Short notes on:

**THE SHIFREN PRINCIPLE – THE IMPORTANCE OF REDUCING ORAL AGREEMENTS TO WRITING WHEN A CONTRACT CONTAINS A NON-VARIATION CLAUSE**

**Introduction**

Today, almost all Commercial Contracts entered into include non-variation clauses. A non-variation clause is a contractual provision which restricts the variation and/or cancellation of an Agreement. Any variation or cancellation of the Agreement will therefore not be of any effect unless reduced to writing and signed by the parties concerned.

Not all parties to a Contract understand the purpose of non-variation clauses and often do not read thoroughly through their contracts. Disputes often arise because of this, when parties decide to enter into oral agreements varying provisions contained in their respective Contracts without reducing it to writing. Later, one party decides to rely on the provisions of the Written Contract and object to an Oral Agreement ever been agreed upon to the frustration of the other party.

This is when the Shifren principle, more commonly known as “the enforcement of non-variation clauses on parties”, comes into effect and which will be more fully explained below.

**The Shifren principle practicably explained**

Example: John is one of several Subcontractors who provides electrical services for a large Electrical Company. A meeting is held in the beginning of April between a Representative of the Electrical Company (who does not have authority to make decisions) and all their Subcontractors. At the meeting it is orally agreed that the fixed fees to be invoiced to the Electrical Company may be increased by 5%. As such, all the Subcontractors invoiced as per what was orally agreed upon. The meeting was never minuted and the Oral Agreement never reduced to writing. At the end of the month, the Subcontractors submitted their invoices and received the following response from the Electrical Company’s Finance and Legal Department who referred to a non-variation clause contained in their Contract with all the Subcontractors:

“Kindly resubmit your invoice in line with the agreed costing set out in clause 5 of the contract entered into with all subcontractors. Further, kindly take note of clause 7 of the
How does the Shifren principle apply herein and what relief, if any, does John have?

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”) to. 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.

In *Industrial Development Corporation of SA v Ballie Foods CC [2007] JOL 19301 (T)*, Judge Bosielo held that parties voluntarily elect to include a non-variation clause in their Contracts to protect themselves and to avoid the uncertainty which stems from (disputed) Oral Agreements.

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 in future by the 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 case law above is precise herein and the Shifren Principle remains applicable in respect of non-variation clauses. John therefore will need to resubmit his invoice as per the costing contained in the Contract with the Electrical Company as the non-variation clause is binding and there is no evidence of the Oral Agreement.
Conclusion

As above, it is important for all Oral Agreements to be reduced to writing, if not, the written Contract will prevail, especially when a non-variation clause exists.

A non-variation clause which requires oral variations of the Contract to be reduced to writing will allow parties to change their minds, as long as the formality of reduction to writing is adhered to. Non-variation clauses therefore favour both parties.

SchoemanLaw can assist with the drafting of all Commercial Contracts.