

IN THE HIGH COURT OF SOUTH AFRICA

DURBAN AND COAST LOCAL DIVISION

CASE NO.: 7517/2008

In the matter between

BUFFET INVESTMENTS SERVICES (PTY) LTD

1ST PLAINTIFF

FRIEDSHELF 783 (PTY) LTD

2ND PLAINTIFF

and

DARREL BAND

1ST DEFENDANT

LUHDO PROPERTIES CC

2ND DEFENDANT

JUDGMENT

MOKGOHLOA J

1. This is an exception to the Defendants' plea. The Plaintiffs aver that the Defendants' plea is excipiable as it lacks averments which are necessary to sustain a defence.
2. The following facts are not in dispute between the parties: During February and August 2007, the parties entered into the following written agreements: Restructure Agreement, Purchase Loan Agreement and Band Loan Agreement. In terms of these agreements certain monies were loaned and advanced to the Defendants. Each of these agreements contained the following clauses:

“No variation of any of the terms and conditions of this agreement will be binding on the parties unless committed to writing and signed by them respectively.

No agreement varying, adding to, deleting from or cancelling this agreement and no waiver of any right under this agreement shall be effective unless reduced to a non-electronic, hard copy written amendment signed by means of handwritten signatures by or on behalf of the parties”.

3. It appears that the Defendants failed to honour the terms of the agreements. Subsequently, and on 30 January 2008, the parties entered into an oral agreement of compromise the terms of which are as follows:
 - (a). In full and final settlement of all claims that the Plaintiff may have against the Defendants arising from the written agreements, the Defendant would pay to the First Plaintiff an amount of R900 000.00
 - (b). Payment of the R900 000.00 would be affected as follows:
 - (i) R300 000.00 within 36 months from date of settlement;
 - (ii) a further R300 000.00 six months thereafter;
 - (iii) a final payment of R300 000.00 six months hence; and
 - (iv) the Defendants undertook to register two covering bonds over a certain property in the amount of R450 000.00 each in respect of this debt.

4. During June 2008, the Plaintiffs instituted action against the Defendants on the written agreements. The Defendants denied that those written agreements are enforceable. In their plea the Defendants alleged the oral agreement of compromise which bars the Plaintiffs from instituting this action.
5. Mr Segal, for the Defendant, argued that the Compromise Agreement varied the written agreements by reducing the payments due to the Plaintiffs; delayed the time of such payments; and provided for the different security. He argued further that the compromise agreement has the effect of ending litigation or preventing litigation resulting from the dispute between the parties. According to him, the agreement stands alone and it exists independently of the cause which gave rise to it. Therefore by its very nature, it bars the bringing of proceedings based on the original cause of action.
6. Mr Salmon SC, for the Plaintiff, conceded that the Compromise Agreement is valid and constituted a waiver of rights created in the main written agreements. He however argued that in the absence of it being reduced to writing and signed by the parties, the compromise is precluded by the non-variation clauses in the main agreements and is therefore unenforceable.
7. The general rule that the parties to a contract are free to vary or discharge their contract as they deem fit is, subject to limitation. When the legislature prescribes certain formalities for the making of contracts of a certain type it would be improper for the courts to vary it informally, as the intention of the legislature might be 'thwarted' (***Christie: The Law of Contract in South Africa 5th edition at page 447***). Similarly,

the parties may impose restrictions of subsequent variations or cancellations of their contract by incorporating in their contract a non-variation clause. This may be done with the object of achieving certainty and avoiding disputes about whether a variation has been agreed upon.

8. Leach J stated the following in ***Karson v Minister of Public Works 1996 (1) SA 887 (E) at 893 f-g***:

“It is well settled that the agreement of compromise, also known as transactio, is an agreement between the parties to an obligation, the terms of which are in dispute, or between the parties to a lawsuit, the issue of which is uncertain, settling the matter in dispute, each party receding from his previous position and conceding something, either by diminishing his claim or increasing his liability.”

9. It was held in ***Collach & Gomperts (1967) (Pty) Ltd v Universal Mills and Produce Co (Pty) Ltd and Others 1978 (1) SA 914 (A) at 921*** that a compromise has the effect of *res judicata*. It may however be set aside on the grounds that it was fraudulently obtained or on the grounds of *justus error*.

10. Having cleared the issue of a compromise constituting a waiver, what remains to be determined is whether a waiver created by the compromise is precluded by the non-variation clause. Waiver has been defined as a deliberate abandonment, renunciation or surrender of an existing legal right by the right holder, acting with full knowledge of the right. (***Alfred Mc Alpine & Sons (Pty) Ltd v Transvaal Provincial Administration 1977 (4) SA 310 (A) at 323-4***)

11. In **SA Sentrale Ko-op Graan (Mpy) Bpk v Shifren 1964 (4) SA 760(A), (Shifren case)** the Appellate Division held that a written contract which contained a stipulation that “any variations in the terms of this agreement as may be agreed between the parties shall be in writing otherwise the same shall be of no force or effect”, that contract would not be altered verbally. This view was confirmed later in the case of **Brisley v Drotsky 2002 (4) SA 1 (SCA)**. In Shifren’s case the court did not investigate in depth the question whether oral waiver might be effectual in spite of a non-variation clause.

12. In **Impala Distribution v Taunus Chemical Manufacturing CO (Pty) Ltd 1975(3) SA 273 (T)** Hiemstra J focused his attention on waiver as a means of limiting the Shifren principle. He stated the following on the headnote:

“When a contract provides that dissolution thereof can only take place in writing such a restriction can be revoked by oral agreement. When the contract contains a further provision that no provision of the contract can be varied other than in writing, it entrenches the restriction on revocation and oral dissolution is no longer possible. An oral waiver is valid, but only by a party in regard to a right which accrues exclusively to himself in terms of the contract. An already existing right of action arising out of breach of contract can also be waived orally.”

13. It is therefore clear that a non- variation clause will prevent waiver in a general sense of an informal agreement to vary or cancel the contract. However an oral waiver would still be effectual despite the non-variation clause on the basis that the terms of an agreement were to the sole benefit of the Plaintiffs. In the present case, the Plaintiffs, with full

knowledge of their rights, entered into an oral agreement which varied the written agreements by reducing the payments due to the Plaintiffs, delayed the time for such payment, and provided for the different security. Therefore the Plaintiffs waived their rights under the written agreement and if the Plaintiffs decide to sue, their claim should be based on the oral agreement. I therefore find that the Defendants' plea is not excipiable.

11. Accordingly, I make the following order:

The exception to the Defendants' plea is dismissed with costs.

JUDGE MOKGOHLOA

COUNSEL

Counsel for the Plaintiff : Adv Salmon SC

Instructing Attorneys : Garlick & Bousefield Inc

Counsel for the Defendant : Adv Segal

Instructing Attorneys : Drobis & Associates

C/o Legator Mckenna Inc

Date of hearing : 30 January 2009

Date of Judgment : 5 May 2009