IN THE HIGH COURT OF SOUTH AFRICA

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE

(1)REPORTABLE: ~~YES~~/NO

(2)OF INTEREST TO OTHERS JUDGES: ~~YES~~/NO

(3)REVISED

29/10/2014 .....

DATE SIGNATURE

CASE NO. 53591/2012

29/10/2014

In the matter between:

PIETER JOHANNES VISAGé N.O. **1ST APPLICANT**

MARIA JACOBA VISAGé N.O. **2ND APPLICANT**

in their official capacities as co-trustees of the

CONTERBERG BOERDERY TRUST

and

FIRSTRAND BANK LTD **RESPONDENT**

JUDGMENT

BOTES AJ

1. **INTRODUCTION**

1.1 The First and Second Applicants are the co-trustees of the Conterberg Boerdery Trust, Masters Ref No. IT6179/1996 (hereinafter referred to as *"the Trust"*).

1.2 Mr P J Visagé (hereinafter referred to as *"Mr Visagé"*) was a director of V8 Cattle Ranch (Pty) Ltd (hereinafter referred to as *"V8"*). The Trust was a shareholder of V8.

1.3 The Trust instituted action against the Respondent (as the Defendant) during 2012. The Trust claims payment from the Respondent in the amount of R266 million, alternatively R11 790 634,99, alternatively R9 569 470,16.

1.4 The Respondent filed its notice of intention to defend the action, followed by an exception on the basis that the particulars of claim does not sustain a valid or enforceable cause of action.

1.5 The Respondent's exception was upheld on 27 March 2013 in terms of which the Trust's particulars of claim was struck out and it was afforded an opportunity to file a notice of intention to amend by no later than 16 April 2013. The Trust filed and delivered a notice of intention to amend its particulars of claim on 16 April 2013, but omitted to take any further steps in order to effect the proposed amendment. The amendment was therefore not

effected and lapsed.

1.6 The Respondent filed an application for the dismissal of the Trust's action, by virtue of a notice of motion dated 12 June 2013. Pursuant to the delivery of this application, the Trust realised that it had to take remedial action in order to avoid its claim to be dismissed. The Trust instituted an application for condonation and leave to amend its particulars of claim in accordance with the provisions of Rule 28. This application was delivered at the offices of the Respondent's attorney on 27 June 2013.

1.7 Murphy J came to the Trust's rescue on 27 February 2014, and leave was granted to the Trust to amend its particulars of claim in accordance with the provisions of Rule 28. The notice of intention to amend had to be filed and delivered on or before 13 March 2014.

1.8 The Trust duly filed its notice of intention to amend on 13 March 2014, in terms of which the Trust intends to amend its particulars of claim in its entirety and to substitute it with the amended particulars of claim which is attached to the notice of intention to amend, marked Annexure "X".

1.9 The Respondent objects to the Trust's proposed amendment of its particulars of claim on the grounds alluded to *infra*.

2. BRIEF HISTORY AND BACKGROUND

2.1 V8 caused a General Notarial Bond to be registered in favour of the Respondent over certain movable assets, including Holstein cattle, as covering security pursuant to a loan agreement which was concluded between it and the Respondent. The Respondent loaned and advanced a certain amount of money to V8, at the latter's special instance and request, and it became apparent that V8 failed or omitted to comply with its obligations or responsibilities towards the Respondent in respect of the repayment of the loan. This resulted in an application which was instituted by the Respondent to perfect the security which was granted to it by V8 pursuant to the registration of the General Notarial Bond. This Court granted an order on 20 May 2008 in terms of which the General Notarial Bond was perfected, but when the Respondent attempted to execute on the order which was granted on 20 May 2008, it became apparent that some of the Holstein cattle, which was the subject of the General Notarial Bond, had been disposed of.

2.2 V8 and the Respondent entered into a written settlement agreement (hereinafter referred to as *"the agreement"*) on 10 June 2008, which comprehensively regulated V8's indebtedness to the Respondent and it also provided for the manner in which V8 would settle such indebtedness. The terms of the agreement are not in dispute and on a proper interpretation and analysis of the agreement, V8 assumed liability in an amount exceeding R6 million which it was obliged to pay to the Respondent in the following manner:

2.2.1 R200 000,00 on or before 18 June 2008;

2.2.2 R250 000,00 on or before 10 July 2008;

2.2.3 R300 000,00 on or before 10 August 2008;

2.2.4 R350 000,00 on or before 10 September 2008;

2.2.5 R2,35 million on or before 10 October 2008; and

2.2.6 The then outstanding balances on the loan accounts in the name of V8 as on 10 October 2008 will be normalised and normal monthly instalments in terms of the agreement of the loan will be payable until such time as the loans have been repaid in full.

2.3 It is common cause that V8 failed or omitted to comply with its obligations and responsibilities provided for in clause 4 of the agreement, prior to the service of the liquidation application.

2.4 The agreement contains an acceleration clause and provision was made for the non-variation thereof, unless it is reduced to writing and signed by all the parties thereto.

2.5 By the time the Respondent instituted the liquidation application against V8, V8 was in arrears in respect of its obligations contained in clause 4(a), (b) and (c) of the agreement, and the full amount became due and payable.

2.6 During the initiation of the liquidation application V8 paid the outstanding

arrears in the amount of R450 000,00 in three instalments, but thereafter failed or omitted to pay any further amounts to the Respondent.

2.7 The liquidation application was set-down for hearing on 14 September 2009. V8 deemed it unnecessary to brief counsel to appear before Southwood J and Mr Visagé instead decided to attend the proceedings. It is evident from the record that Mr Visagé attempted to represent V8 on 14 September 2009, on the basis that he was the sole director of V8. Southwood J correctly held that Mr Visagé was not entitled to represent V8 and he proceeded with the hearing of the liquidation application and allowed counsel who appeared on behalf of the Respondent to address him. Southwood J consequently exercised his discretion in favour of the Respondent which resulted in V8 being finally wound-up.

3. THE TRUST'S CAUSE OF ACTION

3.1 The Trust's cause of action is founded upon an alleged agreement which was concluded between *"the Visagé group"*, including V8 and the Trust, and the Respondent, represented by Mr Corrie Verster (hereinafter referred to as *"the 11 September 2009 agreement"*). The Trust alleges in paragraph 17 of its amended particulars of claim that the 11 September 2009 agreement depended on the following:

3.1.1 Upon receipt of a letter from the Premier of the Mpumalanga Provincial Government (hereinafter referred to as *"the Premier"*) in which it is confirmed when an amount of R3 149 950,00 is about to be paid to the *"Visagé group"* a written agreement would be prepared (duly signed by the parties concerned), which agreement should have been made an order of Court on 14 September 2009; and

3.1.2 In the event that the letter from the Premier has not been received timeously, then the Respondent would move for a provisional winding-up order on 14 September 2009, instead of a final order.

3.2 The Trust furthermore avers in paragraph 17.2 of its amended particulars of claim that it was a tacit, alternatively an implied term of the 11 September 2009 agreement that the application for V8's liquidation would be postponed and that it would therefore not be necessary for counsel to attend the proceedings on 14 September 2009.

3.3 Mr Visagé attended the proceedings on 14 September 2009 with the intention to sign the agreement as alluded to in paragraph 17 of the Trust's amended particulars of claim.

3.4 It is therefore the Trust's case, and cause of action, that the Respondent repudiated the 11 September 2009 agreement, alternatively that the Respondent committed a breach of a legal duty which constitutes an unlawful

act or omission. The Trust's claim is in respect of the loss of profit it allegedly suffered by virtue of the fact that the *"Green Gold Project"* was unable to come into existence, as a result of the fact that V8 was finally wound-up.

4. THE RESPONDENT'S CASE

4.1 The Respondent objects to the Trust's proposed amendment of its particulars of claim dated 13 March 2014 on the following grounds:

4.1.1 The agreement contains a *"non-variation"* clause which prohibits the Trust from relying on a subsequent agreement (the 11 September 2009 agreement);

4.1.2 The Trust, or V8, failed or omitted to comply with the terms of the 11 September 2009 agreement, in that no allegation is made by the Trust in its amended particulars of claim that the letter of the Premier was received prior to the hearing on 11 September 2009;

4.1.3 The terms of the agreement, as pleaded by the Trust in its amended particulars of claim, are conflicting;

4.1.4 No facts are set out in the Trust's amended particulars of claim which would place the Respondent under the obligation of a legal duty in the

absence of any agreement to that effect;

4.1.5 The Trust's cause of action is dependent on the 11 September 2009 agreement, which agreement constitutes a nullity and is void as a result of the non-variation clause provided for in the agreement which was concluded on 10 June 2008; and

4.1.6 The Trust did not comply with the provisions of Rule 18(10).

5. THE APPLICABLE LEGAL PRINCIPLES

5.1 As early as 1875 the English Court of Appeal in the matter of **Printing and Numerical Registering Co v Sampson 1875 LR 19 EQ 462 at page 465** stated the following:

> *"If there is one thing which more than another public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts when entered into freely and voluntarily shall be held sacred and shall be enforced by Courts of justice. Therefore you have this paramount public policy to consider : that you are not likely to interfere with this freedom of contract."*

5.2 The Respondent submits that the Trust is not entitled to rely on the 11 September 2009 agreement, by virtue of the provisions of the non-variation clause contained in and provided for in clause 10 of the agreement which reads as follows:

> *"This agreement constitutes the whole agreement between the parties and no variation, amendment or cancellation hereof will be valid and binding unless it is reduced to writing and signed by all the parties hereto."*

5.3 The Respondent submits that the Trust's cause of action in terms of which it claims damages for an alleged breach of the 11 September 2009 agreement, is premised on exactly what is precluded by the non-variation clause. In the alternative, the Trust alleges that the Respondent's failure to comply with the legal duty to honour the provisions or the terms of the 11 September 2009 agreement in that it omitted or neglected to bring the alleged oral agreement to the attention of Southwood J on 14 September 2009, which constitutes willful, alternatively negligent conduct by the Respondent.

5.4 The Respondent therefore submits that in the event of the 11 September 2009 agreement falling within the ambit of *"an amendment"* or *"a variation"* of the terms of the agreement (dated 10 June 2008), the subsequent oral agreement (the 11 September 2009 agreement) will constitute a nullity which

will have the inevitable consequence that the Trust's particulars of claim does not disclose a cause of action. The Respondent furthermore submits that the Trust's cause of action is, in its entirety, reliant upon the 11 September 2009 agreement. The terms of the 11 September 2009 agreement are not severable from the agreement which was concluded on 10 June 2008.

5.5 In support of its argument in this regard, the Respondent relies on the following principles and authorities:

5.5.1 The non-variation clause provided for in the agreement serves a legitimate purpose, namely to avoid disputes of fact regarding oral agreements which were allegedly concluded subsequent to the conclusion of a written agreement. In this regard the Respondent relies on the well-known judgment of the Supreme Court of Appeal in the matter of **SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren 1964(4) SA 760 AA**. Steyn CJ held in this regard the following:

> *"Waar partye so 'n bepaling in hul kontrak ingelyf het, dit wil sê 'n bepaling wat nie slegs ander bedinge nie, maar ook homself teen mondelinge wysiging heet te beveilig, kan ek geen rede vind waarom die een party nie die ander daaraan gebonde kan hou nie. Hul klaarblyklike doel met so 'n bepaling is om te waak teen die geskille en bewys moeilikhede wat by mondelinge ooreenkomste kan ontstaan. Om albei daarteen te beskerm*

kom hulle uitdruklik ooreen dat mondelinge wysigende ooreenkomste, ook wat die verskansende beding self betref, al word hul animo contrahendi aangegaan, tussen hul van nul en gener waarde sal wees. Indien 'n party, uit hoofde juis van 'n mondelinge wysiging, belet sou word om hom op so 'n beding te beroep, sou ons hier met 'n soort kontrak te doen hê wat sondermeer nie deur 'n Hof afgedwing word nie. Dit sou 'n opvallende afwyking wees van die elementêre en grondliggende algemene beginsel dat kontrakte wat vrylik en in alle êrns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word. Dit is geen antwoord hierop om aan te voer dat dieselfde van latere mondelinge ooreenkoms gesê kan word nie. Dit staan op 'n ander voet, want die partye het self hul eie bevoegdheid aan bande gelê deur hulle aan 'n formele vereiste te bind, en vooruit bepaal dat so 'n ooreenkoms nie afgedwing kan word nie. Deur so 'n ooreenkoms ten spyte daarvan in stand te hou, sou die Hof aan die party wat hom op ongeldigheid beroep, juis dié voordeel ontneem wat hy met die verskansende bepaling vir homself wou verseker en waarop hy luidens daardie bepaling geregtig is. Dit gaan ook nie op om te beweer dat dit strydig met die openbare belang sou wees om so 'n beperking te erken nie. Die beperking sluit nie kontraktuele vryheid uit nie. Die partye sou hul kontrak nog na willekeur kan wysig, mits hulle aan dieselfde opgelegde formele vereiste voldoen."

5.5.2 The intention and purpose of a non-variation clause, which formed the subject matter of the judgment in the **Shifren**-case, was reaffirmed by the SCA in the matter of **Brisley v Drotsky 2002(4) SA 1 HHA**, where the Court held:

> *"Die doel van die verskansingsklousule is onderneem om 'n dispuut oor die bestaan van 'n latere mondelinge ooreenkoms te vermy."*

5.5.3 The SCA considered the effect or the ramifications of an oral agreement to extend or to postpone certain contractual obligations in the matter of **Venter v Birchholtz 1972(1) SA 276 AA**. The Court became, on this subject matter, to the following conclusion:

> *"Volgens Mnr de Villiers toon hierdie sake dat 'n ooreenkoms tot uitstel van die prestasie van 'n kontrak, of tot 'n surrogaat vir prestasie van daardie kontrak, regtens 'n selfstandige ooreenkoms is en nie 'n wysigende ooreenkoms onversoenbaar met die kontrak nie. Volgens hom behoort dit dan geen beginsel verskil te maak of sodanige ooreenkoms voor, gelyktydig met, of later as die ander kontrak aangegaan word nie. Hierdie betoog gaan egter nie op nie. Hierdie sake berus op 'n onderskeiding tussen "wysiging" en ander afwykings van 'n skriftelike kontrak,*

wat logies moeilik te regverdig is."

5.5.4 This Court confirmed the legal principles which were laid down by the SCA in the **Shrifren**-matter. Spoelstra J held in this regard as follows:

> *"Mnr Marcus, namens die respondente, voer aan die ander kant aan dat die beweerde mondelinge ooreenkoms wel bindend is omdat dit nie die skriftelike ooreenkoms wysig nie, maar slegs die tydstip van prestasie uitstel. Hierdie argument wentel om 'n aantal uitsprake waarin soortgelyke bepalings ter sprake gekom het. Die eerste uitspraak wat ter sprake kom is die van Steyn HR in SA Sentrale Ko-op Graanmaatskappy Bpk v Shrifren en andere 1964(4) SA 760 (A), waar regte onder 'n huurkontrak in stryd met 'n kontraktuele verbod sonder skriftelike toestemming van die eienaar gesedeer is. Die kontrak het ook 'n bepaling bevat wat vereis dat enige wysigings van die bepalings van die kontrak op skrif moet wees anders sal dit geen regskrag hê nie. Op eksepsie is in die Laer Hof beslis dat die partye, ten spyte van die bepalings, mondelings kan ooreenkom dat mondelingse toestemming tot die sessie voldoende sou wees. Op appél is beslis dat die getuienis om die mondelinge ooreenkoms te bewys ontoelaatbaar is. Steyn HR beslis uitdruklik dat waar die partye hulle die vryheid ontneem om die skriftelike ooreenkoms, anders as by wyse van 'n verdere skriftelike ooreenkoms, te*

wysig, is hulle daaraan gebonde. Enige mondelinge ooreenkoms, selfs al word dit animus contrahendi aangegaan, is van nul en gener waarde."

And:

"Venter v Birchholtz 1972(1) SA 276 (A) bevestig dat uitstel van betaling wel 'n wysiging van die kontrak is. In daardie opsig verskil dit klaarblyklik van die Lombard saak. Daar word daarop gewys dat in die Neethling saak die moontlike geldigheid van so 'n beding op 'n beperkende uitleg van die skrifvereiste kan berus of dat daar 'n afstanddoening van regte kan wees. Ek vind nie steun in hierdie beslissing vir 'n standpunt dat 'n ooreenkoms om 'n uitstel van betaling te gee nie op 'n wysiging van die voorwaardes van betaling wat in die skriftelike dokument uiteengesit is, neerkom nie.

Daar kan nie bevind word dat 'n uitstel om betaling nie die voorwaardes van betaling in die skriftelike stuk wysig nie. So 'n bevinding sal bloot sofistery wees. Die beweerde mondelinge ooreenkoms waarop die eerste en tweede respondente steun, wysig die skriftelike ooreenkoms. Ingevolge klousule 10 moes dit op skrif gestel en deur die partye of hulle gevolmagtigde verteenwoordigers onderteken gewees het om bindend te

wees."

See: <u>Van Tonder and another v Van der Merwe and another</u> 1993(2) SA 552 WPA.

5.6 Mr Michau, who appears on behalf of the Trust, submitted that the very essence and purpose of the 11 September 2009 agreement is merely to extend (or to postpone) the payment obligations of the Trust, provided for in clause 4 of the agreement, and that it does not constitute *"an amendment"* or *"a variation"* of the terms of the agreement relied upon by the Respondent.

5.7 Insofar as the Trust relies on the allegation that the liquidation application would be postponed in the event that the letter of the Premier is not received timeously, Mr Michau submits that it constitutes a *"procedural"* aspect which is not sanctioned by the non-variation clause. It is therefore the Trust's case that the 11 September 2009 agreement does not constitute *"an amendment"* or *"a variation"* of the initial agreement and that the non-variation clause is therefore not applicable on the latter agreement. The 11 September 2009 agreement escapes the sanction of the non-variation clause as is envisaged by the authorities referred to herein *supra*.

5.8 Mr Michau furthermore directed my attention to the principles which are applicable in applications of this nature. I was referred to the judgment of a Full Bench in the matter of **<u>Francis v Sharp & others</u> 2004(3) SA 230 CPD**

where the following was held:

> *"The Court prefaced the evaluation of the exceptions by three preliminary observations:*
>
> *First, that save in the instance where an exception was taken for the purpose of raising a substantive question of law which might have the effect of settling the dispute between the parties, an excipient should make out a very clear, strong case before he should be allowed to succeed.*
>
> *Secondly, it was held that Courts were reluctant to decide upon exception questions concerning the interpretation of a contract. An excipient had the duty to persuade the Court that upon every interpretation which the particulars of claim could reasonably bear, no cause of action was disclosed.*
>
> *Thirdly, the Court noted that it had been held that a commercial document executed by the parties with a clear intention that it should have commercial operation should not lightly be held to be ineffective. The Court held that a similar approach should, in broad terms and mutatis mutandis, be adopted in regard to an oral commercial agreement."*

5.9 I agree with the arguments advanced by Mr Michau insofar as the test pertaining to an exception is concerned. Mr Michau directed my attention, in his heads of argument, to the relevant authorities which supports his argument insofar as the test pertaining to an exception is concerned.

6. CONCLUSION

6.1 The object and purpose of the agreement was to afford V8 an opportunity to comply with its obligations on the terms as set out therein. V8 and the Respondent agreed on certain dates upon which certain amounts were to be paid and it is common cause on the papers before me that V8 neglected to comply with its payment obligations.

6.2 I am bound by the decisions referred to *supra*, relating to the validity of a non-variation clause. I am of the view that the purpose and effect of the 11 September 2009 agreement was to extend or to postpone V8's payment obligations, which constitutes an amendment or variation of the material terms of the settlement agreement which came into existence on 10 June 2008, including the postponement of the execution proceedings in terms thereof.

6.3 The inevitable consequence of the extension of V8's payment obligations, relied upon by the Trust in paragraph 17 of its amended particulars of claim, is

that it constitutes an amendment or a variation of the agreement. This will include the postponement of the final liquidation which is dependent on the postponement of V8's payment obligations.

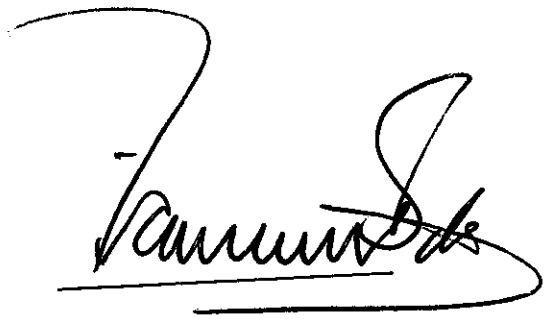
6.4 I am in the premises not persuaded by the arguments advanced by Mr Michau. The Trust is in law precluded from relying on the terms of the 11 September 2009 agreement to sustain its claim for damages either in terms of breach or contract, or on the alleged non-compliance with a legal duty.

6.5 I therefore come to the conclusion that the Trust's cause of action is in its entirety premised on the 11 September 2009 agreement. It therefore follows that this Court should not allow an application to amend to sustain a cause of action which discloses no cause of action.

See: Krischke v RAF 2004(4) SA 358 (W) at 363 F - G.

In the premises the following order is made:

1. **The First and Second Applicants (the Trust's) application for leave to amend its particulars of claim dated 8 April 2014 is dismissed with costs.**



F W BOTES
ACTING JUDGE OF THE
HIGH COURT, PRETORIA

Appearances:

For Appellant:	Adv.: R MICHAU (SC)
Instructed by:	LEWIES MARAIS INC
For Respondent:	Adv.: M A BADENHORST (SC)
Instructed by:	RORICH, WOLMARANS & LUDERITZ INC