

REPUBLIC OF SOUTH AFRICA



IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

(1)	REPORTABLE: No
(2)	OF INTEREST TO OTHER JUDGES: No
23/4/2020	<i>B Vally</i>
DATE	SIGNATURE

Case No.: 19/558

In the matter between:

Super Group (Pty) Ltd**Excipient/Defendant**

and

Abonhlane Consulting (Pty) Ltd**Respondent/Plaintiff**

JUDGMENT

Vally JIntroduction

[1] Abonhlane Consulting (Pty) Ltd (the plaintiff) issued summons in this Court calling on Super Group (Pty) Ltd (the defendant) to answer to its case that it breached an agreement that was concluded between them. The defendant excepts to the particulars of claim (particulars) on the basis that it fails to disclose a cause of action. For readable convenience the parties will be

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referred to as plaintiff and defendant herein rather than as excipient and respondent.

The particulars

[2] The claim in the particulars originates in an agreement concluded between the defendant and a Ms Nonthuthuko Masuku (Ms Masuku) in terms of which she was to provide consulting services to the defendant. That agreement was a written one. The material terms of that agreement were:

- a. It would commence on 1 August 2014 and would expire on 31 July 2019. This is referred to as the initial period (the initial period).
- b. After expiry of the initial period the agreement would continue for an indefinite period unless cancelled by either party on three months written notice.
- c. The agreement could be summarily terminated on the occurrence of one or more events, which have been spelt out but which are not relevant for our present purposes.

[3] A month or two later, i.e. during August/September 2014, the same parties agreed orally that the agreement referred to in the previous paragraphs would continue as is, save for the fact that the plaintiff would replace Ms Masuku as the party that would render the consulting services to the defendant.

[4] The written agreement was not amended to reflect this change. However, both the plaintiff and the defendant continued to conduct their affairs on the basis of the terms and conditions set out therein.

[5] On 14 January 2016 the defendant purported to terminate the agreement with the plaintiff. Such purported termination constituted an unlawful repudiation of the agreement. The plaintiff accepted the repudiation and cancelled the agreement.

[6] As a result of the unlawful repudiation of the agreement the plaintiff has suffered damages in the amount of R3 432 800.00.

[7] There is an alternative claim in which the plaintiff contends that it, represented by Ms Masuku, and the defendant, duly represented by its authorised agent(s), concluded an oral agreement whereby the plaintiff would supply consulting services to the defendant. The defendant unlawfully repudiated this agreement causing the plaintiff a loss of R3 432 800.00.

[8] The written agreement contains the well-known and well utilised non-variation clause which provides that any variation of the agreement is invalid unless reduced to writing and signed by both parties. The non-variation clause reads:

“No addition to, variation, or agreed cancellation of this agreement shall be of any force or effect unless in writing and signed by or on behalf of the parties.” (Underlining added.)

The exception

[9] It is common cause that this clause was not adhered to by the parties in that there was no variation of the written agreement in writing. Hence, the oral agreement could not have altered the written one. Thus, the defendant claims that the particulars do not disclose a cause of action. Since the plaintiff claims that the written agreement was orally amended – by substituting the parties - it falls foul of the well-established legal principle that any variation of the agreement that is not reduced to writing and signed by both parties is of no force and effect. According to this contention, the agreement the plaintiff relies upon for its cause of action – one between the plaintiff and the defendant and not one between Ms Masuku and the defendant - does not exist or is not valid. Hence, it contends, the particulars lack a cause of action and stand to be set aside on exception.

[10] There were other issues raised in the exception, but these were abandoned at the hearing. Nothing more need be said about them.

The legal principles

[11] This being an exception to the particulars, it has to be adjudicated on the basis of the entire particulars as it stands¹, that each and every factual averment pleaded in the particulars is true² and that upon every reasonable interpretation of the particulars no cause of action is

¹ *Salzmann v Holmes* 1914 AD 152 at 156; *Minister of Safety and Security v Hamilton* 2001 (3) SA 50 (SCA) at 52G-H; *Baliso v Firstrand Ltd t/a Westbank* 2017 (1) SA 292 (CC) at [33]
² *Champion v J D Cilliers & Co Ltd* 1904 TS 788 AT 790-1; *Oceana Consolidated Co Ltd v The Government* 1907 TS 786 at 788; *Stols v Garlicke & Bousfield Inc* 2012 (4) SA 415 (KZP) at 421H

disclosed.³ The particulars must contain every fact (*facta probanda*) that is necessary for the plaintiff to prove. It does not, and is not required to, contain every piece of evidence (*facta probantia*) that is required to prove the fact.⁴ Should all the facts required to prove the claim be pleaded in the particulars a cause of action would be disclosed.

Analysis

[12] In the present case, however, the defendant contends that on the facts pleaded, the particulars come up against an insurmountable legal hurdle posed by the non-variation clause. This, therefore, is not a case of the particulars containing insufficient or irreconcilable *facta probanda*, but one of the *facta probanda* relied upon in the particulars failing to overcome an insurmountable legal hurdle. Essentially, the defendant's contention is that the *facta probanda* establishes that there was an oral amendment to the written agreement between the defendant and Ms Masuku in circumstances where the written agreement between them specifically precludes such an oral variation.

[13] There was some debate at the hearing whether this contention of the defendant is correct in law, or whether the clause quoted in [8] above, read in the context of the entire written agreement, allowed for an oral modification. There was also controversy as to whether the law regarding non-variation clauses has undergone a transformative change in recent

³ *Theunissen v Transvaalse Lewendehawe Koöp Bpk* 1988 (2) SA 493 (A) at 500E-F; *Lewis v Oneanate (Pty) Ltd* 1992 (4) SA 811 (A) at 817F

⁴ *McKenzie v Farmers Co-operative Meat Industries Ltd* 1922 AD 16 at 23; *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838E-F

times. There was extensive reference to case law by both parties in this regard. Whilst the debate was interesting and even engrossing at times, it is, in my view, inappropriate for this Court to decide such a matter on exception. It is a matter that can be properly and exhaustively addressed by the trial court, which no doubt will analyse it in the light of the evidence presented to it. The particulars cannot be said to be lacking a cause of action in these circumstances.

[14] There is another problem with the defendant's contention. It is reasonable to read the particulars in a manner that is consistent with the claim that the plaintiff had concluded an oral agreement between it and the defendant on the same terms and conditions that applied to Ms Masuku in the written agreement. On this reading, the plaintiff is not claiming that the written agreement between Ms Masuku and the defendant was orally amended. Its agreement is not the same one that Ms Masuku concluded. It may share the same terms and conditions as that of the written one, but it is not the written one amended. It has no qualms with the contention that the written agreement is between Ms Masuku and the defendant, to which it is not a party. Its only interest in that agreement is that it spells out terms and conditions that are the same as the one it agreed orally with the defendant. It does not rely on the written agreement for anything more than that. The oral agreement is a self-standing independent one that happens to share some of the same terms and conditions as that of the written one.

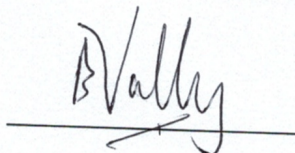
[15] The defendant can plead to this claim. It may agree or disagree on whether all or any of those terms form part of the oral agreement. Thereafter the triable issues would be identified.

[16] For these reasons the exception should be dismissed. Both parties agreed that costs should follow the result.

Order

[17] The following order is made.

- a. The exception is dismissed.
- b. The excipient/defendant is to pay the costs.



Vally J

Dates of hearing:

Date of judgment:

For the Excipient/Defendant:

Instructed by:

For the Respondent/ Plaintiff:

Instructed by:

4 February 2020

23 April 2020

G H Meyer

Fluxmans Inc

R Grundlingh

Joubert Attorneys