

FREE STATE HIGH COURT, BLOEMFONTEIN
REPUBLIC OF SOUTH AFRICA

Case No. : 2387/2013

In the matter between:-

HASSAN MAHOMED VALODIA

Applicant

and

COOPER BEZUIDENHOUT INCORPORATED

First Respondent

DONOVAN THEODORE MAJIEDT N.O.

Second Respondent

BRIAN ITUMELENG NAKEDI N.O.

Third Respondent

NORMAN KLEIN N.O.

Fourth Respondent

JAICHAND HARIPERSAD N.O.

Fifth Respondent

VIDHIAWATHIE HARIPERSAD N.O.

Sixth Respondent

**THE MASTER OF THE FREE STATE
HIGH COURT**

Seventh Respondent

HEARD ON:

20 SEPTEMBER 2013

JUDGMENT BY:

DE WET, AJ

DELIVERED:

26 SEPTEMBER 2013

- [1] The second, third and fourth respondents apply for leave to appeal against the judgment dated 29 August 2013 on numerous grounds as set out in their notice of application for leave to appeal dated 3 September 2013.

- [2] I considered each and every one of the grounds, but deals only with the ones explicitly relied on by respondents' counsel during argument.
- [3] In argument respondents' counsel without abandoning any of the grounds of appeal concentrated mainly on the applicability of the non-variation clause in the written agreement between the parties (clause 22) and referred the court *inter alia* to the cases of **Nyandeni Local Municipality v Hlazo** 2010 (4) SA 261 (ECM), **GF v SH and Others** 2011 (3) SA 25 (GNP), **Steyn and Another v Karee Kloof Melkery (Pty) Ltd** (unreported) SGJ case number 2009/45448, **Nedbank Bpk v Pickor Thirty One Bk and Others** (unreported) FSB case number 6137/2009 and **Absa Bank Ltd v Malherbe** (unreported) FSB case number 5077/2012.
- [4] The Free State High Court cases above are distinguishable from the present matter as both deal with summary judgment which is a remedy with its own unique attributes. Van Zyl J states in the **Nedbank Bpk** matter, *supra*, that the oral amendment of the written agreement has to be accepted as a defence "for purposes of summary judgment procedure".
- [5] The cases of **Nyandeni Local Municipality**, heavily relied on by counsel for respondents and the cases of **GF v SH and Others** and **Steyn and Another**, *supra*, all dealt with circumstances where the demands and the requirements of

public policy justified a departure from the Shifren-principle (according to the judges).

- [6] In **Brisley v Drotsky** 2002 (4) SA 1 (HHA) the majority of judges dealt fully with an argument that the Shifren-principle could not be enforced “omdat dit in die omstandighede onredelik, onbillik en in stryd met die beginsels van *bona fides* (goeie trou) is”.

- [7] The learned judges dealt fully with good faith and came to the conclusion “goeie trou is ‘n grondbeginsel wat in die algemeen onderliggend is aan die Kontraktereg en wat uiting vind in die besondere reëls en beginsels daarvan”. The learned judges then proceed to point out that “‘n ander waarde onderliggend aan die Kontraktereg is dat kontrakte wat vrylik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word. Die taak van die hof is om hierdie waardes wat soms met mekaar in botsing kom teen mekaar op te weeg en om by geleentheid wanneer dit nodig blyk te wees... aanpassings te maak”. See also **De Villies v McKay NO and Another** 2008 (4) SA 161 (SCA) 163 C – D.

- [8] I found on the evidence no conduct by the applicant that justify a departure from the firmly entrenched Shifren-principle and I am satisfied that the parties were bound by the terms of their written agreement.

- [9] The judgment was further criticised by counsel for respondents stating that the court's finding that the evidence relied on by respondents, namely that applicant and the Haripersad Family Trust were in cahoots, was not sufficient to allow the court to make such a finding, was wrong and that it in fact imposed an onus on the respondents to prove the allegations.
- [10] The argument is not correct. The court placed no onus whatsoever on the respondents. What the court tried to convey in the judgment was only that there were no facts in the opposing affidavits on which the court could find that applicant was in cahoots with the respondents. The suspicion referred to is a deduction from the facts made by counsel for respondents in argument not supported by facts in the opposing affidavit and nothing more than speculation at its best.
- [11] I carefully considered the facts in the affidavits, the judgment and the arguments of counsel and I also bear in the mind the remarks of Cloete J in **Janit v Van den Heever and Another NNO (No 2)** 2001 (1) SA 1062 (WLD) 1065:
- “If the decision against which leave to appeal is sought is wrong, leave to appeal can be granted on petition; but it is not for a lower Court to sanction appeal proceedings unless there are reasonable prospects that the appeal might succeed.”
- [12] I came to the conclusion that there are no reasonable prospects of success on appeal and I accordingly make the following order:

1. The application for leave to appeal is dismissed.
2. The second, third and fourth respondents are ordered to pay the costs of the application.

P.J.T. DE WET, AJ

On behalf of applicant:

Adv P.U. Fischer
Instructed by:
Lovius Block Attorneys
BLOEMFONTEIN

On behalf of second, third
and fourth respondents:

Adv Steyn
Instructed by:
Christo Dippenaar Attorneys
BLOEMFONTEIN