie vir enige dienste of bydrae gelewer ten opsigte van ander projekte

of aspekte van UNIQON se bestuur of andersins nie tensy UNIQON dit in sy uitsluitlike diskresie vrywil/iglik wil doen."

[3] " 3 . PROJEKTE

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[4] See *Brisley v Drotsky* 2002 (4) SA 1 (AD) where the court, with reference to the decision in *Shifrin* and the principle of *pacta sunt servanda* pointed out that non-variation clauses are binding: "[24] Die taak van hofe in die algemeen en van hierdie Hof in besonder is om hierdie grondliggende waardes wat soms met mekaar in botsing kom teen mekaar op te weeg en om by geleentheid, wanneer dit nodig blyk te wees, geleidelik en met verdrag aanpassings te maak... Om eensklaps aan regters 'n diskresie te verleen om kontraktuele beginsels te verontagsaam wanneer hulle dit as onredelik of onbillik beskou is in stryd met hierdie werkswyse. Die gevolg sal immers wees dat die beginsel van *pacta sunt servanda* grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalinge sal afhang van wat 'n bepaalde regter in die omstandighede as redelik en billik beskou. Die maatstaf is dan nie meer die reg nie maar die Regter. Vanuit die hoek van die kontrakterende partye gesien, sal hulle nie kan handel op die algemene verwagting dat wanneer daar 'n dispuut tussen hulle ontstaan hulle kontrak ooreenkomstig die terme daarvan afdwing sal word nie. Hulle sal moet wag en sien of die individuele Regter die bepalinge as redelik en billik beskou. Oat so 'n algemene benadering nie aan die behoeftes van die handelsverkeer sal voldoen nie, spreek eintlik vanself. 'n Hof kan nie skuiling soek in die skaduwee van die Grondwet om vandaar beginsels aan te val en omver te werp nie; wel in die lig van die Grondwet kan en moet die reg aangepas word. In hierdie konteks is vaagweg na konstitusionele waardes verwys sander om spesifiek te wees. 'n Vrye regterlike diskresie is nie so 'n waarde nie en ons is ook nie in staat 'to discern any societal value which is imperilled' deur die handhawing van *Shifren* en die weiering om -n 'special equity theory' in die kontraktereg in te voer nie.

[25] Wat verskansingsklousules in die besonder betref, is, soos reeds ten dele aangedui, dit duidelik dat die uiteindelijke beslissing in die *Shifren*-saak juis die resultaat is van 'n opweging van verskillende geldige oorwegings. So het die Hof byvoorbeeld die vraag gestel of daar enigiets verkeerd of onaanvaarbaar is in die oorwegings wat die verskansingsklousule ten grondslag lê. Hierop gee Steyn HR die volgende antwoord (op 766H): 'Hui [dit is die kontrakterende partye se] klaarblyklike doel met so 'n bepaling is om te waak teen die geskille en bewysmoeilikhede wat by mondelinge ooreenkomste kan ontstaan. Om albei daarteen te beskerm kom hulle uitdruklik ooreen dat mondelinge wysigende

ooreenkomste . . . al word hulle animo contrahendi aangegaan, tussen hul van nul en gener waarde sal wees.

[26] Dit staan dus vas dat 'n verskansingsklousule op sigself nie ongeldig is nie ten spyte daarvan dat 'n beroep daarop noodwendig sal neerkom op 'n weiering om uitvoering te gee aan 'n mondelinge ooreenkoms wat animo contrahendi aangegaan is. Wat beklemtoning uit die aanhaling verdien, is dat die verskansingsklousule beide partye beskerm - en dit was hulle vrye keuse. Die potensiële ongelykheid van die partye in hulle bedingingsmag of finansiële vermoë en die beskerming van swakkere kontraktante kom dus glad nie hier ter sprake nie."

[4] See *Brisley v Drotosky* 2002 (4) SA 1 (AD) where the court, with reference to the decision in *Shifrin* and the principle of *pacta sunt servanda* pointed out that non-variation clauses are binding:

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'Hui [dit is die kontrakterende partye se] klaarblyklike doel met so 'n bepaling is om te waak teen die geskille en bewysmoeilikhede wat by mondelinge ooreenkomste kan ontstaan. Om albei daarteen te beskerm kom hulle uitdruklik ooreen dat mondelinge wysigende

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[5] 1964 (4) SA 760 (A).

[6] See : Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd 1975 (3) SA 273 (T) at 275G- H.

[7] Supra at 766C-767C.

[8] 2004 (4) SA 471 (SCA) at para [19]-[21].

[9] My emphasis .

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