REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT
JOHANNESBURG

CASE NO: 11/47695

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

....
DATE SIGNATURE

In the matter between:

BENTEL ASSOCIATES INTERNATIONAL (PTY) LTD	First Excipient
GROUP FIVE HOUSING (PTY) LTD	Second Excipient
and	
BRADFORD CORNER (PTY) LTD	First Respondent
THE BODY CORPORATE OF THE VILLA BROSIA SCHEME	Second Respondent
In re	
BRADFORD ASSOCIATES INTERNATIONAL (PTY) LTD	First Plaintiff
BODY CORPORATE OF VILLA BROSIA SCHEME	Second Plaintiff
and	
BENTEL ASSOCIATES INTERNATIONAL (PTY) LTD	First Defendant
GROUP FIVE HOUSING (PTY) LTD	Second Defendant

J U D G M E N T

N F KGOMO, J:

INTRODUCTION

[1] The first and second excipients, who are the first and second defendants in the main action herein, excepted to the first and second respondent's (first and second plaintiffs in the main action) particulars of claim; the general basis of such exceptions being that the plaintiffs' particulars of claim are vague and embarrassing and/or lack averments which are necessary to sustain an action and/or which should enable them to plead to such particulars of claim.

[2] For considerations of practicality and/or ease of reference and clarity, I will refer to the parties herein as in the main action.

[3] It is common cause between the parties that on or about 11 May 2004 and in Johannesburg, Gauteng, South Africa, an entity named Bedford Square Properties (Pty) Ltd ("*Bedford Square Properties*"), operating from CMA Corporate Park, 234 Alexandra Avenue, Halfway House, duly represented by one Budwa Abrosie; and the first defendant, duly represented by Rob Bray, concluded a written agreement which I will refer to hereinafter as "*the architect agreement*". It is marked Annexure "A" in the papers herein.

[4] The relevant or material express, alternatively, tacit, further alternatively implied terms of the architect agreement were as follows:

4.1 The first defendant was appointed as project architect and principal agent in respect of the construction of 40 duplex attached and semi-attached residential units (the sectional titles) with concomitant external works, boundary fences and services on the site ("*the works*").

4.2 The first defendant's professional services would be rendered in accordance with the client/architect agreement published by the Institute of South African Architects. It is attached to the papers herein as Annexure "B. The scope of work embraced by the architectural appointment would include the design stage, technical documentation, contract administration and inspection of the works, i.e. stages 1 to 5 contained in the said client/architect agreement.

4.3 Site meetings and inspections of the works would generally be held once every week. The first defendant could, at its discretion, increase the frequency of meetings and inspections to suit the reasonable requirements of the project.

4.4 The first defendant would, in the execution of its duties as architect and principal agent in terms of the architect agreement,

adhere to the general level of skill and diligence possessed and exercised at the time by members of the architect profession.

4.5 The first defendant's designs and specifications would conform to sound architectural practice and would be fit for purpose.

4.6 The first defendant would perform its duties as principal agent with reasonable care, diligence and skill.

[5] A copy of the client/architect agreement published by the Institute of South African Architects, which was incorporated by reference in Annexure "A" marked Annexure "B", defined and elaborated upon the first defendant's obligations and services in terms of the architect agreement as follows:

5.1 Stage 3: Design development: Develop the design concept in sufficient detail to define the construction of the building.

5.2 Stage 4: Technical documentation: Prepare construction documentation (being graphic representations including plans, sections, elevations, site plans, construction details, service co-ordination information, schedules and such other details and descriptions as are within the reasonable competence of any architect which are sufficient to indicate the scope of the work executed or intended to be execute according to the building

contract) and co-ordinate the documentation with the work designed by consultants and specialists.

5.3 Stage 5: Contact administration and inspection: Administer and perform the duties assigned to the first defendant in the building contract ("*building agreement*").

[6] The abovementioned building agreement was concluded in Johannesburg on 29 July 2004 between Bedford Square Properties, still represented by Budwa Abrosie and the second defendant, this time represented by Frank Enslin. It is marked Annexure "C" in the papers herein.

[7] The relevant express, alternatively tacit, further alternatively implied terms of the building agreement were among others as follows:

7.1 The second defendant would execute the works, including the installation of timber trusses and clay or cement roof tiles, and Bedford Square Properties would make payment for the works [clause 2.1, read with clause 41.2.1].

7.2 Bedford Square Properties would appoint the first defendant as principal agent and warranted that the first defendant would have full authority and obligation to act in terms of the building agreement [clauses 5.1 and 5.1.1, read with clause 41.1.2].

7.3 The second defendant would comply with all laws of the Republic of South Africa and all regulations and bylaws of local or other authorities having jurisdiction regarding the execution of the works [clause 7.1, read with clauses 1.1 and 41.2.9].

7.4 On being given possession of the site, the second defendant would commence the works and proceed with the due skill, diligence, regularity and bring the works to a stage where, in the first defendant's opinion, the works are free of all defects (being aspects of the works that in the opinion of the first defendant is not according to the building agreement) [clause 15.3.3, read with clause 1.1].

7.5 The first defendant would inspect the works and would issue a certificate of final completion to the second defendant if, in its opinion, the works are free of all defects [clause 26.0, read with clause 1.1].

7.6 A certificate of final completion would be conclusive evidence as to the sufficiency of the works and that the second defendant's obligations, as set out in paragraphs 9.1 and 9.2 above, have been fulfilled other than for defects that a reasonable inspection of the works by the first defendant would not have revealed before the issue of the defects list by the first defendant, defining the defects which would have to be rectified to achieve final

completion ("*latent defects*") [clause 26.6, read with clauses 26.2.2 and 1.1].

7.7 The latent defects liability period for the works would commence at the start of the construction period and end 5 years from the date of achievement of final completion, as set out in paragraph 9.6 above. Defects that appear up to the date of final completion would be addressed in terms of clauses 24.0 to 26.0 of the building agreement.

7.8 The second defendant would be obliged to rectify all latent defects that are revealed after the date of final completion, as set out in paragraph 7.6 above, and before the end of the latent defects liability period, as set out in paragraph 7.7 above on demand.

7.9 The first defendant would issue an interim payment certificate (which would be based on a valuation prepared within 7 calendar days before the stated date) every month until the issue of the final payment certificate [clause 31.1].

7.10 The second defendant would cooperate with and assist the first defendant in the preparation of the payment claim information for an interim payment certificate by providing to the first

defendant all relevant documents and assessments of quantified amounts of work completed [clause 31.2].

7.11 The first defendant would issue each interim payment certificate to the second defendant with a copy to Bedford Square Properties by no later than the 3rd day of the month [clause 31.3, read with clause 41.5.3].

7.12 Bedford Square Properties would pay to the second defendant the amount certified in an interim payment certificate within 7 calendar days of the date for issue of the interim payment certificate. Payment would be subject to the second defendant giving Bedford Square Properties a tax invoice for the amount due [clause 31.9].

7.13 The first defendant would prepare a final account for submission to the second defendant within 90 working days after the date of practical completion. The second defendant would cooperate and assist the first defendant in the preparation of the final account by timeously supplying all relevant documents on request [clause 34.1].

7.14 The second defendant would be given the final account for acceptance within 45 working days of receipt thereof. On written acceptance or should the second defendant not object to

the final account with good reason within the said period, the first defendant would issue the final payment certificate within 7 calendar days [clauses 34.4 and 34.5].

7.15 Bedford Square Properties would pay to the second defendant the amount certified in the final payment certificate within 7 calendar days of the date of issue of the final payment certificate. Payment would be subject to the second defendant giving Bedford Square Properties a tax invoice for the amount due [clause 31.9].

7.16 Neither Bedford Square Properties nor the second defendant would assign or cede their rights or obligations without the written consent of the other party, which consent would not be withheld without good reason [clause 19.1].

[8] In paragraph 7A of their particulars of claim the plaintiffs averred as follows:

> "*On a proper construction of the architect agreement only clause 2.0 (including clauses 2.1 to 2.5) of the client/architect agreement, read with the relevant definitions contained in clause 1.2 of the client/architect agreement was incorporated in and forms part of the architect agreement.*"

[9] This is one of the averments in the plaintiffs' particulars of claim which triggered the exceptions.

[10] Another aspect that also served as a trigger for the exceptions is the averment by the plaintiffs in paragraph 10 of their particulars of claim about an oral or verbal appointment by and between Bedford Square Properties, duly represented by Budwa Abrosie, of the first defendant as the principal agent in terms of the building agreement; which appointment was allegedly accepted orally by the first defendant duly represented by Rob Bray.

[11] The defendants contest or deny the existence of this latter agreement.

[12] According to this disputed agreement the duties of the first defendant as principal agent would include that:

12.1 The first defendant would from time to time inspect the works to give the second defendant interpretations and guidance on the building standards and state of completion of the works that the second defendant would be required to achieve for practical completion (being the stage of completion where, in the opinion of the first defendant, completion of the works has substantially been reached and could effectively be used for the purposes intended [clause 24.1.1, read with clause 1.1 of Annexure “C”].

12.2 Where, in the opinion of the first defendant and after inspecting the works, the works have reached practical completion, the first defendant would issue a certificate of practical completion to the second defendant [clauses 23.3.1 and 24.4.1 of Annexure “C”].

12.3 Within 7 calendar days of the date of practical completion the first defendant would issue to the second defendant a works completion list defining the outstanding work and defects apparent at the date of practical completion to be completed or rectified to achieve works completion [clause 25.1 of Annexure "C"].

12.4 Where, in the opinion of the first defendant and after inspecting the works, the works completion list has been satisfactorily completed, the first defendant would issue a certificate of works completion to the second defendant [clauses 25.2.1 of Annexure "C"].

12.5 At the end of the defects liability period (being midnight 90 calendar days from the date of works completion) the first defendant would forthwith inspect the works and where the works:

12.5.1 has reached final completion (being the stage of completion where, in the opinion of the first defendant, the works are free of all defects) the first defendant would forthwith issue a certificate of final completion to the second defendant;

12.5.2 has not reached final completion the first defendant would forthwith issue a defects list to the second defendant defining the defects, which have appeared during the defects liability period, to be rectified to achieve final completion

[clauses 26.1 and 26.2 of Annexure “C”].

12.6 Where, in the opinion of the second defendant, the defects list has been completed, the second defendant would notify the first defendant who would inspect within 7 calendar days of receipt of such notice. Where, in the opinion of the first defendant, the defects list:

12.6.1 has been satisfactorily completed the first defendant would forthwith issue a certificate of final completion to the second defendant;

12.6.2 has not been satisfactorily completed or where further defects have become apparent, the first defendant would forthwith identify such items on the updated defects list and inform the second defendant thereof. The second defendant would repeat the procedure, as set forth in this subparagraph.

[13] It is the plaintiff's case that pursuant to the conclusion of the building agreement, Bedford Square Properties gave possession of the site to the second defendant who commenced the works.

CESSION OF RIGHTS

[14] According to the plaintiff's further, on or about 9 June 2006, Bedford Square Properties and the first plaintiff concluded a written sale agreement in terms whereof Bedford Square Properties sold to the first plaintiff as a going concern, among others, portion 4 of the site on which the erection of duplex units set out in paragraph 4.1 of this judgment was about to take place ("*the Sale Agreement*").

[15] Bedford Square Properties ceded and delegated its rights and obligations in terms of the contracts entered into between itself and suppliers, building contractors, professionals and agents in respect of the erection of those duplex units to the first plaintiff.

[16] The effective date of this sale agreement would, for all intents and purposes, be deemed to be 31 March 2006, notwithstanding the date of signature of the sale agreement.

[17] The architect agreement and building agreement were two of the agreements referred to above.

[18] According to the plaintiffs further, the first and second defendants were informed during or about May 2006 of the intended cession and delegation of the rights and obligations in terms of the architect and building agreements.

[19] It is common cause that the excipients/defendants are denying the above allegations as well.

[20] On the basis of the above contestations by the defendants, the plaintiffs amended their pleadings and aver in their particulars of claim that:

> 20.1 The first defendant, duly represented by a duly authorised representative (no names furnished), consented orally, alternatively tacitly to the said cession and delegation during or about June 2006, which consent occurred at or near Johannesburg, Gauteng.

[21] In substantiation of the above the plaintiffs averred in their particulars of claim (paragraphs 12.6 (12.6.1 to 12.6.10 thereof)) that:

> 21.1 The second defendant cooperated with and assisted the first defendant in the preparation of interim payment certificate 18, which were issued by the first defendant on behalf of the first plaintiff, by providing the first defendant with all relevant documents and assessments of quantified amounts of work completed.

21.2 The first defendant issued interim payment certificate 18 in respect of the works on behalf of the first plaintiff.

21.3 The first plaintiff made payment to the second defendant of the amount certified in interim payments certificate 18 in the sum of R288 500,94.

21.4 The second defendant cooperated and assisted the first defendant in the preparation of the final account by supplying all relevant documents to the first defendant.

21.5 The first defendant issued the final account on behalf of the first plaintiff, which was approved by the second defendant, on behalf of the second defendant.

21.6 The first defendant issued the final payment certificate in respect of the works on behalf of the first plaintiff.

21.7 The second defendant gave the first plaintiff a tax invoice for the amount due as certified in the final payment certificate.

21.8 The first plaintiff made payment to the second defendant of the amount certified in the final payment certificate in the sum of R139 834,24.

21.9 The second defendant proceeded with the works and brought the works to final completion.

21.10 The first defendant issued certificates of final completion on behalf of the first plaintiff to the second defendant.

[22] The plaintiffs continue to state that:

22.1 The second defendant, duly represented by a duly authorised agent or agents, and with full knowledge of the requirement in clause 19.1 of the building agreement (as set out in paragraph 7.16 above) that neither Bedford Square Properties nor the second defendant could assign or cede their rights or obligations in terms of the building agreement without the written consent of the other party, waived by conduct (as set out in one or more of the subparagraphs of paragraph 19 hereof) the requirement of written consent and which conduct was inconsistent with an intention by the second defendant to enforce the said requirement.

[23] It is on the above basis that the plaintiffs contend that the second defendant, duly represented by a duly authorised agent, consented orally, alternatively tacitly, to the cession and delegation as set out above.

[24] With the above introductory remarks in mind the plaintiffs aver in their particulars of claim that:

> "*Pursuant to the conclusion of the architect agreement, which incorporated clauses 2.3 and 2.4 of the client/architect agreement, the first defendant:*
>
> *13.1 designed the following roof covering system for the sections and issued construction documentation in respect thereof to the second defendant, alternatively, the second defendant's sub-contractor:*
>
> *13.1.1 Mazista 'Vineyard' clay roof tiles on fibre cement sheeting on 50 x 76 mm purlins and 114 x 76 mm rafters;*
>
> *13.1.2 the said Vineyard system comprised a Nutec 'Bigsix' corrugated fibre cement roof sheet overlaid by clay tiles;*
>
> *13.1.3 the purlin spacing would be 1 200 mm.*
>
> *13.2 inspected the roof covering system in terms of the building agreement as set out in paragraph 10 above.*"

[25] The paragraph 10 mentioned in the above quote is set out in paragraphs [9] and [11] of this judgment.

[26] In the circumstances and/or consequently, the plaintiffs aver that the second defendants sub-contractor subsequently constructed the roof covering system as set out in paragraph [24] above, in accordance with the first defendant's said designs and construction documentation.

SPECIFICS OF THE PLAINTIFFS' CLAIMS AGAINST THE DEFENDANTS

[27] For completeness sake, I set out the specifics of the plaintiffs' four claims against the first and second defendants:

27.1 Against the first defendant

Claim A

27.1.1 That the first defendant breached its obligations in terms of the architect agreement by:

27.1.1.1 designing and issuing construction documentation in respect of the roof covering system without exercising the general level of skill and diligence possessed and exercised by members of the architect profession, in that:

(a) due to the manner in which the tiles were laid on the "*Bigsix*" sheets and the fact that clay tiles by nature are not uniform, point and line

loads acted on the fibre cement sheets which caused the cracking of the "*Bigsix*" sheets when traffic is introduced onto the roof;

(b) the cracking of the "*Bigsix*" sheets adversely affected the waterproofing requirement of the said roof covering system;

(c) the said roof covering system was accordingly not appropriate and fit for the purpose for which it was specified and designed;

(d) the said roof covering system has become unsafe due to water damage to the roof trusses caused by damage to the roof covering system;

27.1.1.2 designing and issuing construction documentation in respect of a roof covering system which was not in accordance with sound architectural practice and in any event not fit for purpose, in that:

(a) the roofs could not withstand reasonable traffic;

(b) reasonable traffic caused point and line loads on the fibre cement sheets which caused the cracking of the "*Bigsix*" sheets which adversely affected the water proofing requirement of the roof covering system. The roof covering system accordingly became unsafe due to water damage to the roof trusses.

27.1.1.3 the plaintiffs accordingly claimed payment of the sum of R4 336 560,00, being the sum of R3 804 000,00 plus VAT.

Claim B

27.1.2 That the first defendant issued certificates of practical and final completion to the second defendant, in that process failing to perform its duties as principal agent with reasonable care, diligence and skill, thereby breaching its obligations in terms of the architect agreement by failing to inspect the roof voids to ensure that completion of the roof voids has substantially been reached and the roof voids are free of all defects; as well as by issuing certificates of practical completion under circumstances where completion of the roof voids has not been substantially reached and a reasonable architect would not have issued same.

The plaintiffs' claim R544 000,00 plus VAT in damages, totalling R620 160,00.

Claim C

27.1.3 Alternative to Claim A, the first plaintiff averred that in the event that it is found that the first defendant is not liable to the first plaintiff for the costs of replacing the roofs, then the second plaintiff claims against the first defendant the same sum of R4 336 560,00 (as claimed in Claim A) because:

27.1.3.1 the second plaintiff is entitled in terms of section 36(6) of the Act capable of suing in its corporate name in respect of any damage to the common property, any matter in connection with the land or building on the site for which the second plaintiff is liable or for which the owners of sections in the scheme are jointly liable, and any matter arising out of the exercise of any of its powers or the performance or non-performance of any of its duties under the Act.

27.1.4 The plaintiffs averred that the first defendant breached its duty of care as well as been negligent in that, even though it foresaw, alternatively, should reasonably have foreseen that the failure to meet its duties would or could result in the roof covering systems of the sections not being waterproof; as well as it ought to have reasonably specified and designed a roof covering system that would be waterproof and safe, it did not.

27.2 Against the second defendant

Claim D

27.2.1 That the second defendant breached the terms of the building agreement by failing to comply with Regulation L1 of the National Building Regulations made in terms of section 17(1) of the National Building Regulations and Building Standards Act 1977 (Act 103 of 1977).

27.2.2 The second defendant is further accused of breaching the terms of the building agreement in that the roof as constructed could not resist the forces to which it was expected to be subjected to.

27.2.3 It was the plaintiffs' further contentions in respect of this claim, that because the first defendant issued a certificate of final completion to the second plaintiff on or about 16 August 2007 confirming that the works were free of any defects and that at the time of the issuing of such certificate of final completion the roof covering system contained latent defects; the second defendant was in the premises and in terms of the building agreement obliged to rectify the latent defects by removing the existing roof covering system and brandering, strengthening the existing trusses with additional brandering as well as by installing new brandering under the membrane and concrete tiles.

DEFENDANTS' EXCEPTIONS

The first defendant's first exception

[28] The first exception relates to an attempt by the plaintiffs to exclude from operation certain written terms of the architect agreement which the plaintiffs contend was the written agreement concluded between Bedford Square Properties and the first defendant. The terms that the plaintiffs seek to exclude are those:

28.1 Limiting or excluding the first defendant's liability.

28.2 Requiring written consent for any cession, transfer or assignment of rights or obligations.

28.3 Limiting the parties' ability to amend and/or vary the architect agreement unless in writing.

[29] The plaintiffs are accused of doing so by or in the pleading contained in paragraph 7A of their particulars of claim which I quoted in paragraph [8] of this judgment.

The second exception

[30] This exception relates to the plaintiffs' attempts to rely upon the subsequent oral agreement relating to the appointment of the first defendant as a principal agent. It is common cause that the first defendant has already been appointed as such in terms of the written architect agreement.

[31] According to the defendants what the plaintiffs contemplate in their particulars of claim are two separate agreements for one appointment and also attracts the parole evidence rule that precludes the plaintiffs from relying on an oral agreement in the face of an express written term.

See: *KPMG v Securefin Ltd* 2009 (4) SA 399 (SCA) at 409G.

The third exception

[32] The third exception relates to the plaintiffs' alleged attempt to overcome an express provision of or in the architect agreement to the effect that neither party shall assign, sublet, or transfer its interests in the architect agreement without the written consent of the other. That is clause 4.6 of the client/architect agreement. The plaintiffs are accused of doing to by pleading an oral alternatively tacit consent by the first defendant to that cession of rights under the architect agreement from Bedford Square Properties to the first plaintiff.

[33] The first defendant contends that insofar as the plaintiffs' reliance on the subsequent oral and/or tacit agreement purports to vary the express terms of the architect agreement, they are not permitted to do so as the non-variation clause contained in the architect agreement in effect curtailed their freedom to do so.

[34] The first defendant called itself among others on *S A Sentrale Ko-op Graan Maatskappy Bpk v Shifren* 1964 (4) SA 760 (A); *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and Christie, *The Law of Contract in South Africa*, 6th ed, p 464.

[35] They further rely on *Guman v Latib* 1965 (4) SA 715 (AD) at 722 for their contention on this ground that absent written consent as required by the applicable written agreement, there is no consent.

Fourth and fifth exceptions

[36] These two exceptions are directed at an interpretation of a limitation clause contained in the client/architect agreement, which has been incorporated into and arguably forms part of the architect agreement.

[37] Clause 4.3.4 of that clause provides that the contractor, together with his sub-contractor, are directly responsible to the client for due performance in terms of the building contract. The architect is, by way of administration, and inspection, called upon to use his best endeavours to limit delays to and deficiencies or defects in the execution of the works. However, in terms of the above, the architect shall not be responsible for the aforegoing; neither should he be responsible for the methods, techniques, sequences or procedures employed by the contractor.

[38] Clause 4.3.6 thereof provides that no claim whatsoever shall be enforceable by the client against the architect arising out of or in respect of any services rendered by the architect in terms of the architect agreement or concerning the carrying out of the works after five years have elapsed from the date of practical completion of the works or suspension, postponement or termination in terms of clause 8.5 thereof (my underlining).

[39] In the face of the plaintiffs' contention that the first defendant had failed to perform its duties by among others failing to inspect roof voids to ensure that they are free of or from defects as well as issuing certificates of final

completion in circumstances where the roof voids were not free of any defects, the first defendant's contention is that clause 4.3.4 of the client/architect agreement expressly excludes the first defendant's responsibility for any deficiencies or defects in or during the execution of the works. Furthermore, since the last certificate of practical completion was issued on 16 February 2006 and the plaintiffs' action against the defendants was instituted only on 13 December 2011, the requisite five years before the expiry of which the effects or implications of the certificates of practical completion should be challenged, had already elapsed, thus barring the plaintiffs from suing the first defendant on that basis.

[40] Similarly, action against the second defendant according to the defendants should or stand to be excepted upon for the same reasons.

THE APPLICABLE LAW

[41] When courts consider exceptions, no additional facts may be adduced by either party and the court must assume that the facts alleged in the particulars of claim are correct.

Viljoen v Federated Trust Ltd 1971 (1) SA 750.

Stewart v Botha 2008 (6) SA 310 (SCA) at para [4].

The question that the court must consider is whether a defect appears *ex facie* the pleadings.

See: *Barclays National Bank Ltd/Thompson* 1989 (1) SA 547 (A) at 553F.

[42] Pleadings must contain clear and concise statement of the material facts upon which the pleader relies for his claim to succeed. These facts must be set out with sufficient particularity to enable the opposite party to reply thereto. This is in keeping with Rule 18(4) of the Uniform Rules of Court. With regard to the material facts relied upon, the pleader must set out the *facta probanda* upon which it relies upon for its cause of action.

McKenzie v Farmers' Co-operative Meat Industries Ltd 1922 AD 16 at 23.

Makgae v Sentraboer (Ko-operasie) Bpk 1981 (4) SA 239 (T) at 245D-E.

[43] There is no exhaustive test of what constitutes "*sufficient particularity*". The question should be answered in relation to the circumstances of each case. However, it is incumbent on a plaintiff to plead a complete cause of action which identifies the issues upon which the plaintiff seeks to rely upon and on which evidence will be led, in an intelligible and lucid form which allows the defendant to plead to it. A pleading becomes excipiable because no possible admissible evidence led on the pleadings can disclose a cause of action.

See: *Imprefed (Pty) Ltd v National Transport Commission* 1993 (3) SA 94 (A) at 107C-H.

Jowell v Bramwell-Jones 1998 (1) SA 836 (W) at 902H-I.

Nel NO v McArthur 2003 (4) SA 142 (T) at 146/8.

[44] An exception on the basis that a pleading is vague and embarrassing is supposed or intended to cover cases where, although a case appears in the claim, there is nevertheless some defect or incompleteness in the manner in which it is set out, or aptly put, how it was formulated, which results in embarrassment to the defendant. This kind of exception is not directed at a particular paragraph within a cause of action, but goes to the whole cause of action.

Trope v South African Reserve Bank 1993 (3) SA 264 (A) at 269H.

Lockhat v Minister of Interior 1960 (3) SA 765 (T) at 777E.

Also: *Jowell v Bramwell (supra)*.

[45] The mere fact that it may be possible to plead to particulars of claim that may be read or be lending themselves to be read in a number of ways by simply denying the allegations does not mean that it is not excipiable as being vague and embarrassing. Where an exception is successfully taken to particulars of claim on the basis that they disclose no cause of action, it is appropriate to order that the pleading be set aside and that the plaintiff be given leave, if the facts and circumstances so dictate or if so advised, to file an amended pleading within specified time frames.

See: *Group Five Building Ltd v Government of the Republic of South Africa (Minister of Public Works and Land Affairs)* 1993 (2) SA 593 (A) at 602-603.

Trope v S A Reserve Bank (supra) at 211A-D.

[46] The legal principles for exceptions were enunciated among others in the then Appellate Division of South Africa in *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A) as follows at 183E, 183I-184F and 186I-187A:

> "[A]*n excipient has a duty to persuade the court that upon every interpretation which the pleadings in question, and in particular the document on which it is based, can reasonably bear no cause of action … is disclosed; failing this the exception ought not to be upheld … Problems of contractual interpretation are often before the courts … The basic principles are, for the most part, clear. The determining factor is the intention of the parties. This is ascertained from the language used, read in its contextual setting and in the light of any admissible evidence … Broad speaking there are three classes of such evidence. One is of background facts. Another relates to surrounding circumstances. The third is evidence of what passed between the parties on the subject of the contract. Only the first and second need be considered. It would seem that evidence of the former, i.e. background facts, is part of the context and as such is always admissible. It has been described as encompassing the 'genesis of the transaction' or its 'factual matrix'. Its aim is to put the court 'in the armchair of the author(s) of the document … surrounding circumstances, on the other hand, is only justified in cases of uncertainty or ambiguity. At least this is the conventional thinking. But the possibility of the adoption of a more liberal approach has recently been raised by this Court (Pangbourne Properties Ltd v Gill & Ramsden (Pty) Ltd 1996 (1) SA 1182 (A) at 1187B-F) …*
>
> *The mere notional possibility that evidence of surrounding circumstances may influence the interpretation of a contract does not necessarily operate to debar a court from deciding the issue on exception. The contention that such evidence exists must be examined with care …*

> *As a rule, courts are reluctant to decide upon exception questions concerning the interpretation of a contract. But this is where its meaning is uncertain … In casu the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous.*"

[47] The test applicable in deciding exceptions based on vagueness and embarrassment arising out of a lack of particularity was summarised in the case of *Quilan v McGregor* 1960 (4) SA 383 (D) at 939F-H as follows:

> "*It seems to me that in each case the court is obliged first of all to consider whether the pleading does lack particularity to an extent amounting to vagueness. If there is vagueness in this sense the court is then obliged to undertake a quantitative analysis of such embarrassment as the excipient can show is caused to him, in his efforts to plead to the offending paragraph, by the vagueness complained of. In each case the court must, in my judgment, make an ad hoc ruling as to whether the embarrassment is, or is not, so serious as to cause prejudice to the excipient if he is compelled to plead to the paragraph in the form to which he objects. It seems to be that the eventual test as to whether the exception should be upheld or not is whether the excipient is prejudiced. Furthermore, it seems to me that the onus is on the excipient to show both vagueness amounting to embarrassment and the embarrassment amounting to prejudice. Unless he can do this, the exception, in my judgment, must be dismissed.*"

WHETHER THE EXCIPIENTS (DEFENDANTS) HAVE MADE OUT A CASE FOR EXCEPTIONS TO BE UPHELD

[48] It is so that ever since the plaintiffs instituted their action against the defendants on 12 or 13 December 2011, there had been a sort of interminable procession of exceptions taken by both the first and second defendants, resulting in a series of amendments, in an attempt to cure the number of

inherent difficulties encountered. Some of those difficulties, for instance, the attaching of a wrong contract to the pleadings, were rectified. Others have not.

[49] The first defendant's exception is dated 18 September 2012. The second defendant's is dated 17 September 2012.

[50] Both exceptions were set down for hearing on 23 October 2012 but were postponed *sine die* by the judge in charge in that court, who requested that the parties approach the Deputy Judge President of this division ("*DJP*") for the matter to be assigned a special and/or specific period as a special allocation. On 8 November 2012 the DJP issued directives or directions as to what should be done by the parties involved herein as regards delivery of heads of argument as well pagination of the papers herein. The latter allocated 25 February 2012 as the date on which argument would and should be heard.

[51] Short heads of argument were filed around 19 October 2012 already. The ones referred to by the DJP were to be long and/or comprehensive heads of argument. The parties herein were agreed that the matter was relatively complex.

THE GROUNDS OF EXCEPTIONS

[52] Each of the two defendants separately excepted to the plaintiffs' particulars of claim, citing separately, although not totally unrelated reasons therefor. I intend dealing with each defendant's exception separately, starting with the second defendant's before finishing with the first defendant's. By virtue of the almost seamless coincidence or confluence of the first and second defendants' exceptions' grounds, the same arguments in respect of the second defendant may overlap to cover the first defendant's.

THE SECOND DEFENDANT'S GROUNDS OF EXCEPTION

Reliance on invalid cession of rights

[53] The first plaintiff's claim against the second defendant is based on the building agreement which was concluded between Bedford Square Properties and the second defendant. Bedford Square Properties is defined in that agreement as "*the employer*" and the second defendant as "*the contractor*". The first plaintiff was not a party to the building agreement.

[54] The first plaintiff alleges that it took a cession and assignment or delegation of the rights and obligations of Bedford Square Properties under this building agreement in terms of the sale agreement.

[55] Clause 19.1 of the building agreement prevents either party from ceding or assigning its rights or obligations without the written consent of the other party. To avert derogating from the context and extent of the above clause 19.1, it is my considered view that I should quote it herein *verbatim*. It reads thus:

> "*Neither the employer nor contractor shall assign or cede his rights or obligations without the written consent of the other party, which consent shall not be withheld without good reason.*"

[56] Nowhere in its pleadings does the first plaintiff plead that the second defendant gave written consent. Instead the first plaintiff pleads that the second defendant consented orally, alternatively tacitly to the cession and delegation.

[57] When one considers the terms of the building agreement, which are in my view clear and unambiguous, the alleged cession or assignment of rights and obligations falls foul of clause 19.1 thereof.

[58] The first plaintiff ostensibly realised its difficulty with this pleading or averment when one looks at the next move it took: it pleaded further that the second defendant waived by conduct the requirement of "*written consent*".

[59] The second defendant's exception is to the effect that even if the waiver did take place (which is not admitted or conceded), a proper interpretation of the building contract disallows reliance on such a waiver by

conduct and cession in the absence of written consent. The first defendant relied for the above view also on clause 1.8 of the building agreement which reads as follows:

> "*This agreement is the entire contract between the parties regarding the matters addressed in this agreement. No representations, terms, conditions or warranties not contained in this agreement shall be binding on the parties. No agreement or addendum varying, adding to, deleting or cancelling this agreement shall be effective unless reduced to writing and signed by the parties.*"

[60] Where an exception is based, as in this instance, on an interpretation of a contract, there is legal authority to the effect that the proper interpretation of a contract may be decided on exception. I alluded to this earlier on or at paragraph 44 of this judgment when I dealt with the case of *Sun Packaging (Pty) Ltd v Vreulink* 1996 (4) SA 176 (A), especially the last but one of the paragraphs of the case quoted.

[61] In the last paragraph of the above case as quoted above the court noted that while it is correct that courts might be reluctant to decide such questions (like or exceptions) on interpretation, that should not the case where the meaning of the contract is clear and unambiguous from its terms.

[62] The learned judge aptly put it further as follows:

> "*In casu, the position is different. Difficulty in interpreting a document does not necessarily imply that it is ambiguous. (Standard Building Society v Cartoulis 1939 AD 510 at 516.) Contracts are not rendered uncertain because parties disagree as to their meaning. (Williston on*

> *Contracts, 3rd Ed, Vol. 4, para 601 (supplement). Council was probably right in saying that the letter is not a lawyer's contract. But this is no reason for interpreting it differently. For the reasons given, I do not find the meaning of clause 3 doubtful. Properly interpreted, it has only one meaning. It affords the appellant the right to terminate. This is what Mitchell AJ found. His conclusion that the amendment should be refused was therefore the correct one.*"

[63] Similarly in this instance I do not find the meaning of the clause of the building agreement in question here doubtful. In the circumstances I see no reason why evidence of background facts or surrounding circumstances would make any meaningful difference to the outcomes as regards this exception ground.

[64] It was argued on behalf of the second defendant that there are three reasons why this exception should be upheld on the basis that there can have been no valid waiver of the requirement that the second defendant was required to consent to the cession in writing, resulting in there being no valid cession, and the first plaintiff arguing no right or entitlement to enforce any provisions of the contract.

[65] Those reasons are given as:

65.1 Firstly, that the claimed waiver constitutes an impermissible variation of the contract, which is disallowed, if not forbidden under general by the non-variation clause 1.8 of the building agreement.

65.2 Secondly, even if the waiver may not be regarded as a disguised variation, the relevant clause cannot have been waived by the second defendant because it was not included therein solely for its benefit.

65.3 Thirdly, the alleged waiver is prevented by clause 1.8 of the agreement, which operates as a "*no waiver*" clause.

First reason of second defendant's exception: waiver constitutes impermissible variation

[66] The legal principles regarding non-variation clauses in contracts are well set out in the *Shifren* case (*supra*).

[67] That case contained two clauses in a lease agreement among others, which read as follows:

"*11. The tenant shall not have the right to sublet the said business premises or any portion thereof nor shall he have the right to cede this agreement to any person whomsoever without, in either event, the written consent of the owner first being had and obtained …*"

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

[68] The plaintiff sued the defendant and claimed for the cancellation of the lease agreement with the concomitant eviction of the defendant as well as the

cessionary because the defendant ceded his rights in the lease without the written consent of the owner, being the plaintiff, as required by or in the lease agreement. The defendant admitted the cession but pleaded that the parties had concluded an oral agreement in terms of which both parties agreed to the cession on certain conditions.

[69] The court decided that the alleged oral agreement between the parties was *void*.

[70] The facts or circumstances in the *Shifren* case are not too dissimilar to those obtaining in this case. It is clear from the *Shifren* case that where there is a non-variation clause, a requirement of written consent to a cession cannot or should not even be avoided by means of an actual agreement between the parties, let alone a waiver by one of them.

[71] It is so that a non-variation clause may not necessarily be a bar to one party from orally waiving a provision(s) of a contract in the face thereof. That would be in order if the provision(s) waived had been included entirely for the benefit of the party who is alleged to have waived it.

[72] It is apparent that it is not the case in our present case: the clause allegedly waived is not for the benefit of the defendant(s) only or solely

[73] A waiver does not necessarily amount to a variation of a clause or contract. It is a unilateral act by the waiver that does not require the consent of the other party.

> Christie, *The Law of Contract*, 6th ed, Lexis Nexis, 2011, at pp 47.

[74] There may be instances where an alleged waiver may in fact be a disguised variation in the sense that it effectively results in a variation of the agreement contrary to the requirements of the non-variation clause. In such case it must be in writing.

[75] The Supreme Court of Appeal in *HNR Properties CC v Standard Bank of SA Ltd* 2004 (4) SA 471 (SCA) dealt with a similar situation. In that case clause 15 of the relevant contract stipulated that:

> "*… the surety shall not be released from any liability of the surety hereunder or from any of the debtor's obligations unless such release be in writing signed on behalf of the bank by a duly authorised signatory …*"

[76] Clause 16 contains a non-variation clause reading 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 by or on behalf of the bank and the surety.*"

[77] The defendants contended that they had been released as sureties by virtue of the conduct of the bank and an alleged waiver of the requirements of clause 15 that stipulates that the release be in writing and signed on behalf of the bank by an authorised signatory.

[78] Scott JA ruled as follows among others:

> "*19. … In Sentrale Ko-op Graan Maatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) this court held a term in a written contract provides 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) … 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 … 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.*"

[79] This brings up the issue of waiver *vis-à-vis* variation. Nestadt J looked at the difference between the two in *Van As v Du Preez* 1981 (3) SA 760 (T), where said the following at 764-765:

"*It is unnecessary to canvass what the juristic nature of a waiver is and more particularly whether it is contractual in form or merely a unilateral act. Suffice it to say that, however brought about, it is the abandonment or surrender (with the necessary knowledge) of a right (Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (T) at 323). It does not per se result in the contract being altered. Herein lies the difference between it and a variation. It will be a question of fact (and perhaps of law) in each case as to whether the conduct or agreement in question is merely a waiver or whether it goes further and amounts to a variation. Whether the right in question is one which has already accrued or whether it is only enforceable in the future will be an important determining factor. In the latter case it is difficult to imagine the waiver not being other than in the form of an agreement which has the effect of varying the original contract giving rise to the right.*

An oral variation masquerading as or in the guise of a waiver remains what it truly is. It remains a variation. To hold otherwise … would be to render nugatory the principle of the effectiveness of contractual entrenchment as laid down in Shifren's case."

[80] The above principles were quoted with approval in *Sunset Village SPV (Pty) Ltd v Smith Tabatha Buchanan Boyes Inc* 2009 JDR (WCC) as well as in *Kovacs Inv 724 (Pty) Ltd v Marais* 2009 (6) SA 560 (SCA) at para [22].

[81] Blignaut J considered the above issues in the *Sunset Village SPV v Smith et al* case and clarified issues as follows:

"*[23] In Van As v Du Preez … Nestadt J was dealing with an oral agreement between a lessor and lessee of certain premises to the effect that the rental would be reduced from that stipulated in the written agreement of lease. He held that the oral agreement offended against a non-variation clause. Hutchinson, Non-variation Clauses on Contract, 2001 SALJ, 720 of 729 describes the outcome of Van As v Du Preez as 'just and satisfying'. Van der Merwe et al, Contract, General Principles, 156 refers, inter alia, to Van As v Du Preez in support of the following principle:*

> *'A variation entails an alteration of the legal consequences of the contract by mutual agreement of the parties …'*
>
> *…*
>
> *[25] In my view this oral agreement comprised material variations of the terms of the written agreement of sale. Put differently, it entailed 'an alteration of the legal consequences of the contract by mutual agreement'. The oral agreement was certainly not a unilateral waiver of the one party's rights under the agreement.*
>
> *[26] I am accordingly of the view that applicant is precluded from relying on the oral agreement.*"

[82] This issue was canvassed recently in *Investec Bank Ltd v Louw* [2012] ZAWCHC (12 September 2012) in which Bozalek J held as follows at paras [33] and [34]:

> "*[33] In my view, a similar situation pertaining in the present matter. To hold that the alleged oral agreement (which must be assumed for present purposes) coupled with the documents relied upon constitute a waiver by the applicant of its rights under the agreement, would amount to an impermissible circumvention of the provisions* [of the non-variation clause – see para 16], *rendering the principle in Shiften nugatory …*
>
> *[34] Our courts have held in several cases that a defence based on an unenforceable oral agreement disguised as a waiver cannot be used to resist the enforcement of a contractual provision governed by a non-variation/non-cancellation clause.*"

[83] The above was a response to argument in that court by the respondent's counsel around certain clauses in a contract under discussions. Counsel had argued that the applicant through clear representations had waived its rights against the respondent arising out of a suretyship agreement. He further argued that in the ordinary course, a release may be made tacitly

but that was not to be the case if the governing contract stipulates that it must be in writing.

[84] I agree with counsel for the second defendant that in our present case, even if it is accepted (for argument's sake) that the second defendant indeed waived the clause 19.1 requirement that Bedford Square Properties should obtain written consent, the effect of that or such a waiver would be that the contract would be varied in relation to one of its most material provisions, namely, the identity of the contracting parties and that would have been done in flagrant disregard of a corner term of the agreement, i.e. that all variations or alterations or waivers shall not be legitimate unless they are done in writing. Clause 1.8 of the building agreement requires this. No more, no less.

[85] I also echo the words of Blignaut J in the *Sunset Village* case (*supra*) that the effect of such an alleged waiver would result in nothing less than a material variation of the terms of the written agreement or an alteration of the legal consequences of the contract by mutual agreement. That is impermissible in the peculiar facts and circumstances of this case.

<u>Second reason for exception re: clause requiring consent cannot be waived if it was not included solely for the benefit of second defendant</u>

[86] It is common cause or trite that where a waiver from its very nature is for the benefit of both parties and there is a clause requiring such waiver to be in writing, one of the parties cannot unilaterally waive any such clause of an

agreement without the other's consent in writing. If a clause is for the exclusive benefit of one of the parties, that party can waive it. As put in *Barnett v Van der Merwe* 1980 (3) SA 606 (T), a waiver in connection with a written contract containing an entrenchment clause can only apply to a provision which is exclusively for the benefit of one party. At 611G of the above judgment the court went on to state that:

> "*… this is miles away from any concept that the requirement of writing in respect of amendments can be waived orally.*"

[87] The clauses of the agreement in issue in this application are for the benefit of both the excipients and respondents.

[88] The respondents relied on the principles set out in *Hillsage Investments (Pty) Ltd v National Exposition (Pty) Ltd and Others* 1974 (3) SA 346 (W). In this case the party that sought to deny that there had been a valid cession was the defendant, who was the alleged cessionary of a lease from whom the plaintiff had sought payment of rent.

[89] The clause in question there read as follows:

> "*The lessee shall not sublet the premises or any portion thereof, nor cede or assign or pledge this lease or any of his rights hereunder without the lessor's prior written consent.*"

[90] It is clear that the benefit here is to one of the parties only.

[91] On the other hand, the corresponding clause in the agreement between the parties in this application is different. I quote it:

> "*Neither the employer nor contractor shall assign or cede rights or obligations without the written consent of the other party which consent shall not be withhold without good reason.*"

[92] Here the benefit is two edged – both parties are being benefitted. Consequently, this authority cannot avail the respondents.

[93] Where a waiver is a disguised variation, as appears the case herein in my view, then the situation worsens.

[94] Another problem with the reliance on the *Hillsage* case is that it had nothing to do with the question of whose benefit the clause was inserted for or whether the waiver and cession were valid. This is apparent from the following excerpt from the judgment:

> "*… all these points raised by the plaintiff are valueless because they are all based on the interpreting of a contract to which the principal debtor was not a party. Indeed the true fons et erigo of the National Exposition's liability is its own contract with the lessor … in terms whereof it assumed, with the latter's concurrence, all the liabilities of* [the previous lessee] *under the deed of lease. These interesting points which were canvassed by them in this case may very well be relevant in litigation between the plaintiff and Hirba* [the previous lessee] *to determine the legal results which flowed from the plaintiff's conduct in entering into a contract with National Exposition …*"

[95] In the *Hillsage* case the facts were different from those the parties are busy with here. The defendant in that case seems to be saying to the plaintiff: because you did not agree in writing to the cession of the lease to me, the cession is thus invalid and you cannot rely on it against me. In our current application the second defendant seems to be or is saying to the plaintiff: because I did not agree in writing or even approached to consider the cession of the building agreement, then a third party cessionary cannot rely on the agreement against me.

[96] In the *Hillsage* case the defendant had full knowledge of the lease that it was taking cession of. It was a sort of a bargain then. In our current case the second defendant is simply relying on a clause that it expressly agreed to when it concluded the agreement with Bedford Square Properties.

[97] When one looks at and considers the principles expounded in *Hillock and Another v Hillsage Investments (Pty) Ltd* 1975 (1) SA 508 (A), it becomes apparent that the *Hillsage* case cannot be authority for the proposition that a party that wishes to waive compliance with a contractual requirement must give its written consent to a cession. At 515A, Muller JA says the following:

> "*In my judgment this argument has no merit … The object of clause 8 of the lease was to render an assignment concluded by the lessee* [Hirba] *with a third party, without the prior written consent of the lessor, not binding on the lessor. It is unnecessary to decide whether, as was contended before us, the provisions of clause 8 were inserted also for the benefit of the lessee. For present purposes, I shall assume, without deciding, that they were. What is clear, however, is that those provisions, and indeed also the provisions of clause 31, were intended to operate only as between the parties to the agreement, namely, the lessor and the lessee. A third party, such as the National Exposition in the present case, cannot seek to rely on the provisions in question,*

> *unless it has become a party to the agreement, for example, by assignment that the applicants seek to attack.*"

[98] What emerges from the above is, in my view, the following: while the clause may well have been for the benefit of both parties and while a party to the contract may well be allowed to rely on the clause, the true *ratio* of the above case is that a non-variation clause cannot be relied upon by someone who was not a party to the contract and who actually seeks to dispute that it was a party.

[99] On the other hand, in our current matter, it is evident from the contract that clause 19.1 was expressly included for the benefit of both parties and the second defendant, which has always been and still is, a party to the agreement is the party that seeks to rely on it.

[100] Unlike in the *Hillsage* case, in our current matter, no separate contract exists between the first plaintiff and the second defendant. Further unlike in the *Hillsage* case, the first plaintiff is not alleging that this is the case.

[101] Hiemstra J put it succinctly in *Impala Distributors v Taurus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T) at 277D as follows among others when he referred to a party's right to waive a requirement "*… wat uitsluitend tot voordeel van een party is*" (exclusively to the benefit of one party only). The Learned Judge raised the example of the waiver of a stipulation requiring the payment of rental, which is only to the benefit of the

lessor and identified this (at 277E) as a "*pactum de non petendo*" or as "*'n eensydige regshandeling waarby die toestemming van die ander party irrelevant is*". He went on to state that this is a "*… ware en geldige*" oral waiver, which may be distinguished from "*… 'n vermomde*" (disguised) waiver "*… wat niks anders is as ontbinding by wilsooreenstemming nie*" (dissolution by consensus) which, if allowed, "*… sou prakties beteken dat met een asemstoot die hele sorgvuldige opgeboude Shifren-struktuur aan skurwe lê …*" (which would in practice mean that with one fell swoop, the entire laboriously and carefully constructed *Shifren* principles would lie in pieces).

[102] In distinguishing between an oral agreement that the contract in question may be ceded despite the requirement of written consent and a waiver of a right to enforce a right in the contract following a breach thereof, the Learned Judge said:

> "*Dit is omdat in die Shifren-saak die tweede punt nie gepleit was nie, dat die hof hom nie oor afstanddoening uitgespreek het nie. Wat die eerste punt betref, daar het die Appèlhof beslis dat so 'n ooreenkoms nietig is. Wat die tweede betref, bevind ons dat dit wel gedoen kan word omdat dit nog 'n ontbinding nog 'n wysiging van die kontrak is.*"

[103] Hiemstra J in the above utterances confirmed that the Appellate Division in *Shifren* did indeed find that an oral agreement that the contract may be ceded despite the requirement of written consent, is void.

[104] It is thus my view that even an actual agreement to waive the requirement of written consent to a cession is invalid if it is oral. By the same reasoning, a unilateral waiver of such a requirement cannot be valid.

[105] It is noteworthy that the judge in the *Impala* case noted at 277G thereof that in the *Hillsage* case:

> "*… daar word niks meer beslis nie as dat 'n derde hom nie kan beroep op verontagsaming van die skrifvereiste deur kontrakterende partye nie.*"

[106] In *Sunset Village SPV (Pty) Ltd v Smith Tabatha Buchanan Boyes Inc* 2009 JDR 1328 (WCC), Blignaut J considered the judgment of Hiemstra J in the *Impala* case and concluded that:

> "*[21] It is clear … that Hiemstra J equated a pactum de non petendo with a unilateral waiver of a term which is to the benefit of the one party only. This is, with respect, a curious use of the concept as pactum is the Latin word for agreement. A pactum de non petendo has been defined, more correctly in my view, in Van der Merwe and Others: Contract, General Principles, 2nd Ed, 373-374 as follows:*
>
> > *'… a pactum de non petendo suspends the capacity to enforce* [a contract]*, usually for a specified period or until the occurrence of some contingency.'*
>
> *[22] In my view the analysis of Nestadt J in Van As v Du Preez 1981 (3) SA 760 (TPD), is more pertinent.*"

[107] To re-cap, the *Van As* case is authority for the proposition that even if a waiver relates to a provision inserted for the sole benefit of the party alleged

to waive it, it will nevertheless not be valid if it in effect constitutes a variation, which is precisely the case in the current matter.

[108] The first plaintiff also relied on *Varalla v Jayandee Properties (Pty) Ltd* 1969 (3) SA 203 (T). In that case the defendant stated that he had received a written notice. Even though the document he had received did not in fact constituted written notice as required, the court accepted that that does not seem to make any difference to the rights of the parties in the matter because, according to the evidence, the plaintiff's representative contended that a valid notice had been given to the defendant and the defendant apparently thought he had received a valid notice.

[109] From the aforegoing it is my considered view and finding that the *Varalla* case was not an instance of waiver of a requirement that the notice be in writing, but rather of the waiver of a right to raise the issue as a defence at the trial. In other words, it represents a true *pactum de non petendo* as referred to by Blignaut J in *Sunset Village*.

<u>Third basis of first exception: Alleged waiver being prevented by clause 1.8, which is a non-waiver clause</u>

[110] The basis hereon is that the plaintiff cannot rely on the pleaded waiver and cession because clause 1.8 of the building agreement constitutes a non-waiver clause which disallows any reliance on the alleged waiver.

[111] In *Coronel's Curator v Coronel's Estate* 1941 AD 323, the waiver of a right conferred by contract, as opposed to one conferred by law, was regarded as a donation, and is therefore an agreement, not a unilaterally effected act.

[112] Clause 1.8 of the building agreement here includes stipulations that no representations, terms, conditions or warranties not contained in the agreement shall be binding on the parties. On the abovementioned basis that the wavier here is contractual in nature, and not a unilateral act, the clause rendering "*… any representations or term, etc, … not contained in* [the] *agreement*" not binding in fact operates as a no-waiver clause to the extent that such waiver is based on such a representation. In those circumstances, it will not be open to the first plaintiff to lead evidence of the alleged waiver. Such evidence would be inadmissible and the contractual requirement of written consent renders the claim against the second defendant excipiable.

See: *Sun Packaging (Pty) Ltd v Vreulink (supra)* at 184E-J.

Dadabhay v Dadabhay 1981 (3) SA 1039 (A) at 1048B-F.

Sheek v East London Daily Dispatch (Pty) Ltd 1980 (1) SA 151 (E) at 159-160.

Plascon-Evans Paints (Tv) Ltd v Virginia Glass Works (Pty) Ltd 1983 (1) SA 465 (O).

SECOND GROUND OF EXCEPTION: FAILURE TO PLEAD TERMS OF CONSENT

[113] The first plaintiff pleaded that the waiver it is relying on or consent thereto to be exact, was given orally, alternatively, tacitly. It is trite that where a party relies upon an oral contract, it must stipulate when, where and by whom it was concluded. This is a requirement of Rule 18(6) of the Uniform Rules. A litigant's non-compliance with Rule 18(6) may give rise to a successful exception where such non-compliance results in a pleading being vague and embarrassing.

See: *Sasol Industries (Pty) Ltd t/a Sasol 1 v Electrical Repair Engineering (Pty) Ltd t/a L H Marthinusen* 1992 (4) SA 466 (W).

Jowell v Bromwell-Jones & Others (supra) at 902 E.

[114] The Appellate Division elaborated on this rule in *Roberts Construction Co Ltd v Dominion Earthworks (Pty) Ltd* 1968 (3) SA 255 (A) at 261F: wherein among others the Learned Judge stated that Rule 18(4) states a general principle to the effect that every pleading shall contain a clear and concise statement of the material facts upon which the pleader relies for his claim, and that its application to contracts is specific in the sense that:

> "*… A party who in his pleading relies upon a contract shall state whether the contract is written or oral, and when, where and by whom it was concluded.*"
>
> (Rule 18(6))

[115] The court further stated that Rule 18(7) must be read as constituting an exception to the general principle and only relates to a term in an express contract, the latter being pleaded with the particularity required by Rule 18(6). He added that the general principle would require a statement of the facts or circumstances constituting any implied contract relied upon, or, put in another way, the facts and circumstances from which such contract is inferred.

[116] In its pleadings in this (our) matter, the plaintiffs did none of the above. What makes matters more convoluted is the fact that the plaintiffs do not allege that the consent itself was given by means of the conduct alluded to or alleged in paragraph 12.6 of the particulars of claim. Their specific pleadings reveal that this alleged conduct gave rise to the waiver of the requirement that the consent be in writing.

[117] I agree with the second defendant that the failure to comply with the requirements of Rule 18(6) in itself renders the particulars of claim excipiable. In addition thereto the pleadings become excipiable on the ground that it is vague and embarrassing because the defendant is prejudiced by the lack of particularity pleaded in relation to the oral or tacit consent.

See: *Quinlam v McGregor* 1960 (4) SA 383 (D) at 389F-H.

[118] The first defendant in my view cannot tell exactly what it is required to admit or deny, or, for example, whether it is in a position to plead that the plaintiff(s) is (are) estopped from relying on any facts in support of the alleged

oral or tacit consent to the cession. They equally do not know who is or are alleged to have represented them at the conclusion of those alleged oral or tacit agreements or consents and/or whether or not such persons were known to them or authorised.

THIRD EXCEPTION GROUND: CONTRACTUAL EXEMPTION FROM LIABILITY

[119] The relief sought by the plaintiffs against the second defendant include an order requiring it, at its costs, to rectify certain alleged latent defects in the roof covering system, which are identified as being sharp edges which created point and line loads, resting on the Nutex "*Bigsix*" sheets.

[120] After listening to argument from both counsel on this ground of exception, I am not persuaded that the second defendant cannot plead to the allegations hereon. As a result, this ground of exception is not, in my view, good enough.

FOURTH GROUND OF EXCEPTION: NO CONTRACTUAL BASIS FOR RELIEF

[121] The second defendant did not pursue or persist on this ground. As such it was not substantiated during argument.

FIRST DEFENDANT'S EXCEPTION

[122] I have already set out the first defendant's five exceptions in paragraphs [28] to [39] of this judgment hereinbefore.

[123] To re-cap, the first plaintiff alleged that the first defendant failed to deal with the roof coverings in issue here appropriately. An amount of projected and pleaded losses are around R3,8 m plus VAT. There is also an alternative count involving R544 000,00 representing what is called reasonable costs incurred.

[124] When the summons were originally issued the plaintiff's had attached to it a wrong agreement or contract. The plaintiffs also alleged or asserted a written cession. Exception were taken to all the above and the plaintiffs amended their pleadings. The amended papers or particulars of claim no longer pleaded a written cession but alleged that the first defendant agreed to the cession. Another exception was taken and the amendments that are the subject of the present exceptions were effected. These latest amendments now also allege the existence of verbal appointments in the face of allegations pointing to written appointments as per the contract(s). The well-travelled clause in our context or paragraph 7A of the particulars of claim is part of the amendments effected which precipitated the five (5) exceptions raised by the first defendant.

[125] The fourth and fifth exceptions by the first defendant relate to limitations and time bar clauses, respectively.

[126] I agree with the submission by counsel for the first defendant to the effect that should or if this Court upholds the first exception, then the third, fourth and fifth exceptions should also be upheld. If the first exception is dismissed, then equally, the fourth and fifth exceptions should also be dismissed. Should it be necessary that the fourth and fourth exceptions be dealt with or determined, then part of the third exception also should be dealt with together with them.

FIRST DEFENDANT'S FIRST EXCEPTION

[127] The first plaintiff had claimed for damages as a cessionary from the first defendant based on an alleged breach of the first defendant's obligations in terms of the architect agreement signed and the first defendant's alleged failure to perform his duties as principal agent.

[128] The first defendant's first exception is essentially directed at paragraph 7A of the plaintiffs' particulars of claim, which reads as follows, to re-cap:

> "*On a proper construction of the architect agreement only clause 2.0, including clauses 2.1 to 2.5 of the client/architect agreement, read with the relevant definitions* [as] *contained in clause 1.2 of the client/architect agreement, was incorporated in and forms part of the architect agreement.*"

[129] According to the first defendant, the first defendant's first exception relates to an attempt by the plaintiffs to exclude from operation certain written terms of the architect agreement which the plaintiffs contend represent the

written agreement concluded between Bedford Square Properties and the first defendant. This the plaintiffs endeavour to see happening by pleading in paragraph 7A of their amended particulars of claim that on a "*proper construction*" only clause 2 of the client/architect agreement was incorporated into and forms part of the architect agreement. The problem with this attempt according to the first defendant appears to be that in terms of the very architect agreement relied upon by the plaintiffs, the first defendant's services were expressly stated to be rendered in accordance with the client/architect agreement, full stop. No qualification(s) was made to that statement. The first defendant submits in this regard that any exclusion of certain provisions of the client/architect agreement would and should have necessitated an independent or unequivocal written amendment to these agreements, but such a situation has not occurred.

[130] The first defendant contends further, that at the very least, the following provisions of the client/architect agreement/contract were incorporated in the client/architect contract/ agreement:

130.1 Clauses 4.3.2, 4.3.3, 4.3.4 and 4.3.6 which place limits to the architect's responsibilities.

130.2 Clause 4.6, which provides *inter alia* that neither party shall assign or cede its interest in the building agreement without the written consent of the other.

130.3 Clause 11.4, which is a non-variation clause, among others.

[131] The clause of the architect agreement the plaintiff's are relying on for their contentions is clause 3.1 which reads as follows:

"*3. <u>DEFINITION AND SCOPE OF SERVICES</u>*

3.1 <u>Services</u>

Your Services will be in accordance with the client/architect agreement published by the institute of South African Architects. The scope of work embraced by the Architectural appointment includes the design stages, technical documentation, contract administration and inspection of the works, i.e. Stages 1 to 5 inclusive."

[132] The plaintiffs consequently contended that the ordinary grammatical meaning of clause 3.1 does not indicate that the whole of client/principal agent agreement was incorporated in the client/architect agreement.

[133] When asked to indicate whether in the above clauses such an exclusion was clearly and unequivocally apparent, the plaintiffs could not point to that directly. They proceeded to give a rambling anecdotal rendition arrived at by some sort of inferential reasoning in an attempt to justify their contention. They could equally not come up with any cogent reason(s) why some clauses of the client/principal agent agreement would be included while others are supposed to be excluded.

[134] I am not persuaded by the reasons advanced by the plaintiffs who pointed out that although the client/principal agent/architect agreement

contained set out duties, obligations and/or limitations, the fact that the specific terms agreed upon by the parties differed from them, for e.g. in respect of the fee structure, disbursement settlement, the manner of payment of the first defendant's fees and the dispute resolution mechanisms contained therein.

[135] I have meticulously scrutinised the two agreements. I have come to the conclusion that the client/principal agent agreement is a specimen contract document setting out ideal terms that parties may incorporate in their specific contracts *inter se*. The parties are at liberty to adapt those general or template terms contained in the client/principal agent agreement when they conclude their situation perfect client/architect agreement. I could not come across any where in the said template or agreement where a specific clause is singled out for specific incorporation into the client/architect agreement.

[136] It is for the above reason among others, that I find that the entire client/principal agent agreement is not specifically excluded or barred from forming part of the client/architect agreement.

[137] In their heads of argument (page 10, para 17), the plaintiffs appear to be acknowledging that they did not set out sufficient particulars in relation to the oral or tacit consent alleged. The paragraph reads as follows:

> "*17. It is submitted that the alleged failure by the plaintiffs, to set out 'sufficient particulars in relation to the oral or tacit consent', does not amount to vagueness which causes embarrassment and prejudice to the first defendant.*"

[138] For the same reasons I advanced in respect of the second defendant's exceptions hereinbefore, I do not agree with the applicants: The pleadings are vague and embarrassing generally for the self-same reasons that sufficient particulars in relation to the oral or tacit consent details were not furnished.

[139] As regards this first exception by the first defendant, the plaintiffs have not advanced sufficient and/or cogent grounds why they should be allowed to pick and choose which terms of the client/principal agent agreement were excluded or included in the client/architect agreement.

[140] It is my considered view and finding further that the plaintiffs' adoption of this line of conduct or reasoning is not supported by the facts on the ground.

[141] The wording of clause 3.1 which the plaintiffs rely on on this ground or exception is not exhaustive of all the scope alluded to. The words: "*… it includes …*" therein in my view presupposes there are others that are not specifically mentioned.

[142] It is my finding that where parties expressly agree on specific terms of a contract, those express terms should supersede the general or template terms. Hence in the client/architect agreement here, the parties elected to deal with such issues as fees, and/or disbursements in their chosen manner

and moved away from the template client/principal agent agreement on those aspects. That in my view does not make the other terms of this agreement non-applicable. None of the other terms of the client/principal agreement are in my view, excluded. For example, this client principal agreement contains mechanisms and conditions of termination of the parties' agreement and the client/architect agreement does not contain those. Obviously, those terms of the client/principal agent agreement would invariably be of application to their contract.

[143] In the circumstances, the first defendant's first exception makes good sense and deserves to be upheld.

[144] As stated hereinbefore and agreed to or conceded by the parties herein, the upholding of the first exception should lead to the fourth and fifth exceptions being upheld as well. As such it is not necessary that I deal with them specifically herein in order to uphold them.

[145] Which leaves us with the second and third exceptions.

THE SECOND OF THE FIRST DEFENDANT'S EXCEPTIONS

[146] This relates to the plaintiff's endeavours to rely upon a subsequent oral agreement relating to the appointment of the first defendant as a principal agent in circumstances where that appointment had already been made in terms of the written architect agreement.

[147] According to the first defendant the fact that the plaintiffs' particulars of claim contemplate two separate agreement side by side for a single appointment, that on its own is not only indicative of vagueness but also embarrassing, thereby justifying the exception. On top of that, so argued the first defendant, the parole evidence rule does not countenance a litigant relying upon an oral agreement in the face of express written terms.

See: *KPMG v Securefin Ltd* 1009 (4) SA 399 (SCA) at 409G.

[148] All what has been said on this aspect in respect of the first exception is of equal application here. I will not repeat same except where it is absolutely necessary to do so.

[149] It is not in dispute that the written client/principal agent agreement has appointed the first defendant as the architect and agent (principal agent) for the project in question. The plaintiffs somewhat contrived to be substitutes in the place of Bedford Square Properties who are the instance that contracted with the first defendant. The first plaintiff did not plead that the first defendant was party to the processes that saw them replacing Bedford Square Properties as their counterparts in the agreements.

[150] The written agreements are clear and unambiguous in their terms. It is also so that the plaintiffs are not relying on any ambiguity or contextual background in the interpretation of the agreements.

[151] The plaintiffs now alleged in the particulars of claim that there was another agreement made verbally between the parties to the effect that another appointment was made or that can be tacitly inferred in the face of the written agreement. This allegation in my view is totally inconsistent with the allegations in paragraph 5 of the plaintiffs' particulars of claim, which confirms that the first defendant has indeed already been appointed as principal agent and architect.

[152] As stated hereinbefore in respect of the first exception by the first defendant, nowhere do the plaintiffs offer full particulars of such oral or tacit agreement that contradicts a written instrument. No particulars of actors, place and circumstances under which such oral agreement was entered into are furnished.

[153] On the face of it, these allegations are indeed vague and embarrassing and offend the parole evidence rule.

[154] Counsel for the plaintiffs argued that the question relating to this exception can be answered if a consideration is given to the aspect whether or not the client/architect agreement constituted the whole contract between the first defendant and it. He relied on *Johnston v Leal* 1980 (3) SA 927 (A).

[155] My problem with the above case is that it dealt with formalities for the sale of immovable property. What I can deduce from the circumstances and

the submissions made is that this case indeed deal with an exception to a plea that relates to a written contract where there are blank spaces in that contract. The court held that one would need extrinsic evidence admissible to the parties to explain why such blank spaces are in that contract, leading to the validity of such a contract not being capable of being determined without such evidence. In such circumstances, the court further held, a decision on exception is not possible.

[156] We are not dealing with the validity of a contract here. At worst we would be dealing with the interpretation of existing contracts whose validity are not in dispute.

[157] It was also argued on behalf of the plaintiffs that tacit or implied terms of an agreement can explain the terms and conditions thereof, as well as the fact that it was the contracting parties' intention that the variation clause in their agreement should not apply.

[158] I cannot agree with the plaintiffs' submissions. To do so would be tantamount to allowing far-fetched and/or remotely associated considerations to interfere in a simple issue of whether the pleadings herein are vague and embarrassing. Furthermore, it is bad in law for the plaintiffs to plead oral and/or tacit terms of an agreement without setting out the full details of who represented who during such an agreement, where and when that took place or what the peculiar circumstances are surrounding such oral or tacit agreement.

[159] I do not agree with the plaintiffs' submission that reliance on parole evidence rule is bad in law. It may have been inappropriate in the circumstances but it is not bad in law. It is also not an answer, as suggested by the plaintiffs' counsel, that in circumstances such as those that obtain in this instance, where pleadings are vague and embarrassing, the defendant must rely on discovery procedures to clear the vagueness and embarrassment and not except.

[160] The plaintiffs' submission that Rule 18 is merely restrictive in essence whereas Rule 23 is the appropriate procedure cannot in my view affect the decision I intend making in this application. Their further submission that where particulars of claim or pleadings offend Rule 18 and are vague and embarrassing the remedy is by or through Rule 30 to cure that is far-fetched and preposterous to say the least.

[161] I equally do not agree with the plaintiffs' contention that where particularity or details are necessary as in this instance, the matter should be dealt with through Discovery procedures. A litigant needs to know with certainty what it would or should be pleading to. It must be placed in a position where it can decide whether to raise a special plea or plead outright or normally. The particulars of claim herein do not allow the first defendant to make such informed choices. As such the exception i.e. this second exception also stands to be upheld.

[162] It is not proper justification, as the plaintiffs sought to do, to aver or contend that the fact that they did not plead who was involved in the oral agreements or when or where such processes took place are not "*life and death*" issues that should attract and justify the use of an exception. I note with surprise in the light of the above submission that it was contended on behalf of the plaintiffs that where tacit consent is pleaded, the specific circumstances must be pleaded. In my view the two scenarios here are mutually destructive.

[163] I ventured to ask counsel for the plaintiffs if the identities or details of the persons or instances who allegedly acted on behalf of the defendant during the alleged oral and/or tacit agreements were known. The answer was tongue-tying: They did not know who dealt with them during the conclusion of these oral alternatively tacit agreements.

[164] That in my view sealed the fate of the issues relative to this exception.

[165] I would grant them the following: it was argued on their behalf that where implied terms are pleaded, it is not necessary *per se* to provide elaborate details: Consent is the requirement necessary to close the matter. I agree. However, that is not what is before us.

THE THIRD OF FIRST DEFENDANT'S EXCEPTIONS

[166] The third exception by the first defendant relates to the plaintiffs' attempt to overcome an express provision in the client/architect agreement to the effect that neither party shall assign or cede its interests in the architect agreement without the written consent of the other by pleading instead an oral, alternatively, tacit consent by the first defendant to such cession of rights from Bedford Square Properties to the first plaintiff.

[167] In this instance also, the plaintiffs do not know or could not say who they were dealing with who purported to act on behalf of the first defendant.

[168] It is true that the client/architect constitutes the exclusive (written) memorial of the agreement between Bedford Square Properties and the first defendant. It is the law that a party cannot without more plead or lead evidence that tends to or may contract,radict alter, add to or vary such written terms.

See: *Union Government v Vianni-Gerro-Concrete Pipes (Pty) Ltd* 1941 AD 43 at 47.

Johnston v Leal (supra) at 943B-C.

Philmatt (Pty) Ltd v Mossel Bank Developments CC 1996 (2) SA 15 (A) at 23A-24B.

[169] As propounded in the *locus classicus* case on this aspect, *Sentrale Ko-op Grand (Ko-op) Maatskappy Bpk v Shifren* 1964 (4) SA 760 (A) where a party relies on a subsequent oral and/or tacit agreement which purports to

vary the express terms of an agreement (*in casu* the client/architect agreement) it is impermissible to do so in the face of a written non-variation clause expressly prohibiting or limiting such a move or procedure.

See also: *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

Christie: *The Law of Contract in South Africa*, 6th Ed, at p 464.

[170] In *Guman v Latib* 1965 (4) SA 715 (AD) at 722 the court emphasised that where there is no written consent as required by the express terms of an agreement, there cannot be consent altering the *status quo*, more so where such alleged consent is oral or alleged on tacit grounds.

[171] As stated throughout herein, and is common cause, there is a written non-variation clause in the applicable agreement(s) between the parties which demand that variation or additions thereto including any alterations and waivers shall not be valid and of any consequence unless reduced to writing and signed by both parties.

[172] As stated earlier, the plaintiffs' impediment in the path towards success is that they do not know who consented to the said variation, where it took place or what the details are thereof or circumstances under which it allegedly took place.

[173] In this case what the excipients want is: who took part in those alleged talks, what led to those alleged talks, what are the circumstances of the arrangements that led to the purported consent. They have not been pleaded.

[174] The totality of circumstances in this exception also, in my view, points to the excipient having done enough to justify its exception.

CONCLUSION

[175] The exception of "*vague and embarrassing*" is independent of all other exceptions. The two defendants have done enough to persuade me that the plaintiffs are indeed vague and embarrassing in one or other respect as set out in this judgment.

[176] I have read the authorities tendered by both sides for or against the grant of the exceptions. It is my considered view that the excipients' (defendants') authorities were more suited and apt to their cases. The plaintiffs' authorities may have been relevant in other situations, however, they were not appropriate in this application.

[177] The reliance by the defendants on the *Hillsage* case which ruled that where a clause is for the benefit of both parties, cession should not occur unless consented to in writing is correct. Coetzee J's view in the *Impala* case that waiver was possible was in my opinion *obiter*. It was not followed on

appeal. The *Varalla* case facts are in my view distinguishable from the facts we are busy with in this case.

[178] Except for the second defendant's fourth exception, it is my considered view and finding that the defendants have made out cases for the upholding of their exceptions.

COSTS

[179] This was a relatively involved and quite complicated matter. The plaintiffs even retained the services of two counsel.

[180] The second defendant asked that in the event of it succeeding, it should be awarded the costs of one counsel. The first defendant also asked for costs of one counsel.

[181] The plaintiffs asked for costs of two counsel in case they succeeded.

[182] The issue of costs is pre-eminently within the discretion of the trial judge and depends on the totality of circumstances prevailing in each case.

[183] I am of the view and finding that the defendants should be awarded costs on a scale as between party and party.

[184] Both the defendants submitted that in the event of this Court upholding their exceptions the plaintiffs should be granted leave to amend their particulars of claim within 30 days of the date of the order and that should they fail to do so, they (plaintiffs) will approach the court to ask for the dismissal of the action(s).

ORDER

[185] The following order is made:

185.1 The first to fifth exceptions except the fourth, as set out in the first defendant's (first excipient's) notice dated 18 September 2012 are upheld.

185.2 The first to third exceptions to the plaintiffs' particulars of claim in the second defendant's notice dated 17 September 2012 are upheld.

185.3 The second defendant's fourth exception is dismissed.

185.4 The plaintiffs' particulars of claim covered by the granted exceptions and the prayers relevant thereto are struck out.

185.5 The plaintiffs are granted leave to amend their particulars of claim within 30 (thirty) days of date of this order, failing which

the defendants are hereby granted leave to apply on papers, supplemented if necessary, for the dismissal of the plaintiffs' action.

185.6 The plaintiffs are ordered to pay the costs of both the defendants.

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N F KGOMO
JUDGE OF THE SOUTH GAUTENG
HIGH COURT, JOHANNESBURG

FOR THE FIRST AND SECOND PLAINTIFFS (RESPONDENTS) ASSISTED BY	ADV H F OOSTHUIZEN ADV M BOIKANYO
INSTRUCTED BY	RICHARD MEADEN & ASSOCIATES INC BEDFORDVIEW TEL NO: 011 – 455 6868
FOR THE FIRST EXCIPIENT (FIRST DEFENDANT)	ADV M A CHOHAN
INSTRUCTED BY	WEBBER WENTZEL ILLOVO, JOHANNESBURG TEL NO: 011 – 530 5376
FOR THE SECOND EXCIPIENT (SECOND DEFENDANT)	ADV R J A MOULTRIE
INSTRUCTED BY	BAKER & MCKENZIE ATTORNEYS SANDHURST TEL NO: 011 – 669 7600
DATE OF ARGUMENT	05 MARCH 2013
DATE OF JUDGMENT	15 MARCH 2013