Editorial note: Certain information has been redacted from this judgment in compliance with the law.

THE HIGH COURT OF SOUTH AFRICA
FREE STATE PROVINCIAL DIVISION

Reportable: yes/no
Circulate to other Judges: yes/no
Circulate to Magistrates: yes/no

Case Number 4523/2022

In the matter between:

R S H Applicant

and

A J T Respondent

CORAM: BERRY, AJ

HEARD ON: 16 FEBRUARY 2023

DELIVERED ON: This judgment was handed down electronically by email to the parties' representatives and by release to SAFLII. The date and time for hand-down is deemed to be 15h00 on 08 March 2023.

JUDGEMENT BY: BERRY, AJ

JUDGMENT

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[1] The Parties entered into a settlement agreement, which was made an Order of Court, in divorce proceedings under case number 1752/2004.

[2] The clauses of the agreement which form the subject matter of today's proceedings are clauses 5.2 and 5.3, although the Application aims specifically at clause 5.2.

[3] Clause 5.2 reads.

> "5.2 The Plaintiff will maintain the payments of Defendant's current Old Mutual Flexi Pension policy until her death provided that the Plaintiff remains the life beneficiary of that policy. The Defendant will hand the original policy documents to the Plaintiff to secure his right title and interest in the policy. The Defendant will not be entitled to encumber, cede or assign her benefits in terms of the policy."

[4] Clause 5.3 reads:

> "5.3 The Plaintiff will maintain the payments of his own current life/endowment policies and the Defendant will remain the life beneficiary of that policy(sic)."

[5] The Applicant was the Defendant, and the Respondent was the Plaintiff in the divorce proceedings.

[6] The Applicant removed the Respondent as a beneficiary from her Old Mutual Flexi Pension policy during May 2018. She however restored the Respondent as sole beneficiary on 25 September 2018. The reasons for this are unknown.

[7] The Respondent paid the monthly premiums of the policy into the Applicant's bank account, from where the insurance company deducted it monthly.

[8] The attorney for the Applicant sent an e-mail to the Respondent advising him that the monthly premium for the policy has increased to an amount of R2528.10 per month and that he needs to increase the monthly payments on 20 October 2021.

[9] The attorney for the Respondent addressed a letter to the Applicant's attorney on 2 November 2021, wherein she advised that the removal of the Respondent as beneficiary during 2018 was a breach of contract by the Applicant and that the Respondent accepted Applicant the repudiation. Thus, the Respondent was no longer bound to paragraph 5.2 of the Settlement Agreement and would not make further payments towards the policy.

[10] The Respondent stopped paying the monthly premium of the Old Mutual Flexi Pension policy on 01 October 2021.

[11] Correspondence between the parties' attorneys culminated in a letter on 10 March 2022 where the Application's attorney made an offer without prejudice, where she proposes that clause 5.2 be amended, as follows:

"The Defendant will maintain payments of the current Old Mutual Flexi Pension policy until her death provided that the Defendant may change and/or nominate her preferred life beneficiaries of that policy."

[12] The effect of the proposed amendment would be that the Respondent would no longer have to pay the monthly premiums and the Applicant would be able to change the beneficiaries on the policy.

[13] Paragraph 7 of the Deed of Settlement reads:

"7 NON-VARIATION

7.1 This agreement contains all the terms and conditions of the agreement between the parties.

7.2 No variation of or abandonment or waiver of rights or obligations, whether express or implied, shall be binding unless contained in this agreement, or subsequently reduced to writing and signed by both parties.

7.3 Save as provided for in this agreement, neither party shall have any further claims against the other and each party hereby waives and abandons all and any such claims."

[14] The attorney for the Respondent replied per e-mail on 11 March 2022:

> "3. To curtail possible uncertainty, our client will sign an addendum to the settlement agreement and to arrange that Mrs RS H (formerly T) will make payment of the current Old Mutual Flexi Pension policy premiums and are entitled to appoint life beneficiaries of that policy."

[15] This e-mail makes it clear that the attorney for the Respondent intended that both parties should sign a written addendum "to curtail uncertainty".

[16] The attorney for the Applicant addressed a letter to the attorney of the Respondent on 11 April 2022, wherein she states:

> "1. Reference is made to be above mentioned and the parties' agreement to invoke clause 7 of the Deed of Settlement.
> 2. Kindly find attached herein, the Variation Agreement.
> 3. Our client has already signed the agreement, kindly have your client also sign and send the fully signed agreement to us.
> 4. We trust that the above is in order and await your signed agreement."

[17] The attorney for the Respondent replied per e-mail on 12 April 2022, that their client could not sign the agreement and made a counter proposal, wishing to also amend clause 5.3 of the Settlement Agreement:

> "Clause 2.2 should read:
> … by deleting the entire content of clause 5.3 and replacing it with the following:
> The Plaintiff will maintain the payments of his own current life/endowment policies and is entitled to change and nominate his preferred life beneficiaries for that policy."

Clause 2.2 refers to the proposed Variation Agreement.

[18] The attorney for the Applicant responded on 13 April 2022 that the amendment of clause 5.3 was never agreed between the parties, but that she will obtain further instruction.

[19] At this stage the Respondent did not pay the monthly premiums because of the so called repudiation of the agreement by the Applicant.

[20] In Par 40 of the Respondent Answering Affidavit he changes tact and no longer relies on the alleged repudiation but on the argument that the e-mail of 10 March 2022 read with his attorney's e-mail of 11 March 20221 constitutes an agreement and tendered to pay the arrears of the premiums from 01 October 2021 to 11 March 2022. This amount was paid by the time this matter was heard.

[21] The Applicant filed an Application to declare that the Respondent is still bound by the Settlement Agreement and the Respondent filed a counter Application to declare that the settlement agreement has been amended by the e-mail correspondence between the parties' attorneys.

[22] The Respondent correctly abandoned reliance on the so-called repudiation of the "agreement" as it is not an agreement between the parties, but a Court Order.

[23] Counsel for the Respondent relied on the letter from the Applicant's attorney, dated 10 March 2022, read with the e-mail from the Respondent's attorney on 11 March 2022 to submit that this correspondence constitutes the agreement between the parties and that this agreement should be made an Order of Court.

[24] Counsel for the Respondent submitted that the e-mails between the parties' attorneys contained enough identifying information to qualify as an electronic signature in terms of the Electronic Communications Act 125 of 2002, and that the e-mailed correspondence between the parties' attorneys meet the requirements of Clause 7 of the Settlement Agreement, requiring the amendment to be reduced to writing.

[25] Counsel for the Respondent referred the Court to **Spring Forest Trading CC v Wilberry (Pty) Ltd t/a Ecowash and Another** 2015 (2) SA 118

SCA at PAR [18], where the Court held that e-mails constitute data messages and thus met a condition that an agreement had to be reduced to writing.

[26] This contention does not explain why a counteroffer including a proposal to also amend clause 5.3 of the Settlement Agreement was made on 12 April 2022, after receipt of the addendum requested by the Respondent's attorney on 11 March 2022.

[27] It seems the Respondent realised that if he signed the variation agreement varying only clause 5.2 of the Settlement Agreement, the Applicant will remove him as beneficiary of the Applicant's policy, whilst he would be obliged to retain the Applicant as beneficiary of his life policy, if clause 5.3 is not also amended.

[28] The counterproposal made on 12 April 2022 to also amend clause 5.3 of the Settlement Agreement, shows that there was not a meeting of the minds between the parties.

[29] Even if I were to find that there was a meeting of the minds on 11 March 2022 as argued by the Respondent, the case law referred to by Counsel for the Respondent does not find application in that clause 7.2 of the Settlement Agreement requires that the Variation Agreement had to be signed by both parties and not by their attorneys.

> "7.2 No variation of or abandonment or waiver of rights or obligations, whether express or implied, shall be binding unless contained in this agreement, or subsequently reduced to writing and signed by both parties."

[30] I was informed during Court proceedings that the Respondent made a payment of R15 168.60 for the monthly premiums from 01 October 2021 to 11 March 2022. This payment must have been done after the Application was filed as the Answering Affidavit was attested to on 26

October 2022 and in Par 40 of the Answering Affidavit the Respondent undertakes to pay the premiums from 01 October 2021 to 11 March 2022.

[31] The Respondent contents that this payment met his obligations as the Variation Agreement came into existence on 11 March 2022 when his attorney advised the Applicant's attorney that they accept the proposed amendment and requested her to draft an addendum.

[32] The Applicant seeks a Declaratory Order that clause 5.2 of the Settlement Agreement is still applicable and that the letter of 10 March 2022, followed by the e-mail from the Respondent's attorney 11 March 2022 requesting the Applicant's attorney to draft an addendum to amend the Settlement Agreement.

[33] In **SA Sentrale Ko-op Graanmaatskappy v Shifren en Andere** 1964 (4) SA 760 (A) the Court dealt with policy considerations such as the need to avoid disputes, evidential difficulties often associated with oral agreements, the need for certainty and clarity in a commercial environment, and the infringement of the right to contractual freedom.

[34] The principle of *Pacta Sunt Servanda* entails that parties are bound to the agreements they conclude. This principle is fundamental to our law.

[35] In its most common sense, the *Pacta Sunt Servanda* principle refers to private contracts and prescribes that the provisions of a contract are binding in law between the parties to the contract. If a party neglect his or her obligations that party acts unlawful.

[36] The Court found in **Shifren** that there is no basis upon which a non-variation clause could be deemed to be against public policy.

[37] In **Brisley v Drotsky** 2002 (4) 1 (SCA) at 11B-H the Court held that **Shifren** gives greater weight to the parties' original exercise of contractual freedom than to their capacity to undo their original choice without limitation. The **Shifren** principle essentially delineates that - where such provisions are itself entrenched in the agreement between the parties, the original agreement is incapable of being validly altered without complying with certain prescribed formalities.

[38] **Shifren** held that in circumstances where the parties have incorporated a formalities clause which entrenches a prohibition against an oral variation, there was no reason to find that one party cannot hold the other party bound thereto.

[39] The **Shifren** principle is one of certainty. It aims to give effect to the intention of the parties through such a clause and to guard against disputes and difficulties of proof which often arise in oral agreements[1].

[40] In **Barkhuizen v Napier** 2007 (5) SA 323 (CC) at Par [57] the Constitutional Court held that public policy requires parties to honour contractual obligations that have been freely and voluntarily undertaken. The principle of *Pacta Sunt Servanda* is a profoundly moral principle on which the coherence of any society relies.

[41] The majority held that the *Pacta Sunt Servanda* principle –

> "… gives effect to the central constitutional values of freedom and dignity. Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity."

[42] The Court held at Par [69] that the onus rest on the party seeking to avoid the enforcement clause, to demonstrate why its enforcement would be unfair and unreasonable in the given circumstances.

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[1] Shifren at 768 G-H.

[43] In clarification of what is required to avoid being bound by a contractual term, freely and voluntarily agreed upon, the Supreme Court of Appeal considered the judgement of **Barkhuizen** in **Bredenkamp v Standard Bank of SA Ltd** 2010 (4) SA 468 (SCA) held at Par [50]:

"I do not believe that the judgement in **Barkhuizen** held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable, even if no public consideration found in the Constitution or elsewhere, is implicated."

[44] In **Nyandeni Local Municipality v MEC for Local Government and Traditional Affairs and Another** 2010 (4) SA 261 (ECM), the Eastern Cape High Court considered what is required to avoid being bound by a contractual term, freely and voluntarily agreed upon, and commenced its assessment of the question in relation to an entrenchment clause by stating at Par [2]:

"As the law stands at present, there are no exceptions to the application of a Shifren principle, and there are no decided cases not overturned on appeal, where the Shifren principle was relaxed."

[45] At Par [50] in **Nyandeni**, the Court held:

"In terms of Shifren, it is the original contract which must be protected and enforced, not a subsequent oral one, which effectively ignores the first. To enforce the second oral contract on the basis of *Pacta Sunt Servanda* in contravention of the original one, results in circuitous reasoning and is destructive of the carefully constructed reasoning in Shifren, and is offensive to all case law since 1964 following Shifren."

[46] The Court in **Nyandeni** referred with approval to the **Shifren** principle:

"A Court has no general discretion with reference to considerations of fairness and equity to decide whether or not to enforce contractual rights. The exercise of such general discretion is contrary to the law of contract and the principle of *Pacta Sunt Servanda*, and will result in the enforcement or otherwise of contractual rights and obligations depending on the personal views of the Judge on what is fair and equitable (at 16B-E). Such general discretion will result in contractual uncertainty and will. undermine their Constitutional Rights to freedom to contract and choose and agree on the terms".

[47] In this matter the Settlement Agreement between the parties was elevated to a Court Order, thus the more the ned for compliance with the formalities agreed between the parties.

[48] The parties did not conclude a written agreement when the Applicant's attorney made a proposal to amend the Settlement Agreement on 10 March 2022 and the Respondents attorney replied on 11 March 2022, that the Respondent is agreeable to sign an addendum.

[49] The proposal of 10 March 2022 was furthermore made without prejudice of rights.

[50] The e-mail accepting the proposed amendment on 11 March 2022 made it clear that the Respondent's attorney envisaged that a written addendum should be signed by both parties. This was clearly intended to fulfil the formalities agreed upon between the parties in clause 7 of the Settlement Agreement.

> "3. To curtail possible uncertainty, our client will sign an addendum to the settlement agreement to delete the existing clause 5.2 of the settlement agreement and to arrange that Mrs RS H (formerly T) will make payment of the current Old Mutual Flexi Pension policy premiums and are entitled to appoint life beneficiaries of that policy."

[51] I find that the parties did not conclude an agreement to amend the original Settlement Agreement in that the intended amendment did not meet the formalities the parties agreed would be applicable in clause 7 of the Settlement Agreement.

ORDER

[52] The following order is made:

1. The Respondent is bound by clause 5.2 of the Settlement Agreement which was made an Order of Court on 17 February 2005, under Case Number 1752/2004.
2. The Respondent is ordered to pay the premiums from 11 March 2022 to date of this Order and to pay the monthly premiums forthwith.
3. The Counter Application is dismissed.
4. The Respondent is ordered to pay the costs of the Application and the Counter Application.

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AP BERRY, AJ

APPEARANCES:

For the Plaintiff:	**Adv. HJ van der Merwe**
Instructed by:	Neumannn Van Rooyen Attorneys WELKOM c/o Phatshoane Henney Inc BLOEMFONTEIN
For the Defendant:	**M Booysen**
Instructed by:	Moller & Pienaar Attorneys PRETORIA c/o Van der Merwe & Sorour BLOEMFONTEIN