



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 511/2022

In the matter between:

BA-GAT MOTORS CC T/A

GYS PITZER MOTORING

FIRST APPELLANT

GYBERTUS PITZER

SECOND APPELLANT

and

KEMPSTER

SEDGWICK

(PTY)

LTD

RESPONDENT

Neutral citation: *Ba-Gat Motors CC t/a Gys Pitzer Motoring and Another v Kempster Sedgwick (Pty) Ltd* (511/2022) [2023] ZASCA 137 (25 October 2023)

Coram: DAMBUZA, CARELSE, MABINDLA-BOQWANA and MEYER
JJA and NHLANGULELA AJA

Heard: 16 August 2023

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme Court of

Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 11h00 on 25 October 2023.

Summary: Summary judgment – non-variation clause – oral agreement alleged – application of the *Shifren* principle and estoppel.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria (Mabuse J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

Mabindla-Boqwana JA (Meyer JA and Nhlangulela AJA concurring):

[1] The issue in this appeal is whether the Gauteng Division of the High Court, Pretoria (the high court) properly rejected a defence of estoppel relied upon by the appellants in resisting a summary judgment application. In this regard, the high court applied the *Shifren* principle, adopted by this Court in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere*.¹ In terms of this principle, if a written contract provides that any variation of its terms must be in writing, any purported variation by the parties which is not in writing will be void.²

[2] The first appellant, Ba-Gat Motors CC trading as Gys Pitzer Motoring operates a used-car dealership. The second appellant, Gybertus Pitzer is the sole

¹ *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* [1964] 4 All SA 520 (A); 1964 (4) SA 760 (A) at 765C.

² 9 *Lawsa* 3 ed para 345. This Court has reaffirmed the *Shifren* principle in *Brisley v Drotzky* 2002 (12) BCLR 1229 (SCA); 2002 (4) SA 1 (SCA) paras 10-12.

member of the first appellant. The respondent, Kempster Sedgwick (Pty) Ltd operates a Volvo franchise from leased premises.

[3] On 21 February 2017, the respondent concluded a written agreement to sub-lease a portion of the premises to the first appellant commencing on 15 March 2017 to 30 September 2020. The first appellant agreed to pay a rental amount of R100 000 plus VAT, per month for the initial 12 months and thereafter rental increased by 8% on the anniversary of the commencement date. Notably, the sub-lease agreement (the agreement) contained a non-variation clause. Clause 13.3 of the agreement read:

‘No agreement varying, adding to, deleting from or cancelling this Sub-Lease (including this clause) and no waiver of any right under this Sub-Lease shall be effective unless in writing and signed by or on behalf of the parties.’ (My emphasis.)

[4] In addition, clause 13.4 of the agreement stated:

‘No relaxation by a party of any of its rights in terms of this Sub-Lease at any time shall prejudice or be a waiver of its rights (unless it is a signed written waiver), and it shall be entitled to exercise its rights thereafter as if such relaxation had not taken place.’

[5] The second appellant bound himself jointly and severally as surety and co-principal debtor with the first appellant in favour of the respondent for all or any obligations of the first appellant arising out of or in any way connected to the sub-lease.

[6] The first appellant paid escalated rent up to and including April 2019 and refused to pay any rent thereafter. This prompted the respondent to institute action

against the appellants in the high court, claiming payment of an amount of R938 952 for arrear rental, for the months of May 2019 to October 2019.

[7] The appellants delivered a plea denying any obligation to pay rental beyond April 2019. According to the appellants, the sub-lease between the first appellant and the respondent no longer subsisted. They alleged that it was cancelled in terms of an oral agreement concluded between the first appellant and the respondent during or about May/June 2018. In this regard, they alleged that ‘it was agreed that the sub-lease would terminate upon the [first appellant] securing an alternative premises (“the new premises”), from which the [first appellant] would continue with its business activities, alternatively, the sub-lease would terminate on a date to be provided to the [respondent] by the [first appellant] by notice’.

[8] The appellants further pleaded that the respondent ‘is estopped from denying that the sub-lease was cancelled in terms of the aforesaid oral agreement and/or contending that the cancellation agreement relied upon by the [appellants] is of no force and effect as it [did] not comply with the requirements of clause 13.3 of the sub-lease and/or that the [appellants] are precluded from relying on an oral cancellation agreement by the provisions of clause 13.3 of the sub-lease’.

[9] The basis for this defence is that during or about May/June 2018, the respondent, represented by one Thomas Reyneke (Reyneke), an employee of the respondent’s landlord in the main lease agreement, Steve Atkinson (Atkinson), the director of the respondent and one Org Robertse (Robertse), informed the second appellant, who represented the first appellant, of a request to vacate the premises, as the respondent required them for a Subaru dealership.

[10] The second appellant informed the said ‘representatives’ that the first appellant was not interested in vacating the premises. In an endeavour to convince him, they took the second appellant to view alternative premises offered to the first appellant. The second appellant was however not satisfied with the alternative premises shown to him. Reyneke then showed him an empty stand next to a McDonald’s outlet, which he considered as a viable option upon which to erect new premises. Reyneke subsequently approached him with suggestions and preliminary plans for the new premises.

[11] These actions persuaded him, as the representative of the first appellant, to agree to vacate the premises and move the first appellant’s business to new premises. The construction of these new premises proceeded and it was envisaged that the first appellant would vacate the premises and move its business to the newly constructed one, once they were completed. According to the second appellant, had it not been for the request made by the respondent’s representatives, the first appellant would not have proceeded to secure the new premises and incur the expenses in regard thereto.

[12] The appellants contend that it is against that backdrop that the first appellant ‘entered into the oral cancellation agreement with the [respondent] . . . [who] assured the first appellant that the sub-lease would be validly cancelled in terms of the oral agreement that was concluded during or about May/June 2018’. The first appellant acted on the correctness of the facts represented by the respondent’s representatives and proceeded with the construction of the new premises and vacated the leased premises to take occupation of the newly constructed premises, according to the appellants.

[13] The appellants further allege that, at no point during the construction of the new premises, which happened with the full knowledge of the respondent's representatives, did the respondent inform the appellants that the first appellant remained bound by the agreement for the full term thereof. The first appellant acted to its detriment, as a result of the intentional, alternatively negligent representations made by the respondent's representatives. Had the first appellant known that the respondent intended to invoke the provisions of clause 13.3 of the agreement and/or insisted on written cancellation of the agreement, the first appellant would not have proceeded to secure the new premises and incur costs in relation thereto.

[14] The respondent applied for summary judgment, which was resisted by the appellants. In considering the application, the high court found as follows:

‘A contract with a non variation clause cannot be amended orally.

...

I am satisfied that on the basis of the authorities that I have cited, such a cancellation is [in]valid, because it is not in keeping with the non variation clause. Therefore, if a party raises an oral cancellation or variation of an agreement, such defence is invalid and such a party can be regarded as having raised no defence at all.

...

There is, however, another aspect that this Court should turn its mind to, and that is the date of termination of the agreement. It will be recalled that in this matter, even after the purported oral cancellation of the agreement, the [appellants] retained the keys to the building. In terms of the law, even if the [appellants] did not occupy the premises concerned, the mere fact that they had in their possession the keys to the premises, it means that the agreement only terminated [when] the [appellants] returned the keys to the [respondent].’

[15] The high court did not consider it necessary to deal with estoppel considering its findings on the purported oral cancellation of the agreement. The appeal is before us with the leave of this Court.

[16] In *Brisley v Drosky*,³ this Court endorsed the *Shifren* decision as representing ‘a doctrinal and policy choice which, on balance, was sound’.⁴ It, however, recognised that ‘in addition to the fraud exception, there may be circumstances in which an agreement, unobjectionable in itself, will not be enforced because the object it seeks to achieve is contrary to public policy’.⁵

[17] The appellants do not rely on the defence that the agreement or clause 13.3 (the non-variation clause) offends public policy. Nor do they allege fraud or deceit. They contend for estoppel by representation. Apart from the fact that the alleged representation is obscurely pleaded, it seems to be this: the respondent’s representatives represented to the second appellant that the agreement would be cancelled upon the first appellant securing alternative premises and the second appellant was led to believe that the non-variation clause would not be enforced.

[18] The appellants specifically stated that they do not rely on the respondent’s waiver of its rights to enforce the non-variation clause. The oral agreement, therefore, is not pleaded as a *pactum de non petendo in anticipando* (agreement not to sue) that may stand alongside the non-variation clause. It is not denied that the alleged oral cancellation amounts to a variation, deletion or cancellation of the agreement, as contemplated in the non-variation clause, which clause 13.3 is

³ *Brisley v Drosky* 2002 (12) BCLR 1229 (SCA); 2002 (4) SA 1 (SCA).

⁴ *Ibid* para 90.

⁵ *Ibid* para 91.

designed to guard against. What is raised is that the respondent is estopped from relying on the non-variation clause.

[19] This Court in *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd*,⁶ defined estoppel as:

‘The essence of the doctrine of estoppel by representation is that a person is precluded, ie estopped, from denying the truth of a representation previously made by him to another person if the latter, believing in the truth of the representation, acted thereon to his prejudice (see Joubert *The Law of South Africa* vol 9 para 367 and the authorities there cited). The representation may be made in words, ie expressly, or it may be made by conduct, including silence or inaction, ie tacitly (*ibid* para 371); and in general it must relate to an existing fact (*ibid* para 372).’

[20] It follows that if a party reasonably believes in a misrepresentation made by another and relies on it to its own detriment, such a party may hold the latter to the misrepresentation and prevent the representor from relying on the true state of affairs.⁷ ‘[A] party may only rely on estoppel if the reasonable person on the street would also have been misled by the conduct on which the estoppel is founded’.⁸

[21] However, before one gets to whether the pleaded facts reveal conduct on the part of the respondent’s alleged representatives, that would have led a reasonable person in the position of the appellants to believe that the respondent would not rely on the non-variation clause, an antecedent question is whether the appellants’ reliance on the defence of estoppel as pleaded is sustainable in law.

⁶ *Aris Enterprises (Finance) (Pty) Ltd v Protea Assurance Co Ltd* [1981] 4 All SA 238 (A); 1981 (3) SA 274 (A) at 291D-E.

⁷ *University of Johannesburg v Auckland Park Theological Seminary and Another* [2021] ZACC 13; 2021 (8) BCLR 807 (CC); 2021 (6) SA 1 (CC) para 118.

⁸ *Ibid*.

[22] This Court in *HNR Properties CC and Another v Standard Bank of SA Ltd*⁹ had occasion to deal with whether a debtor was released from a suretyship agreement by waiver or estoppel when a suretyship agreement required the release by a creditor in writing. The appellants therein had relied on waiver and estoppel, amongst other grounds, to advance a defence that they were released from the suretyship agreements, which contained a no-cancellation or non-variation clause like the one in this case.¹⁰ This Court had this to say:

‘Courts have in the past, often on dubious grounds, attempted to avoid the *Shifren* principle where its application would result in what has been perceived to be a harsh result. Typically, reliance has been placed on waiver and estoppel. *No doubt in particular circumstances a waiver of rights under a contract containing a non-variation clause may not involve a violation of the Shifren principle*, eg where it amounts to a *pactum de non petendo* or an indulgence in relation to previous imperfect performance. (For an interesting discussion on the topic, see Dale Hutchison *Non-variation Clauses in Contract: Any Escape from the Shifren Straitjacket* (2001) 118 SALJ 720.) But nothing like that arises in the present case.

The appellants contend that they were released as sureties *by virtue of the conduct of the bank*, coupled with a consensual waiver of the provisions of clause 15. In my view, a factual basis for such a contention was not established on the evidence. *But even if it had been, it would have amounted, in the circumstances of the present case, to no more than a variation of clause 15 which was not in writing. This is precluded by clause 16. To hold otherwise, would be to render the principle in Shifren wholly ineffective.*

The same applies to the appellants’ reliance on estoppel. In their plea, the appellants alleged that Linnell had represented to Berthold that the appellants were released from their suretyship obligations and that, relying on such a representation, the appellants had acted to their prejudice. The representation was clearly not established and in argument counsel sought to rely on a representation based more generally on the bank’s conduct together with the letter dated 20 April

⁹ *HNR Properties CC and Another v Standard Bank of SA Ltd* [2003] ZASCA 135; [2004] All SA 486 (SCA).

¹⁰ The clause read as follows: ‘No cancellation or variation of this suretyship shall be of any force or effect whatsoever unless and until it is recorded in writing signed by or on behalf of the Bank and the surety’. (Ibid para 20.)

1998. *But even if there had been such a representation, it would not assist the appellants. Where a release is required to be in writing, as in the present case, it may perhaps be possible, in limited circumstances, to frame an estoppel in such a way as not to violate the Shifren principle. It is unnecessary to consider what those circumstances would have to be. What is clear is that an estoppel cannot be upheld when the effect would be to sanction a non-compliance with provisions in a suretyship agreement of the kind contained in clauses 15 and 16. It follows that the appellants' reliance on waiver and estoppel must similarly fail.*¹¹ (My emphasis.)

[23] Considering these principles, the question is, were the plea of estoppel by the appellants to be upheld, will it not have the effect of sanctioning non-compliance with the provisions of the agreement of the kind contained in clause 13.3? Given that prevailing position, it is difficult to see how the defence of estoppel would work out in this kind of situation. To uphold an estoppel in such circumstances would negate the very purpose and effect of the non-variation clause. Estoppel may only be framed on limited grounds. Although the Court in *HNR Properties CC* did not say what those could be, it did stress that such reliance must not violate the *Shifren* principle.

[24] In my opinion, upholding the defence of estoppel in the present matter would be to do so on dubious grounds and only because the rejection of such would appear harsh to the appellants, something the Court in *HNR Properties CC* cautioned against. To find otherwise would violate the *Shifren* principle. Further, it would render clause 13.3 of the agreement nugatory; this could not have been the intention of the parties when they concluded the agreement.

¹¹ Ibid paras 20-22.

[25] I have considered the decision of this Court in *BMW Financial Services (SA) (Pty) Ltd v Tabata*,¹² which also dealt with suretyship and in which estoppel was raised as a defence. In that case, BMW claimed some R9.5 million from three individuals, including Mr Tabata, the respondent in that case, and two companies in terms of suretyship agreements. Mr Tabata held shares in a company called Vuwa Motor Group (Pty) Ltd (VMG). He sold his shares in VMG. The sale of shares agreement had a clause that read:

‘[T]he Purchasers undertake in favour of the Sellers to procure the written release of Vuwa and/or Tabata from all guarantees/deeds of suretyship contemplated above and to deliver such written releases to the attorneys by the date and in the manner contemplated in clause 7.2.3 of this contract.’

[26] The deeds of suretyship were given in favour of various creditors, including BMW. An attorney, Mr Dixon, entrusted to secure Mr Tabata and Vuwa’s release from the deeds of suretyship, wrote a letter to various creditors, including BMW, addressed to Mr Steyn, stating that their consent was a precondition to the release of Mr Tabata and Vuwa and that those creditors will be required to advise of their ‘requirements with a view to securing the necessary releases by [the] . . . deadline’. Mr Dixon called Mr Steyn to inquire about the process to be followed for the release, but Mr Steyn told him that BMW held no suretyships from Vuwa or Mr Tabata. Mr Steyn conveyed this representation to Mr Tabata and Vuwa, who accepted such to be the position and acted according to this representation.

[27] The distinction between *BMW Financial Services (SA)* and the present matter is manifest: there, the representation did not concern the non-variation clause. In other words, BMW’s case was not that, for the release to have been

¹² *BMW Financial Services (SA) (Pty) Ltd v Tabata* 2018 JDR 1286 (SCA).

effective, it had to be reduced to writing. The dispute turned on the telephonic conversation between Mr Dixon and Mr Steyn and its contents. On appeal, this Court accepted that the telephone conversation occurred. Accordingly, the representation there was that there were no suretyships. A non-variation clause or its violation by the alleged representation, was not in issue in that case.

[28] The appellants' pleaded case also fails at another level. The conclusion of the alleged oral agreement is based on the following facts: (a) the respondent's representatives approached the second appellant to vacate the premises and take alternative premises, which were not to his liking; (b) the representatives showed him vacant land where new premises could be constructed; (c) the second appellant, on behalf of the first appellant, went ahead to construct these new premises; (d) while all this was taking place the respondent was silent and never advised that the non-variation clause would be relied upon.

[29] These facts, in my opinion, are a far cry from demonstrating the conclusion of an agreement to the effect that the agreement was cancelled. I do not see how a reasonable person in the position of the second appellant would, having knowledge of the true facts, believe that the first appellant would be released from the agreement to occupy premises where the respondent would no longer receive any rental income. We however do not need to traverse this point any further.

[30] In the circumstances, oral evidence will not assist the appellants. I am impelled, therefore, to find that the defence raised falls short of a *bona fide* defence that is good in law. Accordingly, the high court's order granting summary judgment in favour of the respondent must stand.

[31] For these reasons, the appeal is dismissed with costs.

N P MABINDLA-BOQWANA
JUDGE OF APPEAL

Dambuza JA (Carelse JA concurring):

[32] I have had the benefit of reading the judgment prepared by my colleague Mabindla-Boqwana JA. Regrettably, I am unable to agree with the outcome reached therein. At summary judgment stage the inquiry in the high court was, in the main, whether the appellants had raised a *bona fide* defence or a defence good in law, to the respondent's claim. Importantly, the respondent had admitted having initiated the proposal that the first appellant vacate the leased premises. There were several disputes of fact, including the veracity of the authority of one of the respondent's alleged representatives at the discussions that resulted in the first appellant vacating the leased premises. These disputes would ordinarily be determined at trial.

[33] Assuming that the appellants' version was proven to be true, was the defence raised good in law? As set out in the main judgment, this Court accepted in *HNR Properties*¹³ that there is room, though small, for the defence of estoppel to claims founded on non-variation clauses. The nature or extent of that narrow window has not been defined by our courts, save to say that *Shifren* must not be violated. But in

¹³ See *HNR Properties* fn 9 in the main judgment.

the past this Court has, in similar cases, considered the plea of estoppel within the context of the evidence tendered. It did so in both *HNR Properties* and in *Tabata*.¹⁴

[34] Estoppel essentially operates to prevent a party that has made a representation from denying the truth thereof where the representee has acted thereon to his detriment. The objective is to prevent litigants from seeking to escape, for opportunistic reasons, agreements which they concluded.

[35] In my view the reliance on representation in this case is comparable to that which was pleaded in *Tabata* and in *HNP Properties*. The clauses of the suretyship that were under consideration in *Tabata* appear in *BMW Financial Services (SA) (Pty) Ltd v Finlay and Others*¹⁵ (*Finlay*, the court *a quo* in *Tabata*) as follows:

‘3.6 This suretyship is a continuing suretyship that shall remain of full force and effect, notwithstanding the fluctuation in, or temporary extinction of, the Customer's obligations to BMW Financial Services. This suretyship may not be withdrawn, revoked or cancelled without BMW Financial Services prior written consent.

3.12 This document was fully completed prior to signature by the Surety. The suretyship may only be amended or cancelled where such amendment or cancellation is reduced to writing and signed by the Surety and BMW Financial Services. BMW Financial Services shall not be bound by any undertakings, representations or warranties not expressly recorded in this document.’¹⁶

[36] In that case, BMW had contended that these clauses precluded reliance on oral cancellation, revocation or withdrawal from the suretyship and that the representation relied on by Mr Tabata was no proper defence as it had been made orally’.¹⁷ This Court upheld the high court’s dismissal of BMW’s claim against Mr

¹⁴ See *Tabata* fn 12 in the main judgment.

¹⁵ See *BMW Financial Services (SA) (Pty) Ltd v Finlay and Others* [2017] ZAGPPHC 181 (GP).

¹⁶ *Ibid* para 26.

¹⁷ *Ibid* para 25.

Tabata. Essentially, it upheld the plea of estoppel. It might be that there are pertinent features that distinguish this case from *Tabata*. However, they are not immediately apparent to me at this stage.

[37] Consequently, I do not agree that the plea tendered by the appellants in this case is a sham or not good in law. To deprive the appellants of the right to have their case determined in the ordinary course of events, by granting the stringent remedy of summary judgment, in these circumstances would be unjust. Accordingly, I would have upheld the appeal.

N DAMBUZA
JUDGE OF APPEAL

Appearances

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