IN THE HIGH COURT OF SOUTH AFRICA /ES

(GAUTENG DIVISION, PRETORIA)

DELETE WHICHEVER IS NOT APPLICABLE
(1) REPORTABLE: ~~YES~~ / NO
(2) OF INTEREST TO OTHER JUDGES: ~~YES~~ / NO
(3) REVISED

DATE **SIGNATURE**

CASE NO: A20/2014

COURT *A QUO* CASE NO: 53591/2012

DATE: 30/9/2016

IN THE MATTER BETWEEN

PIETER JOHANNES VISAGÉ N.O. 1ST APPELLANT

MARIA JACOBA VISAGÉ N.O. 2ND APPELLANT
(In their capacity as Trustees of the Conterberg Boerdery Trust)

AND

FIRST RAND BANK LIMITED RESPONDENT

JUDGMENT

PRINSLOO, J

[1] This is an appeal which came before us, with the leave of the learned Judge *a quo*, against his decision, on 29 October 2014, to dismiss an application by the appellants, as plaintiffs, in their representative capacities as trustees of the Conterberg Boerdery Trust ("the trust") to amend their particulars of claim in an action which they had instituted against the respondent, as defendant.

[2] Before us, Mr Maritz SC, with Mr Maritz, appeared for the appellants and Mr Dreyer SC, with Mr Badenhorst SC, appeared for the respondent.

Brief synopsis

[3] The first appellant, Mr Pieter Johannes Visagé, is an enterprising individual. At all relevant times, he was in charge of, and attached to, a number of entities described by the appellants as "the Visagé group".

For example, he was a director of V8 Cattle Ranch (Pty) Ltd ("V8"), a trustee of the trust, which was a shareholder in V8, a member and/or shareholder of and in Topmel CC, Seahawk Traders 5 (Pty) Ltd, Seahawk Traders 6 (Pty) Ltd and City Square Trading 802 (Pty) Ltd (of these four entities, he was the sole director and/or managing member) and, finally, a trustee of V2 Koop en Verkoop trust.

[4] At all relevant times, the Visagé group was under the direct control of the first appellant.

[5] At all relevant times, the Visagé group, to the knowledge of the respondent, was involved in the development of a large project, known as the "Green Gold Nature Reserve and Nature Estate" project ("the Green Gold project").

[6] The Green Gold project was intended to consist of an impressive property development on some 2 500 hectares of land belonging to some of the Visagé group entities and situated in the Barberton/Nelspruit (Mbombela) area.

The development would include a number of inns or lodges ("herberge") with 3, 4 and 5 star ratings as well as a "herberg" for back-packers.

There would be a caravan park, swimming-baths, restaurants, shops, a petrol filling station, hiking routes, a little church for weddings and culture towns. There would also be 600 erven, to be developed into estate homes and about 100 penthouses.

[7] The business plan of the Green Gold project is attached to the particulars of claim which the appellants sought to introduce by way of an amendment, turned down by the learned Judge *a quo*.

[8] There was an understanding between the entities comprising the Visagé group that each entity would make its fixed property or properties available to be part of the Green Gold project, in exchange for a *pro rata* share of the projected profits.

The projected net profit would be something in the order of R1,208 million. The projected net profit to be received by the trust, would be some R266 million.

[9] Importantly for present purposes, V8 was the owner of the largest and most strategically situated properties to form part of the Green Gold project: these included the remaining extent of the farm Jerusalem Kopje, remaining extent of the farm Rains Vale and portion 1 of the farm Rains Vale. These properties of V8 would house most of the infrastructure and facilities of the project and would also have to be utilised in order to secure the necessary funding for the project.

Without V8, the project could not become a reality. It is alleged in the particulars of claim (as sought to be amended) that the respondent was at all relevant times aware of this state of affairs.

[10] In 2008, the respondent instituted proceedings in this court against V8, aimed at calling up a notarial bond over some Holstein cattle in order to collect monies payable to the respondent by some of the Visagé group entities.

These proceedings, under case number 23660/2008, with the respondent as applicant and V8 as respondent, were settled between those parties in the form of a written deed of settlement ("the settlement agreement") entered into on 10 June 2008. Perhaps understandably, the first appellant, Mr P J Visagé, signed the settlement agreement on behalf of V8.

[11] The provisions of the settlement agreement are directly relevant for purposes of the adjudication of this dispute, and will be revisited later in this judgment. The

settlement agreement was also attached to the (to be) amended particulars of claim, as annexure "B".

[12] Later in 2008, under case number 38065/2008, the respondent, alleging that V8 had failed to comply with the terms of the settlement agreement instituted, as applicant, winding-up proceedings against V8.

V8 entered an appearance to defend, and the opposed liquidation order was set down for hearing on 14 September 2009.

[13] In the (to be) amended particulars of claim (hereinafter simply referred to as "the particulars of claim") the appellants, as plaintiffs, allege that there was a dispute between the parties about the correct interpretation of the settlement agreement and, more particularly, as to when certain payments, prescribed in the payment regime contained in the settlement agreement, were due.

[14] The deponent to the founding affidavit in the liquidation application was Mr C A Verster ("Verster"), and the opposing affidavit was signed by Mr P J Visagé ("Visagé").

[15] In the opposing affidavit, mention was made of monies payable to entities in the Visagé group by the state flowing from land claims which had been settled. It is not disputed that an amount of some R3 149 950,00 had to be paid by the state in respect of movable property which formed part of these settled land claims. These monies would be available to settle the balance still outstanding in respect of the settlement

agreement, which came to some R2,3 million. It is alleged in the particulars of claim that the payment of the amount of R3,149 million had already been approved before 11 September 2009. The land claims were not related to the properties which would comprise the Green Gold project.

[16] In the particulars of claim it is alleged that on or about 11 September 2009, Visagé, as the representative of the Visagé group, including the trust and V8, told Verster that the state had approved the payment of the R3,149 million from which the full balance outstanding in respect of the settlement agreement could be paid. The allegation is made that Visagé suggested to Verster that, in these circumstances, it would not make sense to proceed with the liquidation application and, further, that Ms Lidia Pretorius of the office of the Premier of Mpumalanga, would contact Verster to confirm the date when the payment would be made. It is alleged that Verster told Visagé that he could relax.

[17] Crucially, it is alleged in the particulars of claim that on 11 September 2009, and in Pretoria, an oral agreement was entered into between Visagé (in his various representative capacities aforesaid) and Verster ("the oral agreement") the terms of which are crafted as follows in the particulars of claim:

> "17.1.1 Dat by ontvangs van 'n skrywe van die Premier van die Mpumalanga Provinsiale Regering waarin bevestig word wanneer die bedrag van R3 149 950.00 uitbetaal sal word, 'n ooreenkoms opgestel en 'n bevel van die hof gemaak sou word op 14 September 2009 tot die effek dat die Visagé groep die uitstaande balans nog verskuldig aan verweerder

uit hoofde van die skikking (aanhangsel 'B' hiertoe) ten volle sou vereffen teen uitbetaling van die grond eis;

17.1.2 Dat indien die skrywe nie tydig ontvang word nie, slegs 'n voorlopige (en nie 'n finale likwidasiebevel) aangevra sou word.

17.2 Dit was 'n stilswyende, alternatiewelik geïmpliseerde beding van die ooreenkoms dat die aansoek vir 'n finale bevel in ieder geval uitgestel sou word en dat V8 se regsverteenwoordigers nie die hof hoef by te woon op 14 September 2009 nie."

[18] The only reasonable inference to be drawn from the tenor of the particulars of claim, although it is not specifically stated, is that the letter was not received timeously from the Premier. Nevertheless, it is alleged that Visagé arrived at court on 14 September without legal representatives with a view to signing the agreement foreshadowed in paragraph 17.1.1 of the particulars of claim which I quoted so that it could be made an order of court alternatively, so one has to infer, to oversee the granting of a provisional liquidation order as foreshadowed in 17.1.2.

It is alleged that Verster was not at court for the occasion, but Visagé spoke to the respondent's counsel (applicant in the liquidation application) informing him of the oral agreement which had been entered into. Counsel nevertheless proceeded to ask for a final order. This is borne out by a copy of the transcript of the proceedings forming part of the papers. For present purposes, I suggest no impropriety on the part of counsel. Visagé attempted to appear on behalf of V8 but the learned Judge informed him that he was not entitled to appear as a lay-person to present a litigant.

This is also borne out by the record and the transcript of the proceedings. A final liquidation order was granted.

[19] It is alleged in the particulars of claim that the state duly paid the amount of R3 149 950,00 on 20 October 2009, but well after the 14 September liquidation of V8.

[20] It is alleged in the particulars of claim that, as a result of the liquidation of V8, the Green Gold project could not proceed and assets of the entities comprising the Visagé group, including the trust, were sold on a forced sale basis.

[21] The basis of the damages action instituted by the appellants (as plaintiffs) against the respondent (as defendant), as described in the particulars of claim, is that the respondent acted in breach of the oral agreement, alternatively of a legal duty, when moving for a final liquidation order as it was in the contemplation of the parties that in the event of a final liquidation of V8, the Green Gold project would come to an end with resultant loss of the anticipated profits which would flow from that project.

[22] It was in the course of this litigation that the amendment of the particulars of claim was sought, opposed by the respondent and refused by the court *a quo*.

[23] So much for the brief synopsis.

The wording of the settlement agreement

[24] As I mentioned, when the respondent (as applicant) instituted proceedings against V8, in 2008, to recover certain dues and to call up a notarial bond in the process, the

parties entered into the settlement agreement on 10 June 2008 with the preamble thereof stipulating that the parties "have reached an agreement regarding re-payment of the indebtedness of the respondent in this action as well as the indebtedness of various other companies and trusts under the control of Mr P J Visagé".

[25] The settlement agreement stipulates that V8 was indebted to the respondent at the time to the tune of some R5 million (round figures) in respect of three separate accounts, identified in the settlement agreement, and a number of other accounts reflecting indebtedness by V8 to the respondent's Wesbank Division.

Moreover, there are details reflecting the indebtedness of six of the entities forming part of the Visagé group, which I have mentioned, in relatively smaller amounts. The trust is one of these entities. It is also stipulated that the trust is indebted to the Wesbank Division in certain amounts.

[26] In paragraph 3 of the settlement agreement, Visagé, in his personal capacity as well as in his capacity as trustee of the trusts listed and director of the other entities mentioned, unconditionally accepts the indebtedness mentioned above.

[27] In paragraph 4 of the settlement agreement provision is made for a payment regime, prescribing substantial monthly payments to be made consecutively during the months June, July, August, September and October 2008.

[28] The last subparagraph of paragraph 4, paragraph 4(g), contains provisions which turned out to be of particular importance for present purposes:

"(g) the then outstanding balances on the loan accounts in name of the respondent (accounts number: […]2 and […]1) as on 10 October 2008 will be normalised and normal monthly instalments in terms of the agreement of loan will be payable until such time as the loans have been repaid in full. This is however subject to the satisfaction of applicant's normal credit criteria on 10 October 2008 and at the applicant's sole discretion."

These two accounts are listed in paragraph 1(b) and 1(c) as part of V8's indebtedness and they reflect a combined debt (in round figures) of some R4 million with interest thereon to be calculated from 3 June 2008.

[29] Clause 5 of the settlement agreement deals with arrear and outstanding amounts due to the Wesbank Division including provision for consecutive monthly payments over the aforesaid months of June to October 2008.

[30] Towards the end of the settlement agreement one finds paragraphs 7 and 10, the contents of which represent the basis of the respondent's opposition to the amendment:

" 7.

Should any payments in terms of this agreement of settlement not be made on due date, the full amount of the indebtedness will immediately become due and payable and applicant will be entitled to proceed with action against the respondent, Mr P J Visagé as well as the Trusts and companies listed above for the recovery of the full outstanding amount of the indebtedness."

(I will refer to this as "clause 7" or as "the acceleration clause".)

" 10.

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."

(I will refer to this as "clause 10" or "the non-variation clause".)

[31] I turn to the respondent's objection to the amendment, which led to the resultant application by the appellants to amend the particulars of claim and the dismissal thereof by the learned Judge *a quo*.

The respondent's opposition to the amendment and the main thrust of the respondent's case

[32] The *crux* of the respondent's case is embodied in the following paragraphs of the formal notice of objection to the amendment:

"1.6 the plaintiffs rely in paragraph 17 of the proposed amended particulars of claim, on an alleged oral agreement entered into between the first plaintiff on behalf of the 'Visagé Groep' including V8 and the trust (my note: should have added 'and the defendant'), the terms of which amended the payment obligations of *inter alia* V8 and the trust, prescribed in the settlement agreement and in particular clause 7 of the said agreement. (My note: clause 7, of course, is the acceleration clause.)

1.7 Clause 10 of the settlement agreement (annexure 'B') prescribes that no subsequent agreement amending the particulars of an agreement between the parties shall be valid unless it is in writing and more particularly, no variation of any of the terms of the settlement agreement shall be valid, unless in writing;

1.8 there is no allegation in the amended particulars of claim that the parties agreed to amend clause 10 of the settlement agreement and consequently, the parties are bound by the non-variation clause as stipulated in clause 10. The provision of clause 10 renders the alleged subsequent oral agreement, a nullity;

1.9 the entire cause of action as pleaded by the plaintiffs in their particulars of claim is dependent on the 'oral agreement' the terms of which appears in paragraph 17 of the proposed amended particulars of claim;

1.10 it is the plaintiffs' case set out in the amended particulars of claim, that Mr Verster acting on behalf of the defendant failed to comply with the terms of the oral agreement which eventuated in a final liquidation order of V8. The final liquidation constitutes the causation of the damages as claimed by the plaintiffs on behalf of the trust;

1.11 in the premises the plaintiffs' particulars of claim do not disclose the cause of action and will be excipiable on the grounds as set forth herein."

[33] I add that there are other "objections" advanced relating to suggested conflicting terms of the oral agreement, the alternative "legal duty" relied upon in the particulars of claim and purported non-compliance with the requirements of rule 18(10) dealing with

proper quantification of the amounts claimed. None of these additional "objections", although also mentioned in heads of argument, were advanced with any force during the proceedings before us, neither were they dealt with in the judgment of the court *a quo*. I am, in any event, of the view that there is no merit in these additional "objections" and the argument based on non-compliance with rule 18(10), which is probably ill-founded in any event because quantification of the amounts were pleaded in some detail, falls to be remedied in terms of the rule 30 procedure, if applicable. In the result, I say no more about these additional arguments.

[34] The true position is that the respondent's case is based on the principle that where a written contract contains a non-variation clause (like clause 10 in this case) any purported subsequent oral agreement seeking to amend the written terms of the contract is rendered unenforceable and a nullity by the provisions of the non-variation clause.

This is known as the "Shifren principle" which is a reference to *S.A. Sentrale Ko-op. Graanmaatskappy Bpk. v Shifren en Andere* 1964 4 SA 760 (AD).

The learned Chief Justice says the following at 766G-767C:

> "Waar partye so 'n bepaling in hul kontrak ingelyf het, d.w.s. 'n bepaling wat nie slegs ander bedinge nie, maar ook homself teen mondelinge wysiging heet te beveilig, kan ek geen rede vind waarom die een party nie die ander daaraan gebonde kan hou nie. Hul klaarblyklike doel met so 'n bepaling is om te waak teen die geskille en bewysmoeilikhede wat by mondelinge ooreenkomste kan ontstaan. Om albei daarteen te beskerm kom hulle uitdruklik ooreen dat

mondelinge wysigende ooreenkomste, ook wat die verskansende beding self betref, al word hul *animo contrahendi* aangegaan, tussen hul van nul en gener waarde sal wees. Indien 'n party, uit hoofde juis van 'n mondelinge wysiging, belet sou word om hom op so beding te beroep, sou ons hier met 'n soort kontrak te doen hê wat sonder meer nie deur 'n hof afgedwing word nie. Dit sou 'n opvallende afwyking wees van die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word. ... Dit is geen antwoord hierop om aan te voer dat dieselfde van die latere mondelinge ooreenkoms 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 die self-opgelegde formele vereiste voldoen.

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

[35] In *Van Tonder en 'n Ander v Van der Merwe en Andere* 1993 2 SA 552 (WLD), the learned Judge held that an oral agreement aimed at extending the payment obligations of one of the parties amounts to an amendment of the written agreement and upheld the Shifren principle. At 555H-J the following is said:

> "Na my oordeel is hierdie betoog korrek. 'n Vertolking van artikel 1(1) wat daaraan die betekenis gee dat 'n latere wysiging van die voorwaardes van betaling nie op skrif hoef te wees nie, kan nie die posisie verander waar die partye ooreengekom het dat so 'n wysiging skriftelik moet wees nie. In laasgenoemde geval is die benadering van die *Shifren*-saak van toepassing. 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. Dit is nie gedoen nie. Gevolglik kan die respondente nie daarop as verweer steun nie."

The reference to "artikel 1(1)" refers to the provisions of the General Law Amendment Act 68 of 1957 which had been interpreted as meaning that the provisions in a deed of sale relating to the manner of payment, constitute material provisions of the deed of sale of land and had to be in writing for purposes of the provisions of section 1(1) – see *Van Tonder* at 555B-D. This is not directly relevant for present purposes.

[36] The learned Judge *a quo*, as did the learned Judge in *Van Tonder*, also referred to *Venter v Birchholtz* 1972 1 SA 276 (AA) and also referred to *Brisley v Drotsky* 2002 4 SA 1 (SCA).

[37] The learned Judge *a quo* found that the oral agreement was aimed at amending the settlement agreement so that it flew in the face of clause 10. The learned Judge did so in the following terms:

> "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."

In the result, so it was held by the learned Judge, the particulars of claim, as amended, would be excipiable because it would not disclose a cause of action. Consequently, the application fell to be dismissed.

In considering whether the amendment of a pleading would render such pleading excipiable for failure to disclose a cause of action, the law relating to exceptions comes into play

[38] It was common cause before us, that the principles to be applied by courts considering exceptions, are directly relevant for purposes of deciding this dispute.

[39] In dealing with the provisions of rule 23 under the heading "pleading lacking averments" the learned author, Harms, *Civil Procedure in the Superior Courts*, says the following at B-165: (I only quote extracts and also omit references to the authorities listed in a number of footnotes):

> "An over-technical approach should be avoided because it destroys the usefulness of the exception procedure, which is to weed out cases without legal merit. If evidence can be led which can disclose a cause of action or defence alleged in a pleading, that particular pleading is not excipiable. A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action or defence. Causes of action are not in the first instance dependent on questions of law. They require the application of legal principle to a particular factual matrix. The test on exception is whether on all possible readings of the facts no cause of action is made out. It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts. ... Unless an exception is taken for the purpose of raising a substantive question of law, which may have the effect of settling the dispute between the parties, an excipient should make out a very clear case in order to succeed. Exceptions are generally not the appropriate procedure to settle questions of interpretation. The same applies to the pleading of implied (strictly tacit) terms; the test on exception is whether the trial court could (not 'should') reasonably imply the term alleged."

[40] I turn to the case of the appellants.

The case of the appellants

[41] As I understand it, the appellants' case can be summarised as follows:

(i) On the pleading (particulars of claim) as it stands, it cannot be found, that there is no possible interpretation thereof (applying the principles on exception) that must lead to a conclusion that there is no averment to the effect that, when the oral agreement was entered into, "any payment in terms of the settlement agreement had not been made on due date" in the spirit of the acceleration clause, clause 7.

Consequently, it cannot be found that the oral agreement sought to vary the acceleration clause (which is the main thrust of the objection, as appears from paragraph 1.6 of the notice of objection, quoted above); and

(ii) On the pleading as it stands, it cannot be held that there is no possible interpretation thereof that could reasonably imply that the oral agreement did not seek to vary the payment regime provided for in the settlement agreement.

[42] As to (i), we heard strong and enthusiastic conflicting arguments from both sides.

For example, it was contended on behalf of the respondent that the pleading, properly interpreted, contains averments to the effect that, when the oral agreement was entered into in September 2009, V8 was in breach of its commitments provided for in the settlement agreement and had failed to comply with the payment regime stipulated in the settlement agreement. For example, we were referred to the following paragraphs of the particulars of claim:

- Clause 15.3:

  "Bogemelde fondse (my note: a reference to the monies to be received in respect of the land claims) sou beskikbaar wees en aangewend word om die balans nog verskuldig uit hoofde van die skikkingsooreenkoms (aanhangsel 'B' hiertoe) welke balans ongeveer R2.3 miljoen beloop het, ten volle te vereffen."

- Clause 12.1:

  "Verweerder het 'n aansoek om likwidasie van V8 gerig onder saaknommer 38065/2008 in die Noord Gauteng Hoë Hof, Pretoria, waarin gesteun is op die beweerde nie-nakoming van die skikking, aanhangsel 'B' hiertoe."

- Clause 13.8.3:

  "dat daar geen nadeel vir die verweerder sou wees om te wag vir uitbetaling nie, waar rentes deurlopend gehef word en die Visagé groep oor genoegsame sekuriteit beskik ter dekking van bedrae wat verskuldig sou wees."

- Clause 16.2.2:

  "dat daaruit die volle balans verskuldig uit hoofde van die skikkingsooreenkoms (aanhangsel 'B' hiertoe) vereffen sou word sodra uitbetaling geskied, welke betaling binnekort verwag is."

- Clause 17.1.1:

  "... tot die effek dat die Visagé groep die uitstaande balans nog verskuldig aan verweerder uit hoofde van die skikking (aanhangsel 'B' hiertoe), ten volle sou vereffen teen uitbetaling van die grondeis."

- Clause 20.2.6:

  "dat voormelde uitbetaling voldoende sou wees om die uitstaande balans nog verskuldig op daardie datum uit hoofde van die skikking (aanhangsel 'B' hierby aangeheg) te vereffen en dat dit inderdaad daaruit vereffen sou word."

Mr Dreyer also argued, if I understood him correctly, that, where the last payments in terms of the payment regime contained in the settlement agreement, were due in October 2008, and the oral agreement was only entered into almost a year later, in September 2009, the only reasonable inference to be drawn from any interpretation of the pleading is that the provisions of the settlement agreement had been breached in the sense that payments had not been made on due date so that the acceleration clause had been activated or triggered, with the oral agreement, seeking to vary the acceleration clause, falling foul of the Shifren principle.

On behalf of the respondent I was also referred to the 3rd edition of the *Trilingual Legal Dictionary* by Hiemstra and Gonin at p485 where the word "verskuldig" is described as "due, indebted, (an amount) owing, "n bedrag verskuldig wees', be indebted in an amount, 'verskuldig wees', owe, 'verskuldig en opeisbaar', due and claimable".

On behalf of the appellants, Mr Maritz also referred to some dictionary meanings of the particular words (*Oxford Dictionary*) where "owing" is explained as "yet to be paid, owed, due".

"Payable" is "that must be paid, due; that may be paid".

"Verskuldig" (description from the *Verklarende Handwoordeboek van die Afrikaanse Taal* or *HAT*) is "verplig, onbetaal".

Mr Maritz also referred us to the interesting judgment in *Stafford v Registrar of Deeds* 1913 CPD Vol 1 p379 where the following is said at 385:

> "Not very much assistance can, in my opinion, be derived from English cases, where the meanings of 'due' and of 'payable' have been discussed. It is clear that the word 'payable' is sometimes construed as meaning 'payable at a future time' or 'in respect of which there is liability to pay'. It is true that it is sometimes used to mean 'payable immediately' or 'actually due and presently demandable' ... 'It should be observed that a debt is said to be due the instant it has existence as a debt. It may be payable at a future time.' ... 'Due' means either 'owing' or 'payable', and what it means is determined by the context. From this I gather that 'payable' does not usually mean 'presently owing' according to his view."

Importantly, at 387 of *Stafford*, the following is said:

> "The term 'payable' will bear more than one meaning, as appears from the definition of it to be found in our approved dictionaries. It would be quite correct to say that a sum is due but not yet payable, and similarly to say that a sum is payable, but not yet due, and again that a sum is payable in the sense that it is already due. We must, therefore, look at the context to see in what sense the legislature has used the word 'payable' occurring in the sub-section."

Against this background, it was argued on behalf of the appellants that, given the principles applicable on exception, it cannot be held at this stage that on no possible interpretation of the pleading as it stands, there are no averments that payments in terms of the settlement agreement had not been made on due date. Consequently, it ought not to be held that the acceleration clause had been activated and the oral agreement purported to vary the acceleration clause in conflict with the Shifren principle.

We were reminded that the *onus* is on the excipient to show that its contention is the preferable one. As stated by the learned author *Harms, supra*, "A pleading is only excipiable on the basis that no possible evidence led on the pleadings can disclose a cause of action or defence." And: "It is for the excipient to satisfy the court that the conclusion of law for which the plaintiff contends cannot be supported upon every interpretation that can be put upon the facts."

It was argued on behalf of the appellants, correctly in my view, that the question whether monies had not been paid on due date in the spirit of the settlement agreement, can only be decided on evidence to be presented at the trial.

In the result, as to (i), I have come to the conclusion, and I find, that the respondent, as prospective excipient, failed to show that the acceleration clause, on any possible interpretation of the pleading, had been triggered or activated, so that there was no question of the oral agreement, in that respect, seeking to vary the settlement agreement in conflict with the Shifren principle.

[43] As to (ii), which, to a large extent, overlaps with (i), it was argued on behalf of the respondent that the oral agreement, as pleaded in paragraph 17 of the particulars of claim, clearly purported to vary the payment regime prescribed in the settlement agreement: it sought to vary the payment regime prescribed in the settlement agreement by seeking to introduce an arrangement whereby the payment would be made, approximately a year after the event, by means of a lump sum once the land claim obligations had been met by the state. As held in *Van Tonder*, an attempt to extend the due payment also amounts to a variation of a written contract and falls foul of *Shifren*, rendering the oral agreement unenforceable and a nullity.

[44] On the other hand, it was argued on behalf of the appellants that, where it cannot be found that payments had not been made as foreshadowed in the acceleration clause, it also cannot be found, on any possible interpretation, that the oral agreement constituted an effort to amend the non-variation clause, or, for that matter, the prescribed payment regime.

[45] In this regard, particular emphasis was placed on the provisions of clause 4(g) of the settlement agreement, already quoted, to the effect that outstanding balances on the loan accounts in the name of V8 after October 2008 "will be normalised and normal monthly instalments in terms of the agreement of loan will be payable until such time as the loans have been repaid in full". There was no averment in the particulars of claim, on every possible interpretation, to the effect that these monthly instalments were not duly paid or were not still on schedule by the time the oral agreement was entered into.

We were reminded of the fact that it is clearly alleged in the particulars of claim that payments were continued despite the launching of the liquidation proceedings and there was a difference between the parties about the interpretation of the settlement agreement with regard to when payments would be due. For example, some of these allegations in the particulars of claim include:

- "12.2 Die Visagé groep het egter met verweerder verskil oor die interpretasie van die gemelde skikkingsooreenkoms ten aansien van wanneer sekere betalings moes geskied."

  I add that this allegation is made immediately after 12.1 where it is stated that the liquidation application was launched in this court "waarin gesteun is op die beweerde nie-nakoming van die skikking ..." (emphasis added); and

- "13.5 V8 en ander entiteite in die Visagé groep het intussen *bona fide* voortgegaan om betalings te maak ooreenkomstig V8 en die ander entiteite in die Visagé groep se interpretasie van die gemelde ooreenkoms (aanhangsel 'B' hiertoe)."

  I add that this follows immediately after 13.4 where it is alleged that the liquidation application was opposed and had been set down for hearing on 14 September 2009.

[46] It was argued, by way of example, that a home owner may owe some R1 million on his mortgage bond, but may find himself in a position where only about R5 000,00 is due in respect of the last monthly instalment.

[47] It was argued that the oral agreement simply provided for two eventualities:

(1) if the letter is received from the Premier before the date of hearing of 14 September 2009, indicating when the amount of R3,149 million would be paid, a written agreement would be entered into and made an order of court stipulating for payment of the outstanding balance in terms of the settlement agreement; or

(2) if the letter is not yet received by 14 September (which, on any reasonable inference appears to be the case) only a provisional order of liquidation would be sought or the matter would be postponed in any case.

It was argued that this oral agreement merely foreshadowed an accelerated form of payment of the outstanding balance, seeing that the amount exceeding that balance would be imminently received from the state, and there was no attempt to vary the written agreement in conflict with the non-variation clause. In other words, when the oral agreement was entered into, the non-variation clause was not activated or triggered, let alone the acceleration clause, as previously pointed out.

[48] Consequently, so it was argued in conclusion, the oral agreement did not fly in the face of the written settlement agreement, and, more particularly, clauses 7 and 10 thereof. The result of this is that the oral agreement, relied upon by the appellants for purposes of their damages action, did not render the particulars of claim excipiable.

[49] I find myself in respectful agreement with the argument offered on behalf of the appellants.

[50] In the result, I have come to the conclusion, and I find, that the appeal ought to be upheld.

The order

[51] I make the following order:

1. The appeal is upheld.
2. The respondent is ordered to pay the costs of the appeal which costs are to include the costs flowing from the employment of two counsel.
3. The order of the court *a quo* is set aside and replaced with the following:
   3.1 the application for leave to amend is granted;
   3.2 the respondent is ordered to pay the costs of the application.

W R C PRINSLOO
JUDGE OF THE GAUTENG DIVISION, PRETORIA

A20-2014

I agree

C PRETORIUS
JUDGE OF THE GAUTENG DIVISION, PRETORIA

I agree

N KOLLAPEN
JUDGE OF THE GAUTENG DIVISION, PRETORIA

HEARD ON: 24 AUGUST 2016
FOR THE APPELLANTS: M C MARITZ SC, WITH S G MARITZ
INSTRUCTED BY: JOOP LEWIES INC
FOR THE RESPONDENT: J H DREYER SC, WITH M A BADENHORST SC
INSTRUCTED BY: RORICH WOLMARANS & LUDERITZ INC