



OFFICE OF THE CHIEF JUSTICE

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION: PRETORIA

19/8/15

CASE NO: 3548/2004

DELETE WHICH IS NOT APPLICABLE	
(1)	REPORTABLE: YES YES
(2)	OF INTEREST TO OTHER JUDGES: YES
(3)	REVISED ☒
16/08/2015	Signature

APPLICANT

In the matter between:

MOBILE RADIO COMMUNICATIONS (PTY) LTD

AND

**MICROMATICA 327 (PTY) LTD (formerly
VERTEL NETWORKS (PTY) LTD (now in liquidation)**

**SECURICOR GREY SECURITY SERVICES
(CENTRAL) (PTY) LTD**

HENEWAYS FREIGHT SERVICES (PTY) LTD

**S AND N AUTOTRIM AND PANEL SHOP CC t/a
WESTERN CROWN**

MIKE VAN HEESE t/a DRG SERVICES

MIDDLEFORCE SECURITY SERVICES CC

KAGISO SECURITY SERVICES CC

**MANETRADE 168 (PTY) LTD t/a
SIYATHUTHUKA SECURITY**

LAURO TERESIO CORDERO N.O

ZAHEER CASSIM N.O

BRIAN CEYLON N.O

VERTEL INVESTMENTS (PTY) LTD

1ST RESPONDENT

2ND RESPONDENT

3RD RESPONDENT

4TH RESPONDENT

5TH RESPONDENT

6TH RESPONDENT

7TH RESPONDENT

8TH RESPONDENT

9TH RESPONDENT

10TH RESPONDENT

11TH RESPONDENT

12TH RESPONDENT

JUDGMENT

MAKHAFOLA J:

INTRODUCTION

- [1] The applicant has launched motion proceedings for an order to effect amendments to the “Classen J” order which is already on record marked “X” and FA3 on paginated page 415. The application is opposed by 12 respondents.

MAIN DISPUTE

- [2] The main issue in dispute in the present application is whether the “Classen J” order is capable of amendment by the court or not. The applicant contends that the court is competent to grant the amendment, whilst the respondents aver that the court has no such authority. The documents in the entire case are very voluminous, yet the application is very narrow and limited to the amendment only.

BACKGROUND

- [3] The whole case is complex with a long winded history of legal issues running in and out of the courts unresolved since 2004 to date. There are two court orders that have dominated the direction of the court battles between the parties. These are: the “Patel J” order granted on 17th February 2004 and the “Classen J” order granted on 04th march 2004.

- [4] The “Clanssen J” order emanates from a draft order whereby the parties had agreed to certain terms that they be made an order of court by consent.
- [5] The “Clanssen J” order postponed the main application and the counter-application *sine die* for the parties to comply with the terms of the agreement embodied in it for the resolution of the disputes. The relevant terms of the agreement in the order read as contained in the order itself herein marked FA3 paginated page 415.
- [6] The terms of the order were not complied with. The crucial term is number 08 providing that the disputes at issue be referred to arbitration within 5 days of the delivery of the accountant’s report. The referral to arbitration depended on the report of the accountant, one Danny Sabbagh who had to identify the unresolved issues. He produced only an interim report dated 28th August 2006 which was never used for referral to arbitration because it is not a final report. Sabbagh’s failure to produce a final report is attributed by him to his family problems.

NON-COMPLIANCE WITH THE “CLASSEN J” ORDER

- [7] The parties reached a stalemate due to the non-compliance with this court order. The whole main dispute remains unresolved. The

impossibility to perform is anchored on the non-availability of the Sabbagh's report which is the sole channel to arbitration.

THE PRESENT APPLICATION

- [8] On 08th July 2008 the applicant launched the present application which is opposed by the 1st respondent and the liquidators namely: the 9th, 10th and 11th respondents and at a later stage by the 12th respondent which entered the fray as the intervening party, and now a fully-fledged 12th respondent.

COUNTER-APPLICATION

- [9] In April 2009 the "joint liquidators" who are the 9th, 10th and 11th respondents launched a counter-application whose founding affidavit is deposed to by the 09th respondent: Lauro Teresio Cordero. Excluding costs and alternative prayers, the counter-application is predicated on two prayers, namely:

- (1) An order that the agreement contained in the consent order of Classen J dated 04th March 2004 under case no: 3548/04 has lapsed; and
- (2) An order that monies held in the trust account of attorneys Hofmeyer Herbstein & Ghiwala Inc be paid to the insolvent estate of the 1st respondent.

[10] The grounds for launching the counter-application are the following:

- (a) that Classen J consent order has been breached in many respects, has failed in its terms and that it is at an end;
- (b) no arbitration exists as per court order;
- (c) the accountant, Mr Sabbagh has failed to deliver his final report as provided for in the Classen J order;
- (d) in the interim Micromatica (1st respondent) was liquidated on 18th October 2005.

THE LAW AND OTHER AUTHORITIES

[11] Perhaps the starting point is to understand what the contract or agreement is, before it can even be ventured to deal with its variation, cancellation or novation. The relevant dispute in the application is the amendment of certain terms of the court order.

[12] An agreement by consent includes two or more parties. In CHRISTIE'S THE LAW OF CONTRACT IN SOUTH AFRICA: 6th EDITION, the learned authors have the following to say about an agreement on page 23: "In order to decide whether a contract exists, one looks first for the agreement by consent of two or more parties". The same authors have the following to say on variation of contracts: "The general rule that parties to a contract are as free to vary or discharge their contract as they were to make it is subject to limitations" at p463.

- [13] In VAN STREEPEN & GERMS V TRANSVAAL PROVINCIAL ADMINISTRATION 1987(4) SA 569 (AD) at p589 the following is intimated by the Court of Appeal: “a contract such as the one presently under consideration usually contains a clause empowering the employer to order ‘variations’, which term includes additional work, altered or substituted work for that described in the contract and the omission of contract work. It is recognized that an unbridled power to order variations could cause great hardship to the contractor. Thus it has been held in England that a variation clause will not permit the employer to change completely the character of the works as originally contemplated (Halsbury (op cit at para 1174); Emden (op cit at 147)).
- [14] In BLOU BUL BOORKONTRAKTEURS V McLACHLAN 1991 (4) SA 283(T) at 285F-G the learned Judge-President accepted that judgments entered by consent could “under certain circumstances” be set aside “on the ground of just error”.
- [15] In WILLIAMS V VEVANS [1978(1)] SA 1170 (CPD) the court intimated that where a contract is entered into on the basis of a common assumption as to a future state of affairs, it may fail if the assumption or supposition fails and it is established that the parties would not have entered into the agreement had they known that their expectations would not materialize.

- [16] AJ KERR in his book: THE PRINCIPLES OF THE LAW OF CONTRACT (6th EDITION) has the following to say about a contract: “A contract comes into being by agreement and it may terminate by agreement” at page 540.
- [17] RH CHRISTIE in his book: THE LAW OF CONTRACT IN SOUTH AFRICA (5th EDITION) has the following to say about agreements and contracts at page 90 under the heading “Offer and acceptance without contract”. : “not all agreements are contracts, so it is incorrect to argue that because there has been an offer and acceptance there must necessarily be a contract”.
- [18] In FARLAM AND HATHAWAY: CONTRACT (3rd Edition) the book edited by GF Lubbe and CM Murray on page 18 under the heading: “creating obligations through Agreement” sourced from Pothier Obligations S3 the following is recorded about an agreement. “An agreement is the consent of two or more persons to form some engagement, or to rescind or modify an engagement already made ... [A contract is] an agreement by which two parties reciprocally promise and engage, or one of them singly promises and engages to the other to give some particular thing, or to do or abstain from doing some particular act”.

In the same book on page 19 under NOTES 1. the learned editors note as follows: “It follows that the possibility of creating an obligation by a unilateral declaration of intention (*pollicitatio*) does not form part of our law”. Therefore, *in casu* the applicant should not be granted a declarator to unilaterally amend the order granted by consent. I hold that another agreement by the parties to amend “the Classen J” order is necessary if any amendment is to be effected.

- [19] ESTATE BREET V PERI-URBAN AREAS HEALTH BOARD [1955 (3)] SA 523 [A.D] at 532G-H. In his judgment the learned Judge of Appeal VAN DEN HEEVER, JA said the following about judgment by consent: “Similarly a judgment by consent cannot be said to create contractual relationships”...

EVALUATION, ANALYSIS AND APPLICATION OF THE LAW

- [20] I do not think a court is competent to allow an amendment, even if it were allowed to, where the “sense” and “substance” of the subject-matter will change, thus creating a completely new subject-matter to which, like in an agreement, the minds of the parties were not and are not *ad idem*. In this case the “Classen J” order was given after the parties had agreed (para2) about the terms as embodied by paragraph 3 of the order.

[21] This “Classen J” order by consent is founded on agreement between the parties and it is capable of being amended or altered or set aside by consent between the parties on such grounds or upon another agreement that initiates true consent between them.

[22] But here, there are no allegations that satisfy Rule 42 or Rule 31(2)(b) for the grant of the amendments sought. The applicant does not rely for its application on the said rules but on the common law. The applicant does not attack the consent to the order as fraudulent or unlawful but relies on some impossibility to perform because of some intervening factors that have emerged since the grant of the order. The applicant has not relied on the invalidity of the order as it stands.

HYBRID

[23] It is clear that the “Classen J” order is a hybrid order, *id est*, a court order embodying an agreement of the parties. I say so because it defers from an ordinary court order not given by consent of the parties for the embodiment of an agreement but a court order issuing from granting prayers in a notice of motion where the applicant succeeds in an application. The order in dispute is akin to Deed of Settlement incorporated into a Decree of divorce by consent of the parties. Such a deed of settlement requires the consent of two parties to it for variation. The simple reason for that is that any

is that any change or amendment to be effected to it, may adversely affect the non-consenting party.

[24] The interpretation of the order is bound to the interpretation of the agreement. It is a tricky order because should it be found that the agreement has failed and does no longer exist, that finding will affect the existence of the order. As here, the entry into an agreement was for the purposes of referring the dispute to arbitration. Referral was based on the condition that the accountant should submit a report and that within 5 days of receipt of the report, the matter be referred to arbitration.

[25] I am inclined to agree with the sentiments in *Williams v Evans* (*supra*) although in the present case herein there is no evidence that had the parties foreseen that future circumstances would make the agreement impossible to perform, they would, nevertheless, have entered into that agreement. I am of the view that that may be implied that had the parties known that Sabbagh would not produce a final report, and that arbitration would never take place then the parties would not have consented to the “Classen J” order at all. The parties were desirous that their disputes be resolved through arbitration, and as speedily as would be convenient.

[26] The applicants in their counter-application maintain that the terms of the “Classen J” have not been complied with. At paragraph 15 of the founding affidavit the deponent avers that the arbitration term is no longer workable. The answer by “MRC”, the respondent in the counter-application, denies that applicants’ averment. But, on hindsight, indirectly concedes by saying: “To the extent that the order had not been complied with, this is directly attributable to the dishonest conduct of Micromatica and its erstwhile directors”. This is clearly a concession that the “Classen J” order cannot be complied with in its present form and that the “alleged dishonest conduct”, if any, was never within the contemplation of the parties together with other unforeseen circumstances already spelt out above.

[27] The following sentiments in *BISCHOFBERGER V VAN EYK* 1981 (2) SA 607(W) at 611D are apposite in the present case, and these are: “If the causes (of impossibility) were in the contemplation of the parties, they are, generally speaking, bound by the contract. If, on the contrary, they were such as no human foresight could have foreseen, the obligations under the contract are extinguished”. Analogically, this is correct, but the “Classen J” order embodies an agreement and not a contract.

[28] The quoted sentiment in the *BISCHOFBERGER’S* case (*supra*) was

said to be acceptable with qualification in NUCLEAR FUELS CORPORATION OF SA (PTY) LTD V ORDA AG 1996(4) SA 1190 (AD) at 1208I and 1209H-J and at 1211A-B. I also agree with these sentiments and the reasons given that the sentiments be accepted with qualification.

[29] There is no evidence that the applicant seeks cancellation of the court order or the agreement embodied in it. It is clear that the application is limited to amendment of the order. All the authorities cited above relate to impossibility of performance in a contract. It is only by analogy that I have imported the principle of bindingness of a contract to a consent order sought to be amended. My view is, if an order sought to be amended was obtained by consent, in the absence of fraud or other grounds to invalidate it, then it ought to be amended by consent. And such an order by consent cannot remain indefinitely applicable and binding if its terms are impossible to be complied with, because of its basic purpose having lapsed. If its basic purpose lapses then it is extinguished and can no longer bind parties to it.

[30] The agreement lacking remedies for non-compliance with its terms, created a *lacuna* which cannot, retrospectively, be cured by variations or amendments that were never catered for in it or in the

consent order forming part of the original document.

- [31] In my view, the only way out of the deadlock, is for the applicant to obtain the consent of the other party to the agreement in order to facilitate the amendments sought. At best, the applicant needs to enter into another agreement with the respondents who should consent to amendments sought.
- [32] It is clear and lucid that *ex facie* the “Classen J” order there exists no remedies in the event of: non-compliance and impossibility of performance relating to any terms of the order by any party to the agreement embodied in it.
- [33] Furthermore, having regard to the ordinary grammatical meaning of the words used like: “the parties agree” and “by consent” read in the context of the whole document (the Classen J) order, nowhere do the parties explicitly reserve to themselves any *lex commisorio* (a right to cancel upon a breach of the agreement). It is in this context understood why the applicant does not rely upon a breach of the agreement. In any event, no facts indicate that the respondents are in breach of any terms of the agreement or in contempt of the court order.
- [34] If any breach of the agreement was to be part of the enquiry, (which is not), it could be found that it is the accountant, (Mr Sabbagh), who

is in default of producing a report and that he is the cause of the *impasse* the parties find themselves in.

ARGUMENTS

[35] In summary form, the respondents in support of their counter-application contended that the “Classen J” order cannot be redeemed and to amend it, will alter its “sense” and “substance”. They further submitted that amending it is tantamount to rewriting a new agreement for the parties, by the court. This sentiment is shared by the 1st and the 12th respondents. They have also submitted that there is impossibility of performing in terms of the agreement because of the absence of Mr. Sabbagh’s report which is a “*sine qua non*” for referral to arbitration.

[36] The applicant argued that the respondents’ submission that the court order at issue is not capable of amendments should be rejected. It was further argued that it is the fault of the respondents that the terms of the “Classen J” order have not been complied with.

FINDINGS

[37] All the evidence, the authorities and the submissions having been evaluated and analyzed above, I hold as follows:

- (1) that the applications postponed *sine die* by Classen J on 04th March 2004 have been pending for an inordinate period. My view is that there needs to be finality in these matters;
- (2) that the “Classen J” order by its nature, does not qualify to be amended or varied under the provisions of Rules 42 or 31(2)(b) of the Uniform Rules of Court and the Common Law;
- (3) that the court is not competent to amend the “Classen J” order because this would be tantamount to creating a new obligation in the order by a unilateral declaration of intention at the sole instance and request of the applicant;
- (4) that to amend the “Classen J” order affects the “sense” and “substance” of the agreement, and that would issue a new agreement without the consent of the other party to the original agreement;
- (5) that the applicant has not alleged and proved the invalidity of the original agreement in its unamended form. Therefore, for the court to grant a unilateral amendment without the consent of the 1st respondent will render it invalid;
- (6) that, in the circumstances, the “Classen J” order embodies a

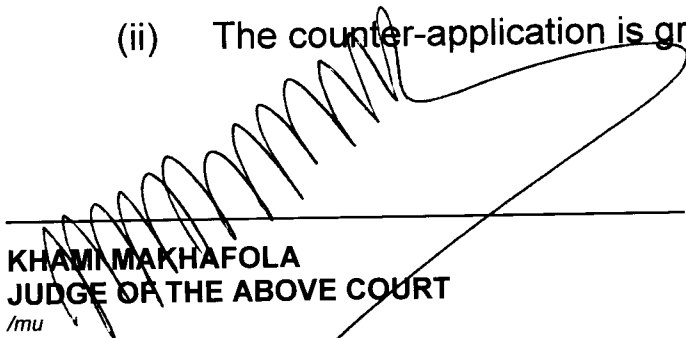
lapsed agreement because of impossibility of performance.
Therefore, the basis of the order has collapsed rendering the order to lapse;

- (7) that this application to amend is ill-fated and falls to be dismissed with costs;
- (8) that the counter-application stands to be granted with costs;
- (9) that the time-frame for referral to arbitration has not materialized and that Sabbagh's report is wanting;
- (10) that under the prevailing circumstances, no arbitration will be held. The 1st respondent has been liquidated on 18th October 2005 and the principles relating to contracts in the authorities cited above are applicable to this application at issue herein, and liquidators have been appointed.

CONCLUSION

[38] In the result, I pronounce the following order:

- (i) The application to amend is dismissed with costs;
- (ii) The counter-application is granted with costs.



KHAM MAKHAFOLA
JUDGE OF THE ABOVE COURT
/mu

