IN THE HIGH COURT OF SOUTH AFRICA

FREE STATE DIVISION: BLOEMFONTEIN

Appeal Number: A37/2014

In the matter between:-

DONOVAN THEODOR MAJIEDT N O

& TWO OTHERS Appellants

and

HASSAN MAHOMED VALODIA Respondent

CORAM: JORDAAN J, *et* DAFFUE, J *et* NAIDOO, J

JUDGMENT: DAFFUE, J

HEARD ON: 24 NOVEMBER 2014

DELIVERED: 26 FEBRUARY 2015

I INTRODUCTION

[1] This is an appeal to the full bench of the Free State High Court against the judgment of De Wet AJ, leave to appeal having been granted by the Supreme Court of Appeal on 24 January 2014.

[2] The *dramatis personae* are the following: The appellants who are the trustees of the insolvent estate of the Barkley Road Development Trust ("the trustees"), the respondent and applicant

in the initial proceedings in the court *a quo*, to wit Hassan Mahomed Valodia ("Valodia"); Cooper Bezuidenhout Inc ("Cooper Bezuidenhout"), a firm of attorneys cited as first respondent in the court *a quo* but which did not feature as a party in the further proceedings and finally, the Haripersad Trust and/or its trustees ("the Haripersad Trust/trustees", as the case may be).

[3] The court *a quo's* orders read as follows:

> "1 The second, third and fourth respondents (the trustees in the appeal) are declared to have concluded a valid and binding agreement for the purchase and sale of the immovable property described as erf 24957 Galeshewe (on which a shopping centre is situated) physically situated in Barkley Road and Seochoreng Road, Galeshewe, Kimberley, Northern Cape with the applicant (Valodia) and that the agreement has not been cancelled by the respondents, but by the applicant after such agreement was repudiated by the aforesaid respondents and the repudiation was accepted by the applicant.
>
> 2 Second, third and fourth respondents are directed to pay the amount of R3 393 750.00 to the applicant.
>
> 2.1 Second, third and fourth respondents are directed to pay interest at the rate of 15.5% per annum a tempore more to the applicant.
>
> 3. Second, third and fourth respondents are jointly liable for the costs of the application, including the costs of 25 June 2013."

[4] Adv FH Terblanche SC assisted by Adv JW Steyn, appeared for the trustees before us, whilst Adv PU Fisher SC appeared for Valodia.

II **<u>THE ISSUES AS DEFINED IN THE APPLICATION PAPERS</u>**

[5] Valodia sought a declaratory order in terms whereof the deed of

sale concluded between the trustees and himself in respect of the aforesaid property be declared valid and binding and not having been cancelled by the trustees. He also sought an order for the payment by Cooper Bezuidenhout and the trustees jointly and severally of the amount of R3 393 750.00 which was paid by him as a deposit in respect of the aforesaid transaction as well as the costs of the application. It has always been Valodia's case that he borrowed the money to pay the deposit. The lender turned out to be – on Valodia's version - the Haripersad Trust.

[6] It is the trustees' case that although the deed of sale entered into with Valodia was not formally cancelled, they entered into a new agreement with the trustees of the Haripersad trust as this trust paid the deposit and not Valodia, that Valodia was fully aware of the new transaction and the eventual cancellation thereof by the trustees following Haripersad trustees' breach of contract and that Valodia and the Haripersad trustees are in cahoots in that they devised a scheme in terms whereof Valodia would claim the deposit, which the Haripersad trustees could not claim due to its breach and the consequent cancellation of their deed of sale.

[7] The trustees also rely on the fact that Valodia had the right in terms of the first deed of sale to appoint a nominee and that he appointed the HaripersadTrust as his nominee.

[8] The trustees also rely on estoppel, claiming that Valodia should be estopped from relying on the fact that he was the actual purchaser.

[9] It is evident that the above deposit was paid to the appointed

auctioneer and not to Cooper Bezuidenhout, although Cooper Bezuidenhout received the amount of R1 778 990,37 from the auctioneer after having deducted his fees and expenses. When Valodia was confronted with this aspect in the answering affidavit, he indicated that he would proceed with joinder proceedings, but the auctioneer was never joined.

III THE FINDINGS OF THE COURT *A QUO*

[10] The court *a quo* found:

1. the deposit was paid by Valodia as alleged by him, he having borrowed the money from a third party who transpired to be the Haripersad Trust, which trust transferred the money directly to the account of the auctioneer;
2. the version of Ms Norval of Cooper Bezuidenhout regarding Valodia's verbal nomination of the Haripersad Trust as purchaser was not acceptable and that in any event, the deed of sale required a written nomination;
3. the trustees ignored the first deed of sale in the absence of any written confirmation and/or authority from Valodia and concluded a second deed of sale with the Haripersad Trustees which they eventually cancelled, where after the property was sold and transferred to a third party;
4. the trustees never invoked the provisions of clause 15 of the deed of sale relating to cancellation vis-à-vis Valodia and they therefore repudiated the agreement with Valodia which repudiation he accepted, entitling him to restitution of the full deposit;
5. although there might be a suspicion that Valodia and the Haripersad trustees were in cahoots, it could not make such a

finding on the papers;

6. consequently, a valid deed of sale having been entered into between the trustees and Valodia, which has been repudiated by the trustees, which repudiation was accepted by Valodia, he was entitled to restitution and return of the deposit of R3 393 750.00."

IV GROUNDS OF APPEAL

[11] The main grounds of appeal can be summarised as follows:

1. The court erred in directing payment of R3 393 750.00 whereas the trustees and Cooper Bezuidenhout, the firm of attorneys acting on their behalf, received the amount of R1 778 990.37 only (as their auctioneer kept the balance).
2. The court *a quo* erred in ignoring the e-mails (referred to above) indicating that Valodia at the very least never objected to the conclusion of the new deed of sale and thereby indicating his agreement therewith.
3. It erred in not finding that it was in fact the Haripersad Trust which made the deposit.
4. It erred in not accepting Ms Norval's version that Valodia had nominated the Haripersad Trust and that his behaviour was indicative of a stepping away and abandoning of the transaction.
5. In not finding that Valodia and the Haripersad Trustees were in cahoots.
6. In not finding that Valodia's attempt to rely on the Shifren principle could not be countenanced in circumstances that offended public policy.

V SALIENT COMMON CAUSE FACTS IN CHRONOLOGICAL ORDER

[12] I refer to the following facts in chronological order, and insofar as there might be differences pertaining to these and the allegations under oath, I rely on the objective facts as apparent from the documentation attached to the papers.

1. On 12 December 2012 the auctioneer appointed by the trustees conducted an auction of the above property on behalf of the trustees. Valodia's telephonic bid was accepted.
2. Valodia signed the deed of sale the same day, it having been faxed to him. The words "or nominee" were written in just after Valodia's surname on the last page of the document.
3. On 19 December 2012 the deposit of R3 393 750.00 was paid into the bank account of the auctioneer by way of an electronic funds transfer (EFT)..
4. On 20 December 2012, a day later, the trustees signed the deed of sale.
5. On 21 December 2012 one Vishal, apparently one of the Haripersad trustees, sent an e-mail to the auctioneer, informing him that all further instructions pertaining to the transaction would be given by the Haripersad family, that the deposit was paid by the Haripersad Family Trust and not Valodia and furthermore, that Valodia would not be included in the further development of the transaction. On the same day Valodia caused the Haripersad Trust Deed and letters of authorisation to be sent to Ms Norval of Cooper Bezuidenhout - his version being that he intended to conclude a back-to-back transaction with the trust pertaining to the property..
6. Still on 21 December 2012 Ms Norval sent transfer documents

to Valodia by e-mail to be signed by him in his personal capacity as purchaser.

7. On 9 January 2012 Ms Norval sent amended transfer documents to be signed by the "appointed trustee of the trust" by e-mail. The heading of the e-mail makes it clear that the transferee was the Haripersad trust. A similar e-mail was sent on 14 January 2013. The first and second e-mails were addressed to Valodia's secretary and to him personally, although it is clear that the first e-mail was not sent to Valodia but to an incorrect e-mail address. The date of sale in the documents attached to the e-mails is reflected as 20 December 2012 which is clearly a mistake as by then no deed of sale had been concluded with the trustees of the Haripersad Trust, and particularly not on 20 December 2012. The new deed of sale was only signed in Durban on 10 January 2013 by one of the trustees of the Haripersad Trust and on 12 January 2013 in Bloemfontein by the trustees. Strange as it may sound, the auctioneer co-signed this document, alleging that he conducted the auction on which the property was sold to the new purchaser.
8. Ms Norval's further e-mails of 17, 24 and 25 January 2013 seeking payment of the transfer costs and guarantee for the balance of the purchase price were sent to Valodia.
9. Further letters were sent by e-mail to Valodia on 28 and 29 January 2013. On 29 January 2013 transfer documents were again forwarded to Valodia for signature.
10. On 1 February Ms Norval, probably after establishing her mistake, sent the transfer documents to one Vishal, as stated herein earlier, apparently one of the Haripersad Trustees. She

followed up her e-mail with another e-mail of 4 February 2013.

11. On 12 February 2013 the Haripersad trustees were placed in *mora* pertaining to their failure to sign the transfer documents, to provide a guarantee for the balance of the purchase price and in respect of the payment of transfer costs.
12. On 13 February 2013 Vishal faxed the signed transfer documents to Ms Norval.
13. On 14 February 2013 the transfer costs were paid by the Haripersad Trust, but on 19 February 2013 the Haripersad trustees were informed of the trustees' cancellation of the deed of sale due to their breach of contract.
14. The property was hereafter sold and transferred to a third party and registration of transfer took place on 9 April 2013. A few days earlier, on 4 April 2013, Valodia's attorney wrote a letter to Cooper Bezuidenhout insisting on transfer of the property into his client's name.

VI THE KEY ISSUES

[13] Mr Terblanche submitted that the central issue in this appeal is the applicability of the Shifren principle and whether or not it should be applied *in casu.*

[14] The trustees submit that the Shifren principle should not be applied slavishly and that recent case law supports their view that we should refuse to apply it if its application would be contra public policy. This was not raised pertinently in the trustees' answering

affidavit and the court *a quo* did not consider it. It is uncertain whether this issue was argued at all.

[15] Valodia's version is quite simple, i.e.:

1 he concluded a deed of sale with the trustees,
2 he made the required deposit, although using borrowed money,
3 he was never placed in *mora* in respect of any alleged breach of contract, and
4 the deed of sale entered into with him was not validly cancelled.

The key aspect in this regard is really whether the trustees' insistence that the Shifren principle should not be applied should be adhered to. It is common cause that they have not placed Valodia in *mora* and they have not validly, formally and in writing, cancelled the deed of sale in accordance with the terms of the document.

[16] A further issue is whether Valodia could have been entitled to restitution in circumstances when he did not pay the deposit which he claimed back as submitted by Mr Terblanche. Other grounds of appeal will be considered as well.

VII EVALUATION OF THE COURT *A QUO'S* JUDGMENT

[17] The court *a quo* concluded that Valodia in his personal capacity entered into the deed of sale as purchaser and that, although he

indicated that he might nominate another party in his stead, such nomination did not take place in accordance with the terms of the deed of sale which required written nomination.

[18] Clause 14 of the deed of sale is clear. It stipulates that where a purchaser is acting as an agent or a nominee for a principal, the purchaser shall be entitled by notice in writing to that effect, addressed to the seller or auctioneer to nominate its principal in its place as purchaser and such notice to be handed to the seller or auctioneer by no later than close of business on the day of acceptance of the offer by the seller, indicating the name and address of the nominee so nominated and which notice shall also be accompanied by the principal's written acknowledgement as provided for in clause 14. In the event of the purchaser failing to nominate a principal, he shall be bound to perform his obligations as purchaser in terms of the agreement.

[19] Clause 22 of the deed of sale contains a non-variation clause which is in line with clauses in similar agreements to the effect that no amendment of the agreement or any provision or any term thereof and no extension of time, waiver or relaxation or suspension or consensual cancellation of any of the provisions or terms of the agreement shall be binding, unless recorded in a written document signed by the relevant parties. The court *a quo* cannot be faulted for finding that the first deed of sale was never validly cancelled in accordance with the provisions of clause 22.

[20] Clause 15 of the deed of sale is the cancellation clause dealing with breach of contract and the right of the seller in the event of the

purchaser failing to comply with the provisions of the deed of sale. It is not the trustees' case that they have acted in terms of this clause and the court *a quo* correctly found that Valodia was never placed in *mora* and consequently, that no cancellation of the first deed of sale had been effected accordingly. This is not in dispute.

[21] In my view the court *a quo* is correct in its consideration of payment of the deposit. Nothing in the papers contradicts Valodia's version. It has always been his case that he borrowed the deposit, although the lender was not identified in the founding affidavit. On 19 December 2012 when the deposit was made, the Haripersad Trust was under no contractual obligation to pay any money to the auctioneer based on the conclusion of a deed of sale or its nomination as purchaser in accordance with the terms of the first deed of sale. The deed of sale entered into with the Haripersad trustees was concluded on 12 January 2013 only.

[22] The high water mark for the trustees is the ignorance and/or lack of response from Valodia during January and February, notwithstanding the e-mails forwarded to him. It is clear that he and/or his secretary received several e-mails relating to the transaction between the trustees and the Haripersad trustees. The court *a quo* did not deal specifically with this issue, but in my view it would not make any difference. It is not necessary to speculate, but it is possible that Valodia might have been prepared to play a waiting game in the hope that he might find his purchaser to conclude a back-to-back transaction. He already indicated this to be his intention at an early stage.

[23] The court *a quo* can therefore not be blamed for finding that the trustees failed to cancel the deed of sale with Valodia and that their subsequent actions are indicative of a repudiation of this deed of sale which was accepted by Valodia and therefore, as the court *a quo* correctly found, Valodia was entitled to restitution.

[24] The remaining question is whether the court could have granted an order directing the trustees to pay the full deposit to Valodia, notwithstanding the fact that the auctioneer kept an amount for his fees and expenses and paid over the amount of R1 778 990.37 only. As mentioned, Valodia believed at a stage that it would be necessary to join the auctioneer in the proceedings which he failed to do. We were not presented with any authority showing that the court *a quo* was incorrect in this regard. Representation is a phenomenon whereby one person concludes a juristic act on behalf of another whereby legal relationships are created, altered or extinguished. The representative does not act for himself, but for his principal. If a contract is concluded by the representative the rights and obligations inure to the principal and not to him. See: **LAWSA** vol 1, 3 ed, para [126] and authorities quoted.

[25] The auctioneer was the duly appointed agent of the trustees who not only arranged the auction, but accepted Valodia's offer. The deed of sale was eventually concluded directly between Valodia and the trustees. The auctioneer did not act as representative of the trustees at that stage. On the basis that Valodia is entitled to restitution, there is no reason why the trustees should not be held responsible for payment of the full deposit notwithstanding clause 5 of the deed of sale. This clause confirms the seller's obligation to

pay commission to the auctioneer which was agreed to be earned when the offer is accepted, together with other agreed costs. It was not necessary to join the auctioneer even though he signed the deed of sale as well, stipulating that he was accepting all benefits conferred upon him. The general principles pertaining to the law of agency referred to *supra,* in so far as these may find application in respect of the auction and acceptance of Valodia's telephonic offer, shall prevail.

[26] The court *a quo* did not deal with the arguments raised by the trustees before us pertaining to the Shifren principle and aspects relating thereto. I do not know whether these aspects were raised at all in the court below. These will be dealt with under the next heading.

VIII THE SHIFREN PRINCIPLE AND RELATED ASPECTS

[27] It was argued on behalf of the trustees that although the Shifren principle was previously applied slavishly, it is no longer the case and that courts nowadays refuse to apply the principle where its application would be contrary to public policy. We were then referred to the so-called modern application in relation to the Shifren principle and several authorities in this regard. The judgment of the full bench in **Nyandeni Local Municipality v Hlazo** 2010 (4) SA 261 (ECM) in particular was discussed. In that case a municipal manager was dismissed after a disciplinary enquiry. Thereafter it was contended on his behalf that the dispute should have been resolved through pre-dismissal arbitration, that the employment agreement between the parties contained a non-variation clause, no amendment was effected and consequently

the disciplinary enquiry was held in breach of the employment agreement. It was accepted that the municipal manager through his conduct consented to variation of the employment contract and he also fully participated in the disciplinary proceedings, but the full bench decided that the facts and circumstances of the case justified a departure from the Shifren principle, finding at para [108] that the municipal manager

> "invokes the Shifren principle not for the legitimate purpose of vindicating his rights, but for the ulterior purpose of delaying his dismissal, to his financial (and other) benefit, and to the financial detriment of the municipality he serves."

The municipal manager never challenged the substantive fairness of his dismissal, but belatedly relied on a procedural irregularity. It was eventually found that public policy dictated that a departure from the Shifren principle was justified. This judgment and the other judgments referred to are clearly distinguishable on the facts and I do not consider that this court is bound to follow any of the judgments and/or the reasoning contained therein.

[28] In the best traditions of the Bar Mr Terblanche referred us to **Spring Forest Trading v Wilberry** (725/13) [2014] ZASCA 178 (21 November 2014), a judgment of the Supreme Court of Appeal which was delivered a mere three days prior to the hearing of this matter, confirming the Shifren principle once again. On the face of it the judgment, as conceded by Mr Terblanche, did away with a relaxation of the Shifren principle although the SCA did not refer to any of the judgments relied upon by the trustees that support their

contentions that relaxation is possible. The SCA reiterated the applicability of the Shifren principle, *inter alia* with reference to **Brisley v Drotsky** 2002 (4) SA 1 (SCA) and RH Christie and GB Bradfield, **Christie's The Law of Contract in South Africa**, 6th ed at 464 - 466 in the following words:

> "[13] Before I consider these it is necessary to remind ourselves that when parties impose restrictions on their own power to vary or cancel a contract - as they did in this case - **they do so to achieve certainty and avoid later disputes**. The obligation to reduce the cancellation agreement into writing and have it signed was aimed at preventing disputes regarding the terms of the cancellation and the identity of the parties authorised to effect it. **Our courts have confirmed the efficacy of such clauses**." (emphasis added.)

[29] In **SH v GF and Others** 2013 (6) SA 621 (SCA) the Supreme Court of Appeal stated as follows at para [16]:

> "[16] In any event the view of Kollapen AJ that in the light of the oral agreement of variation of the maintenance order it would offend against public policy to enforce the non-variation clause, cannot be endorsed. This court has for decades confirmed that the validity of a non-variation clause such as the one in question is itself based on considerations of public policy, and this is now rooted in the Constitution…….Despite the disavowal by the learned judge, the policy considerations relied upon are precisely those that were weighed up in Shifren. In Media 24 Ltd and Others v SA Taxi Securitisation (Pty) Ltd (Avusa Media Ltd and Others as amici curiae) 2011 (5) SA 329 (SCA) para 35 Brand JA said: 'As explained in Brisley v Drotsky 2002 (4) SA 1 (SCA) (para 8), when this court has taken a policy decision, we cannot change it just because we would have decided the matter differently. We must live with that policy decision,

> bearing in mind that litigants and legal practitioners have arranged their affairs in accordance with that decision. Unless we are therefore satisfied that there are good reasons for change, we should confirm the status quo.' "

[30] In **Brisley v Drotsky** 2002 (4) SA 1 (SCA) the Supreme Court of Appeal found that the principles of *bona fides*, namely that the entrenchment clause ought not to be enforced because it would in the circumstances be unreasonable, unfair and in conflict with the principles of bona fides, could not be successfully invoked. See paragraphs [11] to [34]. Regarding good faith relied upon by the lessee in order to avoid the consequences of the non-variation clause, the court opined as follows in para [24]:

> "Om eensklaps aan Regters 'n diskresie te verleen om kontraktuele beginsels te verontagsaam wanneer hulle dit as onredelik of onbillik beskou is in stryd met hierdie werkswyse. Die gevolg sal immers wees dat die beginsel van pacta sunt servanda grotendeels verontagsaam sal word omdat die afdwingbaarheid van kontraktuele bepalings sal afhang van wat 'n bepaalde Regter in die omstandighede as redelik en billik beskou. Die maatstaf is dan nie meer die reg nie maar die Regter."

[31] It is also important to remember that the non-variation clause in contracts as in *casu* also, serves to protect the interest of all the contracting parties thereto. Unlike as indicated or as submitted by Mr Fisher in argument, I am not satisfied that the reference to waiver and the estoppel in clause 22 of the deed of sale are inserted for the benefit of the purchaser. Clause 22.3 specifically stipulates that no extension of time or waiver or relaxation of any other provisions or terms of the agreement will operate as an

estoppel against the seller and/or auctioneer, nor shall it operate to preclude the seller and/or auctioneer thereafter from exercising any rights strictly in accordance with the agreement.

[32] Mr Terblanche's main argument which runs like a golden thread through his submissions, is that Valodia should not be allowed the advantages of the non-variation clause as he walked away from the first deed of sale, he acquiesced in the conclusion of the second deed of sale which side-lined him and that he effectively waived all rights which he had accrued. Although acknowledging the non-variation clause, he submitted that it should be applied conservatively and strictly. If this is done there is sufficient room for a finding, according to him, that Valodia distanced himself from the transaction to such an extent that he abandoned and/or repudiated the first deed of sale. Such action is not covered by the provisions of clause 22.2 of the deed of sale according to the argument. In my view the trustees should not be allowed to rely on repudiation, abandonment, acquiescence and/or a stepping or walking away from the first deed of sale by Valodia. They knew very well that a valid and binding first deed of sale was entered into, that no written nomination of a purchaser was effected in accordance with the terms of the deed of sale, that Valodia was not placed in *mora* and that they have not cancelled the first deed of sale consequent upon his breach of contract, or in writing accepted the so-called repudiation and there was also no consensual cancellation of the first deed of sale. The trustees and/or their attorneys were remiss in concluding a second deed of sale with the Haripersad Trust without ensuring that the first deed of sale was properly and validly cancelled. The trustees had all

the contractual protection in the world at their disposal which they failed to apply, but now deem it appropriate to blame Valodia for the consequences. The kind of uncertainty is exactly that which the parties intended to prevent in agreeing to the inclusion of the non-variation clause. Even if there is no doubt that the parties orally agreed to a consensual cancellation, but one of them decided later to renege on the verbal agreement, the other could not enforce that agreement as the written deed of sale was still *in esse.*

IX **FINAL EVALUATION OF THE EVIDENCE**

[33] The trustees blame the court *a quo* for not dismissing the application based on the factual disputes, alternatively for not *mero motu* referring it to trial or oral evidence so that Valodia could be subjected to cross-examination. I am in agreement with Mr Fischer's argument that the material facts are clear and undisputed and that the trustees raised immaterial issues which did not need to be adjudicated.

[34] Mr Terblanche's contention that Ms Norval's evidence is "deadly" for Valodia's case is based on wrong facts. Her version is in conflict with the objective facts. If she was instructed on 21 December 2012 to transfer the property to the Haripersad trustees, the transfer documents would be prepared to give effect thereto. However it is clear that the documents e-mailed on the 21st indicate Valodia as the purchaser. She, or her direct supervisor and conveyancer at least, should have recognised that transfer of property cannot pass to a third party without there being a proper *nexus* established. *In casu* no written nomination was obtained.

[35] Mr Terblanche relied strongly on payment of the deposit in order to show that Valodia was untruthful and his evidence had to be rejected. On 20 December 2012 the Haripersad Trust was not contractually bound to the trustees to pay the deposit, but Valodia was. His version that he borrowed the money from this trust who paid it over on his behalf is uncontested and must be accepted as correct. Clearly, one Vishal of the Haripersad Trust intervened hereafter and arranged with the trustees to prepare a new deed of sale and amended transfer documents to reflect the Haripersad trustees as the new purchasers and transferees. The trustees did this at their own peril, well knowing that a valid deed of sale existed at the time.

[36] I agree with the court *a quo* that it is not possible to make a finding that Valodia and the Haripersad trustees are in cahoots and that they have in fact devised a scheme in terms whereof the deposit could be claimed back, albeit by making use of improper means. The trustees do not rely on evidence in this regard and merely insist that the established facts point to such a conclusion. Valodia's evidence is not all together satisfactory and I would have expected him to explain why he did not respond to the e-mails addressed to him which were apparently meant for the trustees of the Haripersad Trust. I also would have expected him to query the drafting of amended transfer documents, thereby effectively sidelining him. On the other hand I scrutinised the e-mails and attachments thereto from a trained legal person's perspective. Whilst Valodia might have ignored the documents, it cannot be found on the papers that he intended to defraud the trustees and/or

acted in cahoots with the Haripersad trustees. His version that he borrowed the money from the Haripersad Trust to enable him to pay the deposit and that he would remain liable towards his lender cannot be rejected on the papers. The fact of the matter is that the first deed of sale was never cancelled by the trustees and the court *a quo* came to the correct conclusion by finding that the conclusion of the second deed of sale constituted a repudiation of the first deed of sale which repudiation was accepted by Valodia, entitling him to restitution.

[37] The application of the Shifren principle is not against public policy. As again repeated by the SCA in **Spring Forest Trading** *supra* the purpose of the parties in relying on a non-variation clause is to achieve certainty and avoid later disputes. The present dispute is precisely one such dispute that the parties preferred to avoid. The trustees, trained lawyers as they are, should have known better than concluding a second deed of sale in *casu* without ensuring that the first deed of sale was properly and validly cancelled. They should not be heard to cry foul in the circumstances and they have only themselves to blame. There is no merit in the argument that the Shifren principle should not be applied *in casu.*

X **ORDER**

[38] Consequently the following order is issued:

1. The appeal is dismissed with costs.

J. P. DAFFUE, J

I concur.

A. F. JORDAAN J

I concur.

S. NAIDOO J

On behalf of the appellants:	Adv. F.H. Terblanche SC, assisted by Adv J.W. Steyn Instructed by: Christo Dippenaar Attorneys BLOEMFONTEIN
On behalf of the respondent:	Adv. P.U. Fischer SC Instructed by: Lovius Block Attorneys BLOEMFONTEIN