IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case No: 20266/2015

ABSA BANK LIMITED	Plaintiff
and	
FUTURE INDEFINITE INVESTMENTS 201 (PTY) LTD	First Defendant
DAVID CLIFFORD BIRD	Second Defendant
WHITE SANDS MARINE (PTY) LTD	Third Defendant

Coram: Justice J I Cloete

Heard: 19 August 2020

Delivered electronically: 20 October 2020

JUDGMENT

CLOETE J:

[1] This is an action to be determined in accordance with an agreed statement of facts in terms of uniform rule 33(1). The plaintiff ("Absa") seeks judgment against the defendants for payment of R617 597.47 plus interest and attorney/client costs, coupled with an order declaring the first defendant's

immovable property specially executable. On the other hand the defendants seek orders directing Absa to sign a certain *'settlement agreement'* and for same to be made an order of Court, alternatively that they be ordered to pay R700 000 in instalments of R25 000 per month for a period of 28 months with effect from 1 September 2020, with each party to pay their own costs, save that attorney/client costs are sought, it would seem, from 14 August 2020.

[2] Absa's claim is founded on a written loan agreement concluded with the first defendant on 7 November 2008 and an addendum thereto concluded on 23 July 2012, which will for convenience, unless otherwise indicated, be referred to as *'the agreement'*. The first defendant's indebtedness was secured by way of a mortgage bond registered against its immovable property in Vredenburg as well as deeds of suretyship executed by the second and third defendants in favour of Absa on 28 October 2008 and 16 January 2008 respectively.

[3] The first defendant failed to make timeous payment in terms of the agreement but the defendants disputed that the first defendant was liable to do so. Absa instituted the current action to compel payment on 21 October 2015. The matter was defended and the trial set down for hearing on 19 August 2020.

[4] At all material times the parties' respective attorneys were duly authorised to conduct settlement negotiations and conclude any settlement reached on behalf of their clients, and all communications pertaining thereto were conducted by their attorneys.

[5] On 28 July 2020 Absa made a settlement offer to the defendants. On 31 July 2020 the defendants made a counter-offer in full and final settlement of the dispute, which reads as follows:

> *'1. Our client* [sic] *will pay your client the amount of R600 000.00 in full and final settlement of the matter.*
>
> *2. The aforesaid payment will be made in 24 instalments of R25 000.00 each per month commencing on 1 September 2020.*
>
> *3. Each party shall pay their own costs.'*

[6] On 5 August 2020 Absa replied, rejecting the defendants' offer and making a counter-offer. On 6 August 2020 the attorneys had a telephonic discussion during which they agreed to settle the action between the plaintiff and the defendants on the following basis (hereinafter referred to as *'the settlement agreement'*):

> *'1. The defendants would pay R700 000 in full and final settlement of the matter;*
>
> *2. Payments would commence on 1 September 2020 in instalments of R25 000 per month for a period of 28 months;*
>
> *3. Each party would pay its own costs; and*
>
> *4. The settlement agreement would be made an order of Court.'*

[7] On 6 August 2020 Absa's attorney sent an email to the defendants' attorney confirming the telephone conversation and the terms of the settlement agreement. It reads as follows:

> *'Dear Sir*
>
> *The above matter and our telephone conversation this afternoon refers.*
>
> *We confirm that the matter has been settled on the following basis:*
>
> 1. *Defendants have agreed to pay R700 000.00 in full and final settlement of the matter;*
> 2. *Payments are to commence on 1 September 2020, at an instalment of R25 000.00 for a period of 28 months;*
> 3. *Each party shall pay its own costs;*
> 4. *Settlement agreement to be made an order of Court.*
>
> *I will prepare the settlement agreement and hand same to you for completion in due course.*
>
> *Trust you will find the above in order.'*

[8] On 14 August 2020 the defendants' attorney gave notice of intention to amend their pleadings by inserting a second special plea and introducing a counterclaim. The amendment was subsequently effected on 17 August 2020. The special plea recorded the terms of the settlement agreement and continued as follows:

> *'4. Plaintiff did not reserve its rights to proceed on the original cause of action, which was compromised by the conclusion of the settlement.*
>
> *5. The Plaintiff has repudiated the Settlement Agreement.*

6. The Defendants elect not to accept the said repudiation, and tender to abide by the terms of the Settlement Agreement…'

[9] The counterclaim followed the same format. Absa pleaded to the counterclaim by denying the existence of a settlement and further that:

'2.2 The plaintiff pleads that the agreement [the home loan agreement]*, addendum… and the suretyships… contain the following non-variation clauses….:*

2.2.1 Clause 24 of the agreement:

"No agreement varying or deleting any provisions of the Loan Agreement, or adding any provision, and no waiver of any rights will be effective unless in writing and signed by the Borrower and the Bank."

2.2.2 Clause 7 of the addendum:

"No agreement to vary, add or cancel this addendum shall be of any force or effect unless reduced to writing and signed by or on behalf of the Parties."

2.2.3 Clause 16 of the second defendant's suretyship… and clause 15 of the third defendant's suretyship….:

"Any amendment hereof shall only be valid if it is in writing and signed by both the Bank and myself/ourselves."

2.3 The plaintiff pleads that the alleged oral Settlement Agreement amounts to a variation of the agreement in respect of the total indebtedness of the defendants, the terms of the loan, the plaintiff's right to recover interest from time to time on the outstanding balance owing under the agreement and its entitlement to recover legal costs on an attorney and client scale.

2.4 The plaintiff pleads that the alleged Settlement Agreement fails to comply with the entrenched formalities imposed by the parties in the non-variation clauses, i.e. that it had to be reduced to writing and signed by both parties.

2.5 In the premises, the alleged Settlement Agreement is unenforceable and failed to validly amend, novate and/or compromise the agreement relied upon by the plaintiff in its POC [particulars of claim].*'*

[10] The issue for determination is therefore whether the settlement agreement validly settled the matter which was to be adjudicated by the trial court and thereby compromised Absa's right to proceed on the original cause of action.

[11] Absa's stance is evident from its plea to the counterclaim and will not be repeated save as set out hereunder. The defendants contend that the dispute was encapsulated in the pleadings exchanged; pleadings had closed and *litis contestatio* had been reached; the parties concluded a settlement agreement including that its terms would be made an order of Court; Absa failed to reserve the right to proceed on the original cause of action as pleaded; and the conclusion of the settlement agreement therefore compromised Absa's right to proceed thereon.

[12] Insofar as the non-variation clauses relied upon by Absa are concerned, the defendants contend that the formalities imposed by the parties in terms thereof are not entrenched, and even if they were, they are inapplicable in that the clauses do not preclude settlement in the manner effected *in casu*, i.e. in

settlement of pending litigation; nor do they preclude the tacit cancellation and/or variation and/or novation of the agreements to which they relate.

[13] *Mr Jonker*, who appeared for Absa, submitted that the validity of the settlement agreement turns on compliance with the entrenched formalities imposed by the parties in the agreement, i.e. the *Shifren* principle.

[14] In *Shifren*[1] the Appellate Division held that where it is stipulated in an agreement that variations thereto may only be in writing, such agreement cannot be varied orally. This principle survived constitutional scrutiny in *Brisley v Drotsky*[2] where the Supreme Court of Appeal held that a court has no discretion to decline to enforce a valid contractual term (of which a non-variation clause is part) and considerations of reasonableness and fairness do not come into play in the enforcement of such non-variation clauses. This was reaffirmed in *SH v GF and Others*:[3]

> *'…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…'*

[15] In the instant case it is common cause that the settlement agreement was concluded orally, notwithstanding that its terms were thereafter reduced to writing by Absa's attorney on the same day. In addition to the averments in

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1 *S A Sentrale Ko-op, Graanmaatskappy BPK v Shifren en Andere* 1964 (4) SA 760 (A).
2 2002 (4) SA 1 (SCA) at paras [7], [8], [90] and [91].
3 2013 (6) SA 621 (SCA) at para [16]. See also *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2020 (5) SA 247 (CC).

Absa's plea in reconvention, *Mr Jonker* argued that the settlement agreement amounts to a variation of the agreement in respect of Absa's right to accelerate the full indebtedness in the event of default.

[16] He submitted that the terms of the settlement agreement constitute nothing more than purported amendments to the agreement itself, which fall squarely within the ambit of the agreement's non-variation clauses, notwithstanding Absa's attorney's express reference to *'the above matter'* and *'the matter has been settled on the following basis'* in her email dated 6 August 2020, as well as *'the above matter'* being referred to by her as the pending litigation, ending with *'CASE NO. 20266/2015 (TRIAL – 19 AUGUST 2020) – URGENT!'*

[17] *Mr Jonker* contended that there is no magic in the defendants categorising the settlement agreement as a *'compromise'* in pending litigation, nor as a *'tacit cancellation and/or variation and/or novation'* in their rejoinder to Absa's replication.

[18] He relied on *Steyn and Another v Karee Kloof Melkery (Pty) Ltd*,[4] a decision of Peter AJ in the South Gauteng High Court and *Xtraprops 66 (Pty) Ltd v Phiopater Supplies (Pty) Ltd*,[5] a decision in this division of Binns-Ward J.

[19] The facts in *Steyn* were broadly as follows. The parties concluded a sale of business agreement containing a non-variation clause. Various disputes

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4 (2009/45448) [2011] ZAGPJAC 228 (30 November 2011).
5 (20228/14) [2014] ZAWCHC 177 (25 November 2014).

arose and negotiations followed. A written settlement agreement was concluded but signed by only one of the required signatories (*'the first settlement'*). This did not bring about an end to the dispute. Urgent proceedings were instituted in the magistrate's court.

[20] Further settlement discussions took place between the parties' respective attorneys on their behalf dealing with a number of disputed matters, and culminated in a written settlement offer contained in a letter from the plaintiffs' attorneys to the first defendant's attorneys. Importantly, the offer expressly recorded that its terms were not in novation of the existing sale of business agreement to the extent that the offer did not conflict with the provisions of that agreement. The offer was accepted in a letter from the first defendant's attorneys to the plaintiffs' attorneys (*'the second settlement'*). The second settlement was not otherwise reduced to writing and signed by the parties.

[21] About 18 months later a further dispute arose. The plaintiff issued summons based on the sale of business agreement, alleging that the first defendant was in default of the instalments payable. The full outstanding balance in terms of the sale of business agreement was claimed. The defendants relied on the first settlement and, in an amended plea introduced on the second day of trial, the additional defence of the second settlement.

[22] The defendants in *Steyn* relied on *Buffet Investments.*[6] There the parties entered into various written loan agreements (*'main agreements'*) containing non-variation clauses. As the matter was decided on exception the Court assumed that, as alleged by the plaintiffs, the defendants had failed to honour the terms thereof. Subsequent to the default, the parties concluded an oral agreement of compromise in terms of which the defendants would pay a certain capital sum to the plaintiffs in full and final settlement of all claims arising from the main agreements, subject to stipulated payment terms and the provision of security.

[23] The Court in *Buffet Investments* accepted the argument that the compromise agreement had the effect of preventing litigation arising from the dispute between the parties, and that it constituted a waiver by the plaintiffs of their rights in the main agreements on the principle set out in *Impala Distributors v Taunus Chemical Manufacturing Co*,[7] namely that while an entrenched provision restricting an oral cancellation of a written contract precludes such oral cancellation, an oral waiver is valid in respect of a right which in terms of the contract accrues exclusively to the party waiving. Accordingly, an existing cause of action arising from a breach of a written agreement may be waived orally.

[24] However, in *Steyn* the Court held as follows:

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6 *Buffet Investments Services (Pty) Ltd and Another v Band and Another* [2009] ZAKZDHC 38 (5 May 2009).

7 1975 (3) SA 275 (TPD).

> *'[33] …I am unable, with respect, to agree with the judgment in Buffet Investments as a correct application of the Impala Distributors principle. First, not only was there a standard non-variation clause which required variations to be in writing and signed by the parties to be binding, entrenched therein was a clause providing that no agreement varying, adding to, deleting from or cancelling the agreement and no waiver of any right thereunder was to be effective unless reduced to a non-electronic, hardcopy, written amendment signed by means of handwritten signatures by or on behalf of the parties. As such, the wording of the entrenched clause specifically excluded oral waiver. Secondly, in my view, the agreement was incorrectly characterised as a waiver in any event. It was certainly not the waiver of a provision exclusively for the benefit of the first plaintiff. Had this been so, a waiver of such a term would result in the term ceasing to apply. The oral agreement was one varying the performance obligations of the first defendant and if effective, created new obligations different from those contained in the agreement. Expressed differently, this was not a waiver in the sense of a right or provision which accrued exclusively to one party and having been waived was dispensed with in its entirety. Rather it was an agreement to vary the right and the corresponding obligation. If the reasoning in… Buffet Investments were to be accepted, the Shifren principle would no longer have any application…'*

[25] The findings in *Steyn* with regard to the first settlement are not relevant in the instant case and I will focus on those pertaining to the second. The Court reasoned that three questions needed to be answered. First, whether or not the second settlement fell within the scope of the entrenched formalities clause in the sale of business agreement. Second, if this was a requirement, whether or not there had been compliance. Third, if there had not been compliance, the consequences in light of the *Shifren* principle.[8]

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[8] At para [25].

[26] For present purposes I need only deal with the first and third requirements. At paras [35] – [38] the Court dealt with the first question as follows:

> *'[35] The first question concerning the scope of the agreement is not concerned with a characterisation of the agreement and determining whether such characterisation is an agreement to vary the terms of the original agreement. It is of little profit to attempt to characterise the settlement agreement either as a waiver, an agreement to release, an agreement not to enforce a right – a pactum de non petendo, a compromise, settlement, novation, an agreement to accept substituted performance or any other innominate contract. The first question is answered by determining whether or not the second settlement is an agreement which conflicts with the provisions of the original sale of business agreement. This is so irrespective of whatever label is given to the second settlement agreement.*
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> *[36] This question is answered by looking at the effect of the second settlement and asking whether or not the legal consequences thereof are inconsistent with the legal consequences of the original agreement, prior to the execution of the second settlement…*
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> *[37] The effect of the second settlement, is that if performed, whatever performance obligations the seller had under the agreement that were the subject matter of a dispute between the parties and any further payment obligations the defendants would have thereunder would become extinguished on payment of the R305 000.00 and interest due as stipulated in the second settlement.*
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> *[38] The legal effect of these terms is simply inconsistent with the terms of the original agreement. That this is so is evident by the fact that the second settlement is pleaded as a complete defence to a claim brought under the original agreement. That the second settlement conflicts with the provisions of the original agreement, admits of no doubt. The first question must be answered in the plaintiffs' favour.'*

[27] The Court dealt with the third question as follows:

> *'[42] The dispute is whether or not the second settlement should enjoy efficacy and primacy over the original agreement and defeat the claim. This then brings me to the third question which concerns the limits to the enforcement of the Shifren principle.*
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> *[43] In relation to the third question, it must be noted that the Shifren principle is established law and a part of the common law. The decision of the Court in Shifren is binding upon me… and, on the authority of Brisley, which too, is binding upon me, there is no scope for me to reconsider the principle in the light of my obligation to develop the common law in the light of fundamental constitutional values in terms of section 173 of the Constitution…*
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> *[51] The second settlement was not confined only to the sale of business agreement. It is a compromise of disputes that had arisen not only under the sale of business agreement, but also disputes that were intertwined therewith which arose from the dairy farming operations conducted by the first defendant with its cattle on the farm prior to the effective date. The second settlement, if enforced and given effect, would not only affect the legal consequences of the original agreement but would also bring to a conclusion the Magistrates' Court litigation and settle the other disputes arising from collateral agreements in relation to the additional dairy cows placed on the property prior to the effective date by the purchasers and expenses incurred…*
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> *[52] Thus the effect of the second settlement goes beyond merely an alteration of legal consequences of the original agreements. Agreements in relation to the Magistrates' Court proceedings and the other financial transactions and disputes arising therefrom fall outside the scope of the original agreement. These agreements were not subject to entrenched formalities clauses…'*

[28] The Court then reasoned that three public policy considerations were arguably offended by giving effect to the *Shifren* principle on the facts. The

first is that there should be an end to litigation. By not giving effect to the second settlement, the magistrate's court proceedings would not finally be disposed of or brought to an end. The second is that parties to disputes are to be encouraged to avoid litigation by resolving their differences amicably. Giving effect to the *Shifren* principle on the facts before the Court would discourage not only settlement of the disputes that had arisen in the sale agreement but also re-open the magistrate's court litigation. Third, if effect were to be given to the entrenched formalities clause, the principles of freedom and sanctity of contract would be violated:

> *'[57] This would be a violation of those principles in relation to the agreement insofar as it relates to the settlement of the Magistrates' Court litigation and the disputes which are outside the original agreement and relate to collateral agreements. In respect of agreement relating to these disputes, the parties have not taken upon themselves entrenched formalities.'*

[29] The Court found that, on the facts, the *Shifren* principle had to yield to public policy considerations, thus requiring enforcement of the second settlement agreement.

[30] In *Xtraprops* the applicant applied for the eviction of the respondent from certain business premises. The parties had previously concluded a written lease agreement containing a non-variation clause and it was common cause that the respondent was in arrears with its rental payments in terms thereof. The respondent opposed the application on the basis of an alleged oral agreement of compromise pertaining to an alternative payment arrangement,

contending that it had been complying therewith. The applicant denied both of these allegations.

[31] Binns-Ward J aligned himself with the criticism expressed in *Steyn* of the decision in *Buffet Investments*, finding that the compromise agreement involved in that case was nothing other than a variation agreement and therefore subject to the formalities entrenched in the non-variation clause of the original agreement.

[32] Rejecting the respondent's arguments and ordering its eviction, the learned Judge highlighted what was stated by the Supreme Court of Appeal in *Spring Forest Trading 599 CC v Wilberry (Pty) Ltd t/a Ecowash and Another*[9]:[10]

> *'…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.'*

[33] *Mr Tredoux*, who appeared for the defendants, submitted that both *Steyn* and *Xtraprops* are distinguishable. He argued that in the present case the settlement was reached after *litis contestatio*; the parties settled their disputes on the pleadings at a time when the trial was imminent; and but for Absa's "repudiation" of the agreed terms recorded by its own attorney the formal,

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9 [2014] ZASCA 178 (21 November 2014)
10 At para [13] of *Spring Forest Trading.*

written settlement agreement which she undertook to draft and forward to the defendant's attorney would have been signed by the parties and the litigation brought to an end before the commencement of the trial.

[34] He argued that, had Absa wished to record that the settlement reached was not in novation of the agreement on which its claim in the pending litigation was based (to the extent that it did not conflict with the provisions thereof) it was at liberty to do so. He submitted that, in any event, it would offend against public policy to permit Absa to "hide behind" the non-variation clauses in the agreement in these circumstances.

[35] To my mind *Mr Tredoux*'s arguments have merit. Viewed in proper context, this is not a case where the defendants seek to rely on an oral agreement to vary the original agreement. In her email of 6 August 2020 Absa's attorney not only recorded all the terms of the settlement reached to resolve the pending litigation, she also undertook on Absa's behalf to *'prepare the settlement agreement and hand same to you for completion in due course'.* As is clear from the agreed statement of facts there is no suggestion that she was not authorised to present to the defendants' attorney, for signature by his clients, the very same comprehensive set of terms of the settlement reached which she herself had recorded in writing.

[36] I accept that this may potentially be a harsh result for Absa given its attorney's failure to insist upon an acceleration clause in the event of the defendants' default at the time the settlement was concluded. However it was open to

Absa to have pleaded an implied term of trade usage to this effect when faced with the defendants' second special plea and counterclaim. It was also open to Absa to have relied on any other mercantile usage. Christie's Law of Contract in South Africa 7ed at 195 is instructive:

> *'The onus of establishing all the above requirements is on the party seeking to imply the term in the contract, and because the existence of a trade usage is a matter of fact, not law, it must be pleaded, but some mercantile usages need not be pleaded because they have achieved the status of rules of law by the process described by Bale CJ, in* Hamlin v Dunn & Co*, in relation to the payment of a broker's commission:*
>
> > *"I understand that the rule is that, when a sale is effected, the seller pays the commission. Now this custom has so universally obtained that it may be said to have hardened into a rule of law, and I do not think that a Court ought to shut its eyes to a custom which is so well known, although not pleaded. We are not required to assume entire ignorance of commercial matters." '*

[37] In my view, had Absa pursued either of these options, the defendants would have had a hard time persuading a Court that an acceleration clause would have no application. However it elected not to do so.

[38] I thus conclude that the settlement reached was a compromise of the pending litigation. An additional consideration is that, irrespective of the merits of the pleaded defence to Absa's claim upon which I was not required to adjudicate, the defendants disputed their liability from the outset.

[39] This is not a situation where they admitted liability but sought to compromise their obligations, and Absa's rights, by concluding a settlement agreement. This settlement was plainly concluded to put an end to the litigation, an important public policy consideration. Its legal consequence would have been just that had Absa not subsequently withdrawn from the settlement.

[40] However, I do not believe that a punitive costs order in favour of the defendants is warranted. I am also of the view that no point will be served by compelling Absa to sign the terms of a settlement agreement in circumstances where such terms can simply be made an order of court. This will avoid any potential disputes relating to authorised signatories and the like.

[41] **In the result the following order is made:**

1. **The defendants shall pay the sum of R700 000 (seven hundred thousand rands) to the plaintiff in full and final settlement of this action, in instalments of R25 000 per month with effect from 1 September 2020 for a consecutive period of 28 months. For sake of practicality, payments for the months of September and October 2020 shall be made simultaneously with the instalment due and payable on 1 November 2020;**

2. **Each party shall pay their own costs up to and including 14 August 2020; and**

3. **The plaintiff shall pay the defendants' costs as from 15 August 2020 on the scale as between party and party as taxed or agreed.**

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J I CLOETE

For the plaintiff: Adv J W **Jonker**

Instructed by: Tim Du Toit & Co. Inc.

For the defendants: Adv P **Tredoux**

Instructed by: K J Bredenkamp Attorneys