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

CASE NO: 6822/2022
REPORTABLE: NO
OF INTEREST TO OTHER JUDGES: NO
REVISED.
31 October 2022

In the matter between:

GOSCOR FINANCE (PTY) LIMITED FIRST APPLICANT
(Registration No: 2008/014469/07)

GOSCOR EARTHMOVING EQUIPMENT SECOND APPLICANT
a division of GOSCOR (PTY) LIMITED
(Registration No: 1970/000790/07)

And

SHAKGAPICLE TRADING AND PROJECTS FIRST RESPONDENT
LIMITED
(Registration No: 2014/033360/07)

LESUPI: GAOAREABE REBECCA SECOND RESPONDENT
(Identity No: [....])

JUDGMENT

Delivered: This judgment was prepared and authored by the Judge whose name is reflected and is handed down electronically by circulation to Parties / their legal representatives by email and by uploading it to the electronic file of this matter on Case Lines. The date of the judgment is deemed to be the 31st of October 2022

TWALA J

[1] The applicants, who are the plaintiffs in the main action, brought this application seeking an order for summary judgment to be entered against the respondents, who are the defendants in the main action, jointly and severally in the following terms:

1.1 Payment of the sum of R1 915 905.22 to the first applicant in respect of arrear rental;
1.2 Interest on the sum of R 1 915 905.22 at the rate of 10% calculated per annum from 18 November 2021 t date of payment;
1.3 Payment of the sum of R3 155 511.86 to the first applicant in respect of early termination penalties in terms of clause 12.8 of the Master Rental Agreement;
1.4 Interest on R3 155 511.86 at the rate of 10% calculated per annum from 30 August 2021 to date of payment;
1.5 Payment of the sum of R1 877 073.79 to the first applicant in respect of liquidated damages in terms of clause 12.2.2.1 of the Master Rental Agreement;
1.6 Interest on the sum of R1 877 073.79 at the rate of 10% calculated per annum from 18 November 2021;
1.7 Payment of the sum of R576 204.17 to the first applicant in respect of the costs of repairs to the Returned Equipment;
1.8 Interest on the sum of R122 619.26 to the second applicant in respect of the GEM Service Agreement;
1.9 Interest on the sum of R122 619.26 at the rate of 10.5% calculated per annum from 22 February 2022;
1.10 Costs of suit on the scale as between attorney and own client.

[2] For the purposes of this judgment, I propose to refer to the parties as the applicants and the respondents and where necessary, I shall refer to them as the first or second applicant or respondent.

[3] The foundational facts of this case are that on or about the 2nd of April 2020 and in Klerksdorp the applicants and the first respondent, who was represented by the second respondent, concluded a written credit agreement including the standard terms and conditions of sale, rental and service. It was a term of the credit agreement that the signatory (the second respondent) binds herself in her private and individual capacity as surety and co-principal debtor in solidum with the first respondent in favour of the applicants for the due performance of any obligation of the first respondent and for the payment to the applicants by the first respondent of any amounts which may now or at any time be or become owing to the applicants by the first respondent from whatsoever cause arising and including, but without limiting the generality of the aforegoing, any claims or actions against the first respondent acquired by way of cession.

[4] On the 27th of May 2020 and in Kempton Park, the first respondent entered into a written Master Rental Agreement ("the MRA") with the first applicant whereby the first respondent rented certain equipment, four of which known as Front End Loaders and the fifth as an Excavator against payment of a monthly rental amount. The first applicant performed its obligation under the MRA by delivering the equipment to the first respondent. However, it was a term of the MRA that ownership of the equipment shall remain vested with the first applicant. The first applicant then continued to render invoices to the first respondent in respect of the rental amounts due to the first applicant by the first respondent.

[5] During August 2021 the first respondent and without the consent of the first applicant, terminated the MRA prematurely by returning three of the equipment to the first applicant with effect from the 31st of August 2021. The equipment was damaged and the costs of repair amounted to a sum of R576 204.17. Once again the first respondent committed a breach of the MRA during the period June 2021 and October 2021 by failing to make payment to the first applicant of the monthly rental amount in respect of the equipment when it fell due. On the 28th of October 2021 the

first applicant delivered a written notice to both the respondents notifying them of the first respondent's failure to make payment of the rental amounts to the first applicant when they fell due and payable.

[6] Due to the failure of the respondents to rectify the breach by making the necessary payment of the monthly rentals, on the 18th of November 2021 the first applicant issued a written notice terminating the MRA and demanded the immediate return of the equipment which was still in the possession of the first respondent. However, it was only during January and February 2022 when the first applicant uplifted the equipment from the first respondent.

[7] It is further undisputed that in March 2021 and in Boksburg, the first respondent, represented by the second respondent, concluded an oral agreement with the second applicant for the provision of parts and service by the second applicant to the first respondent ("the GEM Service Agreement"). It was a term of the GEM service agreement that the second applicant would supply parts and services for the equipment at the special request and instance of the first respondent and render the invoices and statement payable within thirty (30) days from the date of the statement. The second applicant rendered invoices and statements but the respondents failed to make payment as agreed in terms of the GEM service agreement.

[8] The applicants instituted action proceedings, jointly and severally against the first respondent and the second respondent as surety for the recovery of: a) the arrear rental amount, b) the early termination penalties, c) liquidated damages, d) the repairs to the early returned equipment and e) for provision of parts and services by the second applicant in terms of the GEM service agreement. The respondents filed their plea to the claims of the applicants – hence this application for summary judgment.

[9] Counsel for the respondents submitted that the respondents do not dispute the existence of the contracts between the parties and the terms thereof. However, it is contended that the first applicant breached the terms of the MRA by supplying and or delivering defective equipment which was unable to meet the needs of the first

respondent. Furthermore, so the argument went, when the first respondent encountered financial difficulties when its contract with its client was cancelled, it was agreed between the parties, through their representatives, that payment of the monthly rental amount will be suspended until the first respondent has secured another contract and that the applicants will also assist in the procurement of another contract for the first respondent.

[10] It was submitted further by counsel for the respondents that the applicants breached the terms of the agreement by cancelling the contract without giving written notice to the respondents as provided for in clause 12 of the MRA. Counsel urged the Court not to follow strictly the Shifren principle in order to give effect to the principle of good faith. The respondents, so the argument went, in good faith concluded an oral agreement with the representatives of the applicants that the rental payment will be suspended until the respondents secure another contract.

[11] It has been decided in a number of cases that, where the parties voluntarily conclude a contract, they should be urged to observe and discharge their obligations in terms of their agreement and should only be allowed to deviate therefrom if it can be demonstrated that a particular clause in the agreement is unreasonable and or so prejudicial to a party that it is against public policy. Furthermore, it is a trite principle of our law that the privity and sanctity of a contract should prevail and should be enforced by the courts.

[12] In *Mohabed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176 (1 December 2017)* the Supreme Court of Appeal reaffirmed the principle of the privity and sanctity of the contract and stated the following:

> *"paragraph 23 The privity and sanctity of contract entails that contractual obligations must be honoured when the parties have entered into the contractual agreement freely and voluntarily. The notion of the privity and sanctity of contracts goes hand in hand with the freedom to contract, taking into considerations the requirements of a valid contract, freedom to contract*

denotes that parties are free to enter into contracts and decide on the terms of the contract."

[13] The Court continued and quoted with approval a paragraph in *Wells v South African Alumenite Company 1927 AD 69 at 73* wherein the Court held as follows:

> *"If there is one thing which, more than another, public policy requires, it is that men of full age and competent understanding shall have the utmost liberty of contracting, and that their contracts, when entered into freely and voluntarily, shall be held sacred and enforced by the courts of justice."*

[14] Recently the Constitutional Court in *Beadica 231 and Others v Trustees for the Time Being of Oregon Trust and Others CCT 109/19 [2020] ZACC 13* also had an opportunity to emphasized the principle of pacta sunt servanda and stated the following:

> *"paragraph 84 Moreover, contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.*
>
> *Paragraph 85 The fulfilment of many of the rights promises made by our Constitution depends on sound and continued economic development of our country. Certainty in contractual relations fosters a fertile environment for the advancement of constitutional rights. The protection of the sanctity of contracts is thus essential to the achievement of the constitutional vision of our society. Indeed, our constitutional project will be imperilled if courts denude the principle of pacta sunt servanda."*

[15] It is necessary at this stage to restate the relevant clauses of the MRA to put matters in the correct perspective and they are as follows:

"Clause 4 Rental and Payment Terms

4.1 ……..

4.3 All payments shall be made in full, in South African currency, without any deduction or set off, and free of bank exchange or other commission. The Customer shall not be entitled to withhold payment of any amount due in terms of this Agreement for any reason whatsoever.

Clause 6 Customer's Obligations

The Customer shall-

6.1 …….

6.14 not be entitled to withhold or delay payment of any monies due by the Customer to Goscor in terms of the Rental Agreement or claim any remission of Rental by reason of the Equipment or any part thereof being in a defective condition or in a state of disrepair.

Clause 12 Termination, Cancellation and Suspension

12.1 ……...

12.8 The Customer shall not be entitled to terminate this Agreement before the end of the Rental Term without the prior written consent of Goscor. In the event that the Customer prematurely terminates this Agreement in whole or in part inn respect of any or all of the Equipment listed on Annexure A or any subsequent annexure, without the consent of Goscor, the Customer shall pay to Goscor, as an Early Termination Penalty, an amount equal to the balance of the Rentals due in terms of the Agreement or 12 (twelve) months' Rentals, whichever is less, plus all costs and expenses incurred by Goscor in recovering possession of the Equipment, and restoring or repairing the Equipment to a good and proper working condition, fair wear and tear excepted.

Clause 15 Jurisdiction and Legal Proceedings

15.1 …….

15.2 Goscor shall be entitled to recover from the Customer, in addition to the aforegoing amounts, all costs disbursed by itself to its attorneys in securing any compliance with the provisions hereof which costs may be taxed and recovered on the scale as between attorney and his own client provided so ruled by the competent court.

Clause 18 General

18.1 ……..

18.2 No party shall have any claim or right of action arising from any undertaking, representation or warranty not included in this Agreement or the Annexures.

18.4 No agreement to vary, add to or cancel this Agreement shall be of any force or effect unless reduced to writing and signed by hand, by or on behalf of the parties to the Agreement

[16] The thread that runs through the authorities quoted in the preceding paragraphs is that the sanctity of contracts should be protected in order to advance constitutional rights. These authorities espouse that the fulfilment of the constitutional project would be imperilled if the Courts were to denude the principle of pacta sunt servanda. The protection of the sanctity of contracts, since there are rights that flow from it, is therefore essential for the achievement of the constitutional vision of the society.

[17] I do not understand the respondents to be disputing that they concluded the MRA and the GEM service agreement with the applicants. However, the respondents raise the issue that the Shifren principle should be relaxed since there were other oral agreements entered into between the parties. The difficulty with that proposition is that the respondents have failed, in their affidavit resisting summary judgment, to state exactly why there should be such a relaxation when the parties

concluded the MRA freely and voluntarily. There is no onus on the respondents but an evidentiary burden to show a good reason why it could not comply with the terms of the agreement. The respondents have dismally failed to show good reason why it failed to comply with the terms of the contract or that the terms of the contract are contrary to public policy.

[18] By definition the Shifren principle is that contracting parties are able to limit their future contractual freedom by stipulating that any variation is only valid if done in the form prescribed in the relevant contract. Put differently, parties are not permitted to introduce extrinsic evidence to contradict the express terms of the contract.

[19] In *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd (183/17) [2017] ZASCA 176; 2018 (2) SA 314 (SCA) (1 December 2017)* the Supreme Court of Appeal stated the following:

> *"Paragraph 29 In this case there is no complaint that the impugned clause is objectively unconscionable. No allegation is made that the lease agreement was not concluded freely. There is also no evidence or contention advanced by either of the parties that there was an unequal bargaining power between them. On the contrary, the ample evidence that the parties contracted with each other on the same equal footing. In other words, it cannot and neither was the respondent's case that there was an injustice which may have been caused by the inequality of bargaining power. Evidently the respondent was at all material times aware or must have been aware of the implications of the cancellation clause. When the respondent committed the first breach in June 2014, its attention was drawn to the fact that in the event of a further breach in the future, the appellant will invoke the provisions of clause 20 and cancel the agreement and evict them from the premises. It is disingenuous on the part of the respondent to now contend that by cancelling the agreement and not affording them an opportunity to remedy the breach, the appellant wanted to snatch at a bargain. The facts demonstrate that the appellant did not cancel the agreement or communicate its intention to so*

immediately upon non-payment of the October rental. It waited for a period of 12 days to lapse before it cancelled the agreement."

[20] The Court continued to state the following:

"Paragraph 30 The fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party's relative power is an issue. There is no evidence that the respondent's constitutional rights to dignity and equality were infringed. It was impermissible for the high court to develop the common law of contact by infusing the spirit of Ubuntu and good faith so as to invalidate the term or clause in question".

[21] The terms of the MRA in so far as it relates to the non-variation clause is plain, clear and unambiguous and there is nothing to suggest that it is prejudicial to any of the parties or that it is contrary to public policy. It would be catastrophic for business in this country if the Courts were not to hold parties to their contract for flimsy excuses. Clause 18 of the MRA makes it plain that any variation or addition to the agreement shall be of no force and effect unless it is reduced to writing and signed by hand by the parties or their representatives. There is nothing ambiguous or unclear about the wording of the section nor can it be said that it is prejudicial to any of the parties or contrary to public policy. There is therefore no sufficient or good reason advanced by the respondents for the relaxation of the Shifren principle.

[22] Similarly, clause 4 read together with clause 6 provides that the customer, the respondents in this case, shall not be entitled to withhold payment of any amount due for any reason whatsoever including for an equipment or part thereof that was defective or in a state of disrepair. It is therefore not open to the respondents to say that they did not pay for the two equipment which they allege were defective when they were delivered to their premises. Furthermore, the respondents misconstrue clause 12 of the MRA with regard to the issuing of a notice to terminate the MRA. In terms of clause 12 it is the customer, the respondents, who are required to obtain the

written consent of the applicants before they could terminate the contract and not visa versa.

[23] There is no merit in the argument that the Court should not allow the plaintiffs to aprobate and probate at the same time. This is contended in relation to the claim of the second plaintiff which is based on an oral agreement. However, the respondents do not dispute the claim of the second respondent nor do they put up a challenge to the terms of the GEM service agreement except to contend that the Court should equally give credence to the other oral agreements concluded by the parties irrespective of the existence of the non - variation clause. Furthermore, the respondents are losing sight of the fact that it was agreed between the parties that the GEM service agreement will be on the same terms as the MRA.

[24] It has been decided in a plethora of cases that the purpose of the summary judgment procedure is to afford an innocent plaintiff who has an unanswerable case against an elusive defendant a much quicker remedy than that of waiting for the conclusion of an action at the trial. It is furthermore trite that for the defendant to successfully resist a claim for summary judgment it has to satisfy the Court by affidavit that it has a bona fide defence to the claim.

[25] The essential question in this case is whether the respondents in their affidavit resisting summary judgment, disclose a bona fide defence that is good in law and whether they state therein the nature and grounds of their defence and disclose the material facts upon which their defences are based in accordance with the peremptory provisions of Rule 32(3) of the Uniform Rules of Court which provides as follows:

> *"Rule 32 (3) Upon the hearing of an application for summary judgment the defendant may-*
>
> *(a) ……..*
>
> *(b) Satisfy the court by affidavit (which shall be delivered before noon on the court day but one preceding the day on which the application is to be heard) or with the leave of the court by oral evidence of himself or of any*

other person who can swear positively to the fact that he has a bona fide defence to the action; such affidavit or evidence shall disclose fully the nature and grounds of the defence and the material facts relied upon therefor."

[26] In the case of *Joob Joob Investments (Pty) Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)*, the Court stated the following:

"The rationale for summary judgment proceedings is impeccable. The procedure is not intended to deprive a defendant with a triable issue or a sustainable defence of her/his day in court. After almost a century of successful application in our courts, summary judgment proceedings can hardly continue to be described as extraordinary. Our courts, both of first instance and at appellate level, have during that time rightly been trusted to ensure that a defendant with a triable issue is not shut out. In the Maharaj case at 425 G-426E, Corbett JA, was keen to ensure first, an examination of whether there has been sufficient disclosure by the defendant of the nature and grounds of his defence and the facts upon which it is founded. The second consideration is that the defence so disclosed must be both bona fide and good in law. A court which is satisfied that this threshold has been crossed is then bound to refuse summary judgment. Corbett JA also warned against requiring of the defendant the precision apposite to pleadings. However, the learned judge was equally astute to ensure that recalcitrant debtors pay what is due to a creditor."

[27] As indicated above, the defendants do not dispute the terms of the agreements concluded between the parties and their failure to perform their obligations in terms of the agreements. I am of the view that the plaintiffs have an unanswerable claim against the defendants and the defendants have failed to raise a bona fide defence and the material facts upon which they rely to the plaintiffs' claims in their affidavit resisting summary judgment. The unavoidable conclusion is therefore that the applicants are entitled to the relief they seek.

[28] In the circumstances, the following order is made against the defendants, jointly and severally for:

1. Payment of the sum of R1 915 905.22 to the first applicant in respect of arrear rental;
2. Interest on the sum of R 1 915 905.22 at the rate of 10% calculated per annum from 18 November 2021 t date of payment;
3. Payment of the sum of R3 155 511.86 to the first applicant in respect of early termination penalties in terms of clause 12.8 of the Master Rental Agreement;
4. Interest on R3 155 511.86 at the rate of 10% calculated per annum from 30 August 2021 to date of payment;
5. Payment of the sum of R1 877 073.79 to the first applicant in respect of liquidated damages in terms of clause 12.2.2.1 of the Master Rental Agreement;
6. Interest on the sum of R1 877 073.79 at the rate of 10% calculated per annum from 18 November 2021;
7. Payment of the sum of R576 204.17 to the first applicant in respect of the costs of repairs to the Returned Equipment;
8. Interest on the sum of R122 619.26 to the second applicant in respect of the GEM Service Agreement;
9. Interest on the sum of R122 619.26 at the rate of 10.5% calculated per annum from 22 February 2022;
10. Costs of suit on the scale as between attorney and own client.

TWALA M L
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION

Date of Hearing: **24th October 2022**

Date of Judgment: **31st October 2022**

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