THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

From: The Registrar, Supreme Court of Appeal

Date: 25 October 2023

Status: Immediate

The following summary is for the benefit of the media in the reporting of this case and does not form part of the judgments of the Supreme Court of Appeal

Ba-Gat Motors CC t/a Gys Pitzer Motoring and Another v Kempster Sedgwick (Pty) Ltd (511/2022) [2023] ZASCA 137 (25 October 2023)

Today, the Supreme Court of Appeal (SCA) dismissed an appeal with costs against the judgment of the Gauteng Division of the High Court, Pretoria (the high court), which rejected a defence of estoppel relied upon by the appellants in resisting a summary judgment application.

The issue before the SCA was whether the high court properly rejected the defence of estoppel in applying the *Shifren* principle.

The facts of the matter were as follows. The first appellant, Ba-Gat Motors CC trading as Gys Pitzer Motoring operated a used-car dealership. The second appellant, Gybertus Pitzer was the sole member of the first appellant. The respondent, Kempster Sedgwick (Pty) Ltd operated a Volvo franchise from leased premises. On 21 February 2017, the respondent concluded a written agreement to sub-lease a portion of the premises to the first appellant commencing on 15 March 2017 to 30 September 2020. Notably, the sub-lease agreement (the agreement) contained a non-variation clause. The second appellant had bound himself jointly and severally as surety and co-principal debtor.

The respondent applied for summary judgment in the high court, claiming payment for arrear rental. The appellants delivered a plea denying any obligation to pay rental beyond April 2019. They alleged that the sub-lease was cancelled in terms of an oral agreement concluded between the first appellant and the respondent during or about May/June 2018.

The SCA, through the majority judgment penned by Mabindla-Boqwana JA (Meyer JA and Nhlangulela AJA concurring), found that upholding the defence of estoppel in this matter would have been to do so on dubious grounds and only because the rejection of such would have appeared harsh to the appellants, something the SCA had in precedent cautioned against. The majority judgment held that to find otherwise would have violated the *Shifren* principle. Further, it would have rendered clause 13.3 of the agreement nugatory; that could not have been the intention of the parties when they concluded the agreement.

The majority judgment found further that, in the circumstances, oral evidence would not have assisted the appellants. It was impelled, therefore, to find that the defence raised fell short of a *bona fide* defence that was good in law. Accordingly, the high court's order granting summary judgment in favour of the respondent had to stand.

A dissenting judgment penned by Dambuza JA (Carelse JA concurring) would have upheld the appeal. Dambuza JA found that there were several disputes of fact, which disputes would ordinarily have been determined at trial. Consequently, Dambuza JA did not agree that the plea tendered by the appellants in this case was a sham or not good in law. To deprive the appellants of the right to have their case determined in the ordinary course of events, by granting the stringent remedy of summary judgment, in these circumstances would have been unjust.

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