

**IN THE HIGH COURT OF SOUTH AFRICA,
FREE STATE DIVISION, BLOEMFONTEIN**

Case number: 4463/2022

REPORTABLE: YES/NO

OF INTEREST TO OTHER JUDGES: YES/NO

CIRCULATE TO MAGISTRATES: YES/NO

In the matter between:

412 BRANDFORT CC

Applicant

And

PIETER NICOLAAS VAN DER MERWE N.O.

First Respondent

[In his capacity as Trustee of the Pieter van der Merwe
Familie Trust]

JOHANNES PETRUS VAN DER MERWE N.O.

Second Respondent

[In his capacity as Trustee of the Pieter van der Merwe
Familie Trust]

DAWID JACOBUS FOURIE N.O.

Third Respondent

[In his capacity as Trustee of the Pieter van der Merwe
Familie Trust]

THE REGISTRAR OF DEEDS, BLOEMFONTEIN

Fourth Respondent

JUDGMENT BY: **RANTHO, AJ**

DATE OF HEARING: 09 February 2023

DATE OF DELIVERY: This judgment was handed down electronically by circulation to the parties' representatives by email and by release to SAFLII. The date and time for hand-down is deemed to be 30 June 2023 at 12H00.

Introduction

[1] This matter concerns a summary judgment application brought by the applicant on 17 January 2023 against the first to third respondents, in their capacity as trustees of Pieter van der Merwe Family Trust ("the Trust").

[2] The applicant seeks in this application an order for the payment of arrear rental and ejectment of the Trust from its property.

Facts

[3] The applicant is a Close Corporation and a registered owner of the property described as Farm Franz Hoek no. 412, District Brandfort, Free State Province in extent 231.8754, held under title deed T12[...] ("the property").

[4] On 02 March 2018 the applicant, entered into a written long-term lease agreement ("lease agreement") with Pieter van der Merwe Familie Trust ("the Trust"), in terms of which the applicant, as lessor, leased the property to the Trust. The lease

agreement was signed in the presence of a notary public and was registered in the deeds registry against the title deed of the property. The Trust took occupation of the property during October 2016 and has been in occupation to date.

[5] In terms of clause 2 of the lease agreement the parties agreed that the rental for the property is R6 000.00 per month (“monthly rental”), subject to an annual escalation of 8% per annum, and 70% of the net income of the pecan nuts harvested on the property. The monthly rental was payable on/or before 7 July 2017 and all subsequent monthly rentals were payable on/or before the seventh day of each successive month.

[6] In terms of clause 16 of the lease agreement the parties agreed that:

(i) The lease agreement is the entire and complete agreement between the parties and there are no undertakings, warranties, guarantees or undertakings which are not contained in the lease agreement;¹

(ii) No amendment to the lease agreement shall be of any force or effect unless it is reduced to writing and signed by the parties;²

(iii) No relaxation or indulgence is granted by the plaintiff to the Trust shall constitute a waiver or novation of the plaintiff's rights in terms of the lease agreement.³

[7] On 26 April 2022 the applicant gave notice of cancellation of the lease agreement to the respondents on the basis that the Trust had not made any monthly rental payments as agreed between the parties.

[8] The respondents oppose the summary judgment on the basis that:

¹ Clause 16.1.

² Clause 16.2.

³ Clause 16.3.

(i) When the lease agreement was concluded on 02 March 2018, de Beer was in terms of section 29(1A) of the Close Corporation Act 69 of 1984, the sole member of the applicant in his capacity as a trustee of the appointed representative of De Beers Trust and represented the application in the aforesaid capacities;

(ii) On 09 April 2018 the trustees of De Beers Trust adopted the resolution to the effect that the rental payments for the property shall be made by means of Discovery Policy ("policy") on the life of Pieter Nicolaas van der Merwe ("van der Merwe Senior") for the insured amount of R6 000 000.00 (six million rand) until 30 June 2037.⁴ In terms of the resolution, should van der Merwe Senior die before the expiry of the lease agreement on 30 June 2037, the rent would be deemed to be paid in full until 30 June 2037;

(iii) On 29 April 2018 the trustees of the Trust held the meeting wherein it was recorded in their minutes that they had accepted the resolution taken on 09 April 2018.⁵ In terms of the said minutes, the premium of the policy would serve as a payment of the remaining extent of 'Franzhoek', excluding the pecan nut orchard, and that upon the death of van der Merwe Senior, the payment of the premiums will cease until the expiration of the term of the lease contract;

(iv) As a result of the resolution dated 09 April 2018⁶ and the minutes of the trustees' meeting held on 29 April 2018,⁷ clause 2.1.1 of the agreement, dealing with the monthly rental payment in the amount of R6 000.00 (six thousand rand), was validly amended;

⁴ Annexures "P1" and "O5" to the plea and opposing affidavit respectively.

⁵ Annexure "P1" to the plea.

⁶ Annexures "P1" and "O5" to the plea and opposing affidavit respectively.

⁷; Annexures "P2" and "O6" to the plea and opposing affidavit respectively.

(v) That the formalities in clause 16.2 of the lease agreement for the amendment to the lease agreement to be reduced to writing and signed by the parties have been complied with by means of the resolution dated 09 April 2018 and the minutes dated 28 April 2018;

(vi) Alternatively, that the applicant is estopped from relying on the non-variation clause because when the lease agreement was concluded, the late Evan de Beer (“de Beer”) was in terms of section 29(1A) of Act 69 of 1984 the sole member of the applicant in his capacity as a trustee and the appointed representative of De Beers Trust;

(vii) In further alternative to the afore-mentioned defences, that the applicant waived its right to rely on the non-variation clause by allowing the cession of the policy to De Beer Trust whilst being fully aware of its rights in terms of the said clause;

(viii) That although the applicant was entitled to 70% of pecan produced in terms of clause 2.2 and 2.2.1 of the lease agreement, the first day of harvest of pecan nut was produced during 2022 and sold for R1 551.50. The said amount was paid to the De Beers Trust, which accepted the payment thereof on behalf of the applicant; and

(ix) In the alternative, should the court find that the sum of R593 696.26 claimed by the applicant is due and payable to the applicant, that a portion of the claim in the sum of R203 130.88, falling outside the 3 years period of the applicant’s claim of arrear rental has prescribed in terms of section 11 of the Prescription Act 68 of 1969.

Issue(s)

[9] The pertinent issue to be determined in this application is whether the Trust was obliged to pay the monthly rental to the applicant as contemplated in clause 2.1 of the lease agreement.

[10] The applicant contends that it is entitled to be granted the summary judgment on the basis that:

(i) the asserted variation agreement which the respondents rely on offends the non-variation clause in the lease agreement which binds the parties to the provision that the agreement may only be amended if such amendment(s) are effected in writing and signed by both parties. It submits that clause 16 of the lease agreement lays down two formal requirements for a valid amendment to the lease agreement. The one is that there must be a written agreement and the other is that, such agreement must be signed by both parties. It argued that the resolutions on which the Trust relies on does not satisfy any of these requirements⁸ and that because clause 16 is in itself '*a provision in the agreement*', it not only entrenches the other provisions, but also itself against informal variation.⁹

[11] The respondents contend that although the resolution dated 09 April 2018 does not say in so many words, it clearly displays the intention of the trustees of De Beers Trust to vary clause 2.1 of the lease agreement.¹⁰ They raised in their opposing affidavit a new issue to the effect that the second respondent ("van der Merwe Junior") was incorrectly cited in his capacity as a trustee because he was no longer a trustee of the Trust at the time when the applicant instituted its action.¹¹

[12] The courts have stressed the fact that the remedy provided by summary judgment rule is of extraordinary and drastic 'nature' which is 'very stringent' in that it

⁸ Plaintiff's heads of argument at paras 4 and 24.

⁹ Plaintiff's heads of argument at para 25.

¹⁰ Opposing affidavit at para 9.19.

¹¹ Notice of intention to amend the defendants' plea was filed on 16 January 2023 to that effect.

closes the door to the defendant, and that ‘the grant of the remedy is based on the supposition that the plaintiff’s case is unimpeachable and that the defendant’s defence is bogus or bad in law’.¹² It is only where the court has no reasonable doubt that the plaintiff is entitled to judgment as prayed, that the plaintiff has an answerable case, that summary judgment will be granted.¹³

Respondents’ asserted variation of the lease agreement a triable issue?

[13] Counsel for respondents submitted during arguments that the intention of the parties and the validity of the resolutions are not matters to be decided at summary judgment stage. He further argued that in order to establish the capacity in which De Beer signed the resolution, there is a need to conduct a full enquiry and thus not expected of the respondents to prove on a balance of probabilities that there was a valid amendment to the agreement. In his view, once a defendant raises a legally recognisable defence, the court should refuse to grant the summary judgment application. This brings to the fore a question as to whether the respondents before this Court indeed raise a legally recognisable defence in this regard?

[14] The principle on variation to contractual agreement as developed by the then Appellate Division in **SA Sentrale Ko-op. Graanmaatskappy Bpk v Shifren en Andere**¹⁴ is that, a non-variation clause is valid and effectively entrenched both in itself and all the other terms of the contract against an oral variation. The Supreme Court of Appeal (SCA) in **Brisley v Drotsky**¹⁵ reaffirmed the *Shifren* principle and held that a court does not, in general, have discretion to refuse to enforce a valid non-variation clause.

¹² Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A); Tesven CC v SA Bank of Athens 2000 (1) SA 268 (A).

¹³ Edwards v Menezes 1973 (1) SA 299 (NC) at 304 -5.

¹⁴ 1964 (4) SA 760 at 766(B) – 767(B).

¹⁵ 2002 (4) SA 1 (SCA) at paras 6-10 and 12.

[15] The respondents argued that, contracts even those strictly regulated by the statute such as the Alienation of Land Act¹⁶, need not be contained in one document.¹⁷ They relied on the decision of *Trever Investments (Pty) Ltd v Friedhelm Investments (Pty) Ltd*¹⁸, wherein the court held that the requirements for a valid variation did not mean that the writing and the parties' signatures must necessarily be embodied in one and the same document.

[16] They further submitted that, by parity of reasoning, the agreement resulting from the signed resolution of 9 April 2018 and minutes of 29 April 2018 must be read together and regarded as an amendment to the lease agreement that was reduced to writing and signed by the parties. In their view, the resolution and the minutes are a written manifestation of an agreement between the parties to vary the lease agreement as well as a record of the terms agreed upon. They further submitted that if the requirement of the agreement being in writing is intended to ensure that there must be a written instrument that can be used as a subsequent reference, the resolutions achieved exactly that.

[17] Counsel for the applicant correctly submitted that, on the objective facts, the applicant was not a party to the resolution relied on by the respondents. I agree with the applicant on this point because neither the resolution nor the minutes of the meeting relied on by the respondents evince a contractual agreement between the applicant and the Trust in the first place.

[18] It was also correctly pointed out by the applicant's counsel that the resolution is not an offer to the Trust made by the applicant with the intention that, by its mere acceptance, a contract should be formed. Even if it was to be accepted that the resolution was an offer by the applicant to the Trust, the minutes dated 29 April 2018 relied on by the respondents do not constitute an acceptance of such offer if regard is to the contents of the resolution.

¹⁶ Act 68 of 1981.

¹⁷ See *Johnston v Leal* 1980 (3) SA 927 (A).

¹⁸ 1982 (1) SA 7 (A) at 18C-E

[19] The legal position with regard to the trust being a member of a Close Corporation is spelled out in section 29 of the Close Corporation Act 69 of 1984 (as amended) which reads as follows:

“(1) Subject to subsection (1A) or (2)(b) and (c), only natural persons may be members of a corporation and no juristic person or trustee of a trust inter vivos in that capacity shall directly or indirectly (whether through the instrumentality of a nominee or otherwise) hold a member’s interest in a corporation.

(1A) A natural or juristic person in the capacity of a trustee of a trust inter vivos may be a member of a corporation: Provided that—

(a) no juristic person shall directly or indirectly be a beneficiary of that trust;

(b) the member concerned shall, as between himself or herself and the corporation, personally have all the obligations and rights of a member;

(c) the corporation shall not be obliged to observe or have any obligation in respect of any provision of or affecting the trust or any agreement between the trust and the member concerned of the corporation;...”

[20] The Full Court of this Division held in the case of **Vermeulen & Another v Mellet N.O. & 2 others**,¹⁹ that:

¹⁹ [2021] ZAFSHC 141; [2021] 4 All SA 281 (FB) (27 May 2021)

“[27] It is clear that a trust with multiple trustees may not, without more, be a member of a close corporation. If such trust wants to become a member of a close corporation, it must appoint a representative of the trust to be a member, if the trust deed does not contain a contrary provision. That trustee will then become the member of the close corporation and not the trust. One of the reasons for this prohibition is that the trustees of a trust must act jointly whilst the member’s interest in a corporation may not be held jointly by two or more persons.” [emphasis added]

[21] The court in ***Tumileng Trading CC v National Security & Fire (Pty) Ltd***²⁰ held that:

“... As has always been the position, the opposing affidavit must "disclose fully the nature and grounds of the defence and the material facts relied upon therefor". The purpose of the opposing affidavit also remains, as historically the case, to demonstrate that the defendant "has a bona fide defence to the action". There is thus no substantive change in the nature of the "burden", if that is what it is, placed on a defendant in terms of the procedure. However, the broader form of supporting affidavit that is contemplated in terms of the amended rule 32(2)(b), will in some cases require more of a defendant in respect of the content of its opposing affidavit than was the case in the pre-amendment regime, for the defendant will be expected to engage with the plaintiff's averments concerning the pleaded defence. In this regard I anticipate that we shall also see much argumentative matter in the opposing affidavits under the new regime, for argument will be met with counter-argument.” [own emphasis]

[22] In deciding whether the defendant has set out a bona fide defence, the court is required to enquire as to: (a) whether the defendant has disclosed the nature and grounds of his defence; and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is *bona fide*

²⁰ [2020] zawchc 28; 2020 (6) SA 624 (WCC) at para 24.

and good in law. *Bona fides* in terms of Rule 32(3)(b) cannot be given its literal meaning; the rule does not require the defendant to establish his *bona fides*; it is the *defence* which must be *bona fide*, and whether it is *bona fide* or not depends upon the merits of that defence as raised in the defendant's affidavit.²¹

[23] In the present circumstances, I find that respondents' claimed variation of clause 2.1 to the lease agreement does not constitute a *bona fide* defence that is good in law to justify the refusal to grant the summary judgment.

Respondents' reliance on estoppel sustainable in law?

[24] In relying on estoppel, the respondents contend that the late De Beer, in his capacity as a sole member of the applicant and in his representative capacity as trustee of the De Beers Trust negligently misrepresented to the trustees of the Trust that the lease agreement was amended and that he had the authority to conclude such an amendment on behalf of the applicant.

[25] It is now settled law that the effect of the defence of estoppel is to bar the representor from having recourse to the true facts or state of affairs. However, if the representee had knowledge of the true facts and knew that the representation was untrue or incorrect, he cannot be misled into relying on the representation made by the representor.²²

[26] The SCA in ***HNR Properties CC v Standard Bank of SA Ltd***²³ held in respect of a written suretyship agreement that, a release which is not in writing cannot be imported into the writing from some other source and thus to hold otherwise, would render the principle of *Shifren* wholly ineffective. The SCA further held that estoppel

²¹ Erasmus Superior Practice Vol. 2: p D1-411; See *also* Joob Joob Investments (Pty) Limited v Stocks Mavundla Zek Joint Venture [2009] ZASCA 23; 2009 (5) SA 1 (SCA) ; [2009] 3 All SA 407 (SCA) (27 March 2009).

²² Van Rooyen v Minister van Openbare Werke en Gemeenskapbou 1978 (2) SA 835 (A) at 849G-H.

²³ [2003] ZACSA 135; [2004] 1 All SA 486 (SCA), par 19 to 21.

cannot be upheld when the effect would be to sanction a non-compliance when the suretyship agreement, amongst others, contain an express non-variation clause and provisions to the effect that any release must be in writing and signed by the parties or otherwise it violates the *Shifren* principle.

[27] In ***Nyandeni Local Municipality v MEC Local Government and Traditional Affairs and Another***²⁴ the court had to decide as to whether estoppel by representation would offer assistance in circumventing a non-variation clause and held as follows:

“[49] The main problem is that estoppel is forbidden if the result is not permitted by law. Stripped off all pretensions, the representation relied upon by the appellant in this case is conduct on the part of the municipal manager which points to a waiver or variation of a term or terms of the written contract of employment, including a waiver or variation of the entrenched non-variation clause. And this is precisely what the Shifren principle seeks to prevent. If our common law forbids in particular circumstances an oral variation (either expressly or by implication) of a written contract, as does the Shifren principle, then the resort to estoppel is thwarted by the rule that estoppel cannot operate in such a way as to bring about a result not permitted by law. This rule was recently reaffirmed by the Supreme Court of Appeal in HNR Properties CC and Another v Standard Bank of S.A Ltd 2004 (4) S.A. 471 (SCA) (2004) 1 All SA 486 in para 21...

...[54] I accept, as stated by Scott JA in HNR Properties (supra) at 479E, that in particular circumstances reliance on estoppel may not involve a violation of the Shifren principle. Prof Hutchison (supra) concludes at 746:

The doctrine of estoppel can offer but limited assistance in circumventing a non-variation clause. A plea of estoppel can be upheld only if the effect thereof is not to vary the contract, but rather, for example, to discharge an obligation or to

²⁴ [2009] ZAECHMC 28; 2010 (4) SA 261 (ECM).

*establish a **pactum de non petendo**. Whether resort to estoppel is necessary in such circumstances is debatable...”*

[28] It is not suggested by the respondents that the trustees of the Trust were not aware that any variation to the agreement had to be reduced to writing and signed by both parties. Therefore, the respondents’ reliance on estoppel is misplaced and not sustainable in law.

Respondents’ reliance on waiver sustainable in law?

[29] The respondents contend that the applicant, by its conduct consented to a waiver of clause 2.1 of the lease agreement. The applicant argued that it did not waive any of its rights and referred to clause 16.2 of the lease agreement, which provides that the lease agreement is the entire and complete agreement between the parties and that there are no undertakings, warranties, guarantees or undertakings which are not contained in the lease agreement.

[30] The applicant further pointed out that clause 16.3 of the agreement makes it clear that non-relaxation or indulgence granted by the applicant to the Trust shall not constitute a waiver of its rights in terms of the agreement. I agree with the approach adopted by the applicant in this regard and find that the respondents’ defence mounted on waiver falls short of a *bona fide* defence that is good in law.

The effect of joinder of the second respondent in this application

[31] It is evident from the letter of authority issued by the Master of the High Court²⁵ that the second respondent was authorised to act as trustee of the Trust at some point. The second respondent’s role in the Trust is also confirmed in the minutes of the meeting of the trustees held on 29 April 2018, which minutes form the basis of the defence raised by the respondents’ in their opposing papers. After all, this issue does

²⁵ Application papers: pg. 45.

not affect the validity of the summons because all other trustees of the Trust are properly before the Court. It is now trite that a trust is not a juristic person, unless specifically so defined in a statute. It is generally regarded as a legal institution *sui generis*.²⁶

[32] The applicant sought to cure the defect in the summons by way of an amendment substituting the second respondent. This in my view is acceptable and in line with the court's reasoning in **Standard Bank of South Africa Ltd v Roestof** ²⁷ wherein it was stated that:

"...If the papers are not technically correct due to some obvious and manifest error which causes no prejudice to the defendant, it is difficult to justify an approach that refuses the application, especially in a case such as the present one where a reading of the defendant's affidavit opposing summary judgment makes it clear beyond doubt that he knows and appreciates the plaintiff's case against him."

[33] Having considered the circumstances of this matter, I find that, save for the issue of the prescription, the respondents have not raised the defences that are good in law to justify the refusal of granting of the summary judgment application in favour of the applicant.

Costs

[34] The general rule is that the costs should follow the result. The applicant, having substantially succeeded in this application is entitled to the costs.

[35] In the result, I make the following order:

²⁶ Land and Agricultural Bank of South Africa v Parker and Others 2005 (2) SA 77 (SCA).

²⁷ 2004 (2) SA 492 (W) 496F-H.

1. The cancellation of the notarial long-term lease agreement entered between the applicant and Pieter van der Merwe Familie Trust on 02 March 2018 is hereby confirmed.
2. The first and third respondents are ordered to pay to the applicant the arrear rental amount of R390 565.38 plus interest at the rate of 15.5% per annum a *tempore morae* from date of judgment to date of payment.
3. The first and third respondents are granted leave to enter defence on a portion of a claim of arrear rental in the sum of R203 130.88 based on the defence of prescription raised in their plea.
4. The fourth respondent is directed to cause cancelation of the registration of the notarial long term lease agreement under reference number K27[...] as registered against the title deed of the farm Franz Hoek no. 412, District Brandfort, Free State Province in extent 231.8754 hectares held under T12[...].
5. Pieter van der Merwe Familie Trust is ordered to vacate the farm Franz Hoek no. 412, District Brandfort, Free State Province in extent 231.8754 hectares held under T12[...] within 14 days of this order.
6. The first and third respondents are ordered to pay the costs of this application jointly and severally, the one paying the other to be absolved.

M.R. RANTHO, AJ

APPEARANCES:

On behalf of applicant:

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Instructed by:

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On behalf of respondents:

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