

Oral Settlement Agreements vs Non-variation Clauses contained in Written Agreements

Settling legal disputes out of court is very common and often encouraged by lawyers and courts alike. It is generally advisable for disputing parties to hold settlement negotiations before resorting to litigation. Parties may conduct settlement discussions even after litigation has begun.

Settlements are usually concluded orally or in writing. Written agreements often contain a clause stating that any amendment or variation will only be effective if reduced to writing and signed by both parties. This is widely known as a non-variation clause. Our courts have been repeatedly faced with the question of whether oral settlement agreements can validly change the provisions of a written agreement which contains a non-variation clause.

A typical example of a non-variation clause would be a provision in a lease agreement stating that any changes to the terms of the contract, whether it be to the rental amount, duration or cancellation of the lease, would only be enforceable if reduced to writing and signed by both the lessor and the lessee. This means that any verbal agreements between the parties would not be enforceable.

The Western Cape High Court in the recent case of *Absa Bank Limited v Future Indefinite Investments 201 (Pty) Ltd and others [2020] JOL 48740* grappled with the issue of enforceability of oral settlement agreements. The dispute in this case stemmed from a written loan agreement in terms of which Future Indefinite Investments (the Borrower) failed to make payment timeously. As a result, Absa (the Lender) instituted legal proceedings against the Borrower. Although the Borrower disputed its liability to make payment, the parties engaged in settlement negotiations. The parties' attorneys, after a seesaw of counter offers, concluded an oral settlement agreement which was later reduced to writing by the Borrower's attorneys but was not signed by either of the parties. The Lender later rejected the oral agreement and chose to continue with the litigation. The court had to decide on the validity of the oral settlement agreement taking into consideration the non-variation clause contained in the initial loan agreement.

The general position in South African law is that verbal agreements cannot outweigh the party's intentions under an initial written agreement that includes a non-variation clause. This is known as the *Shifren* principle. The *Shifren* principle is entrenched in South African law and was endorsed in the case of *Brisley v Drotzky* which held that a court has no

discretion to decline to enforce a non-variation clause. Accordingly, courts cannot employ considerations of reasonableness and fairness in the enforcement of such clauses.

In dealing with disputes of this nature, our courts have reasoned that a three-pronged approach is to be adopted in determining the enforceability of an oral settlement agreement:

1. Whether there was a non-variation clause to be complied with in the initial agreement;
2. If this was a requirement, whether the settlement agreement was in compliance; and
3. If there had not been compliance, what the consequences would be considering the *Shifren* principle.

In dealing with the third question, courts distinguish between settlement agreements in respect of pending litigation and those in relation to the initial agreement. Settlement agreements flowing from litigation fall outside the scope of the initial agreement and are not subject to a non-variation clause. For example, if you are involved in a court battle and you verbally agree terms with the other side to settle the matter, a non-variation clause would not affect the enforceability of the settlement reached to bring finality to those court proceedings. In those circumstances, the oral settlement agreement will stand and be binding on the parties independent of the initial agreement.

In the Absa Bank case, the court endorsed this approach by holding that this was not a matter where the Borrower sought to rely on an oral agreement to vary the initial agreement but rather to resolve the litigation. The court indicated that the settlement agreement was plainly concluded to put an end to the litigation. That being the case, the non-variation clause in the initial agreement was not applicable to the facts.

The outcome of this case demonstrates that a court will, in appropriate circumstances, relax the impact of the *Shifren* principle where the oral agreement was reached after litigation has commenced. It is advisable to always have agreements in writing and signed by both parties to avoid disputes as to the terms of the agreement. This will go a long way in providing certainty for the contracting parties.

Livingston Leandy has a wide range of experts to assist you with the negotiation, drafting, interpretation and dispute resolution of agreements.



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