IN THE HIGH COURT OF SOUTH AFRICA

(EASTERN CAPE LOCAL DIVISION – MTHATHA)

CASE NO.: 2833/2016

Date of argument: 08 October 2021

Date delivered: 10 May 2022

In the matter between:

PROFESSOR B L MEEL	First Plaintiff
PROFESSOR K S GAIRE	Second Plaintiff
PROFESSOR VERENA KARAIRE-MUSHABE	Third Plaintiff
PROFESSOR A B NGANWA-BAGUMAH	Fourth Plaintiff
PROFESSOR A B KAFUKO	Fifth Plaintiff
DOCTOR M EJUMU	Sixth Plaintiff
DOCTOR P M MAFUYA	Seventh Plaintiff
DOCTOR F J MAYANJA	Eighth Plaintiff

And

LIFE ST MARY'S PRIVATE HOSPITAL	Defendant

JUDGMENT

MAJIKI J:

[1] In July 2016 five medical doctors and shareholders (first to fifth plaintiff) of St Mary's Private Hospital (Pty) Ltd (the defendant company) initially launched an urgent application against the defendant. The plaintiffs sought an order declaring the 2002 shareholder's agreement (2002 agreement) invalid, of no force and effect *ab initio* and that it be set aside. Further, that the defendant be interdicted from seeking to compel the plaintiffs to dispose of their shares from the defendant on the basis of the said agreement, pending the finalisation of the matter. The defendant opposed the application. On 28 July 2016 an interim order was agreed to by the parties, in the main, prohibiting the defendant, its directors from taking possession of, alienating or encumbering the plaintiffs' shares. The defendant filed a counterclaim seeking an

order declaring the 2002 agreement to be valid, of full force and effect and binding on the first to fifth plaintiffs, alternatively, that the said plaintiffs do what was necessary to give effect to and sign all necessary documents to give effect to the 2002 agreement.

[2] Subsequently, the matter was referred to trial for the applicant to be plaintiffs and respondent to be defendant and;

> ‘(a) The notice of motion and founding affidavit stand as a simple summons and the answering affidavit as respondent’s notice of intention to defend;
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> (b) The applicants will deliver a declaration by no later than 31 March 2017;
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> (c) The respondent will deliver a plea and counterclaim by no later than 7 April 2017;
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> (d) The applicants will deliver a plea to the counterclaim and a replication (if any) by no later than 28 April 2017.
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> 2. The parties will discover only documents not already part of the papers in the application. Their discovery affidavits together with discovered documents will be delivered by no later than 19 May 2017. The provisions of rule 35 shall apply to the party’s discoveries;
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> 3. Request for further particulars, if any will be delivered by no later 31 May 2017 and answered by no later 9 June 2017.
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> 4. All deponents to any affidavit in the application may be called as a witness without further notice. Any party who intends to call a witness, other than a witness that deposed to an affidavit in the application, must give notice to the other party (or parties) no less than ten (10) days before trial – trial date and in the notice, must provide the name of the witness, to be called.

5. The provisions of rule 36 (9) (a) and (b) will apply, to the extent that any party may wish to call an expert witness.

6. The parties will hold a pre-trial conference on 20 June 2017, at a time to be arranged.

7. The costs incurred to date are reserved for decision by the trial court'.

[3] Thereafter the sixth to the eighth plaintiffs, by agreement, joined in the proceedings. All eight plaintiffs will be referred to as plaintiffs hereunder. The sixth respondent has since died, he was substituted by the representative of his estate. All other plaintiffs sue in their personal capacities.

[4] As at the stage of trial plaintiffs had filed an amended declaration and the defendant had filed an amended plea and counterclaim. The defendant's counterclaim in turn attracted a plea from plaintiffs.

BACKGROUND

[5] It is common cause that the defendant company was registered on 22 December 1992. Further, plaintiffs at different times bought and acquired shares from the defendant company, from the time of its registration. Thereafter, plaintiffs as shareholders entered into shareholder's agreement on 01 August 1996 (the 1996 agreement). In 2002 another agreement was drafted, presented and discussed at various board meetings, with a view to have it signed and entered into by the shareholders. The said agreement is the subject of the dispute between the parties, in particular whether the agreement was validly concluded and replaced the 1996 agreement. For purposes of the judgment the numbering of the 2002 agreement will be referred to in accordance with the pagination in the agreement.

PARTIES VERSIONS

[6] According to plaintiffs, the board's attempt to have the 1996 agreement replaced by the 2002 agreement was unsuccessful. The only validly concluded

agreement between the shareholders and the defendant company is the 1996 agreement. The said agreement was not terminated by the shareholders.

[7] Plaintiffs rely on clause 7 of the 1996 agreement (clause 7) which provides:

> 'no variation of this agreement shall be valid unless reduced to writing and signed by all shareholders'

They say the said agreement was not varied, in writing. In the plea to the defendant's counterclaim they say, In order for the 2002 agreement to come into existence it needed to be signed by all parties.

[8] Furthermore, plaintiffs aver that the 2002 agreement is not binding on them it because it was not adopted at any shareholder's meeting, the directors of the defendant were never authorised by the shareholders to adopt it on their behalf.

[9] All plaintiffs except for fifth and seventh plaintiffs said they were not presented with and did not sign the 2002 agreement, the signatures on two pieces of paper (pages 11), attached to the copy of the disputed 2002 agreement were not for the acceptance of the said agreement. The pages 11 were fraudulently annexed to the 2002 agreement in order to misrepresent that the aforesaid plaintiffs signed the said agreement. The fourth plaintiff later stated that he never signed at all, what appeared at the first page 11, annexed to the 2002 agreement, was not his signature. The sixth plaintiff had said he was neither presented with the 2002 agreement nor did he sign it. The said plaintiff was already deceased during the hearing of the matter.

[10] Seventh plaintiff did not testify. She had pleaded that a one page document, with a heading, St Mary's Private Hospital Shareholder's Agreement was transmitted to her via facsimile, directing her to sign and send it back. She was not presented with the 2002 agreement.

[11] According to the defendant the 1996 agreement was terminated upon conclusion of the 2002 agreement. The 2002 agreement was presented to the shareholders and was signed at various locations during May and June 2002. In

instances where shareholders acquired shares only after the dates of signature of the 2002 agreement, those shareholders agreed in writing to be bound to and accepted the terms of the said agreement.

[12] Furthermore, the 2002 agreement was validly concluded, it was reduced to writing in terms of clause 7 of the 1996 agreement and remains of force and effect. It was not a requirement that in order for the 2002 agreement to be valid it had to be adopted by either shareholders or directors of the defendant whether at a meeting or otherwise. On 24 July 2002 seventh respondent was presented with the document annexed as 'CC1' constituting the entire 2002 agreement, she agreed in writing to be bound by the said agreement. She did not in July 2002 or at any stage thereafter, dispute being so bound.

[13] The defendant avers that on 2 April 2002 in a shareholders' meeting, the defendant advised that a new shareholders' agreement would be distributed for comment. Subsequently on 16 May 2002, in a director's meeting, the 2002 agreement was tabled. Fourth plaintiff was personally present, first to third plaintiffs and the fifth, sixth and eighth plaintiffs and other doctor shareholders were represented, the attention of the meeting was drawn to the proposed clause 9, which was inserted into the 2002 agreement. Fourth plaintiff and other representatives of doctor's shareholders did not object to the intended conclusion of the 2002 agreement or to clause 9 of the said agreement. In subsequent directors' meetings on 5 September 2002 and 9 December 2002, the doctor shareholders who were represented were informed that only two doctors, Drs Mushabe and Surka did not sign the 2002 agreement. They are not among plaintiffs. Fourth plaintiff was personally present in the meeting of 9 December 2002. None of the doctor shareholders denied that the 2002 agreement had been signed. They also did not dispute that doctor Mushabe would not be entitled to representation, as a shareholder on the board, until he signed the 2002 agreement.

[14] Further, it averred that it, acting on the strength of plaintiffs' representations, the defendant conducted itself in accordance with the 2002 agreement and accepted that the said agreement was of full force and effect. It also permitted appointment of further doctor shareholders ostensibly in terms of 2002 agreement, in doing so it

acted to its detriment. The defendant pleaded that the plaintiff was therefore estopped from disputing the validity of the 2002 agreement.

[15] In its counterclaim the defendant pleaded that plaintiffs' conduct among others, that of disputing the validity and existence of the 2002 agreement is a clear and unequivocal intention to no longer be bound to the 2002 agreement. Therefore, such constituted repudiation of the 2002 agreement, which repudiation is not accepted by the defendant.

[16] Clause 9.3 provides:

> 'In the event of the retirement (in this regard, within six months of reaching the age of 70 years), any doctor emigrating, relocation of practice to a position 100 km away from Umtata, death or incapacity of any of the Doctor shareholders, he or his estate shall be required by the St Mary's board of directors to sell all of his St Mary's units of equity to the other Doctor shareholders on the basis set out in clauses 9.2 and 9.6.'

Clause 9.4 provides:

> 'In the event that a Doctor shareholder, in the opinion of the board of directors of St Mary's is not adequately supporting St Mary's, or has conducted himself in such a fashion so as to bring disrepute on St Mary's, he may be required by the St Mary's board of directors to sell all or some of his St Mary's units of equity to the other doctor shareholders on the basis set out in clauses 9.2 and 9.5'.

[17] On 7 August 2017 the defendant requested admissions from plaintiffs. The response thereto was filed on 26 January 2018, amongst those first, second, third, fifth to seventh plaintiffs admitted that they signed page 11 for attendance in some meeting and not for accepting 2002 agreement. Their signatures were not forged but the pages were not authentic.

[18] In relation to the claim in convention regarding the declaratory of 1996 agreement, plaintiffs bear the onus of proof and the duty to begin. Plaintiffs led evidence of five (5) witnesses, doctors Ngwane-Bagumah, Gaire, Meel, Mushabe and Mayanja.

PROFESSOR NGWANA-BAGUMAH

[19] He said he became a shareholder from inception of the defendant in 1992. He also became a director. He said he recalled discussions at the meeting of 16 May 2002 about shareholding. His stance had always been that of disagreeing with the 2002 agreement, in particular with regard to elevation of the status of Afrox, the proposal regarding retirement, emigration, relocation of practice and the defendant's perverse incentive above the interests of patients. He had insisted that the shareholders be consulted. Mr Garwood was to obtain the shareholders' signatures. There was no interaction about the 2002 agreement or signature thereof. During his informal engagements with the shareholders he gathered that some were not against the agreement whilst others were against it.

[20] He accepted that in the affidavits it was stated that he had signed page 11 attached to the 2002 agreement but for other purposes and not the 2002 agreement. It was further stated, he did not know why he signed but probably it was for shares. He said at that stage the signature looked like his. However, as the case progressed and upon a closer look, he realised that the said signature was not his. He said he would remember if he had signed the 2002 agreement. His signature was forged, anyone who would have done so would be from the defendant's camp. This was consistent with what he stated after he had been granted leave to withdraw his prior admission that he had signed page 11. He was taken through the minutes of directors' meeting of 9 December 2002. He accepted the contents thereof, even though he said he did not have independent recollection of discussions at the meeting. Therein, it was recorded that Drs Kali, Mushabe and Surka had not signed the 2002 agreement, Doctor Kali had since signed. He said he did not remember why he did not indicate that he had not signed, even after he received a copy of the minutes. He also did not recall receiving the minutes but accepted that as a matter of course the minutes ought to have been sent to him.

DOCTOR GAIRE

[21] He testified that he first obtained shares in 2001. He signed page 11 but had no recollection of when and how he signed it. Further, he had never seen the 2002 agreement. He first became aware that he was said to have signed the 2002 agreement when he received the letter of 5 April 2016, advising that he had to sell his shares. He was disturbed when he learnt about having signed for the sale of shares as suggested in the said letter. He said page 11 was probably an attendance register at one of the annual general meetings or special meetings. He discussed the issue about signing of the shares with other shareholders and none had a clue of having signed for such. They also thought page 11 was some attendance register. He only learnt of the actual terms of the agreement after the commencement of the litigation, Mr Garwood never interacted with him regarding the procurement of his signature. Regarding Drs Stofile and Mbambisa's evidence that they would say they signed 2002 agreement, he said they may have, but he did not sign the 2002 agreement. He also said he never paid attention to the fact that page 11 had a provision for signature of witnesses, nevertheless, none so witnessed.

PROFESSOR MEEL

[22] Professor Meel testified that he first became a shareholder in the defendant in 2001. He never saw or signed any shareholder's agreement. He was not aware of any agreement. He just applied for shares as he would in entities like Telkom, without more. He said the signature at page 11 was his, in its short form. However, he did not recall the circumstances under which he signed it. He never met Doctor Garwood. In cross examination it was suggested that in the replying affidavit it was stated that they thought they were signing their shares. They were defrauded of the true nature of what they were signing. He said misrepresentation was possible, he could not have signed for a document he had not seen. However, he was not able to state who did so. Even other doctor shareholders he spoke to, did not know how their signatures at page 11 were procured. He also said he became aware of the existence of the 2002 agreement in 2016. He did not sign documents like agreements with his short form signature.

DOCTOR KARAIRE MUSHABE

[23] She testified that she became a shareholder in 2001. Her signature appeared at page 11, however, she had no recollection of when she signed same. She said she never met Mr Garwood. She only saw the said page in 2016. It was strange that there were two (2) pages with page number 11. It could well have been an extract of a meetings' attendance register. She said she only remembered discussions and disagreements about 2002 agreement. She never discussed about the said agreement with her husband, who was one of the directors during the period the 2002 agreement was mooted. In 2016 when the case started, she together with other plaintiffs discussed the 2002 agreement, her husband was also part of the discussions. Her husband told her about five (5) shares he signed for on 6 January 2020. Previously they had not discussed his interaction with the defendant or about the letter requesting the shareholders to sign the 2002 agreement. Initially she had said she did not recall if she received the letter of 4 June 2002 addressed to shareholders enclosing the 2002 agreement, however she was certain that she never received the 2002 agreement. Later, she said she did not receive the said letter.

DOCTOR MAYANJA

[24] He testified that he became a shareholder in 2001. He said his signature appeared on the second page 11. He said he did not know how his signature ended up in that page. He never interacted with Mr Garwood and never signed the 2002 agreement. He was also not aware of the 1996 agreement. He only heard informally about the discussions relating to 2002 agreement. He never saw or received communication about 2002 agreement and could not have said he would or would not sign it.

[25] He said he would not sign one page, without more, there would have to be a reason him to sign, for example, that of signing an acknowledgement of receipt of a cheque, share certificate and etc. When he received page 11 he was troubled, he made enquiries from other plaintiffs who were at a loss about the said signatures. He

never enquired from the defendant, he was of the view that the defendant would not have assisted him to prove that he never signed the 2002 agreement.

DEFENDANT'S WITNESSES

[26] The defendant also called five (5) witnesses.

MR ARCHIBALD

He testified that he was a retired chartered accountant, he was employed as a financial manager by the defendant. He was also its board member. He said he was not personally involved in the procurement of the signatures appearing at pages 11. He confirmed the resolution recorded in the minutes of the meeting of 2 April 2002. In particular, that Afrox shareholding would be reduced from 60% to 55%. Further, that prior to transfer of shares the shareholder's agreement was to be agreed upon and signed. He tabled the revised shareholder's agreement and drew attention to paragraph 9. He was not involved in preparation of that agreement, but believed it was the one annexed to the papers.

[27] He said, save for two (2) doctors who did not sign the agreement, he did not recall any other difficulties and queries with the doctor shareholders about the 2002 agreement. He was present in the meeting of 9 December 2002. He did not recall that doctor Bagumah objected to the report that only three (3) doctors had not signed. He had not heard that doctor Bagumah said his signature at page 11 was a forgery. Under cross examination he conceded that the fact that the version of 2002 agreement was tabled at the meeting of 16 May 2002 did not imply that it was adopted by shareholders. Further, that the agreement sent with the letter of 4 June 2002 was being sent for the first time to shareholders.

DOCTOR STOFILE

[28] She testified that she was a signatory to the 2002 shareholders' agreement appearing from pages 147 to 158 of the papers. Her signature appeared at and she signed page 11, however, she did not recall when and under what circumstances

she signed page 11 and whether that page was presented as part of the 2002 agreement. As a director of the defendant she was signing a number of documents. She confirmed that the new shareholders' agreement was tabled on 16 May 2002. It was discussed in board meetings and the board was kept abreast of who had signed or not. She was not part of procuring the signatures. She did not know that doctor Bagumah had said his signature was forged, at any stage. In cross examination she conceded that having signed page 11, she would not have needed to sign again. She did not know why doctor Mntonintshi needed to sign twice. She also conceded that, only one doctor Mntonintshi appeared as a shareholder in the defendant's documents. She also said that she did not recall if she had read the answering affidavit in 2016, when she deposed to a confirmatory affidavit. However, she said she ought to have read it, as ordinarily she would not have signed without having read it. Further, if in 2016 she had said she was presented with the 2002 agreement by Mr Garwood, she probably remembered then, even though she did not recall at the stage of the hearing.

MISS PILLAY

[29] Ms Pillay was only able to confirm that she was responsible for the drafting of the 2002 agreement.

DOCTOR G MBAMBISA

[30] He testified that he served on the board of the defendant company from the latter's inception. He confirmed that he appended the signature appearing at page 11, accepting the 2002 agreement. He said in their doctors' meeting they discussed the agreement and were keen on the agreement. He was present in directors' meetings that discussed the 2002 agreement. However, he said he did not recall if he signed a separate page or it was attached to the actual agreement. He also did not recall where he signed.

[31] In cross examination he said he signed page 10 first, the last page of the 2002 agreement, in his capacity as a director of the defendant, simultaneously with Mr Garwood. Thereafter, the agreement was circulated to the shareholders for

signature. His wife appeared to have signed page 11 first, he said he did not know if other shareholders signed before he did, as page 11 is not dated. He also did not know why he did not sign pages 10 and 11 simultaneously. He was unable to recall if he signed page 11 at a meeting or in his office.

DOCTOR R R MBAMBISA

[32] She is also a shareholder of the defendant company. She only confirmed that she signed the 2002 agreement. She also confirmed her signature at page 11 but could not recall who gave her the page 11 document.

[33] The issue for determination is whether the 2002 agreement replaced the 1996 agreement or the 1996 agreement is still valid in that; the 2002 agreement is of no force and effect for failure to comply with the non-variation clause. Also, whether the 2002 is valid or binding as the defendant contends.

ONUS

[34] The existence of 1996 and its clause 7 are admitted by the defendant. The plaintiffs seek that 2002 agreement be declared to be of no force and effect because the 1996 agreement was not varied in writing as clause 7 required. As appearing from pleadings and in accordance to the oral testimonies plaintiffs, save for the fourth plaintiff who alleged fraud, others stated that their signatures appearing on pages 11 were not in acceptance of 2002 agreement. Indeed they do not recall the circumstances surrounding the appending of the said signatures, however, they said they did not do so to agree to the 2002 agreement. Doctor Meel went further to say he would not use his short form of signature to sign a document in the nature of 2002 agreement. He and doctor Gaire said they never saw the agreement. They never interacted or saw Mr Garwood about the agreement. The defendant on the other hand made positive assertions in its plea that the agreement was presented to shareholders and was signed at various places between May to June 2002. Further, the 2002 agreement complied with clause 7. Where shareholders acquired shares after the dates of signing of the 2002 agreement, those shareholders agreed, in writing to be bound to and accepted the terms of 2002 agreement.

[35] In **Pillay v Krishna and another** 1946 AD 946 at 951-952 Davis AJA referred to various principles governing the incidence of the burden of proof. Those include the one that 'where the person against whom the claim is made is not content with a mere denial of that claim, but sets up a special defence then he is regarded as *quoad* that defence, as being claimed: for his defence to be upheld he must satisfy the court that he is entitled to succeed on it.' He went further to quote the summary of two rules, and other related applicable rules to the effect that 'first the plaintiff proves his declaration, unless it be admitted and then the defendant since he is plaintiff so far as that goes'. The onus is on the person who alleges something and not on the opponent who merely denies it, put differently the burden of proof is not cast on the party who merely denies an assertion.

[36] The defendant also pleaded estoppel against plaintiffs' denial of 2002 agreement.

[37] Plaintiffs therefore have to prove that the 1996 contract was not varied and replaced, as a consequence thereof, they are entitled to the declaration that the 2002 agreement is of no force and effect. The defendant on the other hand has to prove its positive assertions, which in turn will prove that the 2002 was validly concluded. In relation to evidence, this depends on whether pages 11 were signed as part of the 2002 agreement by the shareholders.

[38] According to plaintiffs, the applicable legal principles are those relating to general principles of governing written contracts. The amendment or cancellation of the contract is required to be in writing, in line with *Shifren* principle. Further, whether the *Shifren* clauses can be circumvented in effect by operation of estoppel.

[39] The defendant on the other hand submits that where plaintiffs admit signing 2002 agreement for a different reason and not to accept 2002 agreement they would be bound by the agreement unless, if such was induced by fraud or was *justus error*. They would have to prove why they should not be bound by it. Alternatively, where the plaintiff signed page 11, as a single page, not as part of the 2002 agreement, it is not clear whether it was presented as a single document for each one to sign or

page 11 was misrepresented to them, in circumstances where it did not form part of 2002 agreement, their pleadings directly or by implication impute fraud. Fraud or dishonesty ought to be clearly pleaded and each plaintiff have to prove that case.

[40] Furthermore, with regard to fourth plaintiff, he would have to prove fraud. Seventh plaintiff would have to prove why, after having signed the document signifying her consent to 2002 agreement, she should not be bound by it. Finally, according to the defendant the non-signature by one shareholder does not impact on the others who signed, those would be bound by the 2002 agreement.

[41] The first aspect that requires resolution relates to the defendant's inability to avail the original pages 11. The submission on behalf of the defendant in this regard is that only the fourth plaintiff stated that he never signed page 11. The rest of plaintiffs have no issue with the fact that pages 11 were signed by them. What is in issue is the purpose for which it was signed. In those circumstances, the defendant submits that there would be no prohibition against acceptance of the photocopy of pages 11 as evidence.

[42] Save for some plaintiffs who raised concerns about authenticity of pages 11, in relation to them not having been signed as part of the 2002 agreement, as presented by the defendant, the plaintiffs did not object to the admissibility of pages 11. In fact they conceded, except for fourth plaintiff, that they had signed the said pages. In the light thereof, it is accepted that pages 11 represent pages that the defendant says were signed by the plaintiffs, except for fourth plaintiff.

[43] The next issue relates to whether plaintiffs signed 2002 agreement. The plaintiffs pleaded that there was an attempt to have the 1996 agreement changed and replaced with 2002 agreement but it was unsuccessful. According to the defendant, in the light of the fact that plaintiffs said they signed pages 11, they should have pleaded fraud or dishonesty. It is difficult to agree with this, mainly because, most plaintiffs, except fourth and seventh, say they do not know the circumstances of their signing the said document, some speculate that it could have been an attendance register or for acknowledgement of receipt of some dividend cheque, etc. What they are certain of is that they were not signing to agree to 2002

agreement. I am inclined to agree with the submission on behalf of plaintiffs regarding the need to determine whether the parties were of the same mind, of being bound by 2002 agreement than whether the plaintiffs proved fraud or dishonesty.

[44] There is a dispute as to whether the 2002 agreement constituted an amendment to the 1996 agreement. According to plaintiffs it did, therefore it needed to be in writing and signed for by the parties. Farlam JA in *Pillay and another v Shaik and others* 2009 (4) SA 74 (SCA), considered which agreements needed to be in writing. After quoting from *Goldblatt v Freemantle* 1920 AD 123 at 128-129, the learned judge stated:

> '[50] I do not agree with the court a quo's conclusion that there could be no binding contracts between the parties unless each was signed by or in behalf of the buyers and sellers. In my opinion it is clear from Goldblatt v Freemantle, supra, and the authorities cited therein that, in the absence of a statute which prescribes writing signed by the parties or their authorised representatives as an essential requisite for the creation of a contractual *obligation* (something that does not apply here), an agreement between parties which satisfies all the other requirements for contractual validity will be held not to have given rise to contractual obligations only if there is a pre-existing contract between the parties which prescribes compliance with a formality or formalities before a binding contract can come into existence. That this is so is clear, for example, from CW Decker's annotation on Van Leeuwen's Commentaries on *Roman-Dutch Law* 4.2 s 1 (not s 2 as Innes CJ says at 129) where he pointed out (Kotzé's translation, 2 ed, vol 2 p 12) that we no longer uphold the distinction drawn in Roman law between real, verbal, literal and consensual contracts because all contracts with us are made with consent. With regard to written contracts he referred to an observation by Samuel Strykius (*Modern Pandect* 2.14.7) as follows:
>
> '(W)e must regard the *written* contracts as distinct, in so far as we should bear in mind that although the writing does not constitute the essentiality of the contract, which is contained in the mutual consent of the parties, they may nevertheless agree that their verbal agreement shall be of no effect until reduced to writing, in which case the agreement cannot before signature have

any binding force, although there exists mutual consent; and it cannot be said that the writing served not in perfecting the transaction, but only as proof thereof . . ., since here it is agreed that the consent should not operate without the writing, which must be observed as a legitimate condition.'

[51] The passage in *Wessels* cited in the judgment in the *Meter Motors* judgment supports this approach. The learned author refers to *Institutes* 3.23. pr, and says that '(t)he plain meaning of this passage seems to be that if the parties agree to have their contract of sale in writing, then until a document is drawn up there is no *vinculum juris* and therefore no actionable contract. This is the interpretation which Voet (18.1.3) gives to this passage and it seems difficult to justify any other.'

[45] Mr Daniels, counsel for the defendant, submitted that the 1996 agreement does not include a term that it may be the only agreement or that that no other shareholders agreements may be entered into. The Memorandum of association and articles of association acknowledge a possibility that more than one shareholders' agreement may be in force from time to time. Further, there are shareholders who acquired shares after the 1996 agreement was signed, their shareholding was not conditional upon the signature thereof. The 2002 agreement does not purport to vary or amend a term in the 1996 agreement it is a new agreement. Therefore, clause 7 cannot be a prohibition against a new different agreement.

[47] The defendant is of the view that clause was not effective against subsequent agreements. Mr Whitcutt, counsel for the plaintiff, traced the history of *Shifren principle.* In *Nyandeni Local Municipality and MEC for local Government and others* (CA68/2009), Mthatha, delivered on 12 November 2009, unreported, Alkema J did likewise. The learned judge explained that the principle binds contracting parties to the entrenchment clause under their written agreement to the effect that no variation thereof shall be binding unless agreed to in writing and signed by both parties. At paragraph 43 he referred to a number of Supreme Court judgments where the principle has consistently been reaffirmed [*Impala Distributors v Taunus Chemical Manufacturing Co.* 1975(3) 273 at 277; *Kovacs Investments 724 (Pty) Ltd v Marais* [2009] 4 All SA 398 (SCA)], among others.

[48] I am unable to agree with the submission that the 2002 agreement was not varying the 1996 contract. The facts indicate that the said agreements were not meant to co-exist. The 2002 agreement introduced clause 9, among others, which would have the effect of changing the continued shareholding by the shareholders after retirement, emigrating or relocating practices. That constituted a major variation of the 2016 agreement. Therefore the 2002 agreement would have replaced the initial agreement. The *Shifren* principle would therefore apply in the two agreements, except on grounds of public policy which grounds, of which none are said to be in this matter.

[49] Mr Daniels, counsel for the defendant submitted that it is unlikely that plaintiffs would have been presented with pages 11 as loose unattached documents and that those would simply be signed. None of plaintiffs, except fourth plaintiff said they had a reason not to sign the 2002 agreement. Therefore, there is no reason to conclude that they would not have signed when they were asked to do so. Further, doctor Mushabe's position of refusing to sign was recorded as such with its consequences.

[50] The evidence establishes that there are shareholders who did not sign the agreement. That is so, even on the defendant's version, but according to the defendant, they are not among plaintiffs. As regards the pages 11, they do present a difficulty, firstly, they are not dated or stated where they were signed. There is a shareholder who signed on both pages 11. They also do not indicate if they are annexures to what document. Unlike the signature clauses at the end of the agreement, at page 10, therein, it is clear as to who signed, in respect of which party, on what date and in what capacity. The common cause facts are that Mr Garwood was to procure the signatures. Some plaintiffs testified that they never saw the agreement and never met Mr Garwood.

[51] During evidence it was canvassed with the witnesses that the minutes indicated in a board meeting that only two doctors had not signed the 2002 agreement by 9 December 2002. It may be accepted that the said record indicates what was reported to the board members. However, it may not suffice for purposes of concluding that, against what the witnesses stated that they never agreed to the

2002 agreement and some never even met Mr Garwood, it proves that they indeed signed the 2002 agreement. There is no evidence about the circumstances of the procurement of the signatures, what document was presented and whether the signatory understood what one was signing for. I would not even say there are irreconcilable versions, the court is called upon to make inferential reasoning, among others, from what transpired in board meetings.

[52] In the circumstances I am unable to find that plaintiffs, other than fourth and seventh signed the 2002 agreement. The position of those plaintiffs is somewhat different. It was to be expected for seventh plaintiff to explain the circumstances under which she signed the document headed St Mary's Private Hospital Shareholder's agreement. Fourth plaintiff also needed to prove that his signature was forged. However, the determination of the issue in the next paragraph has a bearing on their cases too.

[53] Mr Daniels submitted further that, a finding in favour of one plaintiff will not necessary mean a finding in favour of other plaintiffs. This submission presents a difficulty, firstly, clause 7 requires signature of all the shareholders. Secondly, in circumstances where it has not been said the agreement would have different consequences for the shareholders who signed and those who did not, it is not clear what the practical implications of the order would be for each or the other shareholder. In my view, either the 2002 agreement met the requirements for the variation of the 1996 agreement or did not, in spite of the defendant witness shareholders who said they signed or plaintiffs who did not prove that they never signed the agreement.

ESTOPPEL

[54] At paragraphs 48 and 49 in Nyandeni, supra, the learned judge affirmed that reliance on estoppel to circumvent the *Shifren* principle is seldom invoked with any degree of success and carries a host of potential problems. It is not permitted where it is forbidden by law. Furthermore, in the present case, as submitted by Mr Whitcutt, the evidence does not support the defendant's assertions, from which the defendant seeks to invoke estoppel. The defendant had stated that plaintiffs, by their conduct,

represented that the 2002 agreement had been signed. Further, that they did not dispute the existence of 2002 agreement. Plaintiffs disputed that they agreed to 2002 agreement. Most of them said they were not aware of its existence, their participation as shareholders, in those circumstances cannot be construed to represent that they signed or agreed to 2002 agreement.

[55] In my view, the defendant has not established that the 2002 agreement was presented to shareholders and signed at various places as it had alleged. The defendant witnesses testified about their own accent to the 2002 agreement. They also could not recall if they were presented with the actual agreement. Their evidence as to their state of mind, in my view cannot extend to plaintiffs who said they never saw the agreement, others never interacted with Mr Garwood.

In the result,

1. The defendant's 2002 shareholders' agreement is hereby declared to be invalid and of no force or effect *ab initio* and is hereby set aside.

2. The defendants' counterclaim is hereby dismissed.

3. The defendant is hereby ordered to pay costs of the application, including costs of the counter application and the costs occasioned by the appointment of two (2) counsel.

B MAJIKI
JUDGE OF THE HIGH COURT

Counsel for the Plaintiffs	:	Mr Whitcutt SC with Ms C De Witt
Instructed by	:	Messrs FASKEN (incorporated in South Africa as Bell Dewar Inc.) C/o ZILWA ATTORNEYS Office suite 452 4th Floor Development House York Road

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Counsel for the Defendant :	Mr Daniels SC
Instructed by :	Messrs Webber Wentzel
	C/oMessrs Keightley Sigadla
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