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The non-variation clause and its place in modern contracts

Gone are the days when deals were concluded on a handshake. Today, relationships in the modern commercial world are regulated by contracts. These contracts record the rights, duties, obligations and remedies available to the contractual parties, which are negotiated when contracts are drafted. A legally binding contract also regulates and restricts the parties' conduct throughout the duration of the contract and often precludes variation of the contract by way of a material clause which prescribes the manner in which variation may take place, more commonly known as the "non-variation clause".

Non-variation clauses often prescribe that variations of a contract must be agreed upon by the contractual parties and reduced to writing. However, in practice contractual parties or their representatives often agree and purport to commit to oral variations of their contracts over a "cup of coffee". Suppose a supplier of goods has a written agreement, including a non-variation clause, with a regular client to supply a product at a fixed price. Suppose that the supplier and the client "agrees" to reduce the fixed price by 10 percent while enjoying a latte. What will the courts do if this becomes disputed?

Non-variation clauses provide commercial certainty and the application thereof has been reaffirmed in our courts. In the case of *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren* 1964 (4) SA 760 (A), the court held that where the contractual parties insert a non-variation clause in their contract, there is no good reason not to hold the parties bound to the non-variation clause to which they both agreed (this became known as the "Shifren Principle"). The court held further that the clear goal in inserting such a clause was to prevent disputes and the difficulties associated with proving oral agreements. Non-variation clauses thereby ensure certainty in contractual dealings and such clauses operate in favour of both parties. A non-variation clause which requires oral variations of the contract to be reduced to writing would still allow parties to change their minds, as long as the formality of reduction to writing is adhered to.

The principle was confirmed in the case of *Industrial Development Corporation of SA v Ballie Foods CC* [2007] JOL 19301 (T), in which Judge Bosielo held that parties voluntarily elect to include a non-variation clause in their contracts to protect themselves and avoid the uncertainty which stems from (disputed) oral agreements.

Does the existence of the non-variation clause imply that parties who enter into contracts are voluntarily allowing an infringement of their contractual freedom? In the case of *Brisley v Drotsky* 2002 (4) SA 1 (SCA) Judge Cameron held that the doctrine of public policy is a suitable mechanism to ease potential difficulty caused by the non-variation clauses. Put simply, the courts are saying that when there is unacceptable behaviour, they will not condone it. The court held that it was not difficult to foresee situations in which contracts would be struck down because the Constitution requires it but did not give examples, leaving this to be expanded upon by future courts.

However, striking the balance between the principle of *pacta sunt servanda* (the contractual parties' obligation to honour the agreement) and what public policy requires as being fair and constitutional is not an easy exercise. The Constitutional Court case of *Barkhuizen v Napier* 2007 (5) SA 323 (CC) had found that agreements cannot be honoured if the application thereof violates public policy. The court also confirmed that it must be determined whether the contract or its operation in the prevailing circumstances and facts of each case, renders it contrary to public policy. The determination of fairness in a constitutional setting is not dependent on the personal views of the judge nor the parties to the contract, but on the identification of a constitutional principle which is said to be offended. The principle is then balanced and measured against the challenged contractual term. Most importantly it was held that public policy, as expressed by constitutional values and norms, does not allow the abuse of the process of law and that the facts and circumstances of each case may justify the departure from the Shifren principle. This was also confirmed in the case of *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM).

An attempt to depart from the Shifren Principle came about in *ABSA Bank Limited v Malherbe* (2013) JOL 30374. In this case, the plaintiff had two separate claims against the defendant. The first claim was based on a mortgage loan secured by a mortgage bond over immovable properties. The second claim was based on an overdraft facility. The defendant contended that he and the plaintiff's representative had reached a verbal *pactum de non petendo* (an agreement not to sue) whereby the plaintiff undertook not to enforce its contractual rights in terms of the loan agreement(s) by way of legal action before 31 December 2014. The defendant did not deny that he was indebted to the plaintiff in respect of each claim nor that he was in breach in respect of each agreement. However, the defendant's defence was that the plaintiff's action was prematurely instituted in that the plaintiff's claims had not yet become due and payable at the time the legal proceedings commenced on the 14 December 2012. The Court found that, "if the Shifren Principle were to be suddenly

relaxed, on the strength of the peculiar facts, great legal uncertainty would be created," and found that on account of the vagueness of the alleged verbal variation pact, departure from the Shirfren principle was not warranted in this case.

More recently in the case of *Galaxias Properties CC v Georgiou* (2015) JOL 33093 (GSJ), the owner (the landlord) of a shopping centre sought the eviction of a tenant. The landlord alleged that the tenant breached the agreement of lease by failing to pay the agreed monthly rental timeously for the months of April 2009 as well as November 2009. The tenant admitted that he had failed to pay the rent on the first day of the months referred to, but alleged that the applicant had condoned the late payments and waived its right to cancel the agreement arising from such late payments.

The lease provided that the rental was payable monthly in advance on the first day of each month. Failure to pay the rental on the date when it fell due entitled the landlord to give the tenant ten days' written notice requiring the tenant to make payment. Failure to comply with the demand entitled the landlord to cancel the lease forthwith, to take possession of the premises and institute whatever action may be necessary for the immediate ejectment of the tenant. If during any 18 month period the landlord had, on two occasions, given the tenant notice regarding failure to pay the rent or any other sum payable by the tenant, the tenant would not thereafter be entitled to any notice in respect of any other similar breach during the same 18 month period and the landlord could immediately, without written notice, exercise its rights in terms of the agreement. After notice was given for the April and November 2009 defaults, the tenant defaulted again in February 2010 which triggered the provisions referred to above.

As his main defence, the tenant alleged that the requirement of timeous performance by him of the obligation to pay rental on the first of each month was never enforced by the applicant. He went further in stating that there was a specific agreement between himself and the landlord that he could pay the rent if and when he had the money available.

The initial court which heard the case found that the landlord ought to have warned the tenant that it intended to cancel the agreement if the tenant persisted in paying the rentals after the due date in terms of the agreement. The court also found that the landlord's failure to do so was unfair, unjust and unreasonable. This discussion led to alarm bells ringing in landlords' offices.

Fortunately for the landlord, the case was taken on appeal by the aggrieved landlord and the appeal court held that public policy requires that contractual obligations freely and voluntarily undertaken should be honoured, precisely because this requirement gives effect to the central constitutional values of freedom and dignity. Of particular significance to the landlord's? defence was the existence in the written lease agreement of a non-variation clause. The initial court's conclusion was reached without having identified any specific constitutional value which was allegedly breached by the landlords reliance upon the non-variation clause. Finding that the initial court had erred, the appeal Court upheld the appeal.

It is apparent from the above cases that the non-variation clause may afford a contractual party the option of going back on his or her word despite the other party's reliance on the (purportedly) mutually agreed oral variation. However, as judge Alkema held in the *Nyandeni* case referred to above, where a contractual party seeks the protection afforded by the Shifren Principle but is motivated by an ulterior motive (fraudulent conduct by that contractual party), it amounts to an abuse of the due process of law which is contrary to public policy and warrants a departure from Shifren Principle.

Even though the non-variation clause restricts a party's contractual freedom, it seems impossible to envisage a contract without such a clause. In conclusion, while the courts have recognised that a departure from the Shifren Principle *may* be warranted in the eyes of public policy, it is clear that the courts are reluctant to depart from the principle. Constitutional values are broad and difficult to define clearly and there are likely to be ongoing court cases involving non-variation clauses. This is an interesting area of law and business and this article will definitely not be the last on this topic.

Written by Maurice Alexander, associate (Litigation)