

REPUBLIC OF SOUTH AFRICA

(1) REPORTABLE: YES / NO
(2) OF INTEREST TO OTHER JUDGES: YES/NO
(3) REVISED.

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SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 2009/45448

In the matter between:

STEYN: JAMES

First Plaintiff

STEYN: DEREK

Second Plaintiff

and

KAREE KLOOF MELKERY (PTY) LTD

First Defendant

VISSER: THEUNS LOUIS

Second Defendant

JUDGMENT

PETER AJ

[1] The issue in this trial action is whether or not the first and second plaintiffs validly entered into an agreement in terms whereof the parties, and in particular the first and second plaintiffs, compromised their claims and settled their disputes with the first defendant, arising from a written agreement between the plaintiffs and the first defendant. The validity of the agreement is to be tested by reference to both compliance with entrenched formalities imposed by the parties, known as the *Shifren* principle and by determining the limits of the *Shifren* principle.

[2] At all times material to this action and up until 2007, the Steyn family lived on the farm “Stadigfontein” on which a dairy farming business operated. The dairy farming business appears to have been conducted by Mr James

Steyn, the first plaintiff (“Mr Steyn Snr”) in partnership with his son Mr Derek Steyn, the second plaintiff (“Mr Steyn Jnr”). The land upon which the dairy farming business was conducted was owned by Mr Steyn Snr and his wife, Mrs Dolores Steyn (“Mrs Steyn”). As a result of contact through Mrs Steyn’s sister, the second defendant (“Mr Visser”), commenced negotiations in 2007 to purchase from the Steyns both the land and the farming business. On 15 May 2007, two written agreements of sale were concluded. The first concerned the sale of the land by Mr Steyn Snr and Mrs Steyn to a company Autumn Storm Investments 384 (Pty) Limited, represented by Mr Visser. The second agreement was the sale of the dairy farming business by Mr Steyn Snr and Mr Steyn Jnr to the first defendant company, represented by Mr Visser. Mr Visser signed as surety and co-principal debtor for the first defendant. No issue arises from the first sale agreement in respect of the land.

[3] In terms of the sale of business agreement, the first defendant purchased the dairy farming business from the first and second plaintiffs for the sum of R1 809 250,00. A deposit of R1 million was payable on or before 1 July 2007. The balance was to be paid in thirteen monthly instalments of R62 250,00, commencing on 1 August 2007. Thereafter each instalment was to be paid on the first day of each following month. The agreement expressly recorded that no interest was payable on the price. The business was sold as a going concern and expressly included a herd of livestock, a feed mixer, a tractor, a wagon, approximately 700 tons of animal fodder, the goodwill and the name of the business. The effective date of the agreement was midnight on 30 June 2007. The livestock was ascribed a value of R1 444 400,00 and the 700 tons of fodder agreed at the sum of R120 000,00. The agreement included an express provision for the retention of ownership in favour of the sellers of the livestock until payment of the full purchase price had been made. Clause 15.1 of the sale of business agreement recorded that the agreement was the whole agreement between the parties and no agreement in conflict with the provisions thereof was to be binding on the parties unless it was reduced to writing and signed by all the parties. The written agreement itself was signed on behalf of the sellers by only Mr Steyn Snr.

[4] Prior to the conclusion of the agreement and on 1 April 2007, a payment of R225 000,00 was made in cash by Mr Visser.

[5] The transaction was further complicated by the fact that, prior to the conclusion of the two agreements and in anticipation thereof, during or about mid April 2007, Mr Visser caused approximately 200 further dairy cows to be brought onto the farm. From that time up until the effective date of the agreement, these cows were fed and managed by the Steyns who were required to recoup the cost of maintaining and the upkeep of the animals from the revenues generated from their milk yield. In this regard it appears that Mrs Steyn was burdened with the task of keeping track of and accounting for the feed consumption of these animals and their production output. In addition, Mr Visser's brother came to stay on the farm to familiarise himself with the business as it seemed he was to be involved in its future day to day management.

[6] On 1 July 2007, a further payment of R800 000,00 in discharge of the purchaser's obligation to pay the initial deposit of the purchase price was made. On 3 July 2007 and 8 August 2007 respectively, two payments of R62 250,00 were made.

[7] On 21 August 2007, Mr Visser addressed a letter to the Steyns recording a number of complaints. The complaints are summarised as follows: the land was purchased at almost twice the highest going price per hectare in the area, the general condition of the farm was below average and intensive maintenance was required for fencing, gates, paths, houses and buildings which were in a poor condition, the inadequacy of grazing pastures giving rise to the need to purchase feed and the performance of both the tractor and the feed mixer. The letter of complaint was taken up by attorneys Liebenburg Malan Liezel Horn Inc for the Steyns. This led to discussions concerning the disputes and in particular accounting issues arising from the additional cows brought onto the farm prior to the effective date.

[8] On 19 September 2007, a written agreement of settlement was concluded between the first and second plaintiffs and the first defendant, represented by the second defendant (“the first settlement”). The first settlement was signed by Mr Steyn Jnr on behalf of the seller. Mr Steyn Snr’s signature was absent from the document. The first settlement provided for the return of the feed mixer in return for a credit, a reduction of the price of the tractor to R20 000,00, a credit in respect of the slaughter of a bull and an undertaking by the sellers to rectify the shortage of fodder delivered as at the effective date. The joint dairy farming from the second half of April to the end of June 2007 was acknowledged and there was an undertaking to credit the first defendant for duplications of amounts charged and errors in accounting.

[9] On 5 and 7 November 2007, the first defendant made two further payments each of R30 538,14.

[10] The first settlement did not bring about an end to the dispute between the parties. Later in November 2007 another dispute developed between the parties when Mr Steyn Jnr discovered that Mr Visser had sold 23 animals and was attempting to sell further livestock. This was alleged to be in contravention of the rights of the plaintiffs by reason of the express terms of the sale which provided for the retention of ownership in the animals until the full purchase price had been paid. This dispute in turn gave rise to urgent proceedings in the Vereeniging Magistrates’ Court. The deponent to the founding affidavit was Mr Steyn Jnr. Both the first and second plaintiffs were represented in these proceedings by a new firm of attorneys, De Bruyn & Vennote. By this stage, Mr Visser had engaged the services of a firm of attorneys Miller & Nolte Inc who thereafter dealt with the matter. Settlement discussions were held at De Bruyn & Vennote’s offices on 6 December 2007. On the following day a payment was made of R142 000,00 in cash to Mr Steyn Jnr, apparently in settlement for livestock which had been sold.

[11] At that stage the settlement negotiations dealt with a number of disputes. The first defendant had complained that there was a shortfall of sixteen heifers and the best milk cow was absent from the herd that had been handed over. The purchaser raised disputes about the defective condition of the feed mixer and the tractor. Complaints were made about the overgrazing of the property leased out to a neighbouring farmer and the shortage in the quantity of fodder at the date of handover. According to the evidence of both parties, at some stage it was determined that Mr Steyn Jnr would be the only member of the Steyn family present at meetings held with the attorneys and Mr Visser.

[12] In any event, on 7 December 2007, attorneys De Bruyn & Vennote sent a settlement offer by way of telefax on behalf of the first and second plaintiffs. The letter was addressed to the first defendant's attorneys. The letter proposed that the first defendant pay to the plaintiffs the sum of R300 000,00. The sum of R300 000,00 was to bear interest at the rate of 15,5% per annum from the date of signature of the settlement to the date of final payment, such interest to be calculated on the outstanding balance. The balance was to be paid by way of monthly payments of R25 000,00 together with the interest with the first payment to be made on or before 7 January 2008. The offer expressly recorded that the settlement agreement ("the second settlement") was not in novation of the existing purchase agreement to the extent that it did not conflict with the provisions thereof. Over and above the payment of R300 000,00 a contribution to the plaintiffs' legal costs in the sum of R5 000,00 was required. The other terms of the offer are not relevant for the present purposes.

[13] On 12 December 2007, the first defendant's attorneys sent a letter by telefax to the plaintiffs' attorneys confirming that the settlement proposal set out in the letter of 7 December 2007 was acceptable. The letter recorded that R100 000,00 had been paid on 11 December 2007 to the plaintiffs and the capital balance was to be altered to the sum of R200 000,00. The letter recorded that in all likelihood the balance of R200 000,00 would be paid

before 7 January 2008 to finalise the matter and if such balance was not paid on or before 7 January 2008, then the provisions relating to the repayment of the balance at the rate of R25 000,00 per month would apply.

[14] In the event, the payment of R100 000,00 was only reflected in the plaintiffs' bank account on 13 December 2007. A further payment of R210 000,00 was paid into the plaintiffs' bank account on 14 December 2007.

[15] On 14 January 2008, the plaintiffs' attorneys wrote to the defendants' attorneys recording their understanding that the defendants had paid the full outstanding balance as referred to in their letter of 7 December and in that sense the matter was finalised. The letter called for payment of the R5 000,00 in respect of the legal costs so that the matter could be finalised. On 1 April 2008, a letter was addressed to De Bruyn & Vennote enclosing payment of a cheque of R5 000,00 in respect of the legal costs in full and final settlement. It is unclear to me whether the payment was in fact made. It is not necessary to make any finding in this respect as R310 000,00 had in fact been paid. This more than covered the capital, interest and costs required in terms of the second settlement agreement.

[16] Thereafter for almost a year and a half, the disputes appear to have been put behind the parties. However on 16 September 2009, a letter was sent by attorneys Zehir Omar, on behalf of the plaintiffs, demanding payment of the sum of R410 820,72 claimed as the balance outstanding in respect of the sale of business agreement.

[17] The plaintiffs' summons was based on the sale of business agreement dated 15 May 2007. The claim alleged the written terms and default on the part of the first defendant having failed to make timeous and proper payment of the instalments of R62 250,00 per month. The summons claimed the amount of R410 820,72 due and payable. This amount was later amended at trial to an amount of R413 673,72. The plaintiffs' calculation of the amount outstanding gave credit for R1 million paid by way of deposit, the two

instalments of R62 250,00, the two payments of R30 538,14 made in November 2007 and a credit was given for the R210 000,00 paid on 14 December 2007. The formulation of the plaintiffs' claim ignored the first and second settlement agreements.

[18] The defendants' plea originally relied on the denial that the amount due under the agreement had been paid and asserted the existence of the first settlement agreement. On the second day of trial an amendment was sought and granted which introduced, as an additional defence, the second settlement agreement.

[19] It is common cause between the parties that there existed a myriad of disputes which I have enumerated above. Witnesses differed as to the merits of the various disputes but it was common cause that the feed mixer was returned to the plaintiffs and a sum of R277 000,00 had been paid to the plaintiffs by the first defendant for which the defendants have not been given credit. The reason for this, according to the evidence of Mrs Steyn, was that these payments were appropriated to other claims that had arisen between the parties outside the written sale of business agreement, relating to the first defendant's livestock that had been put on to the farm in April 2007 and matters ancillary thereto. It was also further common cause that there was a duplication of R14 830,90 to which the first defendant was entitled in respect of such other transactions. The plaintiffs' evidence, given by Mrs Steyn, did not dispute that the grazing pastures on the farm had been depleted or that the fodder that was delivered was less than 700 tons. Mrs Steyn attributed the cause to the defendants having brought an additional 200 cows onto the farm. It was also common cause that the feed mixer had been returned to the plaintiffs.

[20] The plaintiffs' challenge to the settlement agreements was that they did not comply with the formalities in clause 15.1 of the sale of business agreement.

The Shifren principle

[21] The principles of freedom of contract and that contracts must be enforced (embodied in the Latin expression *pacta sunt servanda*), or sanctity of contract, are fundamental to the South African Roman Dutch common law of contract. Prior to the decision in *SA Sentrale Ko-op Graanmaatskapy Bpk v Shifren en andere* 1964 (4) SA 760 (A), in the context of agreements which entrench their provisions with a clause prescribing formalities for the subsequent variation of the terms of the earlier agreement, these principles were applied with equal vigour to both sides of the debate over the question whether the original contract prescribing formalities should prevail over a later contract executed by the parties without observing the formalities, see Hahlo (1965) 82 *SALJ* 4 and Reinecke and Van der Merwe (1964) 28 *THRHR* 154. Ultimately in *Shifren*, the application of these principles has recognised that, through the exercise of freedom to contract, parties can restrict their freedom to contract and their autonomy. This they do by prescribing that any future agreement to vary or alter the terms of a contract, must comply with prescribed formalities. Where such provision is itself entrenched, the original agreement is incapable of being validly altered without complying with such prescribed formalities. This has become known as “the *Shifren* principle”. The *Shifren* principle has survived constitutional challenge in recent times, *Brisley v Drotsky* 2002 (4) SA 1 (SCA). As pointed out in *Brisley*, at 11B - H, *Shifren* gave greater weight to the parties’ original exercise of contractual freedom than to their capacity to undo their original choice without limitation. In so doing, the court made a policy choice between two opposing standpoints where there were weighty arguments on both sides. It did not necessarily come to one answer that was right in absolute terms with the other answer being wrong.

[22] The policy in *Shifren* was that in circumstances where the parties have incorporated a formalities clause which itself is entrenched against an oral variation, there was no reason to find why one party cannot hold the other party thereto. The policy is one of certainty and to give effect to the intention

of the parties, through such a clause, to guard against disputes and difficulties of proof which can arise in oral agreements, at *Shifren* 766 G-H.

[23] Although the enforcement of the *Shifren* principle may cause hardship in particular cases, such hardship must yield to the certainty of principle in the law. However when faced with an entrenched formalities clause, the courts are astute to examine the scope of a future agreement governed by such formalities. Where the entrenched formalities apply to a future variation of the terms of the original agreement, such formalities have been held not to apply to an oral cancellation, *Impala Distributors v Taunus Chemical Manufacturing Co (Pty) Ltd* 1975 (3) SA 273 (T), an oral waiver *Phillips & another v Miller & another* (2) 1976 (4) SA 88 (W), or to a waiver by a conduct, *Van As v Du Preez* 1981 (3) SA 760 (T). Entrenched formalities clauses must be restrictively interpreted because they curtail common law freedom of contract, *Randcoal Services Ltd and others v Rand Gold and Exploration Co Ltd* 1998 (4) SA 825 (SCA) at 841 F. That a restrictive interpretation is required, on the grounds of a curtailment of freedom of contract, of a clause which is valid because effect is given to the principles of freedom of contract seems contradictory. This highlights the paradox considered in *Shifren* which is referred to in the minority judgment of Cameron JA in *Brisley* at 34 B – C.

[24] As remarked by Hutchison (2001) 118 SALJ 720, courts have frequently felt uncomfortable about applying the *Shifren* principle and have resorted to all sorts of ingenious stratagems to avoid doing so. I am mindful of the observation that the courts have frequently in the past done so on doubtful grounds, *Brisley* at 12A.

[25] In the present case, three questions arise, in respect of each of the settlement agreements. First, whether or not such settlement agreement was one within the wording of the scope of the entrenched formalities clause. Secondly, if such a requirement is present, whether or not there has been compliance. Thirdly, if there has not been compliance, whether,

notwithstanding such non compliance, the *Shifren* principle should be enforced, or the settlement agreement nevertheless be given force and effect. This third question involves an examination of the limits of the application of the *Shifren* principle.

The first settlement

[26] In respect of the first settlement agreement, there was no dispute that this settlement agreement was one within the wording of the scope of the entrenched formalities clause. That is to say, the parties were agreed that for it to be valid, it had to comply with the formalities of clause 15.1 of the sale of business agreement. It had to be in writing and signed by the parties.

[27] The agreement had been reduced to writing. The dispute between the parties was whether or not the first settlement agreement was compliant by reason of the fact that it had been signed on behalf of the sellers by only Mr Steyn Jnr. The absence of Mr Steyn Snr's signature was contended by the plaintiffs to be fatal to its validity.

[28] In the context of the alienation of land, a statutory formality is imposed requiring an alienation of land to be in writing and signed by the parties thereto or their agents authorised in writing. In this context, it has long been held that the signature of one partner serves as a signature as principal of all the partners in the partnership. That partner is not treated merely as an agent, whose authority is required to be evidenced in writing, *Potchefstroom Dairies v Standard Supply Co* 1913 TPD 506, *Miller en ander v Pienaar* 1968 (3) SA 195 (A). There is no reason to confine this principle only to formalities imposed by statute and not to extend this principle to formalities agreed by the parties.

[29] Since the first and second plaintiffs operated the business in partnership, the signature of the first plaintiff to the original sale agreement sufficed to bind the second plaintiff thereto. The signature of the second

plaintiff to the first settlement agreement was sufficient to satisfy the formalities of clause 15.1 of the sale of business agreement. Thus the first settlement complies with the entrenched formalities clause.

The second settlement

[30] The court in *Shifren* was concerned with a clause prescribing formalities for future variations of the terms of the agreements. Such clauses have commonly become known in commercial practice as “non-variation” clauses. No doubt, by reason of the restrictive interpretation given by the courts over the years to the scope of such clauses, their wording is commonly expressly formulated to include waivers and cancellations. I have deliberately chosen to use the terminology “entrenched formalities”, when describing such a clause, as the wording of the clause in the present case extends far beyond mere variations of the terms of the original agreement.

[31] The first question in relation to the second settlement is whether or not the second settlement is an agreement which falls within the scope of the entrenched formalities clause.

[32] Ms Lundström, who appeared for the defendants, relied on *Buffet Investments Services (Pty) Ltd and another v Band and another* [2009] JOL 24368 KZD as authority for the proposition that an oral agreement of compromise is not an agreement which is subject to the formalities of a non-variation provision. Paragraph 13 of the judgment in *Buffet Investments* holds that a non variation clause will prevent waiver in the general sense of an informal agreement to vary the contract but that an oral waiver could still be effectual despite a non variation clause on the basis that the terms of an agreement were to the sole benefit of the plaintiffs. This proposition was based on the authority of *Impala Distributors*. The *Impala Distributors* case is authority for the proposition that where there is an entrenched provision restricting an oral cancellation of the agreement, an oral cancellation is not possible. An oral waiver would however be valid but only in regard to a right

which accrues in terms of the contract exclusively to the party waiving. An existing cause of action arising out of a breach of contract can be waived orally. This was so held in *Impala Distributors* on the basis that *Shifren* did not deal expressly with waiver and a waiver was distinct from a variation of the contract. The distinction between “waiver” and “variation” is discussed by Hutchison, to which I have referred above.

[33] The *Buffet Investment* case dealt with an exception to a plea alleging an oral agreement in terms whereof the first plaintiff agreed in full and final settlement of the claims against the defendants to accept a reduced payment delayed in time with different security. This agreement was characterised as a waiver. I am unable, with respect, to agree with the judgment in *Buffet Investments* as a correct application of the *Impala Distributors* principle. First, not only was there a standard non variation clause which required variations to be in writing and signed by the parties to be binding, entrenched therein was a clause providing that no agreement varying, adding to, deleting from or cancelling the agreement and no waiver of any right thereunder was to be effective unless reduced to a non-electronic, hardcopy, written amendment signed by means of handwritten signatures by or on behalf of the parties. As such, the wording of the entrenched clause specifically excluded oral waiver. Secondly, in my view, the agreement was incorrectly characterised as a waiver in any event. It was certainly not the waiver of a provision exclusively for the benefit of the first plaintiff. Had this been so, a waiver of such a term would result in the term ceasing to apply. The oral agreement was one varying the performance obligations of the first defendant and if effective, created new obligations different from those contained in the agreement. Expressed differently, this was not a waiver in the sense of a right or provision which accrued exclusively to one party and having been waived was dispensed with in its entirety. Rather it was an agreement to vary the right and the corresponding obligation. If the reasoning in paragraph 13 of *Buffet Investments* were to be accepted, the *Shifren* principle would no longer have any application. Every oral agreement not complying with the formalities prescribed by the parties would be given effect on the basis that such

constituted a waiver by the party whose rights are reduced in favour of the party whose corresponding obligation is reduced by such oral agreement. I find myself in respectful disagreement with the decision in *Buffet Investments*.

[34] There is authority however for the proposition that an agreement to accept substituted performance is not a variation of the original agreement and, where such substituted performance has been fully performed, this is performance of the original agreement *Van der Walt v Minnaar* 1954 (3) SA 932 (O); *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) at 282.

[35] The first question concerning the scope of the agreement is not concerned with a characterisation of the agreement and determining whether such characterisation is an agreement to vary the terms of the original agreement. It is of little profit to attempt to characterise the settlement agreement either as a waiver, an agreement to release, an agreement not to enforce a right – a *pactum de non petendo*, a compromise, settlement, novation, an agreement to accept substituted performance or any other innominate contract. The first question is answered by determining whether or not the second settlement is an agreement which conflicts with the provisions of the original sale of business agreement. This is so irrespective of whatever label is given to the second settlement agreement.

[36] This question is answered by looking at the effect of the second settlement and asking whether or not the legal consequences thereof are inconsistent with the legal consequences of the original agreement, prior to the execution of the second settlement. I confess that I do not understand the difference, other than one of semantics, between an agreement which varies the terms of an original agreement and one which varies not the terms but the legal consequences thereof.

[37] The effect of the second settlement, is that if performed, whatever performance obligations the seller had under the agreement that were the

subject matter of a dispute between the parties and any further payment obligations the defendants would have thereunder would become extinguished on payment of the R305 000,00 and interest due as stipulated in the second settlement.

[38] The legal effect of these terms is simply inconsistent with the terms of the original agreement. That this is so is evident by the fact that the second settlement is pleaded as a complete defence to a claim brought under the original agreement. That the second settlement conflicts with the provisions of the original agreement, admits of no doubt. The first question must be answered in the plaintiffs' favour.

[39] In relation to the second question, Mr Omar, who appeared for the plaintiffs, argued that the settlement agreement was concluded by the attorneys who were not authorised to make the offer on behalf of both plaintiffs as Mr Steyn Snr had not consulted with them nor given them instructions.

[40] Lack of an agent's authority ordinarily ought to be specifically pleaded, *Tucker's Land & Development Corporation (Pty) Ltd v Perpellief* 1978 (2) SA 11 (T). It ordinarily cannot be raised without an amendment, *Nyandeni v Natal Motor Industries Ltd* 1974 (2) SA 274 (D). Although this is so, I do not intend to hold this against the plaintiffs; the defendants introduced the second settlement agreement by way of amendment on the second day of trial. In any event, the defence of lack of authority in my view must be rejected for two principal reasons. First, the attorneys had been acting for both plaintiffs in the Magistrates' Court proceedings and represented both plaintiffs in the dispute. On that basis the attorney certainly had ostensible authority to make the settlement proposal. Secondly, on the plaintiffs' evidence, the attorneys were being instructed by Mr Steyn Jnr who was in partnership with Mr Steyn Snr. As such, his instructions to the attorneys were sufficient authority for the attorneys to make the settlement offer on behalf of both partners.

[41] Although the letter of the defendants' attorneys dated 12 December 2007 is signed by the attorneys, the letter embodying the offer dated 7 December 2007 does not bear a manuscript signature of its author. The name of the attorneys is appended at the foot of the letter in typescript. This letter was transmitted by telefacsimile transmission. The lack of a signature to such letter was not something to which my attention was drawn nor to which specific reference was made by either of the parties' representatives in argument. The lack of signature is clearly a failure to comply with the formalities. Accordingly the second question must be answered in the plaintiffs' favour.

[42] The dispute is whether or not the second settlement should enjoy efficacy and primacy over the original agreement and defeat the claim. This then brings me to the third question which concerns the limits to the enforcement of the *Shifren* principle.

[43] In relation to the third question, it must be noted that the *Shifren* principle is established law and a part of the common law. The decision of the court in *Shifren* is binding upon me as a puisne judge sitting as a court of first instance and, on the authority of *Brisley*, which too, is binding upon me, there is no scope for me to reconsider the principle in the light of my obligation to develop the common law in the light of fundamental constitutional values in terms of section 173 of the Constitution.

[44] In *Brisley* an argument was advanced that a court should refuse to enforce the *Shifren* principle where to do so would be unreasonable, unfair or conflict with the principles of good faith. This submission was based on a decision of *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A). The submission was rejected as *Magna Alloys* dealt with the enforceability of an agreement in restraint of trade. In rejecting the submission, the majority in *Brisley*, at page 18 C-F, drew a distinction between agreements in restraint of trade and entrenched formalities clauses. In restraints of trade, the enforcement of a limitation on the freedom to trade

brings into collision, two fundamental considerations of public policy. These are sanctity or enforcement of contracts and the policy that everyone should be free to pursue a chosen trade. On account of these two conflicting considerations, covenants in restraint of trade themselves contain the nucleus of later being held to be unenforceable and the parties take this risk upon themselves, *Brisley* at 18 para 30.

[45] The only tension in the application of the *Shifren* principle is the paradox in having to choose between an earlier or later contract and the application of the principles of freedom and sanctity of contract.

[46] *Magna Alloys* however dealt with covenants in restraint of trade from a starting point of general principles applicable to all contracts. That is that a covenant in restraint of trade, like any other contract, lawfully concluded, ought to be enforced unless the enforcement thereof, at the time of enforcement, would be contrary to public policy. The fundamental policy consideration is the principle of the sanctity of contracts, namely that contracts ought to be enforced. Although there is no patent nucleus of a conflict of public policy considerations, it does not mean that none will ever arise later. Sanctity of contract has its limitations which are to be found in other policy considerations that are present in the enforcement of such a contract at the time it is sought to be enforced. Applying these legal principles to the present case, the limits of the enforcement of the *Shifren* principle are to be found in public policy. Hence if the *Shifren* principle is not to be enforced in the present case, such must be justified on the basis that the enforcement would be contrary to public policy. Support for this is to be found in the minority judgment of Cameron JA in *Brisley* at 34G.

[47] In the present case, the policy choice made in *Shifren* was to apply freedom and sanctity of contract and prefer the original agreement and thus enforce the entrenchment and formalities clause in the interests of certainty and to protect against disputes and difficulties of proof that arise in oral agreements.

[48] This approach of limiting the scope of the application of the *Shifren* principle, on the grounds that to enforce the principle would be contrary to public policy was adopted in a carefully reasoned judgment of Alkema J in a judgment in *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM). I agree with the reasoning therein and in particular the conclusion in paragraph 94 on page 280 of the reported judgment, save that I would add that whether or not a contractual term offends public policy is not to be determined solely by the identification of a constitutional principle which informs public policy and which is offended.

[49] As pointed out by Cameron JA in *Brisley*, at 34C-D, the courts have the general obligation which is not purely discretionary to develop the common law in the light of fundamental constitutional values. The inherent power of the High Courts to develop the common law is expressly recognised in sections 39(2) and 173 of the Constitution. The former section provides that the courts, when developing the common law must promote the spirit and objects of the Bill of Rights. In section 172(1) of the Constitution, a court is enjoined when deciding a constitutional matter within its power to declare that any law or conduct that is inconsistent with the Constitution to be invalid to the extent of its inconsistency. Section 2 of the Constitution unequivocally declares the Constitution to be the supreme law of the Republic and law inconsistent with it is invalid. The common law however is recognised in sections 39(2) and 173 and, except where inconsistent with the Constitution, remains valid. It is thus clear that where the common law conflicts with the Constitution, to the extent of such inconsistency, the common law is no longer applicable. Furthermore in developing the common law, the courts exercise their inherent jurisdiction and are required to take into account the interests of justice, section 173, in the light of fundamental constitutional values. However, where there are features of the common law which are in no way repugnant to constitutional values, and in respect of which the fundamental values of the Constitution are silent, the common law must continue to be applied.

[50] The principled basis for not enforcing an entrenched formalities clause, set out in *Nyandeni*, has been followed in *GF v SH and others* 2011 (3) SA 25 (GNP). Although I need not comment on the application of the legal principles underlying the basis for defining their limitation of the enforcement of the *Shifren* principle in *Nyandeni* and *GF*, I accept as correct such basis.

[51] The second settlement was not confined only to the sale of business agreement. It is a compromise of disputes that had arisen not only under the sale of business agreement, but also disputes that were intertwined therewith which arose from the dairy farming operations conducted by the first defendant with its cattle on the farm prior to the effective date. The second settlement, if enforced and given effect, would not only affect the legal consequences of the original agreement but would also bring to a conclusion the Magistrates' Court litigation and settle the other disputes arising from collateral agreements in relation to the additional dairy cows placed on the property prior to the effective date by the purchasers and expenses incurred with hospitality afforded to Mr Visser's brother.

[52] Thus the effect of the second settlement goes beyond merely an alteration of legal consequences of the original agreement. Agreements in relation to the Magistrates' Court proceedings and the other financial transactions and disputes arising therefrom fall outside the scope of the original agreement. These agreements were not subject to entrenched formalities clauses. The second settlement was not only a comprehensive agreement which disposed of all of these disputes but was indivisible; it did not separately identify parts of the settlement sum as relating to individual disputes. The figure was derived no doubt by considering the net effect of all the disputes and claims made by each of the parties against the other.

[53] Arising from this there are three public policy considerations which are arguably offended by giving effect to the *Shifren* principle in the present matter.

[54] The first is that there should be an end to litigation, *Boshoff v Union Government* 1932 (TPD) 345, *Firestone SA (Pty) Ltd v Gentiruco AG* 1977 (4) SA 298 (A), *Minister of Justice v Ntuli* 1997 (3) SA 772 (CC) and *African National Congress v United Democratic Movement and others (Krog and others intervening)* 2003 (1) SA 533 (CC) at 541 para 14. By not giving effect to the second settlement, the Magistrates' Court proceedings will not be finally disposed of or brought to an end.

[55] The second ground of public policy is that parties to disputes are to be encouraged to avoid litigation and the expenses, delays, hostility and inconvenience that it usually entails, by resolving their differences amicably. By reason of this public policy consideration and in order to encourage full and frank discussions to arrive at such a resolution, evidence of such negotiations and admissions made in such discussions are not admissible in ensuing litigations if the negotiations fail, *Naidoo v Marine & Trade Insurance Co Ltd* 1978 (3) SA 666 (A) at 677 C-D. Giving effect to the *Shifren* principle in the present matter will discourage not only the settlement of the disputes that have arisen in the sale agreement but reopen the Magistrates' Court litigation.

[56] This is not to say that agreements, aimed at settling litigation or bringing litigation to an end, are never subject to the *Shifren* principle. One may well conceive of cases in which there is particularly acrimonious litigation and the parties convene a settlement discussion but, by reason of mutual mistrust and hostility, do so on the prior understanding and agreement entrenched if needs be, that notwithstanding whatever might be discussed orally at such settlement meeting or negotiations, there will be no settlement agreement unless and until same is reduced to writing and signed by the parties or their representatives. In such an instance, the public policy considerations would weigh in favour of enforcing the *Shifren* principle.

[57] Thirdly if effect were to be given to the entrenched formalities clause, the principles of freedom and sanctity of contract would be violated. This is

not in respect of the tension or paradox to which I have referred to above in relation to the agreement insofar as it varies the legal consequences of the original agreement. This would be a violation of those principles in relation to the agreement insofar as it relates to the settlement of the Magistrates' Court litigation and the disputes which are outside the original agreement and relate to collateral agreements. In respect of agreement relating to these disputes, the parties have not taken upon themselves entrenched formalities.

[58] Thus the third question is to be answered in the defendants' favour. The *Shifren* principle must yield to the public policy considerations requiring the enforcement of the second settlement agreement.

[59] Furthermore and in any event, should I be wrong in giving effect to the second settlement agreement, the plaintiffs have two other difficulties. These are the first settlement agreement and the plaintiffs' own performance.

[60] The first settlement agreement in any event complies with the entrenched formalities clause. The plaintiffs' claim of R413 673,72 ignores payments totalling R277 000,00, acknowledged by the plaintiffs as having been received. R25 000,00 was received in April 2007 as part of a payment of R225 000,00 in respect of which only R200 000,00 was credited to the first defendant as a deposit. A further R10 000,00 was received on 13 July as were two further payments of R142 000,00 and R100 000,00 received on 7 December 2007 and 13 December 2007 respectively. To that ought to be added the value of the credit for feed mixer which was promised in the first settlement agreement. The evidence of all the parties was that this amount was R70 000,00. There is too a further credit by way of a reduction of part of the purchase price assigned to the tractor. The parties agreed this amount in the sum of R10 000,00. A further credit in the sum of R51 428,57 ought to be given by reason of the fact that 400 tons of fodder of the 700 tons stipulated was delivered and lastly there is admitted credit of R14 830,90 in respect of a duplication of charges applied to the defendants that ought to be given.

[61] After applying these credits, in the light of the first settlement, the first defendant has paid an amount in excess of R9 585,00 over and above the plaintiffs' claims.

[62] The plaintiffs' formulation of their claim completely ignores the first settlement agreement and the credits due which I have highlighted above. The claim is for what is calculated on the terms of the original agreement without any regard to the credits. Even if I were to disregard both settlement agreements and the credits, the plaintiffs' own performance which has emerged from four days of evidence cannot be ignored. On the terms of the original agreement, the plaintiffs have not properly performed. In particular the plaintiffs did not deliver a tractor in the condition it ought to have been, the plaintiffs have retained possession of the feed mixer and they have failed to deliver the agreed quantity of 700 tons of fodder.

[63] The sale agreement being synallagmatic, the first defendant's obligation to pay the purchase price is reciprocal to the plaintiffs' obligation to deliver the purchased subject matter. Having not rendered full performance, the plaintiffs cannot demand full performance, by reason of the *exceptio non adimpleti contractus*. A plaintiff who has not rendered full performance in a synallagmatic contract may claim reciprocal payment of a reduced contract price, in certain circumstances where such claim might be equitable. In such a claim the plaintiff the onus of quantifying the reduction, *BK Tooling (Edms) Bpk v Scope Precision Engineering (Edms) Bpk* 1979 (1) SA 391 (A) at 435 A.

[64] If the settlement agreements are to be disregarded, as contended by the plaintiffs, the reductions therein of the obligations of the first defendant, in relation to the amount of the purchase price, must thus be disregarded. However the settlement agreements also reduce the performance obligations of the plaintiffs and release them from the consequences of their admitted deficient performance in relation to the tractor, feed mixer and fodder. The consequences beneficial to the plaintiffs must similarly be ignored. The

plaintiffs are thus in the position of demanding full performance from the defendants, of the first defendant's obligations in the original sale agreement, without having rendered, or tendered, full performance themselves. They claim the full purchase price without there being any reason, other than the settlement agreements which they seek to have disregarded, why they should be excused from full performance. Furthermore, the plaintiffs fail to make any attempt to quantify the value of a reduced contract price which takes into account the deficiency in their performance. As such the claim should fail.

[65] Accordingly I grant judgment for the defendants with costs.

J R PETER
ACTING JUDGE
SOUTH GAUTENG HIGH COURT, JOHANNESBURG

Appearance for Plaintiffs:

Mr Z Omar, Zehir Omar Attorneys, Springs, Mark Anthony Beyl Attorneys, Johannesburg

Appearance for the Defendants:

Ms D M Lundström, instructed by Trevor Swarts Attorneys, Johannesburg

Date of hearing:

20 and 21 April 2011, 3 May 2011, 23 June 2011

Date of judgment:

30 November 2011