**Republic of South Africa**

**IN THE HIGH COURT OF SOUTH AFRICA**

**(WESTERN CAPE DIVISION, CAPE TOWN)**

Case number: 20228/14

Before: The Hon. Mr Justice Binns-Ward

In the matter between:

**XTRAPROPS 66 (PTY) LTD** Applicant

And

**PHIOPATER SUPPLIES (PTY) LTD** Respondent

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**JUDGMENT DELIVERED ON 25 NOVEMBER 2014**

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**BINNS-WARD J:**

[1] The applicant has applied for the eviction of the respondent from certain business premises in Camps Bay. The respondent has been in occupation of the premises in terms of an agreement of lease with the applicant.

[2] It is not in dispute that the respondent is in arrears with the rental calculated according to the tenor of the deed of lease, although the extent thereof is a matter in contention.

[3] The deed of lease provides in clause 12.1 that should the tenant fail to pay any amount due under the lease on due date the landlord shall be entitled to cancel the lease. Acting pursuant to that provision, the applicant gave the respondent written

notice of the cancellation of the lease on 4 November 2014. The letter of cancellation gave the respondent notice to vacate the premises by 5:00 p.m. the same day.

[4] The current proceedings were instituted on 11 November 2014 after the respondent had failed to comply with the demand that it vacate the premises. The application was set down pursuant to a notice of motion formulated in accordance with the practice described in *Gallagher v Norman's Transport Lines (Pty) Ltd* 1992 (3) SA 500 (W) to incorporate a truncated timetable for the exchange of papers. The respondent duly delivered its answering papers in compliance with the timetable set in the notice of motion.

[5] The respondent contested the propriety of the application being entertained as a matter of urgency. There is no doubting that it remained open to the respondent to take the point notwithstanding its delivery of answering papers. There was no suggestion by the applicant's counsel, quite rightly, that the respondent had waived its right to contest urgency by delivering answering papers that went into the merits of the case. On the contrary, a respondent in receipt of a notice of motion in an allegedly urgent matter, in which a reasonably formulated timetable on truncated time limits for the exchange of papers has been provided, puts itself at risk of not having its side of the case considered if the court determines that the case should be heard as one of urgency on the date on which it has been set down for hearing in terms of the timetable.

[6] The applicant contends that the urgency of the matter lies in the fact of the continuing prejudice it is suffering through non-receipt of the stipulated rental on the property and that it has a replacement tenant who is able to take occupation of the premises as soon as the respondent vacates them. There is the potential, in the context of the respondent's alleged history of an inability to meet its debts, that the applicant may suffer irremediable financial prejudice if the matter were to be heard in the ordinary course, or three months' hence on the semi-urgent roll. In my judgment a case for some degree of commercial urgency has been made out. Having regard to the fact that the papers were complete, counsel on both sides had been briefed to be prepared to argue the matter and the demands on the 'fast lane' court of the Third Division were relatively light at the time, I considered that it was in the interests of justice to entertain the application out of the ordinary course. As I remarked during the course of argument, this was a borderline case on urgency. While the court should

be careful to discourage the bringing of applications on unrealistically optimistic contentions of urgency, the distinction between what will be entertained as urgent enough to be heard in the 'fast lane' court and what will be enlisted for hearing as semi-urgent will to some degree be determined by the exigencies of the demands on the duty judges when the matter is called. Had the state of the 'urgents' roll been more pressing at the time, the matter would have been sent for hearing on the semi-urgent roll.

[7] The respondent opposed the application on the basis of an alleged agreement concluded orally between its representative and a representative of the applicant in April 2014. According to the respondent, the applicant had agreed to accommodate the respondent's difficulty in respect of meeting its rental obligations by accepting payment of 25% of the daily takings of the restaurant business conducted by the respondent in the leased premises. The respondent alleged that it had been complying with the terms of the so-called 'compromise agreement'. The applicant disputed the respondent's allegations concerning the alleged compromise agreement. As the applicant is seeking final relief on motion, the application falls to be decided accepting the respondent's version to the extent that it is not patently untenable.

[8] The applicant's counsel contended, however, that the respondent was unable to rely on the orally concluded compromise agreement by reason of clause 14 of the deed of lease, which provides as follows:

> 14. **NO VARIATIONS**
>
> 14.1 No variations of this agreement shall be of any force or effect unless it (sic) is in writing and is signed by both the Landlord and the Tenant. (underlining supplied)
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> 14.2 This Lease contains all the terms and conditions of the agreement between the Landlord and the Tenant. The parties agree that there are no understandings, representations or terms between the landlord and the Tenant in regard to the Letting of the Premises other than those set out herein.
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> 14.3 No indulgence, concession, act of relaxation or latitude on the part of the Landlord in regard to the carrying out of any of the Tenant's obligations in terms of this Lease shall prejudice or derogate from or be construed as a waiver of any of the Landlord's rights in terms hereof or be regarded as a novation of such rights or found an estoppel.

The applicant's counsel was relying on what is commonly called the *Shrifren* principle, after the judgment in *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A).

[9] In *Shifren*, the Appellate Division of the late Supreme Court of South Africa determined that parties who contracted on the basis of entrenching formalities, such as requirements that any consensual cancellation or variation of their agreement had to be in writing signed by the parties to be of any force or effect, bound themselves by such contracts to observe such formalities, and that any subsequent contract of a nature to which the formalities were intended to apply would be unenforceable unless compliant with the self-imposed formalities. The application of the *Shifren* principle in the post-constitutional era was confirmed by the Supreme Court of Appeal in *Brisley v Drostky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363)

[10] The respondent's counsel acknowledged the effect of the *Shifren* principle, but argued that in the circumstances of the current case it could be ameliorated to allow recognition and effect to be given to the compromise agreement. In this regard counsel submitted that the conclusion of the compromise agreement had entailed the oral waiver by the applicant of its rights in terms of the rental clause. He contended that the *Shifren* principle did not exclude the ability of a contractant to orally waive a provision in a contract subject to a non-variation clause that was exclusively for the benefit of that party. In support of that contention he called in aid the unreported decision of the KwaZulu-Natal High Court in *Buffet Investments Services (Pty) Ltd and Another v Band and Another* [2009] ZAKZDHC 38 (5 May 2009). Counsel submitted that the conclusion of the compromise agreement had entailed the waiver by the applicant, *pro tanto*, of the benefit of the rental clause, which was a provision exclusively for its benefit.

[11] The respondent's counsel also argued that, depending on the facts of a given case, public policy considerations might justify a departure from the controversial strictures of the *Shifren* principle. For this part of his argument counsel invoked support from the judgment of Peter AJ in *Steyn and Another v Karee Kloof Melkery (Pty) Ltd and Another* [2011] ZAGPJHC 228 (30 November 2011), which, in turn, in the relevant part, had relied on the judgments of Alkema J (Pillay and Ndengezi JJ concurring) in *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) and Kollapen AJ in *GF v SH and others* 2011 (3) SA 25 (GNP). Counsel contended that

it would be against public policy to allow the applicant, to the grave prejudice of the respondent, to avoid the solemnly concluded compromise agreement by reliance on the *Shifren* principle. I understood counsel's argument in this regard to be in essence that to apply the *Shifren* principle in the context of the given facts would be, in effect, to favour dishonesty or business immorality in a manner that should not be countenanced by public policy.

[12] A final argument advanced by the respondent's counsel – about whom, it should be recorded, that while he acknowledged, realistically, that his client was in a difficult spot, said everything that could be advanced in favour of his client in the circumstances – was that the compromise agreement established a regime of substituted performance in respect of the rental obligation in terms of the deed of lease. Referring to *Van der Walt v Minnaar* 1954 (3) SA 932 (O) and *Telcordia Technologies Inc v Telkom SA Ltd* 2007 (3) SA 266 (SCA) (cited at para 34 of the judgment in *Steyn and Another* supra), he submitted that it had been held that an agreement to accept substituted performance was not a variation of the original agreement.

[13] For the reasons that follow I am of view that there is no merit in any of bases suggested by the respondent's counsel upon which the respondent could avoid the effect of the *Shifren* principle to rely on the compromise agreement. I also find that there is nothing to be had in the substituted performance related defence.

[14] An agreement that the rental be determined and paid by way of 25% of the respondent's business's daily takings would amount to a variation of the agreement as to the determination and payment of the rental entrenched in the deed of lease. The subject of any such agreement would therefore fall four square within the ambit of clause 14.1 of the deed lease and thus, on the *Shifren* principle, be enforceable only if it complied with the entrenched formalities, viz. that its terms be reduced to writing and signed on behalf of both the parties. I subscribe to the criticism expressed by Peter AJ in *Steyn and Another* supra, at para 33, of the judgment in *Buffet Investments* on which the respondent's counsel relied for this part of his argument. For the reasons given by Peter AJ, I too consider that the decision in *Buffet Investments* was wrong in the respects relevant for the purposes of the argument advanced on behalf of the respondent. The compromise agreement involved in *Buffet Investments* was nothing other than a variation agreement and therefore subject to the formalities

entrenched in the non-variation provisions of the original agreement between the parties in that case quoted at para 2 of the judgment. (It seems to me, with respect, that the learned judge in *Buffet Investments* may have confused the discrete concepts of the doctrine of election, the waiver of conditions and the contractual variation of agreements in her consideration of the operation of the *Shifren* principle.)

[15] The judgment of the full court of the Eastern Cape High Court in *Nyandeni Local Municipality* would indeed appear to provide some support for the argument put up by Mr *Wynne* for the respondent. The difficulty that I have with it is the issues of probity and good faith on which it places emphasis as justification for deviating from the *Shifren* principle will almost invariably arise in matters in which the enforceability of a subsequently concluded agreement is excluded by reason of non-compliance with formalities entrenched in the preceding agreement which it purports to vary. It has been considerations of that nature that have led to the observation by judges and academic writers over many years that the effect of the statutorily imposed formalities in respect of contracts such as those in respect of the alienation of land has often been to bring about greater evils than those which it was hoped thereby to avoid; see e.g. RH Christie and GB Bradfield, *The Law of Contract in South Africa* 6 ed (LexisNexis) 2011 at pp. 114-115 and the authorities cited there in note 34. While I thus readily appreciate, and indeed identify with, the philosophical approach that informed the judgment in *Nyandeni Local Municipality*, it is impossible, in my view, to reconcile it with the legal policy decision reflected in the *Shifren* judgment.

[16] Mr Acting Justice Kollapen followed the judicial philosophy of the decision in *Nyandeni Local Municipality* in his subsequent judgment in *GF v SH and others* supra. He held that public policy considerations concerning the paramountcy of the best interests of children trumped the application of the *Shifren* principle. The learned judge articulated his reasoning towards that conclusion along the following lines. In para 13 of the judgment he referred to the decision in *Nyandeni Local Municipality*, stating:

> In a full bench decision of the Eastern Cape High Court in *Nyandeni Local Municipality v Hlazo* 2010 (4) SA 261 (ECM) the court held that:
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> > 'Public policy (as underpinned by constitutional norms) dictates that the *Shifren* principle, which holds that a contractual non-variation clause is valid and effectively entrenches both itself and all other terms of the contract against oral variation, should

> be relaxed so as to bar a party from relying on it where it was invoked for purposes other than the vindication of legitimate rights.'
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> Thus, even though the *Shifren* principle is firmly entrenched in our law, it is subject to the consideration that in appropriate cases the demands and the requirements of public policy may well permit or indeed justify a departure from such a principle.

With reference to the question of whether a non-variation clause in a divorce settlement agreement prevented the enforceability of a subsequently orally agreed variation of the respondent's maintenance obligations, the learned judge held as follows at para 18-22:

> [18] While the *Shifren* principle was not articulated as being confined to contracts of a commercial nature, and on the face of it would have general application, it must also be evident that, in matters that relate to the rights and obligations (in the context of family law), different considerations, distinguishable from those applying in the world of commercial contracts, may well warrant consideration.
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> [19] Those considerations include:
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> > [19.1] The constitutional imperative that in all matters concerning children the principle of the best interests of the child must apply as a guiding and paramount principle.
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> > [19.2] The obligation of parents to maintain their children in accordance with their ability, as well as the needs of the minor children. It should follow that it is indeed a matter of public policy to ensure that those guiding principles, insofar as they relate to the reciprocal and mutual reinforcing obligations of parents, are maintained and are not sacrificed, as it were, at the altar of ensuring certainty at all times.
> >
> > [19.3] The fact that in the real world parents, entrusted with the responsibility of ensuring that the best interests of their minor children are advanced, must invariably make decisions that may warrant a departure from, or a variation of, the express terms of a settlement agreement. It would be impractical and inconvenient to suggest that, in all such instances, and in the face of a non-variation-except-in-writing clause, parents should then be constrained in their ability to take decisions and to do things, even by mutual agreement, that would advance the interests and the wellbeing of such minor children.
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> [20] Certainly, and for the considerations alluded to above, there must be instances where public policy may justify a departure from the *Shifren* principle in the area of family law. Without suggesting that such departure should be easily justified or readily countenanced, there must be due regard to the context within which parenting takes place, and within which decisions that may on the face of it vary an express obligation, are arrived at to attain some other socially desirable objective — the best interests of the child. In all the circumstances the demands and the consideration of public policy, in the context of ensuring the development of family law, that are consistent with the values of the Constitution, including the values of

> equality and non-discrimination, as well as ensuring the advancement of the best interests of the child, would in my view, in appropriate instances and where a proper case is made out, certainly justify a departure from what has become known as the *Shifren* principle.
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> [21] In conclusion, I find that while the principle remains a firmly entrenched and necessary part of the law, the departure may not only be constitutionally permissible, but perhaps even constitutionally mandated.
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> [22] If indeed the *Shifren* principle were entrenched and did not (sic) apply in the context of family law, it may well have the effect of achieving all kinds of unintended consequences that may well militate against the development of a public policy consistent with the norms and values of our Constitution. In particular, a strict adherence to those principles may well mean that parents become saddled with a disproportionate share of their responsibility in respect of the maintenance and upbringing of a minor child. It may well have the effect of restricting the ability of parents to do that which the best interests of the child demand, as opposed to that which they are obliged to do in terms of an agreement of settlement, which terms and provisions may well not have kept in touch with the changing times and developments relevant to the context.

[17] The passage in *Steyn and Another* supra, on which the respondent's counsel relied, followed the judicial philosophy reflected in the judgments in the *Nyandeni Local Municipality* and *GF v SH* judgments just discussed. The determination of the case appears, however, to have been made on unrelated grounds and the *dicta* of Peter AJ in point were thus probably obiter.

[18] The approach adopted by Kollapen AJ in the respect described above was rejected by the Supreme Court of Appeal when the matter was taken to that court on appeal. At para 16 of the judgment on appeal, *SH v GF and Others* 2013 (6) SA 621 (SCA), it was held:

> 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. See *SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere* 1964 (4) SA 760 (A) at 767A – C and *Brisley v Drotsky* 2002 (4) SA 1 (SCA) (2002 (12) BCLR 1229; [2002] 3 All SA 363) paras 7, 8, 90 and 91. Despite the disavowal by the learned judge, the policy considerations that he 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:
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> > '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.'

That approach has most recently been confirmed in the judgment of the Supreme Court in *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another* [2014] ZASCA 178 (21 November 2014), which was given on the very day that the current matter was argued. At para 13 of the judgment, Cachalia JA stated '…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 to 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'.

[19] In the circumstances, while I suspect that the last word has yet to be spoken on the inviolacy of the *Shifren* principle, I consider that I am bound by the judgments of the Supreme Court of Appeal not to follow the approach contended for by the respondent's counsel on the basis of the views reflected in the decisions in *Nyandeni Local Municipality, SH v GF* (GNP) and *Steyn and Another*.

[20] Dealing with the respondent's counsel's aforementioned final argument, I do not think that the alleged compromise agreement postulated substitute performance. Rather, as already noted, it varied the deed of lease's provisions on the determination of the rental and how it was to be paid. Even were the alleged arrangement properly to be characterised as a method of substituted performance, it is common cause that the equivalent of the rental due to have been paid in terms of the deed of lease has in point of fact not been paid under the alternative scheme related to the respondent's daily takings. Thus, on any approach there is nothing in the argument.

[21] It follows that the applicant is entitled to an order directing the respondent to vacate the premises. I consider that it would be reasonable to afford the respondent a few days in order to make the necessary arrangements to do so. The order to be made will provide that respondent must vacate the premises within five days of the service on it at the premises of a copy of the order.

[22] The applicant sought costs on the attorney and client scale. The applicant's entitlement to costs on that scale was stipulated in terms of clause 12.2 of the deed of lease. The applicant also sought the costs of two counsel. In my view the nature of the matter did not reasonably require the costs of two counsel. I shall allow only the costs entailed in the engagement of a single advocate, even if those be the fees of a senior counsel.

[23] The following order is made:

1. The applicant's non-compliance with rules, in particular those relating to service and time periods, is condoned; and the matter is declared to have been properly instituted as one of urgency within the meaning of rule 6(12) of the Uniform Rules.
2. The respondent is directed to vacate the premises situated at Shops 15 and 16, First Floor, The Promenade, Victoria Road, Camps Bay, within five (5) days of the service on it at the premises of a copy of this order.
3. The respondent shall be liable to pay the applicant's costs of suit on the scale as between attorney and client.

**A.G. BINNS-WARD**
**Judge of the High Court**

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| **Date of hearing:** | **21 November 2014** |
| **Date of judgment:** | **25 November 2014** |
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| **Applicant's counsel:** | **B.J. Manca SC** |
| | **S. Wagener** |
| **Applicant's attorneys:** | **Van der Spuy & Partners** |
| | |
| **Respondent's counsel:** | **R. Wynne** |
| **Respondent's attorneys:** | **Clyde & Co.** |