

SOUTH AFRICA / JUDGMENT

**Technologies Acceptances Receivable (Pty) Ltd and  
Another v Pieter Toerien Productions CC t/a Theatre  
on the Bay and Others (4086/2020) [2024] ZAWCHC  
269; [2025] 1 All SA 775 (WCC) (18 September 2024)  
[2024] ZAWCHC 269**

## COURT

Western Cape High Court, Cape Town

## BEFORE

Kantor

## CASE / FILE NUMBER

4086/2020

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE DIVISION, CAPE TOWN)

Case No: 4086/2020

In

the appeal between:

TECHNOLOGIES  
ACCEPTANCES RECEIVABLE  
First Plaintiff  
(PTY)  
LIMITED  
FINTECH  
UNDERWRITING (PTY) LIMITED  
Second Plaintiff  
and  
PIETER  
TOERIEN PRODUCTIONS CC  
t/a  
THEATRE ON THE BAY  
First Defendant  
DYLAN  
SAGE  
Second Defendant  
OXBOW  
EQUIPMENT (PTY) LIMITED  
Third Defendant

Heard: 26, 27 and 28 August 2024 and 12 September 2024  
Judgment: 18 September 2024

## JUDGMENT

Handed down by email to the parties' legal representatives on 18 September 2024, that date being the date of the Judgment

KANTOR, AJ:

1. A mix of Shifren,[1] a non-variation clause, public policy and what Grusd[2] means, in the world of office equipment finance and contracts of sale.
2. Overview:
  - 2.1. The third defendant ("Oxbow" or the third defendant) leased two printers ("the Printers") to First Defendant ("Toerien" or the first defendant), represented by Third Defendant ("Sage" or the second defendant), in terms of a written Master Rental Agreement concluded on 1 June 2016 ("the MRA").
  - 2.2. The MRA was to replace an agreement in respect of other printers which had been concluded by Toerien with a supplier called CBA ("CBA") which Toerien no longer wanted. Toerien was liable to CBA for an early cancellation payment. Oxbow agreed to incorporate the extent of the CBA early cancellation into the monthly payments in terms of the MRA and CBA was to be paid its early cancellation payment.
  - 2.3. Plaintiffs contend that the MRA was ceded to Second Plaintiff ("FUN") and from FUN to First Plaintiff ("TAR"). Where referred to together, TAR and FUN may also be referred to as the plaintiffs.
  - 2.4. Monthly rentals payments were charged to and debited from Toerien's bank account. There is a dispute as to the amount thereof, with Toerien contending that it was over-charged for three years, in consequence of which Toerien purported to cancel the MRA and tendered return of the Printers, and claims (in a counter claim) payment of what it avers it overpaid (R209 130.88).
  - 2.5. The plaintiffs contend that Toerien is liable in the amount of R451 466.66, alternatively they claim that amount from Oxbow, on the basis of representations, warranties and indemnifications by Oxbow, in the event that their claims against Toerien and Sage are not upheld and a further R209 130.88 in the event that Toerien's counter claim is upheld.
3. The law requires a discipline to pleading, for the delineation of the

## issues

between particular parties:

3.1. The introduction to Amler's Precedents of Pleadings 9ed reads as follows in part:

Purpose of pleadings: A party must define its cause of action and defence in the appropriate pleading in the court of first instance to inform the other parties to the matter of the case they must meet and of the relief sought against them in that court. This is a fundamental principle of fairness in the conduct of litigation, which promotes the parties' rights to a fair hearing guaranteed by section 34 of the Constitution.

South African Police Service v Solidarity obo Barnard 2014 (10) BCLR 1195 (CC), [2014] 11 BLLR 1025 (CC),

2014 (6) SA 123 (CC) para. 202

Pleadings define the issues not only for the other party and the trial court but also for any court of appeal. The duty of courts is to adjudicate upon the pleaded disputes and those disputes alone.

Molusi and others v Voges NO and others 2016 (7) BCLR 839 (CC), 2016 (3) SA 370 (CC)

Fischer and another v Ramahlele and others [2014] 3 All SA 395 (SCA), 2014 (4) SA 614 (SCA) para. 13

Barkhuizen v Napier

[2007] ZACC 5; 2007 (7) BCLR 691 (CC), 2007 (5) SA 323 (CC) para. 39

Damons v City of Cape Town 2022 (10) BCLR 1202 (CC), [2022] 7 BLLR 585 (CC), (2022) 43 ILJ 1549 (CC) paras 117-119

The oft-repeated statement that 'pleadings are made for the court not the court for the pleadings' may be misunderstood. As mentioned, pleadings are made primarily for the parties. They are also made for the court, meaning that they circumscribe the function of the court in the matter. However, a court should not be hampered in deciding a matter by pleading technicalities.

3.2. In Minister of Safety and Security v Slabbert 2010 2 All SA 474 (SCA) it was held at paragraph 11 as follows:

*"The purpose of pleadings is to define the issues for the other party and the court. A party has a duty to allege in the pleadings the material facts upon which it relies. It is impermissible for a plaintiff to plead a particular case and seek to establish a different case at trial. It is equally not permissible for a trial court to have recourse to issues falling outside the pleadings when deciding a case."*

3.3. Mr Fasser, who appeared for the plaintiffs, accepted that the principles in Slabbert are all correct but submitted that they are complied with by the plaintiffs. The import of this appears below.

4. The pleaded cases of the parties are important. They are as follows:

4.1. Between plaintiffs and first and second defendants, in convention:

4.1.1. Plaintiffs claim (in the alternative between them) that Toerien is liable for the balance of R451 466.66 due in terms of the MRA (ceded from Oxbow), and that Sage is jointly and severally liable as guarantor for that amount.

4.1.2. Toerien and Sage's defence is that the incorrect amount in terms of the MRA were deducted from Toerien's account which constituted a breach of the MRA which it cancelled.

4.1.3. TAR and FUN contend that the correct monthly rental amount in terms of the MRA was R11 426.47, that being the amount which it deducted on a monthly basis from Toerien's account.

4.1.4. Toerien and Sage contend that the correct monthly rental amount in terms of the MRA was R6 235.80.

4.1.5. What had happened to cause the impasse was that the amount of R6 235.80 provided for in the MRA (in handwriting) had been crossed out and R11 426.47 inserted in its place (in handwriting) and initialled by Sage for Toerien but not by anyone for Oxbow.

4.1.6. The core issue is whether this disputed amendment ("the Disputed Amendment") was effective, taking into account the non-variation clause in clause 15.1 of the MRA ("the Non-Variation Clause"). The wording of the relevant part of this clause is quoted verbatim below.

4.1.7. The other main issue is whether the MRA was validly ceded from Oxbow to FUN and then to TAR.

4.1.8. It is in dispute whether the public policy issue raised by Oxbow in its Plea against the plaintiffs, if upheld, will have implications for the claim in convention between the plaintiffs and the first and second defendants, because it was not pleaded by the plaintiffs.

4.1.9. The quantum of R451 466.66 is not in issue.

4.2. Between first defendant and plaintiffs, in reconvention:

4.2.1. Toerien avers that it overpaid the amounts due in terms of the MRA in the total sum of R209 130.88, which sum was not due and payable on the terms of the MRA. This turns on the Disputed Amendment.

4.2.2. As a result of the overpayments, Toerien avers that TAR, alternatively FUN, was enriched at the expense of Toerien, which enrichment was unjustified.

4.2.3. The quantum of R209 130.88 is not in issue.

4.3. Between plaintiffs and third defendant, in convention:

4.3.1. The first part of this claim in the amount of R451 466.66 is conditional on the plaintiffs' claim against Toerien and Sage not being upheld (i.e. the claim for the portion of the rentals based on the increased monthly rental in the context of the Disputed Amendment).

4.3.2. The second part of this claim in the amount of R209 130.88 is conditional on Toerien's counter claim against the plaintiffs succeeding (i.e. the claim for the rentals which Toerien alleges it overpaid based on the lower monthly rental in the context of the Disputed Amendment).

4.3.3. The plaintiffs claim that there was a breach of certain representations/warranties given by Oxbow in relation to the MRA. The plaintiffs also rely on an indemnification from Oxbow.

4.3.4. Third Defendant pleads that the monthly rental was amended to be R11 426.47.

4.3.5. Third Defendant also pleads that if the Non-Variation Clause is an impediment to this, then it would be contrary to public policy to enforce it.

4.3.6. The other main issue is whether the MRA was validly ceded from Oxbow to FUN and then to TAR.

4.3.7. The quantum of R451 466.66 and R209 130.88 is not in issue.

5. During the course of the trial of the matter:

5.1. Mr Fasser placed on record that the plaintiffs are not relying on any estoppel, both in respect of (ostensible) authority and in respect of the Non-Variation Clause.

5.2. Mr Jonker, who appeared for the first and second defendants, placed on record that the authority of Sage to act on behalf of Toerien is not an issue in this matter.

5.3. In regard to public policy:

5.3.1. This was not pleaded by the plaintiffs. A party invoking public policy has the onus in this regard (*Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC) at paragraph 37, *Caratco v Independent Advisory (Pty) Ltd* 2020

(5) SA 35 (SCA) at paragraph 26).

5.3.2. In his opening address, Mr Fasser placed on record that, from the plaintiffs' perspective, it is relevant that the plaintiffs have not pleaded public policy and a finding on this aspect will have legal implications for all the parties, whether the public policy defence is upheld or not.

5.3.3. I asked Mr Jonker for his attitude in this respect and he pointed out that public policy is not raised in the pleadings between the first and second defendants, on the one hand, and the plaintiffs, on the other, and in consequence submitted that it was not in issue between them.

5.3.4. I raised with Mr Fasser, whether having been put on terms by Mr Jonker, the plaintiff would wish to plead public policy in respect of the Non-Variation Clause against the first and second defendants. Mr Fasser placed on record that the Plaintiff will not plead public policy and that whatever consequences may flow from that will flow.

5.3.5. The public policy aspect is dealt with in detail below.

5.4. Mr Fasser placed on record that the quantum of Toerien's counter claim is admitted, without admitting liability.

6. During the course of the trial of the matter, the parties agreed as follows (recorded in a document filed of record):

*"In addition to the admissions set forth in the pleadings, the parties record the following additional admissions:*

1. The plaintiffs are duly registered and incorporated in accordance with the Company Laws of the Republic of South Africa.
2. The conclusion of the first main cession agreement, as pleaded in paragraph 14 of the particulars of claim ("the POC"), a copy of which appears at page 117 of bundle "A".[3]
3. From 1 August 2016 to 1 July 2019, Sasfin Bank Ltd debited the first defendant's account monthly with the rental payments provided for in the version of the rental agreement appearing on page 136 of bundle "A".

4. Without admitting liability:

4.1 the first and second defendants admit the quantum of the plaintiffs' claim as set out in prayer 1 of the POC;[4]

4.2 the third defendant admits the quantum of the plaintiffs' claim as set out in prayer 5 of the POC,[5] and the quantum of the first and second defendants' counterclaim as set out in prayer (a) of the CC.[6]

4.3 The plaintiffs admit the quantum of the first and second defendants' counterclaim as set out in prayer (a) of the CC.[7] "

Plaintiffs' locus standi

7. The defendants contend that the plaintiffs lack locus standi, essentially because there had not been compliance with certain procedural mechanisms for the cessions. Oxbow further contended that the warranties relevant to this matter were not ceded on a proper interpretation of the cession agreement.
8. The plaintiffs led evidence which established that insofar as they were concerned the cessions relevant to the matter had been concluded and were in place and that they acted in terms thereof, which included the warranties, representations and indemnification at issue in this matter.
9. A third party cannot enter into the fray in regard to procedural mechanisms and interpretations in respect of an agreement to which it is not a party, absent an estoppel or prejudice (*Aussenkehr Farms (Pty) Ltd v Trio Transport CC 2002 (4) SA 483 (SCA)* at paragraphs 24 to 27, *Hillock v Hilsage Investments 1975 (1) SA 508 (A)* at 514C-515B).

10. Faced with this legal position, Mr Jonker abandoned the locus standi point taken by the first and second defendants, save that he argued that the unamended MRA without the purported handwritten amendments on it was the true agreement and not the one with the purported handwritten amendments on it and therefore the MRA was not ceded. In my view this has no merit: there was only one document and one agreement in question, which either had a valid handwritten amendment on it or not. It was the contract embodied in that document, with or without the Disputed Amendment, which was ceded. It was not a situation where, for example, the document signed on 1 June 2016 was torn up and a new one signed on 22 June 2016 and the wrong

one of the two was ceded.

11. Similarly, Mr Quinn, who appeared for Oxbow, limited his submissions in regard to locus standi to the argument that the cession between FUN and TAR, on a proper interpretation thereof, did not include the warranties relied upon by them. In my view this argument cannot be upheld based on the principles upheld in Aussenkehr and Hillock.

12. I therefore conclude that the defendants' arguments as to locus standi are of no merit.

Plaintiffs' claim in convention against first and second defendants as pleaded

13. This claim concerns, in effect, whether the Disputed Amendment was effective, which is, in turn, answered by whether it complies with the Non-Variation Clause.

14. The evidence revealed the following:

14.1. The MRA was signed by Sage for Toerien and on behalf of Oxbow by a duly authorised representative of Oxbow (this was not in dispute).

14.2. The MRA was concluded between Toerien and Oxbow on 1 June 2016.

14.3. Clause 15.1 of the standard terms and conditions of the MRA provides (in part) as follows:

*"This agreement is the entire complete agreement between the parties. No agreement differing from the terms of the shall be of any force or effect unless it is in writing and signed by the parties to this agreement."*

14.4. The "Agreed Monthly Rental", Value Added Tax thereon and the "Total monthly rental (incl VAT)" in terms of the MRA were all provided for in handwriting in the schedule on the main page thereof, the "Total monthly rental (incl VAT)" being in the amount of R6 235.80.

14.5. At some point between 22 and 30 June 2019, the MRA was purported to be amended in handwriting by crossing out and replacing the handwritten figures in respect of the above-mentioned three items with other figures, the "Total monthly rental (incl VAT)" being purportedly amended to be in the amount of R11 426.47. This is the Disputed Amendment.

14.6. It is the differential between the two handwritten figures for the "Total monthly rental (incl VAT)" which resulted in the dispute and claims in this matter.

14.7. The crossing out and replacing of the handwritten figures in respect of the above-mentioned three items was initialled by Sage on behalf of Toerien. It was not signed by him. It was neither initialled nor signed on behalf of Oxbow.

14.8. In my view, with the purported amendment having been neither initialled nor signed on behalf of Oxbow, it does not comply with the Non-Variation Clause in the MRA and is therefore not effective and of force and effect. This appeared to be accepted by the parties and was certainly not disputed by them with any vigour or at all.

14.9. This conclusion means that I need not consider the question as to whether Sage having initialled the purported amendment, but not signed it in full, would be sufficient for the purposes of compliance with the Non-Variation Clause (I am of the view that it is, but that need not be decided).

15. The finding in paragraph 14.8 above means that on the pleadings in respect of the claim in convention between the plaintiffs, on the one hand, and the first and second defendants, on the other hand, the plaintiffs have failed to establish their pleaded case as to the Disputed Amendment and the first and second defendants are successful against the plaintiffs in that respect, subject to the possible legal implications of the defence of public policy raised by Oxbow on which Mr Fasser submitted the plaintiffs intended to and were entitled to rely. That submission and the defence of public policy is dealt with further below.

Toerien's claim in reconvention for enrichment

16. Mr Quinn's cross-examination of Sage effectively teased out and stitched together the facts and context underlying the purported amendment of the MRA and the purpose thereof, which was ultimately that it was intended by both Toerien and Oxbow to be amended as it was purported to be done and that this was because Toerien and Sage had heavily underestimated the cost of the cancellation of its existing lease with CBA. The evidence was as follows:

16.1. Sage agreed on behalf of Toerien to the increased monthly rental payment which is the subject of the Disputed Amendment.

16.2. He and Toerien were not tricked into agreeing to and paying the increased amount.

16.3. Mr Quinn put to Sage that it seems that there was a good faith attempt to amend the contract but there was non-compliance with the formalities, which Sage accepted.

16.4. The handwritten amendments to the MRA (i.e. the subject matter of the Disputed Amendment) and the credit application form were made in Sage's presence by someone from Oxbow and Sage initialled the amendments there and then.

16.5. Leaving aside formalities, he did in fact agree to these amendments.

16.6. Sage accepts that there was no malice, bad faith and fraud on the part of anyone in regard to the Disputed Amendment.

16.7. There was a factual and business-like basis for the purported amendments and the debits in the amended amounts.

16.8. Oxbow had presented a written comparison between CBA's offering and what Oxbow could offer, which included the CBA settlement amount of R44 349.97 which had been provided to them by Sage. It was Toerien's responsibility to pay the CBA settlement amount, which was to be built into the Oxbow contract rental payment.

16.9. Initially the CBA settlement was thought by Sage to be in respect of a period of seven months resulting in the aforesaid sum of R44 349.97, which he advised Oxbow. This was built into the paperwork signed on 1 June 2016, resulting in the rental payment of R5 470 (ex Vat) and the "Total monthly rental (incl VAT)" of R6 235.80 provided for in the MRA, which is the central focus of the dispute in regard to this aspect of the matter.

16.10. On 21 June 2016, Sage requested the settlement amount from CBA. He was trying to get on top of what was owed. The settlement figure was stated to be R329 738.22 (including VAT) in the CBA settlement letter dated 21 June 2016 received by Sage. Later that day, Sage wrote to Dayne Ridgeway ("Ridgeway"), representing Oxbow, and said that CBA had sent a huge settlement amount in the CBA settlement figure letter of 21 June 2016.

16.11. Sage had not realised that the CBA contract had much more than seven months to run and that the CBA settlement figure was as much as it was.

16.12. Mr Quinn put that Toerien was in a predicament because it had binding agreements with two service providers and that it would cost to get out of either agreement.

16.13. Sage said to Ridgeway on 22 June 2016 that he is not sure how the big CBA settlement would affect the contract signed with Oxbow.

16.14. Ridgeway tried to help with the CBA problem and said that in the worst case scenario the Oxbow rental would have to increase but they will cross the bridge when they got to it, 'so do not stress'.

16.15. The CBA contract was found and given to Ridgeway by Sage with the CBA settlement letter on or about 22 June 2016. The contract was 20 months in with 40 months to go (of the 60 month contract), as opposed to the 6 or 7 months believed by Sage, which resulted in the CBA settlement figure being R329 738.22, and not the expected R44 349.97 which had been the basis for the figures

in the MRA signed on 1 June 2016.

16.16. The CBA settlement figure of R329 738.22 was subsequently reduced to R276 919.48, for reasons not material to this judgment.

16.17. Sage then recorded in an email to Ridgeway on 22 June 2016 that: 'So I guess we have to increase the rental proposal accordingly ?'

16.18. FUN paid the amount of R267 126.16 to CBA to settle the settlement amount. CBA never asked Sage for money and never came to collect its machines.

16.19. Oxbow installed the Oxbow machines on 17 June 2016.

16.20. Sage accepts that if Ridgeway had initialled the MRA then the issue as to the amendment of the MRA would not be before the court today.

17. The Disputed Amendment was therefore made by agreement between Oxbow and Toerien.

18. The debt to CBA was initially thought by Sage to be in respect of a period of seven months resulting in the sum of R44 349.97, which he advised Oxbow. This was built into the paperwork signed on 1 June 2024, resulting in the rental payment of R5 470 (ex Vat) and the “Total monthly rental (incl VAT)” of R6 235.80 provided for in the MRA, which is the central focus of the dispute in regard to this aspect of the matter. It turned out this was incorrect and the Disputed Amendment was made. The debt owing by Toerien to CBA was finally settled by the amount of R267 126.16 being paid by FUN to CBA, to be financed by the increased monthly rentals which are the subject of the Disputed Amendment in respect of the MRA. This was substantially more than what was envisaged to be due to CBA in terms of the MRA concluded on 1 June 2016.

19. Mr Jonker argued that it was a term of the MRA that Oxbow was to pay CBA and therefore there could not be an enrichment of Toerien and an impoverishment of FUN/TAR by that payment being made.

20. I asked Mr Jonker whether this meant that it was a term of the MRA that Oxbow was obliged to pay CBA whatever the amount of the debt to CBA turned out to be, whether R44 349.97 or R267 126.16 or something else. His effective answer was an affirmative. I asked him where that was in the agreement. It is not there. He then said it was a tacit term. I do not agree with that. It would mean that, were the debt later to be found out to be R500 000.00, then Oxbow would

be with paying that amount to CBA. That would be quite a tacit term, to say the least. I disagree with it.

21. R44 349.97 is what was envisaged to be financed for the purposes of the CBA debt when the MRA in unamended form was concluded. This was subsequently established to be in a much greater amount eventually resulting in a payment to CBA of the amount of R267 126.16. When the MRA in unamended form was concluded, the CBA settlement amount was envisaged to be R44 349.97. It was not some floating figure for which Oxbow would be liable to pay whatever it may be.

22. The liability to CBA for the amount of R267 126.16 was Toerien’s liability, not Oxbow’s. There was no agreement that Oxbow was taking on that liability or the liability to CBA, whatever amount it may have been – that explains why the Disputed Amendment had to be made, in order to cater for the financing of the huge under-estimation of the CBA settlement amount.

23. That amount could have been paid to Toerien for it to pay to CBA or Toerien, at its instance, could have elected to use the funds as working capital in its business and continue to pay the monthly instalments to CBA as well as Oxbow. In any of these instances, the monthly rentals would remain the same. As an example of another difference, the payment instruction forming part of the discounting letter itself from Oxbow provides for payment of the full amount from FUN into one account.
24. As a result, the plaintiffs (FUN) paid R267 126.16 for the benefit of Toerien. Whether the figure is R267 126.19 or that amount less the R44 349.97 envisaged when the MRA in unamended form was concluded on 1 June 2016, it is greater than the R209 130.88 claimed by Toerien in its counter claim.
25. Toerien's enrichment claim is for overpayments of the monthly rentals in terms of the MRA in the amount of R209 130.88, which is exceeded by the payment to CBA.
26. Toerien has therefore not been impoverished and neither of the plaintiffs has been enriched.
27. I therefore conclude that Toerien's counter claim fails.

#### Public policy

28. Public policy will be dealt with at this point because, although only pleaded by Oxbow and not by the plaintiffs, it was argued by Mr Fasser that the resolution of this issue has legal implications for the plaintiffs' claim in convention against Toerien and Oxbow.
29. According to Amler's Precedents of Pleadings, 2018, 9ed at 120, a party relying on the illegality of a term of an agreement must plead it. When illegality does not appear *ex facie* the transaction but arises from surrounding circumstances, the circumstances founding that illegality must be pleaded, and the party relying on the facts must prove them.
30. However, a full bench decision of this court has held that the court has a duty to raise the illegality of a contract *mero motu* when the parties to a dispute related to it have not done so (*Morley v Lambrechts* (A 526/2013) [2014] ZAWCHC 124 (21 August 2014)).
31. I am therefore of the view that the public policy issue is before the court in this matter, and, as submitted by Mr Fasser, whatever implications flow from a finding in that respect apply to the matter as a whole, despite it having only been pleaded by Oxbow.

#### Public policy per se

32. Mr Jonker, having accepted the principles in regard to *locus standi* articulated above, sought to deploy them in Toerien and Sage's favour, submitting that because, flowing from the cession to FUN, Oxbow is not a party to the MRA, it therefore cannot raise public policy in respect of the MRA. In my view, that is a false premise because, as pointed out by Mr Quinn, Oxbow did not assign its obligations and remained a party to the MRA to that extent

and for that purpose.

33. As the Non-Variation Clause itself is unobjectionable (which was common cause), and that which is attacked on the grounds of public policy is its enforcement (*Barkhuizen v Napier*

[2007] ZACC 5; 2007 (5) SA 323 (CC) at paragraphs 56-57, *Beadica* 231 CC and *Others v Trustees for the time being of the Oregon Trust and Others* 2020

- (5) SA 247 (CC) at paragraphs 26 and 37), *Oxbow* (who bears the onus) "... is required to show that, in the circumstances of the case there was a good reason why there was a failure to comply", which means that it must establish facts explaining why it did not comply with the clause because "The difficulty in the present case is that the applicant has not furnished the reason for the non-compliance ... For all we know he may have neglected to comply with the clause in circumstances where he could have complied with it ..." (*Barkhuizen v Napier*

[2007] ZACC 5; 2007 (5) SA 323 (CC) at paragraphs 58, 84 and 85).

34. In my view, this applies perforce to this matter in which there was no evidence in this respect. On the contrary, it was beyond any question that *Oxbow* could have complied with the Non-Variation Clause but simply failed to do so. Mr Quinn submitted that the court must 'Weigh the absence of the explanation as opposed to it being a threshold enquiry.' The problems with this are (1) that *Barkhuizen* requires it for the reasons explained therein and that (2) this would have the consequence that non-variation clauses would be vastly more vulnerable to attack than what the cases suggest rendering the terms of contracts more uncertain.

35. My Quinn relied on three cases in which non-variation clauses were held to yield to public policy. In my view, however, none of them assist *Oxbow*, for the reasons set out below:

35.1. *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM):

35.1.1. The issues in that case were " ... resolved with reference only to the constitutional values as constituting public policy." (paragraph 79).

35.1.2. The ultimate basis for the finding not to uphold the non-variation clause was very different to what is in issue in the instant matter, described as follows at paragraph 125:

*"Public policy, as expressed by the constitutional values and norms, does not tolerate the abuse of the process of law. The rights and freedoms under the Constitution are there to be used, and not abused. Courts often find that litigants use their legal rights under the Constitution to manipulate legal proceedings by obtaining postponements and causing unwarranted delays, and by raising defences with improper objectives and motives. Sadly, this trend seems to be on the increase. Public policy requires courts to put an end thereto."*

35.1.3. In my view, therefore, this authority is of no assistance to *Oxbow*.

35.2. *GF v SH* 2011

(3) SA 25 (GNP):

35.2.1. That matter involved the maintenance of minor children and inequitable results flowing from the application of a non-variation clause (paragraphs 29 and 30).

35.2.2. In my view, that distinguishes the matter from the instant one.

35.2.3. In any event, as properly pointed out by Mr Fasser which I appreciate, the findings in regard to the non-variation clause and public policy in that matter did not survive an appeal before the SCA which overturned them in *SH v GF (De Haas v Fromentin)* 2013 (6) SA 621 SCA, holding as follows at paragraph 16:

*“In any event the view of Kollapen AJ that in the light of the oral agreement of variation of the maintenance order it would offend*

against public policy to enforce the non-variation clause, cannot be endorsed. This court has for decades confirmed that the validity of a non-variation clause such as the one in question is itself based on considerations of public policy and this is now rooted in the Constitution. See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren & andere* 1964

(4) SA 760 (A) at 767A-C and *Brisley v Drotsky* 2002

(4) SA 1 (SCA) paras 7, 8, 90 and 91. Despite the disavowal by the learned judge, the policy considerations that he relied upon are precisely those that were weighed up in *Shifren*. In *Media 24 Ltd & others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd & others as amici curiae)* 2011

(5) SA 329 (SCA) para 35 Brand JA said:

‘As explained in *Brisley v Drotsky* 2002

(4) SA 1 (SCA) (para 8), when this court has taken a policy decision, we cannot change it just because we would have decided the matter differently.

We must live with that policy decision, bearing in mind that litigants and legal practitioners have arranged their affairs in accordance with that decision. Unless we are therefore satisfied that there are good reasons for change, we should confirm the status quo.’

35.2.4. In my view, therefore, this authority is of no assistance to *Oxbow* and, on the contrary, reinforces the enforcement of non-variation clauses in matters such as the instant matter.

35.3. *Steyn and Another v Karee Kloof Melkery (Pty) Ltd and Another* (2009/45448) [2011] ZAGPJHC 228 (30 November 2011):

35.3.1. This involved the settlement of a dispute to bring litigation to an end and the avoidance of litigation, these being two of the public policy reasons invoked (paragraphs 55 and 56 of the judgment).

35.3.2. The Constitutional Court *Eke v Parsons* 2016 (3) SA 37 (CC) at paragraphs 22 and 23 approved the following:

*“(T)he policy underlying the favouring of settlement has as its underlying foundation the benefits it provides to the orderly and effective administration of justice.”*

35.3.3. In my view, that distinguishes the matter from the instant one.

35.3.4. In paragraph 57 a third reason was given, namely that it was stated that “... if effect were to be given to the entrenched formalities clause, the principles of freedom and sanctity of contract would be violated.”

35.3.5. In my view, that, at face value, directly contradicts *Shifren* and, if so, would not to be endorsed.

35.3.6. The next sentences in that paragraph 57 of the judgment, however, goes on to show that this is not the case and explains that it is in the context of the settlement of litigation:

*“This is not in respect of the tension or paradox to which I have referred to above in relation to the agreement insofar as it varies the legal consequences of the original agreement. This would be a violation of those principles in relation to the agreement insofar as it relates to the settlement of the Magistrates' Court litigation and the disputes which are outside the original agreement and relate to collateral agreements. In respect of agreement relating to these disputes, the parties have not taken upon themselves entrenched formalities.”*

35.3.7. The next paragraph (58) of the judgment explains the basis for the formalities clause yielding to public policy being the context of the settlement of litigation:

*“Thus the third question is to be answered in the defendants' favour. The *Shifren* principle must yield to the public policy considerations*

*requiring the enforcement of the second settlement agreement.”*

35.3.8. In my view, therefore, this authority is of no assistance to *Oxbow*.

36. I think that the essence of the legal concept of public policy is that it is not some form of remedy to be applied on an unrestrained basis: on the contrary, the authority is unanimous that it is to be applied sparingly and only in the clearest of cases failing which uncertainty will abound. The Constitutional Court emphasised in *Beadica* that contracts are to be respected (at paragraphs 76, 79, 82, 84 and 94).
37. The courts, in my view, should guard against any tendency developing by which parties perceive there to be a licence to raise public policy when they wish to escape a contract. It is essential to bear in mind that, as held in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (SCA) at 9B, the power of a court in this regard must:

*“... be exercised sparingly exercised and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one’s individual sense of propriety and fairness.”*

38. Lest one loses sight of what appears to me to be the true ambit of public policy in this legal context, two of the leading cases on this aspect may provide guidance, being *Eastwood v Shepstone* 1902 TS 294 at 302 and *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A), which upheld similar public policy considerations, namely where a person would “virtually be relegated to the position of a slave” (*Sasfin* at 13H) and reduced to “forced labour” (*Eastwood* at 302).

39. Mr Quinn relied on the following part of paragraph 33 of the judgment in *Infovest Consulting (Pty) Ltd and Another v Libra Partners LLC* (19524/2018) [2023] ZAWCHC 85 (3 May 2023):

*“Demonstrating in a given case that such contracts should not be enforced as being contrary to public policy would require something more. It would require proof that the operation of the given contract according to its tenor would be legally or societally unacceptable for some objectively identifiable reason; for example, that it would unjustifiably impinge on an inalienable constitutional right, be inconsistent with the rule of law (the old case of *Nino Bonino v De Lange* 1906 TS 120 affords an example) or bear unacceptably onerously on a party ... [the underling is Mr Quinn’s]*

40. In my view, what is instructive is the balance of the paragraph which immediately follows the above part, in which *Sasfin* was cited as an example (virtually be relegated to the position of a slave) to illustrate this principle:

*“... (as illustrated, for example, in *Sasfin* supra, where the features of a cession in securitatem debiti executed in favour of *Sasfin* by its debtor (*Beukes*) that impelled the conclusion that the agreement offended against public policy were described by the court as follows: ‘This follows from the provisions in clause 3.4 that *Sasfin* would be “entitled but not obliged” to refund any amount to *Beukes* in excess of *Beukes*’ actual indebtedness to *Sasfin*. As a result *Beukes* could effectively be deprived of his income and means of support for himself and his family. He would, to that extent, virtually be relegated to the position of a slave, working for the benefit of *Sasfin* (or, for that matter, any of the other creditors). What is more, this situation could, in terms of clause 3.14, have continued indefinitely at the pleasure of *Sasfin* (or the other creditors). *Beukes* was powerless to bring it to an end, as clause 3.14 specifically provides that “this cession shall be and continue to be of full force and effect until terminated by all the creditors”. Neither an absence of indebtedness, nor reasonable notice to terminate by *Beukes* in those circumstances would, according to the wording of clause 3.14, have sufficed to bring the deed of cession to an end.’).*

41. In my view, what has been set out in the above paragraphs illustrates the proper ambit of the application of public policy in this legal context, and to go beyond that proper ambit would, in my view, take it out of context and would be to extend the application of public policy well beyond its heavily curtailed sphere, which is to be avoided "... lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power." (Sasfin at 9B).
42. I think that the above considerations are neatly and concisely summed up by borrowing from, paraphrasing and augmenting a dictum of Cameron J in *Absa Bank Limited v Moore and Another* 2017 (1) SA 255 (CC) at paragraph 39: Public policy is not a universal solvent providing an out to a contractant and nor is it a flamethrower withering all within reach.
43. I therefore conclude that Oxbow's case grounded in public policy does not succeed.
44. While the observer may at first blush consider this result to perhaps have some unfairness, hard cases must not make bad law and the courts eschew "... one's individual sense of propriety and fairness." as held in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (SCA) at 9B (quoted more extensively above).
45. A final observation is that Oxbow raised public policy in respect of the Non-Variation Clause in the MRA in a curious way, by asserting it against the plaintiffs. Toerien was a party to the MRA. My impression is that the proper way to have raised and pleaded this issue would have included asserting it against Toerien.

## Fraud

46. In argument, Oxbow relied on fraud, linked to public policy, to avoid the Non-Variation Clause.
47. Fraud was not pleaded by Oxbow.
48. The courts will have no hesitation in not enforcing a provision which would involve the condonation of a fraud (*Wells v SA Alumenite Co* 1927 AD 69 at 72).
49. Fraud is defined in *Van Heerden v S* (A160/2016) [2016] ZAFSHC 191 (27 October 2016) as follows at paragraph 15:

*"Fraud is the unlawful and intentional making of a misrepresentation which causes actual prejudice or which is potentially prejudicial to another."*
50. Mr Quinn relied on *Bank v Grusd* 1939 TPD 286, suggesting that Grusd requires three things: (1) agreement on a variation, (2) allowing effect to be given thereto and (3) receiving benefit from a co-contractant's performance in terms thereof. It would appear that his argument is that Grusd is a special case of fraud, not requiring intent or knowledge.
51. On my reading of Grusd, it is squarely based on fraud, the court holding at 287 that parties must "be answerable to the jurisdiction of this Court in cases of fraud". This was the court's introductory premise of its ratio decidendi. I do not believe that the court refers to fraud, as

it does, only to effectively jettison the requirements of that concept, as appears to me to be the effect of the submission made by Mr Quinn. Grusd, to me, appears to regard as fraud, for example, allowing someone to go ahead on a particular basis and then raising formalities. That suggests some form of intention and knowledge. The judgment is short (two pages) and this is not elaborated upon therein.

52. I am somewhat fortified in this view by the analysis in *Gainsford NO and Others v Sasol Chemical Industries (Pty) Limited* (24803/2015) [2017] ZAGPJHC 333 (5 August 2017) in which Grusd was considered and applied in an exception in respect of which the court held that it was necessary to plead fraudulent or unconscionable

conduct. Paragraphs 17 to 20 of the judgment are quoted in some length to provide context:

*“[17] Finally, the liquidators also argue that ‘Stainless Fabricators executed the purchase orders and incurred extra costs as provided in the respective agreements. The manufacturing process has been concluded and during this process Sasol stood by and monitored the expenditure being incurred. They obtained the benefit of these expenditures caused by the late placing of orders, amendments, and changes and refuse to make payment therefor.’ That SASOL stood by, monitored the expenditure being incurred and obtained the benefit thereof, are counsel’s contentions and not factual averments made in the particulars of claim.*

- [18] The liquidators found authority for these contentions in *Bank v Grusd* 1939 TPD 286 at 288. There a building contract provided that no extra work was to be done unless upon the written order of the owner and that no claim for extra payment should be entertained unless supported by the written authority of the owner. Maritz J held thus:

‘it seems to me, therefore that if the defendant [builder] proves that the plaintiff [owner] agreed that the extra work should be done or, knowing that the defendant regarded the work to be done as falling outside the contract, stood by and allowed him to do this work, well knowing that she was going to get the benefit, she ought not to be heard when she says “I refuse to pay because I had given no written authority to the defendant to supply the extras.’

- [19] There can be no doubt, as is stated in *RH Christie The Law of Contract in South Africa* 3rd Ed at 496-7, ‘that a party whose conduct is “fraudulent or unconscionable, or a manifestation of bad faith” will not be permitted to rely on a non-variation clause’ and that *Bank v Grusd* ‘is still good law’. (See *Grey v Waterfront Auctioneers (Pty) Ltd and Another* 1992

- (2) SA 662 (WLD), at 668.) But the liquidators need to plead fraudulent or unconscionable conduct on the part of SASOL that legally prevents reliance on the applicable restriction clauses of the contract in each instance where price extras and allowances are claimed. [underlining added]

- [20] I conclude, therefore, that the liquidators’ claim as presently formulated is bad in law and excipiable on the ground of vagueness and embarrassment.”

53. In my view, the above reflects the proper interpretation of Grusd, namely that it does require fraud. Indeed, I apprehend that Mr Quinn's proposed interpretation of Grusd would have the effect that many, if not most, instances of reliance on a Non-Variation Clause would be vulnerable to attack.
54. If Grusd means what I think Mr Quinn contended, then I would decline to follow it for the reasons set out above. But I am of the view that is not the correct interpretation.
55. No case was attempted to be made out, let alone made out, that Toerien and Sage had any knowledge of the non-compliance with the Non-Variation Clause. Further, no intent component was established for fraud.
56. I therefore conclude that Oxbow's argument based on fraud does not succeed.
57. As to Mr Fasser's 'legal implications' of this decision, the result is that the plaintiffs do not succeed against the first and second defendants in this respect.

#### Plaintiff's case against Third Defendant

58. The question of public policy has been dealt with above.
59. The question to be decided in this matter, according to Mr Fasser, is not whether there is liability, but rather which of Toerien and Sage, on the one hand, and Oxbow, on the other hand is liable – if not the former, then the liability of the latter follows as a matter of course (it was also submitted in the heads of argument prepared by him that there is liability one way or the other). Core to this is his submission that:

*"... if the MRA is ultimately found, on a conspectus of all the evidence, not to be enforceable according to the amended terms against the First and Second Defendants, then (i) the First and Second Defendants will succeed in their reliance on the non-variation clause entailing that they are not liable to the Plaintiffs, and (ii) the Third Defendant will be liable for breach of the applicable warranties."*

60. Put another way, now that it has been found that Toerien and Sage are not liable to the plaintiffs, according to the plaintiffs it follows as a matter of course that Third Defendant is liable.
61. I consider this approach and submission to be too simplistic for the reasons set out herein. In core principle, it is because the question for the court to determine is whether a case for liability, as pleaded against any of the defendants, has been made out by the plaintiffs. I have already found that no case is made out against the first and second defendants. What remains is whether a case is made out against the third defendant (leaving aside the public policy defence raised by the third defendant which I have

already found should not be upheld).

62. Even in the case of *Mazibuko v Santam Insurance Co Ltd* 1982

- (3) SA 125 (A) at 135C-136H relied upon by the plaintiffs, it was found, in an application for absolution from the instance, that:

*“... the case should be decided on the evidence which all the parties might choose to place before the Court, provided, as I say, that the plaintiff, when presenting his case, has laid the necessary foundation of showing, prima facie, that one or other or both of the defendants are legally liable.”*

63. I mention this at this point because the third defendant’s possible liability depends in the first instance on whether the provisions relied upon by the plaintiffs against the third defendants are successfully invoked, and not as a matter of course if the first and second defendants are not liable. Further, even if successfully invoked, the third defendant will only be liable to the extent of losses which flow from such breach.
64. Plaintiffs’ case against Oxbow is based on the following contractual provisions pleaded in their Particulars of Claim, the relevant ones being pleaded as follows (“the Provisions”):

*“... Oxbow:*

36.1 warranted, represented and undertook:

36.1.1 the first defendant ... is bound by the terms of the rental agreement; (clause 5, 5.1.16)

36.1.2 the first defendant has no right of action against FUN; (clause 5.1.19 and 5.1.25 and 5.1.28)

36.1.3 the first defendant shall not be entitled to claim termination of the rental agreement for any reason whatsoever; (clause 5.1.23; (hereinafter referred to as the warranty clause)

36.2 indemnified FUN and held it harmless against:

36.2.1 any claim, loss or expense (including consequential damages, loss of revenue, profits and legal costs) arising out of or in connection with or which may be sustained or incurred by FUN as a direct or indirect consequence of any breach by the first defendant of any of the terms, conditions, warranties or representations or undertakings in terms of the first main cession agreement. Including but not limited to any innocent or negligent misrepresentation by Oxbow to FUN; (clause 6.1, and hereinafter referred to as the indemnity clause).”

65. Toerien’s counter claim has not been upheld. That aspect of the claim against Oxbow therefore falls away insofar as the case between the plaintiffs and Oxbow is concerned.
66. The plaintiffs’ claim against the first and second defendants has already been held not to succeed.
67. That, however, does not mean, as Mr Fasser has submitted, that it follows as a matter of course that their claim against Oxbow must succeed. That claim must still be established, which entails whether any of the Provisions have been successfully invoked. Accordingly, what still remains is whether the plaintiffs’ case against Oxbow is upheld in this regard.

68. Oxbow and the plaintiffs both allowed the error on Oxbow's part in not effecting the amendment to the MRA to slip through their systems. Oxbow, in particular, did not act in this respect. None of this has anything to do with questions such as blame or causation. It is mentioned because the MRA was not amended and, accordingly, its terms were in the unamended form. I believe this to be a key consideration when the terms of the Provisions are considered.
69. I have already found in respect of the pleaded case in convention between plaintiffs, on the one hand, and the first and second defendants, on the other hand, that the MRA was not amended. In other words, the terms of the MRA are the terms in the unamended form
70. Accordingly:
- 70.1. The MRA was in the unamended terms.
- 70.2. Toerien was bound by the MRA in those unamended terms.
- 70.3. There was no breach thereof by Toerien.
- 70.4. There was no right to cancel the MRA by Toerien at the time of the cession.
71. The aspects in the above paragraphs are, in my view, material to the consideration of whether the Provisions have been breached and are successfully invoked.
72. In the result, I raised with counsel for the plaintiffs and Oxbow whether there was any breach of any of the Provisions (pleaded in paragraph 36 of Particulars of Claim), and whether there was a claim in respect of which the indemnification pleaded therein can be invoked. Mr Fasser engaged on the issue but Mr Quinn said he was not in a position to do so and would require some time. I therefore afforded them the opportunity to deliver written supplementary notes on the issue, which they did.
73. I will set out (1) each of the provisions relied upon by the plaintiffs in this regard and detail what I consider to be their import and meaning; and then (2) the plaintiffs' supplementary argument in some detail in italics, and after each aspect thereof express in bold underlined words where I agree and disagree and explaining why.
74. In undertaking this exercise, I consider it important to bear the following in mind: Oxbow, for example in the discounting letter, and by means of the invalid purported amendment, created the impression that the higher rental was validly agreed. Intuition, informed by this, and perhaps fuelled by perceptions of what may be fair, has the propensity to lose sight of what is the real question, and the consideration thereof, namely whether there was a breach of the Provisions. I must confess that initially it did not occur to me there may have been a discord between what was to be concluded on the

## facts

and the law in regard to the MRA and its terms, on the one hand, and what was covered by the Provisions, on the other. It was while considering the matter prior to argument, during which I considered the terms of Provisions against the MRA as unamended, that the possibility thereof occurred to me. It is with this in mind that the analysis below is undertaken.

75. The Provisions relied upon by the plaintiffs in their claims against Oxbow are as follows (the emphasis in bold or underlining or both is that of Mr Fasser in his supplementary written submissions, which emphasis I have retained for the purpose of presenting his argument):

75.1. In terms of clause 5.1 of the First Main Cession Agreement, Third Defendant agreed to the following: “The cedent hereby warrants, represents and undertakes to TA in respect of each and every Contract as at the cession effective date...”

75.2. ‘Contract’ is defined in clause 1.1.7 as “a written lease or rental agreement entered into between the Cedent and a customer, which shall have a value of not less than R20 000-00 (twenty thousand rand) in a form approved by TA in writing from time to time.”

In my view this definition is of fundamental importance to the resolution of this aspect of the matter.

75.3. The ‘Cession Effective Date’ is defined in clause 1.1.8 as “... in respect of each Contract, the effective date or Cession by the Cedent to TA, as set out in the Final Discounting Letter.”

75.4. The plaintiffs rely on the following specific Provisions to justify their contention that the third defendant was in breach:

75.4.1. In terms of clause 5.1.16:

*“the Contract is factually correct in every respect, correctly reflects the intention of the parties thereto, and no Contract has been amended, altered or modified in any respect except in writing, and copies of all such writings are attached to the Contract. In addition, unless otherwise agreed in writing by TA, the Contract delivered to TA comprises the only original document/s in existence relating to the transactions and the Goods referred to therein;”*

This clause detained consideration more than the others, in particular the words “the Contract is factually correct in every respect, correctly reflects the intention of the parties thereto”. In my view, the key is to identify that this relates to the ‘Contract’ as defined. I have already found that the Disputed Amendment was not effective and that the contract is the MRA in its unamended form. The question is whether something handwritten but not part of the contract is covered by this provision, in other words whether it is part of the ‘Contract’ as defined. I think that putting this question effectively answers it because the invalid amendment is not part of the contract. This is understandable because the plaintiffs would not want anything outside of the legally valid ‘Contract’ to be raised against them and would require to be covered by the Provisions should that arise. As an aside, it is easy to see that the purported amendment does not comply with the Non-Variation Clause and is not validly part of the contract. Further, this clause 5.1.16 records that it

has not been amended except in writing “and copies of all such writings are attached to the Contract”, yet the handwriting on the document is with incomplete signatures as required by what is a standard Non-Variation Clause and is not in writing attached to the ‘Contract’. Of some interest in this respect is the evidence of Gené Olivier, a national support manager for plaintiffs, who testified that her team receives new deals for checking and if acceptable processes them, and had it been picked up that there was a (purported) amendment to an MRA initialled by only one party and not the other, then it should have been raised with Oxbow and it would then be a matter for Oxbow to counter-sign the amendment and that would solve the problem. Accordingly, it is the MRA in its unamended form that was warranted. That contract was not breached.

75.4.2. In terms of clause 5.1.23:

*“the Customer shall not be entitled to claim termination of the Contract for any reason whatsoever.”*

In my view, this relates to the ‘Contract’ as defined at the time of the cession (the effective date as defined above), i.e. the MRA in its unamended form. Contrast the wording in clause 5.1.25 below. Guaranteeing the future is unbusinesslike and I believe that this clause did not intend to do so.

75.4.3. In terms of clause 5.1.25:

*“the Customer has not and will not acquire during the currency of that Contract, any claim enforceable against TA for the reduction of any amounts payable under any Contract, the return of Goods, or for damages.”*

In my view, this relates to the ‘Contract’ (i.e. the MRA in its unamended form). This is what was warranted and it was not breached, as considered further above.

75.4.4. In terms of clause 5.1.28:

*“the Customer has no counterclaim or right to set-off any claim or amount against any sum payable or which becomes payable by the Customer in terms of the Contract.”*

In my view, this relates to the ‘Contract’ as defined at the time of the cession (the effective date as defined above), i.e. the MRA in its unamended form. Guaranteeing the future is unbusinesslike and I believe that this clause did not intend to do so. Further, its wording appears to relate to claims outside of the ‘Contract’ as defined.

75.4.5. In terms of clause 5.1.4:

*“The Contract will be valid, binding and enforceable in accordance with its terms and will comply fully with all relevant South African laws or instruments having the force of law. It is specifically agreed that*

approval by TA of the form of the Contract for cession purpose shall not relieve the Cedent of any liability or obligation in terms of this clause.”

In my view, this relates to the ‘Contract’, i.e. the MRA in its unamended form, as considered further above. This is what was warranted and it was not breached.

75.4.6. In terms of clause 5.1.5:

*“there is no challenge, dispute or claim by or against the Lessor under or in respect of such Contract.”*

In my view, this relates to the ‘Contract’ as defined at the time of the cession (the effective date as defined above), i.e. the MRA in its unamended form. Guaranteeing the future is unbusinesslike and I believe that this clause did not intend to do so.

75.5. Each of these warranties, representations and undertakings was agreed to be material to the decision to accept the offer to purchase a contract from the third defendant. This is expressly catered for in clause 5.4 which reads:

*“Each representation, warranty and undertaking shall be deemed to be a separate representation, warranty or undertaking and a material representation, warranty or undertaking which induced TA to enter into this Agreement and to accept any Offer made under this Agreement.”*

75.6. In terms of clause 5.5:

*“In the event that there is any breach of any of the above representations, warranties and/or undertakings, or if any Customer makes any allegation which, if proved by the Customer, would result in a breach of any of the above representations, warranties and/or undertakings, and in particular if any Customer withholds payment of any amount owing under a Contract as a result of such allegation, the Cedent*

shall be in breach of the Agreement and, without limiting any other remedies TA may have under this Agreement or at common law, TA shall have the right to require the Cedent to repurchase the Contract upon such terms and conditions provided in 6.2 below.”

76. The plaintiffs’ supplementary argument is set out below in italics with my views in respect thereof, based on my understanding of the Provisions relied upon by the plaintiffs as articulated above, following in bold underlined words:

76.1. The warranties, representations and undertakings were material to the plaintiffs’ decision to purchase, and thereby take cession,

of the MRA. I agree with this (relating, as it does, to the Provisions).

76.2. From the evidence of the plaintiffs’ witnesses, at the time that the MRA was offered for cession, the version of the MRA that was offered for cession was the (purportedly) amended version which reflected the higher rental amount. I agree with this (I added in the word ‘purportedly’). Key, however, is that the purported amendment was not valid and did not form part of the contract. It was therefore not part of what was covered by the Provisions because it was the contract which was covered thereby.

76.3. In so offering the MRA for cession, the third defendant thereby undertook, represented and warranted that the plaintiffs would be able to claim rental on the MRA at the amount recorded therein (i.e. the amount of R10 023-22 per month excluding VAT). While superficially attractive, in my view this does not pass muster when one considers (as has been done above) the terms of the

Provisions, which relate to the 'contract' and its terms, which is the MRA in its unamended form which does not include the above figure, the Disputed Amendment having been ineffective. What was therefore actually warranted therefore was the contract as I have found it to be. This is an example of the intuition referred to above and below.

76.4. In other words, the third defendant, in effect, said the following to the plaintiffs:

'Here is the MRA we are offering you for cession. We represent, warrant and undertake that you will be able to claim (or debit) rental from the client in the amount of R10 023-22 per month excluding VAT. This has been agreed between the parties and any amendment effected to the MRA was compliant with its terms. You will be able to lawfully debit and enforce payment of this rental amount for a period of 60 months. The client does not have, and will not acquire, any claim against you during the currency of the MRA and does not have any reason whatsoever to cancel this MRA. This MRA is legally enforceable on these terms.'

I disagree with this for the reasons stated in the above paragraph.

76.5. However, these warranties, representation and undertakings proved to be incorrect. To the contrary:

76.5.1. The plaintiffs were not, in law, entitled to claim the amount of R10 023-22 excluding VAT from the first defendant over a period of 60 months. While this is correct, I disagree that it constitutes a breach for the reasons stated above.

76.5.2. The amendment of the rental amount was not, as a matter of fact, effected in writing and signed in accordance with the MRA's non-variation clause. While this is correct, it is not covered by any of the Provisions relied upon by the plaintiffs. It is also easy to see ex facie from the MRA itself. Paradoxically, this submission shows why the MRA is in the unamended terms.

76.5.3. The parties' respective intentions to increase the rental amount was not legally effective or binding. While this is correct, it is not covered by any of the Provisions relied upon by the plaintiffs.

76.5.4. The MRA was not factually correct in every respect and did not correctly reflect the parties' intentions insofar as the parties had not properly given effect to that intention in accordance with clause 15.1. My views expressed above and below apply equally here.

76.5.5. The first defendant had, and/or acquired during the currency of the MRA, a legal basis to cancel the MRA due to (i) the legally ineffective amendment, and (ii) the subsequent incorrect debiting of amounts that had not legally been agreed, or consented to, for a period of three years. While this is correct, it is not covered by any of the Provisions relied upon by the plaintiffs.

76.5.6. The first defendant did, in fact, cancel the MRA on the foregoing basis as it was legally entitled to do. The plaintiffs debiting of higher amounts of rental over a period of three years, as a consequence of the ineffective amendment, and without having any

legal basis to do so, is undoubtedly a material breach going to the root of the contract justifying cancellation. While this is correct, it is not covered in any of the Provisions relied upon by the plaintiffs.

76.5.7. The first defendant did, in fact, institute a counterclaim against the plaintiffs for the amount by which it alleged constituted

overpayments to the plaintiffs. While this is correct, it is not covered in any of the Provisions relied upon by the plaintiffs as it relates to a future claim. In any event, the counter claim is dismissed in this judgment.

76.6. In the event of the Court upholding the first defendant's contentions, then the Customer (i.e. Toerien) has indeed made allegations which entail that the third defendant was (and is) in breach of the foregoing representations, warranties and undertakings. As recorded above, I do not agree that there was any breach.

76.7. It matters not that what was actually ceded by the third defendant was an MRA that was enforceable according to its unamended terms (i.e. that the plaintiffs could have enforced the unamended MRA). I disagree. The terms of the Provisions relied upon by the plaintiffs must be considered. They relate to the 'contract' which is the MRA in its unamended form, as superficially unattractive as that may be.

76.8. The question is not whether the Third Defendant was in breach of warranties and/or indemnities with regard to the MRA in its unamended form. The MRA in its unamended form is not what was offered by the Third Defendant for cession to the Plaintiffs. I disagree. The MRA in its unamended form is the 'contract' which was ceded. The terms of the Provisions relied upon by the plaintiffs must be considered. They relate to the 'contract' which is the MRA in its unamended form, as superficially unattractive as that may be.

76.9. What matters is that the third defendant sold and ceded to the plaintiffs an MRA that was supposedly enforceable in its amended form according to its amended terms, and which the plaintiffs understood to be enforceable as such. It was in respect of the amended MRA that the plaintiffs, in fact, made payment of the total sum of R628 518-54. While this is correct, the terms of the Provisions relied upon by the plaintiffs must be considered. They relate to the 'contract' which is the MRA in its unamended form, as superficially unattractive as that may be. This is an example of the intuition referred to above and below.

76.10. This entails that the conclusion reached by Oxbow, namely, that 'In the circumstances, the warranties on which the plaintiffs

rely are not activated by the rental contract in unamended form' is simply irrelevant. I disagree for the reasons set out above.

76.11. It is apposite to note that the discounting letter provided to the plaintiffs in which the third defendant offered to cede the MRA

itself expressly reflects the amended monthly rental of R10 023-22 (excluding VAT). It is correct that the discounting letter provides as such. However, while that itself may ground a misrepresentation, it is not covered by the Provisions relied upon by the plaintiffs in this action and is not the claim sought to be enforced by the plaintiffs in this action. This is an example of the intuition referred to above and below.

76.12. In short, the plaintiffs did not get what they bargained for with the third defendant and, more particularly, they did not get what the third defendant expressly warranted or represented they would get. While the plaintiffs did not get what they expected, the terms of the Provisions relied upon by the plaintiffs are what must be considered. They relate to the 'contract' which is the MRA in its unamended form, as superficially unattractive as that may be.

76.13. Such a conclusion logically and legally entails that the third defendant was (and is) in breach of the foregoing representations,

warranties and undertakings. I disagree, for the reasons set out above.

76.14. In terms of the relevant portion of clause 6.1:

*"The cedent hereby indemnifies TA and holds TA harmless against any claim, loss or expense (including consequential damages, loss of revenue and profits, legal costs on the scale as between an attorney and his own client, and any other costs) arising out of or in connection with, or which may be sustained or incurred by TA as a direct or indirect consequence of any breach by the Cedent of any of the terms, conditions, warranties, representations or undertakings of the Cedent in terms of this Agreement or any cession pursuant hereto including, but not limited to, any innocent or negligent misrepresentation by the Cedent to TA ..."*

76.15. The plaintiffs have suffered loss insofar as they purchased the MRA in question from Oxbow expecting to be able to claim the higher

rental amount, for a period of 60 months, from the first defendant, and they are unable to do so. This is precisely the sort of loss that the third defendant undertook to indemnify the plaintiffs against. While the first sentence may be so and I agree that the plaintiffs did not get what they expected, the terms of the Provisions relied upon by the plaintiffs are what must be considered. They relate to the 'contract' which is the MRA in its unamended form, as superficially unattractive as that may be. I therefore disagree with the second sentence.

76.16. It is also a loss that undoubtedly arises as a direct consequence of the fact that the third defendant did not properly attend to the legally effective amendment of the MRA. I agree. However, while that may possibly ground a claim on another basis, it does not do so in respect of the Provisions and it is the terms of the Provisions relied upon by the plaintiffs are what must be considered. They do not cover this. They relate to the 'contract' which is the MRA in its unamended form, as superficially unattractive as that may be.

76.17. Given that the third defendant admits the quantum of the plaintiffs' loss in this case, it follows as a matter of logical and legal necessity that the third defendant must recompense the plaintiffs for this amount (i.e. the amount that the plaintiffs expected they would receive from the first and second defendants, in terms of the MRA, for the period of 60 months). I disagree for the reasons set out above. Further, breach of different aspects of the Provisions will not necessarily have the same consequences insofar as the quantum of damages is concerned.

76.18. Furthermore, in the event of the Court upholding Toerien's counterclaim, this also constitutes a type of damage or loss, incurred by the plaintiffs, flowing directly from Oxbow's failure to have properly amended the MRA, yet warranting and representing to the plaintiffs that the MRA as amended was enforceable. Such loss or damage would also be for the third defendant's account. The quantum of the first defendant's counterclaim has also been admitted by the third defendant. Toerien's counter claim is not upheld in this judgment. This need not be commented on further.

77. In short:

77.1. The following occurred:

77.1.1. Oxbow represented to the plaintiffs that the deal with Toerien was in the figures as contained in the discounting letter.

77.1.2. The plaintiffs understandably expected those figures to apply.

77.1.3. The MRA was sent through with the same figures inserted by means of handwriting and the crossing out of lower figures.

77.1.4. That was invalid and the terms of the MRA were in the unamended form.

77.2. However, in my view:

77.2.1. The question in the claim against Oxbow is whether the Provisions are breached by the foregoing.

77.2.2. The question is not whether a representation was made external to the ambit of those Provisions, such as in the discounting letter or in the form of an invalid amendment.

77.2.3. The ambit of those Provisions was in essence the terms of the 'contract', which has been found in this judgment to be the unamended MRA, and the breach of the terms thereof.

77.2.4. It did not incorporate any terms not forming part thereof.

77.2.5. There was, accordingly, no breach of the Provisions for the reasons set out in the analysis of the argument in respect thereof above.

78. In even shorter terms, the claim against Oxbow is based on the Provisions which in essence relate to the 'contract' and, because the 'contract' is the unamended MRA, there is no breach of the Provisions.

79. I must confess that initially it did not occur to me there may have been a discord between what was to be concluded on the facts and the law in regard to the MRA and its terms, on the one hand, and what was covered by the Provisions, on the other. It was while considering the matter prior to argument, during which I considered the terms of Provisions against the MRA as unamended, that the possibility thereof occurred to me.
80. The result on this issue in this judgment may not appear to be intuitive, fuelled by what may be perceived to be fair. That contrary intuition, however, I found, arises if one does not analyse the content of the Provisions and the terms of the MRA as it exists in fact and law. As found in this judgment, those terms do not include the Disputed Amendment. What was covered by the Provisions was the 'contract', which is the MRA as I have just identified it. To test this:
- 80.1. One might consider what the situation would be, were the Provisions to be found to cover the MRA with the invalid amendments as they are, in the scenario where the figures were crossed out and new ones inserted but no-one (including Sage) had initialled. The question would then be whether that was covered by the Provisions. In that scenario, the perception of unfairness and the contrary intuition weakens.
- 80.2. What about the scenario if only the total monthly rental amount, and not the other figures, was crossed out and a new figure inserted with neither party having initialled it ? I think that the answer can only present itself in the negative, with contrary intuition very weak.
- 80.3. What about if the new figures were written on a separate piece of paper which accompanied the MRA ? I think that the answer must present itself in an even firmer negative, with contrary intuition all but absent.
- The point and reason for this are that it is the 'contract' (i.e. its actual terms) which the Provisions cover.
81. I therefore conclude that the plaintiffs have no claim against Oxbow, as pleaded.
82. This leaves the plaintiffs without a successful claim against any of the defendants.

## Conclusion

83. In the premise:
- 83.1. The plaintiffs' claim against the first and second defendants will be dismissed.
- 83.2. The plaintiffs' claim against the third defendant will be dismissed.
- 83.3. The first defendant's claim in reconvention against the plaintiffs will be dismissed.
84. As to costs, I am of the view that with plaintiffs and Toerien having been unsuccessful in their claims against each other, it would be appropriate in their cases for neither of them to be awarded costs or to have costs awarded against them. In regard to Oxbow, while it has been successful, the problem in this matter arose originally because of its (and the

plaintiffs') failure to properly prepare and/or check the documentation relevant to this matter (the MRA), core to their businesses, and therefore, in the exercise of my discretion, there shall be no award as to costs in respect of the case between

the plaintiffs and Oxbow. All counsel agreed that scale B in terms of Rule 67A should apply to any cost order made. In the light of my finding in this paragraph, this is not applicable.

Order

85. The following order is granted:

1. The plaintiffs' claim against the first and second defendants is dismissed.
2. The plaintiffs' claim against the third defendant is dismissed.
3. The first defendant's claim in reconvention against the plaintiffs is dismissed.
4. The parties shall pay their own costs.

A Kantor

Acting Judge of the High Court

Legal Representation

For Plaintiff

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For Defendant:

Adv. Jonker

Attorney: Bernadt Vukic Potash & Getz Attorneys

[1] SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren 1964 (4) SA 760 (A)

[2] Bank v Grusd 1939 TPD 286

[3] Pleadings Bundle: page 10.

[4] Pleadings Bundle: page 20.

[5] Pleadings Bundle: page 20.

[6] Pleadings Bundle: page 149.

[7] Pleadings Bundle: page 149.

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