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IN THE HIGH COURT OF SOUTH AFRICA
[GAUTENG LOCAL DIVISION, JOHANNESBURG]

CASE NUMBER: 2023-105110

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

A LIVERSAGE AJ

[* The date of this judgment, despite any contraindications contained herein, is the date of uploading onto CaseLines.]

IN THE MATTER BETWEEN:

LSP INVESTMENTS NO 8 (PTY) LTD

Plaintiff

AND

ROYAL KINGS EDUCATION HOLDINGS (PTY) LTD

Defendant

JUDGMENT

Summary: Summary judgment – raising of new defences in heads of argument

[1] This is an opposed summary judgment application.

[2] The parties in the application for summary judgment will be referred to as in the action.

[3] The Plaintiff seeks summary judgment, founded on the following averments contained in its combined summons, being, *inter alia*:

[3.1] On 1 August 2018, the Plaintiff and the Defendant entered into a written so-called “*Sale of Rental Enterprise Agreement*” (“the sale agreement”), containing, *inter alia*, the terms and conditions below;

[3.2] The going concern comprised, *inter alia*, of the rental enterprise being conducted by renting out the property known as Erf 2[...], F[...], Registration Division I.Q., Gauteng Province (“the property”);

[3.3] The purchase price for the rental enterprise was stipulated to be an amount of R8 million, including VAT at a rate of 0% (“the purchase price”);

[3.4] R7 million of the purchase price was payable against registration of the property into the Defendant’s name;

[3.5] The balance of the purchase price was either:

[3.5.1] R1 million, if paid within 24 months of transfer; *alternatively*

[3.5.2] R2 million, if not paid within 24 months of transfer, but within 48 months thereof;

[3.6] Whatever the outstanding balance, it had to be paid in monthly instalments of at least R30,000.00 per month on the first day of each and every month by the Defendant for a period of 24 months or 48 months, as the case may be;

[3.7] Should any payment failed to be made, such overdue amount will bear interest at Standard Bank’s prime rate from time to time compounded monthly in arrears;

[3.8] Any costs awarded will be recoverable on an attorney and own client scale, unless the Court determines that such scale shall not apply, in which

event costs will be recoverable on an attorney and client scale in the High Court;

[3.9] The Plaintiff complied with all its obligations in terms of the sale agreement;

[3.10] The property was registered into the name of the Defendant on 26 October 2018 against payment of R7 million, leaving a balance of either R1 million – if paid within 24 months of transfer – or R2 million – if not paid within 24 months, but within 48 months of transfer;

[3.11] The Defendant failed to make payment of the balance purchase price of R1 million within 24 months of transfer, resulting in the Defendant becoming indebted to the Plaintiff in the amount of R2 million payable within a period of 48 months of transfer, i.e. on or before 25 October 2022;

[3.12] The Defendant failed to make payment of the balance purchase price in the amount of R2 million, despite demand; and

[3.13] The provisions of the National Credit Act 34 of 2005 (“NCA”) do not apply for reason of the fact that the Defendant is a juristic person whose asset value or annual turnover, together with the combined asset value or annual turnover of all related juristic persons, exceeded the threshold determined by the Minister in terms of section 7(1) of the NCA.

[4] In the result, the Plaintiff seeks summary judgment in the following terms:

[4.1] Payment of the balance purchase price in the amount of R2 million;

[4.2] Interest on the said amount at the prime rate, as defined in the sale agreement, from the due date for payment to the date of actual payment, both days inclusive, *alternatively* at the prescribed rate *a tempore morae* until date of final payment; and

[4.3] Cost of suit on the scale as between attorney and own client, *alternatively* on a scale which the Court deems appropriate.

[5] The Plaintiff’s claim is resisted by the Defendant, advancing two special pleas and by pleading over.

[6] In the Defendant's first special plea, it raises the following defences:

[6.1] The sale agreement had to be signed on behalf of the Plaintiff by a certain Mr Jeremy Day ("Mr Day"), who was introduced to the Defendant as the Plaintiff's representative by the Plaintiff's estate agent. The sale agreement was, however, signed by Mr IDG Pallot ("Mr Pallot") and not by Mr Day. Therefore, Mr Pallot was not authorised to sign the sale agreement on behalf of the Plaintiff;

[6.2] All subsequent and further negotiations were conducted on behalf of the Plaintiff by Mr Day;

[6.3] It was agreed between the parties that the commercial office space would need to be converted into space for the purposes of conducting a school with its own special requirements;

[6.4] The onset of COVID-19 caused serious delays in the completion of the conversion and the commencement of the opening of the school;

[6.5] There were numerous omissions in the delivery (or the existence) of certain improvements referred to in paragraph 5.6 of the Plaintiff's particulars of claim, more specifically access control systems (booms, security systems and security cameras), garbage compaction units, air-conditioning systems, lifts and escalators; and

[6.6] It was agreed with Mr Day that the balance would be R1 million and not R2 million.

[7] In the second special plea, the Defendant pleads that the parties, through their attorneys, have subsequently agreed in writing that the outstanding amount would be R1 million and not R2 million.

[8] In the Defendant's plea over, the Defendant pleads as follows:

[8.1] The Defendant denies that Mr Pallot was authorised to enter into the sale agreement on behalf of the Plaintiff;

[8.2] The Defendant avers that the sale agreement was amended between the parties after summons was issued;

[8.3] The parties agreed that the Defendant would pay R1 million in full and final settlement of the outstanding balance in two instalments, the first in the amount of R500,000.00 on or before 30 March 2024 and the remaining R500,000.00 on 30 September 2024;

[8.4] That having regard to the “oral” agreement between the parties, no moneys were due nor payable;

[8.5] The Defendant was obliged to substantially renovate the existing building, comprising the property, since certain assets either did not exist or had been removed, causing a shortfall in the Defendant’s cash resources;

[8.6] The Defendant subsequently renegotiated an extension for the payment of the two instalments with the Plaintiff;

[8.7] The Plaintiff’s attorney was unhappy about the extensions, but presented a new agreement to the Defendant in terms of which the first instalment would be payable on 30 June 2024 and the second on 28 February 2025;

[8.8] The Defendant was unable to sign the new agreement timeously and the Plaintiff, unexpectedly, served a notice of bar on the Defendant’s attorneys;

[8.9] The presentation of the new agreement by the Plaintiff to the Defendant abrogated the previous agreement in terms of which the first instalment was payable on 30 March 2024;

[8.10] The service of a notice of bar by the Plaintiff on the Defendant is *mala fide* and invalid;

[8.11] Since the first payment is only due and payable on 30 June 2024, no funds are due nor payable to the Plaintiff;

[8.12] The parties through their attorneys have agreed that no interest would be payable;

[8.13] The Plaintiff has dishonoured its obligation by serving a notice of bar when it was not entitled to do so, obliging the Defendant to file a plea; and

[8.14] The Plaintiff has, through its attorneys, agreed to two instalments of R500,000.00 each, payable respectively on 30 June 2024 and 28 February 2025;

[9] The Defendant finally pleads as follows in its plea:

“30. Subsequently the parties agreed that:

30.1. The correct and actual amount payable is the sum of R1 000 000.00

30.2 The payment would be settled by way of a payment of R500 000.00 the 30 June 2024 and R500 000.00 on the 28 February 2025.

30.3 No interest would be payable.

30.4 Each party would bear its own costs.”

[10] In the Plaintiff's founding affidavit in support of its application for summary judgment, the Plaintiff avers that:

[10.1] Subsequent to the issuing of summons for the unpaid balance of the purchase price in the amount of R2 million, the parties engaged in negotiations in the hope of settling the action proceedings;

[10.2] The negotiations were, however, unsuccessful due to the Defendant's failure to sign a proposed settlement agreement;

[10.3] Subsequent thereto, the Plaintiff, on 26 April 2024, filed a notice of bar, calling upon the Defendant to file its plea within 5 days;

[10.4] All the defences raised by the Defendant are defeated by the express provisions in the sale agreement, in particular clauses 20 (“voetstoots clause”), 29.2 (“non-variation clause”) and 1.1 of Annexure 1 (“corporate warranty clause”);

[10.5] On a proper assessment of the special plea and plea, the Defendant raises two main defences:

[10.5.1] The first is that the Plaintiff's deponent did not have the requisite authority to sign the sale agreement; and

[10.5.2] There were allegedly four agreements concluded between the parties, which varied the sale agreement and the amount owed as the balance of the purchase price and the dates of payment thereof;

[10.6] The Plaintiff denies that there is any merit in the Defendant's defence pertaining to the authority of the Plaintiff's deponent to sign the sale agreement, *inter alia*, on the following grounds:

[10.6.1] The corporate warranty recorded in clause 1.1 of Annexure 1 to the sale agreement, expressly warrants authority;

[10.6.2] The parties, especially the Defendant, acted in accordance with the obligations imposed upon it by the terms of the sale agreement by having made payment of R7 million;

[10.6.3] The Defendant has not filed a counter-claim, challenging the validity of the sale agreement on the basis of lack of authority;

[10.6.4] The Defendant does not seek to resile from the agreement for lack of authority by claiming a refund of the sum of R7 million already paid; and

[10.6.5] The Defendant does not seek to avoid the sale agreement, but in fact admits to be indebted to the Plaintiff for at least R1 million.

[11] As to the alleged amendments to the sale agreement, the Plaintiff:

[11.1] Denies the four agreements allegedly concluded between the parties, as alleged by the Defendant, which varied the terms of the sale agreement;

[11.2] Submits that clause 29.2 of the sale agreement contains a non-variation clause determining, *inter alia*, that:

"29.2 Variations to be in Writing

No addition to or variation, deletion, or agreed cancellation of all or any clauses or provisions of this Agreement will be of any force or effect unless in writing and signed by the Parties."

[11.3] Submits that the Defendant did not attach any written or signed agreement(s) to its special plea and plea to demonstrate compliance with

clause 29.2 of the sale agreement. Consequently all alleged variation agreements are denied and void;

[11.4] Denies that the sale agreement makes mention of any deliverables, by relying on clause 1.28 of the sale agreement which defines “*Rental Enterprise Assets*”, without reference to any of the alleged deliverables, allegedly not received by the Defendant;

[11.5] In addition, relies on clause 20.2 of the sale agreement containing a “*voetstoots*” clause;

[11.6] Denies that any improvements were to be effected in terms of the sale agreement;

[11.7] Submits that on at least two occasions, the parties engaged in an attempt to settle the action proceedings, but on both occasions the Plaintiff’s attorney had prepared written settlement proposals, which were favourable to the Defendant. Therein the outstanding balance was reduced from R2 million to R1 million, payable in two instalments on 30 March 2024 and 30 September 2024 respectively. On a second occasion, the Plaintiff’s attorney proposed payment of the outstanding balance on 30 June 2024 and 28 February 2025 respectively, for each party to pay its own costs and for the settlement, once signed, to be made an Order of Court; and

[11.8] Submits that none of the proposals, which were reduced to writing by the Plaintiff’s attorney, were ever signed by the Defendant.

[12] The Plaintiff records that in the event of the Court not being inclined to grant summary judgment for R2 million, the Plaintiff seeks payment of R1 million, together with interest and costs on a scale as between attorney and own client on the basis of the Defendant’s acknowledgement, in its plea, that it is indebted to the Plaintiff in the amount of R1 million and undertakes to pay this amount in two instalments of R500,000.00 each on 2 June 2024 and 28 February 2025 respectively.

[13] In the Defendant’s affidavit resisting summary judgment, the Defendant alleges that:

[13.1] An amount of R500,000.00 was payable to the Plaintiff on 30 June 2024, payment which was tendered to the Plaintiff on 28 June 2024, but rejected by the Plaintiff;

[13.2] Only R1 million is due and payable in two instalments of R500,000.00 each on 30 June 2024 and 28 February 2025 respectively;

[13.3] The Plaintiff's claim is premature, since neither the first instalment nor the second instalment was due at the time when summons was issued or at the time when the application for summary judgment was brought;

[13.4] The Plaintiff refused to furnish its banking details to the Defendant, as a result of which the Defendant was prevented from making payment of the instalment of R500,000.00 on 30 June 2024, which amount remains deposited in the bank account of the Defendant's attorneys;

[13.5] The Plaintiff never disputed the Defendant's averment in paragraph 7 of its plea, which was to the effect that the parties, through their attorneys, have subsequently agreed in writing that the correct amount owed is R1 million, instead of R2 million;

[13.6] The Defendant attaches and relies on a letter by its attorney to the Plaintiff's attorney, dated 28 June 2024. This letter, *inter alia*, mentions:

- "1. Your letter dated 28 June 2024 was received after office hours.*
- 2. By way of background we record, that we telephoned your Ms Muwana Ramanyimi shortly after 11:00 am this morning requesting details of your banking details to enable our client to pay the sum of R500 000.00 therein.*
- 3. A few SMS's were exchanged and we received an SMS late this afternoon stating that a banking account was furnished. No such SMS was received. Your final SMS stated that the reference should be L Rhodie.*
- 4. We are aware that L Rhodie is a person whose name appears on your letters.*
- 5. We responded immediately to that SMS to record that no banking details were received and we required a bank letter to confirm that such bank letter was in fact genuine. Our attempt to send this SMS was rejected. It was apparent that you had switched of (sic) your telephone.*

6. *We reiterate that we can only recommend to our client (who is still very ill) that he should not make payment until we have been satisfied that the letter from the bank is genuine.*

7. *As at this time being after 18:00 on Friday and we can take the matter no further.*

8. *With prejudice, we record that the sum of R500 000,00 is being tendered to you before the 30 June 2024, you have made it difficult for our client to make payment of this sum as no banking details have been furnished.*

9. *You are aware that the summary judgment application by your client is being opposed and you are aware thereof that an answering affidavit will be filed with a request for condonation as soon as our client has recovered.*

10. *Please confirm that your client has rejected the offer of payment of R500 000.00.”*

[13.7] The refusal by the Plaintiff's attorneys to furnish their banking details constitutes a breach on the part of the Plaintiff; and

[13.8] A new proposed amendment rendering the outstanding balance to be R1 million, payable in two equal instalments of R500,000.00 each on 30 June 2024 and 28 February 2025 respectively, could not be signed timeously by the Defendant.

[14] Evident from the above summary of the papers, the Defendant seeks to avoid payment on the following grounds:

[14.1] That the sale agreement had to be signed by Mr Day and not by Mr Pallot;

[14.2] The sale agreement was amended, reducing the outstanding balance to R1 million;

[14.3] Only R1 million is due and payable in two instalments of R500,000.00 each on 30 June 2024 and 28 February 2025 respectively;

[14.4] The Defendant had tendered payment in the amount of R500,000.00 on 28 June 2024 (which was payable by 30 June 2024), but the Plaintiff rejected such payment;

[14.5] The Plaintiff breached the agreement by failing to provide its banking details in order for the Defendant to effect the aforesaid payment; and

[14.6] The Plaintiff's claim is premature as neither of the instalments were due at the time when the summons or the application for summary judgment were issued.

[15] The Plaintiff's heads of argument in support of the application for summary judgment was uploaded onto CaseLines on 16 January 2025, although already filed on Court Online on 26 September 2024.

[16] This Court issued a directive to the effect that for purposes of opposed motions allocated for the week of 24 February 2025, no late filing of heads will be accepted and no further papers are to be uploaded after 12:00 on Monday, 17 February 2025.

[17] In disregard of the aforementioned directive, the Defendant's heads of argument resisting summary judgment were uploaded onto CaseLines on 26 February 2025, some minutes before the commencement of this hearing. Counsel for the Defendant had to be motivated by the Court to seek condonation for the late filing thereof, which condonation was then granted.

[18] In the Defendant's heads of argument, which did not deal with most of the defences raised in the plea and the affidavit resisting summary judgment, it was submitted:

[18.1] The Plaintiff claims two completely different amounts – and there is no evidence set out in the papers why the Plaintiff is claiming the sum of R2 million, as opposed to the sum of R1 million. This should in itself be dispositive of the summary judgment application;

[18.2] The instalments of R30,000.00 per month, which had to be made in terms of the sale agreement, calculated over a period of 48 months, total R1,440,000.00 and not the alleged R2 million outstanding. This is regarded by the Defendant as a "*glaring error*";

[18.3] For the first time, a submission pertaining to prescription is made. The issue of prescription was neither raised in the Defendant's plea nor in its affidavit resisting summary judgment. The Defendant submits that since transfer occurred on 26 October 2018, the first instalment on the balance outstanding in the amount of R30,000.00 became payable immediately thereafter. Since summons was only issued on 12 October 2023, some 59 months after the first payment was due, at least 24 instalments have become prescribed, amounting to R720,000.00;

[18.4] It is then submitted that, at best for the Plaintiff, an amount of R280,000.00 (R1 million less R720,000.00) would be "*liquidated*" for purposes of summary judgment, which amount is currently held in trust in the bank account of the Defendant's attorneys, which can be paid as soon as the Plaintiff's attorney provides proper proof of the Plaintiff's banking details; and

[18.5] This matter calls for the relaxation of the *Shifren* principle on grounds of public policy. In support of this submission, the Defendant relies on *Steyn v Kareekloof Melkery (Pty) Ltd* (2009/45448) [2011] ZAGPCJHC 228, submitting that this Court ought to, as was done in *Steyn*, consider the sale agreement as having been amended by the conduct of the parties, rendering a reliance on the unamended sale agreement against public policy.

[19] None of the submissions belatedly raised in the Defendant's heads of argument are to be found in the Defendant's plea or its affidavit resisting summary judgment. This caused the Court to request counsel representing the respective parties to submit supplementary heads of argument on the crisp issue of whether such submissions (new grounds resisting summary judgment) can be entertained at this stage of the proceedings. This directive was adhered to by the submission of supplementary heads, on 27 February 2025, on behalf of the Plaintiff and the Defendant.

[20] In the supplementary heads of argument, the Defendant took the stance that it is permissible to raise an issue not raised in the plea or affidavit resisting summary judgment, in this instance the issue of prescription, by ultimately suggesting:

“14. I have set out numerous authorities above, some of which are contradictory to others. The default position appears to be that a defence should not be raised for the first time in heads of argument – however, I have also pointed to authorities demonstrating that the Court has a wide discretion in how to deal with matters in these instances.

15. From a pragmatic point of view, the defendant submits that it would be in the interests of justice to postpone the matter to enable the defendant to deal with the defence of prescription properly. This would avoid an inevitable opposed rescission application and the costs associated therewith. Ultimately, the Court however has a discretion in how to deal with evidence placed before it in heads of argument.”

[21] In the Plaintiff’s supplementary heads of argument, it was submitted that the new grounds of resisting summary judgment raised in the Defendant’s heads of argument ought to be disregarded. The following arguments were advanced in support of this stance:

[21.1] Section 17 of the Prescription Act 68 of 1969 (“the Prescription Act”) informs:

“17. Prescription to be raised in pleadings

(1) A court shall not of its own motion take notice of prescription.

(2) A party to litigation who invokes prescription, shall do so in the relevant document filed of record in the proceedings: Provided that a court may allow prescription to be raised at any stage of the proceedings.”

[21.2] By relying on the *dicta* of the Constitutional Court in *Njongi v Member of the Executive Council Department of Welfare, Eastern Cape*¹ where the apex Court explained:

“[36] ... Prescription raises questions of both fact and law. It is for this reason that, as pointed out by the judge in Ntame, prescription must ordinarily be raised

¹ *Njongi v Member of the Executive Council Department of Welfare, Eastern Cape* 2008 (4) SA 237 (CC), par. [36]

on affidavit. ... The applicant would need to traverse the factual substratum of any claim of prescription only if and after prescription had been properly raised and the facts supporting it had been put forth on affidavit. The notice asks the court not to decide the lawfulness of the administrative action on the basis that the case had prescribed in circumstances where the prescription was not properly before the court. ..."

it was submitted that the new defences raised in the Defendant's heads of argument should be disregarded.

[21.3] By relying on another judgment handed down in the matter of the *Minister of Justice and Constitutional Development v Mathobela and Others*², where the Court informed:

"[15] Though Section 17 (2) refers to "relevant document" and not specifically to "pleadings" as contained in its predecessor (Section 14 of Act 18 of 1943), I am of the view that the "relevant document" is either a plea (special plea) in trial proceedings or an opposing affidavit in motion proceedings.

[16] In my view heads of argument is an aid prepared by counsel or an attorney or a litigant for the convenience of the Court. Heads of argument cannot be regarded as evidence by a party. In my view the way to invoke prescription as envisaged in Section 17 (2) is either by way of a plea (special plea) in trial proceedings or an opposing affidavit in motion proceedings. First Respondent should have filed an opposing affidavit even if the only issue contained therein would have been prescription. By raising the issue in the manner it did, the First Respondent has, in my view, done so in an incorrect manner.

...

[22] I am of the view that prescription was not properly raised as a defence seeing that no facts were placed before this Court by way of an opposing affidavit. The Court cannot on its own motion take notice of prescription. First

² Minister of Justice and Constitutional Development v Mathobela and Others (1185/05) [2007] ZANWHC 5 (25 January 2007)

Respondent who wishes to invoke prescription as a defence should have done so in an opposing affidavit as a relevant document, and not in heads of argument.”

it was similarly submitted that the Defendant’s heads of argument should be disregarded.

[21.4] In addition, the Plaintiff relies on a judgment of this Court in *Petersen NO and Others v Shoe Warehouse SA (Pty) Ltd t/a Shoe Warehouse and Another*³ where this Court dismissed an opposed summary judgment application on the basis that the plaintiff, in support of the summary judgment, relied on heads of argument and not averments in its particulars of claim or affidavit for summary judgment. This Court held that heads of argument are not pleadings. It stated:

“[14] The Plaintiff in their affidavit in support of summary judgment relied on the Heads of Argument of the Defendant’s attorney in the Randburg Magistrates Court case 22615/2020 wherein it is contended that First Defendant vacated the premises in the first week of March 2021, in order to refute the Defendant’s plea that First Defendant vacated the leased premises before 01 December 2020.

[15] The claim for payment in this summary judgment centers around whether Defendant occupied the premises 1 December 2020 until February 2021, which is disputed in their plea and affidavit in opposition to summary judgment, the Plaintiff’s attack on this defense is through the submission of Heads of Argument, however Heads of Argument are not pleadings.”

[21.5] The authorities relied upon in the Plaintiff’s supplementary heads are convincing. This Court is in any event bound by such higher authority. In the result, it is found that the two new defences raised for the first time in the Defendant’s belated heads of argument pertaining to prescription and the

³ Petersen NO and Others v Shoe Warehouse SA (Pty) Ltd t/a Shoe Warehouse and Another (2022/8054) [2023] ZAGPJHC 934 (17 August 2023)

defence that the *Shifren* principle ought to yield to public policy in this matter, must be disregarded for purposes of considering the application for summary judgment in view of the Defendant's omission to have raised these defences in its plea or in its affidavit resisting summary judgment.

[22] Counsel for the Defendant did not move for a postponement of the summary judgment application in order to amend the Defendant's plea to introduce such new defences. He also did not move for an amendment before this Court of the Defendant's plea in order to introduce the aforesaid new defences. Instead, it was submitted on behalf of the Defendant that it would be in the interest of justice to postpone the matter to enable the Defendant to deal with the defence of prescription properly. This was obviously done in order to avoid the inevitable, namely a probable order for costs to be granted against the Defendant for seeking a postponement and/or a late amendment of its plea.

[23] The submission by the Defendant's counsel that the Court was now made aware of the existence of the possible defence of prescription and must deal with it, does not sit well with this Court. It is not for the Court to insist on amendments of pleadings. It is also not for the Court, *mero motu*, to raise the issue of prescription. The problem remains that of the Defendant.

[24] The Court accordingly needs to deal with the remainder of the defences raised in the Defendant's special plea and plea and in the affidavit resisting summary judgment.

[25] There appears to be no merit in the Defendant's plea that the sale agreement had to be signed by Mr Day, who represented the Plaintiff during the negotiations leading up to the conclusion of the sale agreement and not by its director, Mr Pallot. This is said for the following reasons:

[25.1] A company is a juristic person and can only act through human agency. A company thus needs to be represented by a natural person when concluding agreements for it cannot do so on its own;⁴

[25.2] Section 66(1) of the Companies Act 71 of 2008 regulates the powers of the board of directors, who may delegate its powers to an individual director (or individual directors), a committee of the board, a managing director or other officers of the company. The board of directors, who are determined by (or recorded in) the company founding documents, including the company's Memorandum of Incorporation and Shareholders Agreement,⁵ are thus at liberty to appoint any person to sign an agreement on the company's behalf,

[25.3] If the Defendant's challenge was directed at the absence of a written power of attorney or resolution authorising Mr Pallot to have signed on the Plaintiff's behalf, then it should have pleaded this. This was not done; and

[25.4] Clause 1.1 of Annexure 1 to the sale agreement contains an express corporate warranty. If the Defendant wanted to challenge this clause, it had to do so on the basis of breach of that warranty, which ought to have been pleaded. This the Defendant similarly failed to do.

[26] There is no merit in the defence raised by the Defendant that the sale agreement became amended by having reduced the outstanding balance from R2 million to R1 million, or, if that was ever intended by the Defendant, that the matter became settled between the legal representatives of the respective parties.

[27] No settlement of the dispute was established by the Defendant.

⁴ Makate v Vodacom Ltd 2016 (4) SA 121 (CC)

⁵ Section 20 of the Companies Act, 71 of 2008

[28] The non-variation clause obviously trumps the defence based on an oral amendment.⁶ No written amendment of the sale agreement, duly signed by or on behalf of the parties was established by the Defendant.

[29] It is therefore clear from the above that the Defendant failed to demonstrate that it has a *bona fide* defence to the claim by the Plaintiff.

[30] In conclusion, the application for summary judgment should succeed.

[31] The parties bound themselves to clause 22.2 of the agreement, which agreement I find to be valid and enforceable between the parties for reasons advanced above. The parties are thus bound by the agreed interest rate.⁷

[32] What remains is the issue of costs. The general rule is that the successful party is entitled to costs. There is no reason to depart from this rule in the present case. The Applicant is seeking costs of suit on an attorney and own client scale in accordance with the terms and conditions agreed to in the sale agreement.

[33] In the premises, the following order is made:

[33.1] Summary judgment is granted in favour of the Plaintiff in the amount of R2 million;

[33.2] The Defendant is ordered to pay interest on the aforesaid amount at the prime rate charged by Standard Bank Ltd from time to time, compounded monthly in arrears, as from 26 October 2022 until date of payment, both days inclusive; and

⁶ In SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere 1964 (4) SA 760 (A) at 765 the Appellate Division laid down a principle governing the non-variation clauses in agreements. In terms of this principle, known as the Shifren Rule, once parties to a written agreement agree that an agreement cannot be altered unless certain conditions are met, no amendment will be valid unless the prescribed condition has been met. The principle was reaffirmed in *Brisley v Drotsky* 2002 (4) SA 1 (SCA).

⁷ *Nedbank Limited v Lateral Support 102 CC and Others* (193/2022) [2022] ZAMPMBHC 43 (20 June 2022) at paras [9] – [11].

[33.3] The Defendant is ordered to pay the costs of this application on an a scale as between attorney and own client.

**A LIVERSAGE
ACTING JUDGE OF THE HIGH COURT
JOHANNESBURG**

HEARD ON: 26 FEBRUARY 2025

* DECIDED ON: 2 MAY 2025

APPEARANCES

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Attorneys for Plaintiff: Cliffe Dekker Hofmeyr Inc

Counsel for Defendant: Adv T Lautré

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