IN THE HIGH COURT OF SOUTH AFRICA
EASTERN CAPE HIGH COURT : MTHATHA

CASE NO. CA68/09

In the matter between:

NYANDENI LOCAL MUNICIPALITY **Appellant**

and

THE MEC FOR LOCAL GOVERNMENT AND TRADITIONAL AFFAIRS **1st Respondent**

HENLEY TSHAKA HLAZO **2nd Respondent**

JUDGMENT

ALKEMA J

[1] The *"Shifren"* principle, which 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, remains controversial. Depending on the facts of the case, its application may sometimes result in harsh and inequitable consequences. For this reason and over the period of 45 years of its existence and particularly since 1994 with the coming into operation of the new

constitutional order, the principle has from time to time reared its head in unsuccessful attempts by our courts to develop the common law in order to escape, in appropriate circumstances, such consequences; only to be knocked back in place by definitive judgments from the Supreme Court of Appeal re-affirming its status and its scope and ambit of operation, and coupled with reminders to the lower courts to observe the *stare decices* rule.

[2] The court *a quo* was once again requested to relax the principle. It refused the invitation. On appeal, this court is yet again invited by the appellant to embark on the perilous journey of developing the common law by escaping the **Shifren** shackle. Our only beacons are judgments from the Supreme Court of Appeal pointing the direction where not to go. As the law stands at present, there are no exceptions to the application of the **Shifren** principle, and there are no decided cases not overturned on appeal where the **Shifren** principle was relaxed. This then is the issue in this appeal.

[3] The facts of the case, which are either common cause or not seriously disputed, are the following.

[4] The appellant is a local authority. The second respondent was at all material times employed by it as its municipal manager in terms of a written employment agreement. The first respondent is the relevant provincial department of local government which abides the decision and has not entered the dispute, and has no further interest in the matter. Since the inception of the legal proceedings the appellant, at different times, was either the applicant or the respondent; and likewise the second respondent. For the

sake of clarity I shall in this judgment continue to refer to the appellant as the municipality; and to the second respondent as the municipal manager.

[5] The employment contract between the municipality and the municipal manager was signed on 11 September 2007, but operated retrospectively from 1 July 2006. Two months after it was signed, and during November 2007, the accounting firm Deloite and Touche prepared an interim forensic accounting report highlighting certain financial irregularities concerning, *inter alia,* the municipal manager. The allegation by the municipality that the municipal manager *"concealed"* the report from the council and the mayor and only revealed it when threatened with criminal action, is not disputed by him.

[6] On the strength of the forensic report, the council resolved on 28 March 2008 that the municipal manager be given a three month *"precautionary suspension".* For reasons which do not appear from the papers, the municipal council thereafter on 4 April 2008 advised the municipal manager that the *"precautionary suspension"* is withdrawn, and that he should report to his offices on Monday 7 April 2007 at 8h00. When he reported at 8h00 on the date as instructed, he was given a letter of the same date advising him , *inter alia,* as follows (I quote verbatim from the letter):

> *"1. It is has emerged therefrom (the report) that the management of the municipality at one stage increased its salary without the approval of the Council of the Municipality.*
>
> 2. *It has emerged therefrom further that the pay roll has been interfered with such that there are people who are not employed*

by the Municipality but are paid salary by the municipality Management on monthly basis.

3. *It has emerged therefrom further that the Management is directly involved on all above irregularities including mismanagement of funds of the Municipality."*

[7] The letter concluded by calling on him to show cause, at 11h00 on the same date, why he should not be suspended *"... as the Accounting Officer of the Municipality."*

[8] The municipal manager thereupon, in writing, requested the municipality to give him more time to respond to the threat of suspension. It is unclear from the papers whether further discussions ensued between the parties or whether or not they reached any agreement in regard to time limits and/or the making of further representations; or whether the municipality even considered the request for more time or even if it was agreed that he be temporarily suspended. What is clear, however, is that at 11h30 on 7 April 2008 the municipality handed the municipal manager a letter advising him as follows: (I again quote verbatim)

"Further to our letter for you to show cause, kindly be advised that it has been considered prudent and wise to suspend you from your duties as the Accounting Officer for the purpose of conducting an investigation of the contents of the Deloitte and Touche report which sights irregularities in relation to the payroll system, against you for a period of three months or on completion of the foresaid investigation with full pay from the time of the receipt thereof."

[9] The letter concludes that the municipal manager will in due course be advised in writing of the date of hearing of a disciplinary hearing *"...should such a route be found to be a necessary one."*

[10] The municipal manager does not attack, in any way, the circumstances under which he was suspended pending the outcome of the disciplinary hearing, and this was never, and is not, an issue in this appeal or in any of the preceeding hearings. Nothing further need be said about this.

[11] On 24 June 2008 the municipal manager was served with a *"Notice of Misconduct"* calling on him to attend a disciplinary hearing on a stated day, time and place to answer four charges and alternative charges of misconduct. The charges may be summarized as follows:

Charge 1

A contravention of s. 171 of the Municipal Finance Management Act 56 of 2003 in that, *inter alia*, the municipal manager wrongfully authorized irregular salary overpayments to certain senior managers, including himself.

Charge 2

A contravention of the same section in that he *"improperly"* engaged the services of a service provider by the name of Apexq Consulting, and in a dishonest manner caused unauthorized payments to be made to it.

Charge 3

He wrongfully:

1) caused over – expenditures in respect of payments to five service providers named in the charge;
2) failed to ensure that there were valid contracts in place with the said service providers;
3) failed to recover penalty fines from the named service providers;
4) caused payments to be made to Apexq Consulting in respect of services which were never rendered.

Charge 4

He wrongfully in contravention of the said Act and without authorization disposed of a certain immovable municipal asset (the town clerk's house) in circumstances where he knew he was not entitled to do so.

[12] The stated commencement date of the proposed disciplinary hearing was 3 July 2008, but the hearing was postponed to a later date which does not appear from the papers. It is common cause that at all material times, including at the hearing of the disciplinary enquiry, the municipal manager was represented by an attorney from East London, Ms N. Pakade. At the conclusion of the disciplinary hearing, and having considered the evidence and the arguments, the chairperson returned a verdict of *"guilty"*. It is not clear from the papers in respect of which charges the municipal manager was found guilty, or when the finding was handed down. However, it seems probable that the verdict was reached sometime during September 2008.

[13] The municipal manager was advised of the verdict of guilty, and he was again invited to submit written representations on why a recommendation should not be made to the council for his dismissal. Such representations were made, and at a special meeting of the council on 3 October 2008, the report of the chairman of the disciplinary enquiry and her recommendation that the municipal manager should be dismissed, together with the submissions and representations of both parties, were considered.

14] On the same day, namely 3 October 2008, the municipal manager handed a letter to the mayor pre-dated 1 October 2008 in which he tendered his resignation as municipal manager with immediate effect. It seems that the municipality did not accept the resignation, and on 8 October 2008 it served a letter dated 7 October 2008 on the municipal manager advising him that the council has resolved to confirm the finding and recommendation of the disciplinary enquiry, and that he is therefore dismissed with immediate effect. He was advised that he has the right to appeal against the findings and/or sanction.

[15] On 10 October 2008 the municipal manager's attorney addressed a letter to the municipality complaining that the dismissal procedure which was followed was defective in three respects, namely:

1) the municipal manager should have been given the opportunity to make representations to the council before the decision was taken to dismiss him;
2) the decision to dismiss him should have been taken *"in consultation"* with the municipal manager; and

3) the decision has an adverse effect on the municipal manager.

[16] It is necessary to make a few observations concerning the letter of 10 October. Firstly, it does not refer to or even faintly attack the lawfulness, validity and/or outcome of the disciplinary hearing. The opposite is true; it seems to accept the regularity thereof and that the municipal manager was correctly found guilty. Secondly, its attack is aimed solely at the municipal council's acceptance of the dismissal recommendation. In support of this contention, it suggests that the correct procedure should have been a *"two staged hearing"*: the first being the disciplinary enquiry *"...with the mandate to make recommendation"* (sic), and the second a *"hearing"* by the council with a view to either accept or reject the recommendation. During the appeal hearing it was common cause that the third ground, namely, the alleged failure by the council to afford the municipal manager an opportunity to make representations and submissions to the council before it accepted the recommendation, was factually incorrect. In his founding affidavit, the municipal manager specifically alleges that he was invited to make such representations to the council, and that he availed himself of such opportunity.

[17] In terms of s.32 of the Municipal Structures Act 117 of 1998, a municipal council has the power to appoint, and by implication also the power to terminate the appointment of, municipal managers. This must be done in terms of the Regulations promulgated under the Act and the applicable labour legislation. It was never contended, in either the court below or in this court, that those procedures were not followed.

[18] On 14 October 2008, the municipal manager's attorney addressed a further letter to the municipality, *"...declaring a dispute..."* and demanding that such *"dispute"* be referred to arbitration. It based the *"dispute"* on the alleged non-compliance with the procedure contained in the earlier letter of 10 October. I have great difficulty in understanding the nature of the *"dispute"* contemplated in this letter. When I put this difficulty to Mr. Dzingwa, who represented the municipal manager on appeal during argument, his response was that it was the fact of the finding of guilty by the disciplinary enquiry which triggered the dispute, rather than the manner in which it was arrived at.

[19] The response of the municipality to the letters of 10 and 14 October was to invite the municipal manager to appeal against the dismissal in terms of the prescribed procedures, which invitation he declined. On 17 October 2008 his attorney again called on the municipality to refer the *"dispute"* to arbitration, but on this occasion and for the first time in the history of the matter, he referred to clause 16.2 of the employment contract which specifically deals with the manner in which disciplinary proceedings against a municipal manager should be dealt with. I will later in this judgment again return to the *"dispute"*

[20] Clause 16 of the employment agreement deals with matters of arbitration, disputes and disciplinary enquiries. It contains two sub-paragraphs which are similarly numbered as clause 16.2. For the sake of convenience I para-phrase hereunder only those sub-clauses which are relevant, containing the error of two similarly numbered sub-paragraphs 16.2.

"16. ARBITRATION

16.1 ... ...

16.2 *All disputes emanating from, but not limited to, the interpretation of this contract and/or any part of conditions of service and/or any municipal policy and/or code of conduct shall be resolved by means of arbitration.* ***It is therefore specifically recorded that where disciplinary proceedings are initiated against the Municipal Manager such disputes shall be resolved through pre-dismissal Arbitration under the auspices of the Commission for Conciliation Mediation and Arbitration*** (my emphasis).

16.2 *Save as specifically provided to the contrary in this agreement, should a dispute arise, any party shall be entitled to require, by written notice to the other, that the dispute be submitted to arbitration in terms of this clause.*

16.3 ……

16.4 ……

16.5 *The arbitration shall be held as quickly as possible after it is demanded with a view to its being completed within thirty days after it has been so demanded.*

16.6 ... ...

16.7 ... ...

16.8 ... ...

> *16.9 This clause is severable from the rest of this agreement and shall, notwithstanding termination thereof, remain in full force and effect.*

[21] Clause 14 of the agreement contains the entrenchment clause. It reads as follows

> ***14. VARIATIONS NOT EFFECTIVE UNLESS IN WRITING***
>
> *Except by resolution of the Council of the Municipality, no variation, modification or waiver of any provision of this agreement, or consent to any departure therefrom, shall in anyway be of any force or effect unless confirmed in writing and signed by the parties and then such variation, modification, waiver or consent shall be effective only in the specific instance or given."*

[22] It is common cause between the parties, and was accepted by the court *a quo* and is accepted by this court, that the disciplinary enquiry followed by the municipality pursuant to which the municipal manager was dismissed, was not held in terms of clause 16.2. More particularly, the dispute in connection with the employment agreement and its termination, was not resolved. *"...through pre-dismissal Arbitration under the auspices of the Commission for Conciliation Mediation and Arbitration."*

[23] The municipality claims that, by his conduct, the municipal manager consented to the procedure which was followed and therefore, by implication, agreed to the departure therefrom and to the variation of clause 16.2. The court *a quo* found, as a fact, that the municipal manager by his conduct did agree to the variation of clause 16.2. in the respects mentioned,

but that by virtue of the entrenchment clause 14 and the operation of the **Shifren** principle, the municipality is, in law, not entitled to rely on any variation of the agreement unless it is in writing and signed by the parties as contemplated by clause 14.

[24] Notwithstanding the formal denial in the founding affidavit that the municipal manager consented to such variation, Mr Dzingwa did not argue in this court that the municipal manager on the facts of the case did **not** agree thereto, but wisely concentrated on the protection afforded to his client by the entrenchment clause. He therefore supported the judgment of the court *a quo* in this respect and did not contend that it erred in any of the factual findings.

[25] I believe this is the correct approach. In my view, the facts of the case support a finding that, by his conduct, the municipal manager consented to the variation. As municipal manager he was authorized to conclude employment and service contracts on behalf of the council, and he had a sound knowledge of the content of those contracts and also that of his own; he was represented by an attorney months before the disciplinary enquiry commenced; the charges served on him refer to alleged instances of misconduct arising from the terms of his employment contract; the opening words of the *"Schedule of Charges"* warn him that if the case is established by the municipality, it will call for his *"summary termination of your contract of employment"*; he, duly assisted by his attorney, fully participated in the proceedings, made submissions and written presentations, and never complained about the procedure; after he was found guilty, he attempted to resign in an obvious attempt to escape the financial consequences of a

dismissal as opposed to a resignation and to protect his chances of future employment; he made representations to the council on why the recommendation for his dismissal should not be followed without referring or objecting to the procedure which was followed; he never suggested that any irregularities were committed, either procedurally or substantively, during the disciplinary enquiry or that any decision by either the chairperson or the council was arrived at in an irregular or wrongful manner; and finally; he only complained about the non compliance with clause 16.2 after he was found guilty and after the recommendation that he be dismissed was accepted and he was dismissed.

[26] The inference that the complaint regarding clause 16.2 was an after-thought to give him a second bite of the cherry, or perhaps even to prolong the proceedings which will have substantial financial benefits to him at the expense of the municipality, and will in addition give him the time and opportunity to seek alternative employment without a history of dismissal based on misconduct, is irresistible.

[27] Such inference, in my respectful view, is also supported by the manner in which his case is presented on the papers. In his founding affidavit, a strong impression is created that the municipal manager accepted the outcome and validity of the disciplinary enquiry, but believed that it only constituted a preliminary enquiry to be followed by pre-dismissal arbitration proceedings under the auspices of the CCMA as provided for in clause 16.2 of the employment agreement. In his founding affidavit he states as follows:

"17.

*I was very astonished by annexure **'HTH 8"** for I was of the view that once the internal proceedings were completed, the First Respondent's Council would, in terms of the arbitration clause in my employment contract, initiate pre-dismissal arbitration proceedings under the auspices of the CCMA, which is the only manner that I could have been dismissed."*

[28] This belief, erroneous as it is, is borne out by the relief he claims in his Notice of Motion, namely, that an arbitrator be appointed in terms of clause 16.3. It is significant that he does not allege in his founding affidavit, and nor does he ask in the relief which he claims, that the disciplinary enquiry which was held and the finding of guilty made pursuant thereto, is a nullity and *ultra vires* and therefore should be reviewed and set aside. No case is made out by him, and nor does he claim, the review and setting aside of the disciplinary proceedings.

[29] When this issue was put to Mr Dzingwa during argument, he contended that this was indeed the belief of the municipal manager. This belief is further supported by para.18 of the founding affidavit in which the municipal manager stated:

"18.

When these internal proceedings were being pursued I was of the view that the First Respondent was collecting sufficient information from which to consider whether to dismiss me or not. I was also of the view that once such a stance to dismiss me had been adopted, pre-dismissal arbitration proceedings under the auspices of the CCMA would be followed."

[30] The belief held by the municipal manager as articulated above by him in his founding affidavit, is in my view irreconcilable with the notion that he did not consent to the proceedings adopted by the municipality and in which he fully participated.

[31] The emphasis in the municipal manager's replying affidavit shifts somewhat. In paragraphs 7 and 8 thereof he expressly contends that the hearing before the disciplinary enquiry was in contravention of clause 16.2 and that its recommendations could therefore not lawfully be upheld. However, his case remained that it was not a review of the hearing, but rather a *mandamus* compelling the municipality to comply with clause 16.2.

[32] I have already indicated that in the argument before us, Mr Dzingwa returned to the case made out in the founding affidavit and did not attack the lawfulness or validity of the disciplinary hearing, but rather elected to describe it as a *"preliminary fact-finding enquiry"* in accordance with the municipal manager's belief as articulated in paragraphs 17 and 18 of the founding affidavit quoted above.

[33] The fact that the expressed belief was wrong, is neither here nor there. Its only relevance, in my view, is that it fully supports the finding that the municipal manager consented to the procedure which was followed and which resulted in his dismissal.

[34] I therefore have no hesitation, on the facts of this case, to support the finding of the court *a quo* that he, by his conduct, agreed to a variation of

clause 16.2 in the respects mentioned. Of course, it does not necessarily follow that, in law, his implied agreement to vary the terms has the lawful result of a variation. An agreement by conduct may be prohibited by the **Shifren** principle, and this is what the municipal manager argued in the court below and in this court, and this is what the court below held.

[35] Before dealing with the **Shifren** principle I point out that, in my view, another strong argument may be made out why his application should have failed in the court below, and why it should fail in this court. That is this:

[36] I have already recorded that in his correspondence on 10, 14 and 17 October 2008 the municipal manager accepted the correctness and regularity of the disciplinary proceedings and its finding, both substantively and procedurally, but attacked only the acceptance by the municipal council of the recommendations made by the enquiry. This, then, was also the case made out by him in his Notice of Motion and supporting affidavit. Notwithstanding the shift of emphasis in his replying affidavit to which I have already referred, this remained his case before the court *a quo*.

[37] As I pointed out, the belief he held was wrong. His complaint about not being asked to make representations to the council on the issue of the acceptance or otherwise of the recommendation is not supported by the facts. His view that the recommendation of dismissal should be regarded as the second stage of a *"two stage"* process by way of arbitration is not supported by the terms of the employment contract or by law. By no stretch of the imagination can clause 16 be interpreted in this way. As conceded by his attorney in argument and confirmed in his letter of 10 October 2008, the

power of dismissal vests with the municipal council on recommendation, and not with arbitration. The relief as formulated in his Notice of Motion may therefore not be granted.

[38] In my view, the municipal manager misconceived his remedy. He should have instituted review proceedings asking for the setting aside of the disciplinary enquiry as being *ultra vires* the employment contract. I believe his application in the court *a quo* may very well have been dismissed on this ground alone, and his appeal may likewise be dismissed without further ado on this ground only.

[39] However, such a result will only further delay proceedings and will result in further legal action and costs. This will not be in the interest of justice if this appeal can be dealt with on the real issue, namely, the applicability of the entrenchment clause and the **Shifren** principle. The issue of the enforcement of the entrenchment clause was argued fully in both the court *a quo* and in this court. The parties are agreed that this appeal should be dealt with on this basis, and neither party will be prejudiced if this issue is determinative of the appeal. I believe the appeal can and should be dealt with on this basis, and it is to this issue that I now turn my attention.

[40] Mr Botma, on behalf of the municipality, argued that by his conduct the municipal manager waived compliance with both the arbitration clause and with the entrenchment clause 14. In my view, this contention is untenable and contrary to law. For reasons which will appear later in this judgment, it is, I believe, necessary to refer briefly to the history of the *Shifren* principle.

[41] Prior to 1964 there were two opposite schools of thought in Southern African jurisprudence on this topic; both relying on the principle of *pacta sunt servanda* or the right to freedom of contract. The one school argued that to give effect to an entrenchment clause would unjustifiably invade the right of the parties' freedom to change their minds and alter their contract orally; the other side argued that to refuse to give effect to such a clause would violate the elementary and fundamental principle to give effect, in the public interest, to contracts concluded freely, seriously and *animo contrahendi.*

[42] In a carefully worded and forceful, unanimous judgment, the Appellate Division (as it was then known) in 1964 chose the latter option and ruled that a non-variation clause was valid and effectively entrenched both itself and all the other terms of the contract against an oral variation. See: **SA Sentrale Ko-op. Graanmpy Bpk v Shifren** 1964 (4) 760 at 766(B)-767(B) and particularly at 766 (B)-(H).

[43] The judgment in **Shifren** convincingly deals with policy considerations such as the need to avoid disputes, evidential difficulties often associated with oral agreements, the need for certainty and clarity in the commercial environment, and the infringement of the right to contractual freedom to allow a departure from the elementary principle of *pacta sunt servanda.* The principle in **Shifren** has consistently been reaffirmed by the Supreme Court of Appeal and remains good law (**Impala Distributors v Taunus Chemical Manufacturing Co.** 1975 (3) 273 at 277 (A-E)**; Brisley v Drotsky** 2002 (4) SA 1 at 10H-12F; **Kovaks Investments 724 (Pty) Ltd v F.C. Marais** 20 August 2009 S.C.A. Case No. 232/08 as yet unreported).

[44] Of course, in the absence of an entrenchment (non-variation) clause, the contracting parties are free to informally or verbally cancel or vary the terms of their written contract. This proposition was accepted in **Shifren** (at 766C-G) and is supported by subsequent authority such as **Academy of Learning (Pty) Ltd v Hancock** 2001 (1) S.A 941 (C) at 954(B-E).

[45] Because clause 14 is in itself a *"... ... provision of this agreement ...",* it not only entrenches the other provisions, but also itself against informal variation. For a general discussion on the subject, see Christie**, the Law of Contract in S.A.** (5th Ed), p.448 and the cases there cited.

[46] It follows that the contention that the municipal manager by his conduct also consented to a waiver or variation of the entrenchment clause 14 under consideration in this case, cannot prevail. For such a variation or waiver to be effective, it must be in writing.

[47] Mr Botma further argued that on the facts of this case, the municipal manager is now estopped from relying on the variation clause in that the municipality in good faith and relying on the representation that he had consented to the variation of both the arbitration and the entrenchment clauses, acted to its prejudice by not invoking the literal meaning of clause 16.2.

[48] Reliance on estoppel to circumvent the **Shifren** principle is, of course, not novel. However, it is seldom invoked with any degree of success and carries with it a host of potential problems.

[49] The main problem is that estoppel is forbidden if the result is not permitted by law. Stripped of all pretentions, the representation relied upon by the appellant in this case is conduct on the part of the municipal manager which points to a waiver or variation of a term or terms of the written contract of employment, including a waiver or variation of the entrenched non-variation clause. And this is precisely what the **Shifren** principle seeks to prevent. If our common law forbids in particular circumstances an oral variation (either expressly or by implication) of a written contract, as does the **Shifren** principle, then the resort to estoppel is thwarted by the rule that estoppel cannot operate in such a way as to bring about a result not permitted by law. This rule was recently reaffirmed by the Supreme Court of Appeal in **HNR Properties CC and Another v Standard Bank of S.A. Ltd** 2004 (4) S.A. 471 (SCA), at 480A**.** It also carries the approval of distinguished legal writers and academics. See for instance, Rabie and Sonnekus, **The Law of Estoppel in South Africa** (2nd Ed.) 171; Lubbe and Murray, Farlam and Hathaway **Contract**: **Case, Materials and Commentary** (3rd Ed) at 201 n8; and Dale Hutchison, **Non-variation clauses in contract: Any escape from the Shifren Straitjacket?** S.A.L.J. (vol 118) 2001 at 720 and 731-739.

[50] In **HNR Properties (***supra)* Scott JA writing the unanimous judgment remarked at 479I-480B:

> *"Where a release is required to be in writing, as in the present case, it may perhaps be possible, in limited circumstances, to frame an estoppel in such a way as not to violate the* ***Shifren*** *principle. It is unnecessary to consider what those circumstances would have to be.*

> *What is clear is that an estoppel cannot be upheld when the effect would be to sanction a non-compliance with provisions in a suretyship agreement of the kind contained in clause 15 and 16. It follows that the appellants' reliance on waiver and estoppel must similarity fail."*

[51] I do not intend, and nor is it necessary for purposes of this judgment, to enter the debate concerning the difference between a variation and a waiver, or when a waiver does not constitute a variation of a contract.

[52] In **Van As v Du Preez** 1981 (3) SA 760 (TPD) at 765F-G, Nestadt J made the point thus:

> *"A rose by any other name smells just as sweet. An oral variation masquerading as or in the guise of waiver remains for present purposes what it truly is, or at least it follows the same fate. To hold otherwise would be to render nugatory the principle of the effectiveness of contractual entrenchment as laid down in* ***Shifren's*** *case."*

See also **Palmer v Poulter** 1983 (4) SA 11(T) at 17 B-D.

[53] Finally, clause 17.2 of the employment contract also seems to stand in the way of estoppel. It provides as follows:

> *"17.2. This agreement therefore constitutes the sole agreement between the parties and no representation not contained herein shall be of any force between the parties."*

[54] I accept, as stated by Scott JA in **HNR Properties** (*supra*) at 479E, that in particular circumstances reliance on estoppel may not involve a violation of the **Shifren** principle. Prof Hutchison (*supra)* concludes at 746:

> *"The doctrine of estoppel can offer but limited assistance in circumventing a non-variation clause. A plea of estoppel can be upheld only if the effect thereof is not to vary the contract, but rather, for example, to discharge an obligation or to establish a* ***pactum de non petendo.*** *Whether resort to estoppel is necessary in such circumstances is debatable."*

[55] The representations relied upon, in my view, masquerade as a waiver of the entrenchment clause which is not permitted under the **Shifren** principle, and do not amount to a **pactum de non petendo** or the discharge of an obligation. I therefore conclude that, on the facts of this case, reliance on estoppel is not permitted.

[56] Mr Botma finally contended, more in the nature of sigh of despair than a submission in law, that strict application of the **Shifren** principle on the facts of this case will amount to allowing the municipal manager to go back on his word which is a breach of *bona fides* and is therefore offensive to public policy. The contention that reliance on the **Shifren** principle on the facts of this case is offensive to public policy deserves, perhaps for reasons other than those mentioned by Mr Botma, closer scrutiny and attention.

[57] From time immemorial, public policy demanded that contracting parties honour their undertakings to each other. This was also acknowledged in the

judgment which gave birth in South African law to the **Shifren** principle. Chief Justice Steyn said the following at 767 of the **Shifren** case (*supra*):

> *"Dit* (the non-adherence to the entrenchment clause) *sal so 'n opvallende afwyking wees van die elementêre en grondliggende algemene beginsel dat kontrakte wat vryelik en in alle erns deur bevoegde partye aangegaan is, in die openbare belang afgedwing word."*

See also **Magna Alloys and Research (SA) (Pty) Ltd v Ellis** 1984 (4) SA 874 (A) at 893I – 894A.

[58] The contention that relaxing the **Shifren** principle amounts to allowing him to go back on his word, is in my respectful view fundamentally flawed both in logic and in law. In my brief recording of the history of **Shifren** principle, I pointed out that, for the reasons mentioned, the (then) Appellate Division opted in favour of the school of thought which advocated that in accordance with the principle *pacta sunt servanda* contracting parties should be held to their original terms. Therefore, if they *animo contrahendi* agree not to vary any of their terms of contract unless in writing and signed by the parties, then in the public interest they should be kept to their word; hence the remark of the C.J. quoted above.

[59] It follows that if the **Shifren** principle is accepted as correctly reflecting the law, as this court must and does, then there is no room for the suggestion that relaxing the **Shifren** principle is allowing the municipal manager to go back on his word. The opposite is true: by relaxing and not applying the **Shifren** principle, will allow the municipality in breach of the entrenchment clause to escape its contractual undertakings under clause 16.2. In terms of

Shifren, it is the original, written contract which must be protected and enforced, not the subsequent oral one which effectively ignores the first. To enforce the second, oral contract on the basis of *pacta sunt servanda* in contravention of the original written one, results in circuitous reasoning and is destructive of the carefully constructed reasoning in **Shifren,** and is offensive to all case law since 1964 following **Shifren.** See also **Impala Distributors** (*supra*) at 277A-G.

[60] The reliance on *bona fides* should not detain me long. The S.C.A. in **Brisley v Drotsky** 2002 (4) SA 1 (SCA) at 12G-19C recently made short shrift of this argument. It was first raised in **Miller and Another NNO v Dannecker** 2001 (1) SA928 (C) where it was held that a court may refuse reliance on an entrenchment clause if such reliance would amount to a breach of the *bona fide* principle.

[61] The S.C.A. in **Brisley** found, for the reasons mentioned in its judgment, that the **Miller** case was wrongly decided. Of particular importance in the **Brisley** judgment is that *bona fide* does not constitute a general legal principle on the strength of which a court may refuse to enforce contractual rights and/or obligations (at 15D-E). A court has no general discretion, with reference to considerations of fairness and equity, to decide whether or not to enforce contractual rights. The exercise of such general discretion is contrary to the law of contract and the principle of *pacta sunt servanda*, and will result in the enforcement or otherwise of contractual rights and obligations depending on the personal views of the Judge on what is fair and equitable (at 16B-E). Such general discretion will result in contractual

uncertainty and will undermine the constitutional rights to freedom (to contract and choose and agree on the terms).

[62] In the words of Prof. **Hutchison** (*supra*) (at 743-4) *"good faith may be regarded as an ethical value or controlling principle based on community standards of decency and fairness that underlies and informs the substantive law of contract."* However, as the S.C.A. held in **Brisley**, good faith cannot be elevated to an independent principle in terms of which contracting parties may escape their obligations on the grounds of reasonableness and equity. (p.12H-15G of the report). The reliance on the *bona fides* as a means to escape **Shifren** is therefore misconceived.

[63] The result that the municipality, on the facts of this case, may not rely on *bona fides* to escape the entrenchment clause, does not, however, put an end to Mr Botma's submission that if its operation on the facts of this case nevertheless offends public policy, then clause 14 may not be enforced. *Bona fides* may not be the peg on which to hang public policy, but there may be another valid rule of law protected by public interest which may legally justify a departure from the **Shifren** principle, and it is to this issue that I now turn my attention.

[64] The general rule that, in addition to the requirement of fraud or deceitful conduct, there may be circumstances under which a contract will not be enforced because it offends public policy, has its roots in antiquity. (In **Robinson v Randfontein Estates GM Co. Ltd.** 1925 A.D. 172**,** Innes CJ at 204-5 analyzed the Roman and Roman-Dutch authorities on the subject, but for present purposes it is unnecessary to go back that far.)

[65] One of the first leading cases on the subject in South Africa is **Schierhout v Minister of Justice** 1925 A.D. at 417 where Kotze J.A. said at 424:

> *"If the terms of an agreement are such as to deprive a party of his legal rights generally, or to prevent him from seeking redress at any time in the Courts of Justice for any future injury or wrong committed against him, there would be good ground for holding that such an undertaking is against the public law of the land"*

[66] Our law reports abound with judgments where this principle is applied, and it serves no purpose to re-state the law. It suffices to refer only to those cases which may be relevant for present purposes.

[67] In **Magna Alloys and Research S.A. (Pty) Ltd vs Ellis** 1984 (4) SA 874 (A) at 891G the Appellate Division (as it was then known) confirmed that our common law does not recognize agreements that are contrary to public policy. It held that, since our common law accepts the principle that the invasion of the right to freedom of trade offends public policy, it is no longer necessary to apply the English law. It proceeded to apply our own common law including the principle that if a restraint of trade agreement offends public policy, it may be void for that reason.

[68] In **Sasfin (Pty) Ltd v Beukes** 1989 (1) SA (A) the Court of Appeal confirmed that agreements which are clearly inimical to the interests of the community, whether they are contrary to law or morality, or run counter to

social or economic expedience, will accordingly, on the grounds of public policy, not be enforced.

[69] The trend continued post 1994 with the advent of our new constitutional order. In **Juglal NO v Shoprite Checkers (Pty) Ltd t/a OK Franchise Division** 2004 (5) SA 248 (SCA) the same court, now known by its present name as the Supreme Court of Appeal, held at 258F-G that a party *"who implements the contract in a manner which is unconscionable, illegal or immoral will find that a court refuses to give effect to his conduct…"*

[70] Recently, in **Barkhuizen v Napier** 2007(5) SA 323 (CC)**,** the Constitutional Court confirmed the principle and held at 349A: *"But the general rule that agreements must be honoured cannot apply to immoral agreements that violate public policy."* In support of the proposition at 334H; namely that *"Courts have long held that a term in a contract that deprives a party of the right to seek judicial redress is contrary to public policy,"* the CC referred to **Schierhout** (*supra*) and to a number of other judgments decided before 1994 in which the general principle was re-stated and applied.

[71] What is immediately apparent from the very brief overview above, is, first; the principle that public policy may in certain circumstances trump a contractual term concluded *animo contrahendi,* remains firmly established and recognized in our law.

[72] Second; the principle has its origin in our common law and not in our Constitution and therefore remains a common law principle, notwithstanding

that its development post 1994 (to which I shall shortly return) was significantly influenced by the Constitution and its underlying values. The relevance of this observation lies in a possible constitutional attack on the validity and/or enforceability of a contract or any term thereof. In my respectful view, there is a difference in approach to an attack on the constitutionality of a term of contract on the ground of it being inconsistent with the Constitution, on the one hand; and on the other hand, an attack on the validity or enforceability of a contract or a term thereof on the ground of it being in conflict with public policy. In the latter case the concept of public policy is informed by the underlying values and principles of the Constitution, and it is in this sense only that the constitutional order is relevant. In a direct constitutional attack, the constitutional right must first be identified and secondly such right must then be found to be limited by *"a law of general application."* This distinction, I believe, was recognized by the majority judgment of the C.C. in **Barkhuizen v Napier** 2007 (5) SA 323 (CC) at 332A-334B. Langa CJ, at 381J-382C, whilst concurring with the majority judgment, added that under s.8 the constitutionality of a contract may be directly attacked. He nevertheless concurred with the majority that the best approach in determining whether public policy offends a contract, is the indirect constitutional approach which defines the concept of public policy with reference to the constitutional values. In the present case, there is no direct constitutional attack on the entrenchment clause, and nor can there be. The municipality's case is simply that the operation of the entrenchment clause in the prevailing circumstances is contrary to public policy.

[73] This brings me back to the essential question in this appeal: does the enforcement of the entrenchment clause as required by **Shifren** in the circumstances of this case offend public policy? To answer this question, it is unavoidable to give content and meaning to the concept of *"public policy."* This investigation includes, of course, the values introduced by the Constitution post 1994 and should not take me long.

[74] It serves no purpose to repeat the *dicta* in those well known cases on the subject. Various expressions and words were used in our case law prior to 1994 to describe *"public policy,"* such as performance (which) will detrimentally affect the interest of the community; contracts which are *contra bonos mores***,** illegal or immoral; contracts which run counter to social or economic expedience; contracts which are *"inimical to the interests of the community";* contracts implemented in a manner which is unconscionable, and so forth.

[75] As far back as 1917 Innes C.J. in **Law Union and Rock Insurance Co. Ltd v Carmichael's Executor** 1917 AD 593 at 598 said that the requirements of public policy are often a difficult and contentious matter. It is generally accepted that this is so because the values and norms of society which inform public policy constantly change and evolve; not only in time, but also in space. See, for instance, **Magna Alloys and Research** (*supra*) at 891H. In a diverse, multi-social and multicultural society such as South Africa, it is not surprising that our courts in the past often grappled with the concept of *"public interest."* It not only differed from time to time, but also from group to group. Thankfully, this is no longer the case.

[76] There can be no doubt that with the advent of our new constitutional order post 1994, new dimensions were given, both conceptually and contextually, to the meaning of *"public policy."* One of the founding provisions in the Constitution (s.1(a)) is the achievement of equality and the advancement of human rights and freedoms. It follows that the Bill of Rights (chapter 2) applies equally to all human beings in South Africa, irrespective of race, culture, language or religion. The values and norms which underpin the Bill of Rights are universal and cumulatively express public policy and the interest of society. Ngcobo J (as he then was) expressed it thus in **Barkhuizen** p.333 para 29:

> *"What public policy is and whether a term in a contract is contrary to public policy must now be determined by reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus a term in a contract that is inimical to the values enshrined in our Constitution is contrary to public policy and is, therefore, unenforceable."*

[77] Although the principle that contracts which offend public policy dates back to time immemorial, the concept of *"public policy"* is today rooted in our Constitution and the fundamental values it enshrines. These values not only include human dignity, equality and fairness, but also the substantive right to fairly resolve justifiable disputes (s.34) This is also recognized by the Supreme Court of Appeal (noteably the concurring judgment of Cameron JA in **Brisley** at 33F-36B).

[78] The concept of *"fairness"* runs like a golden thread through the Bill of Rights. However, even a superficial glance will reveal that it is used as an adverb or adjective (*"unfairly discriminate"* (s.9) or *"fair public hearing"* (s.34), and it is not an independent or substantive constitutional right. Therefore, and subject to what follows, a contract does not necessarily offend public policy merely because it may operate unfairly. Like the concept of good faith (*bona fide*), fairness may be regarded as an ethical value *"... that underlies and informs the substantive law of contract"* (Prof Hutchison *supra*), but it is not an independent constitutional or contractual principle in terms of which contracting parties may escape their obligations including obligations arising from the **Shifren** principle. (**Brisley** *supra*) at p.12H-15G). It follows that a court does not have a general discretion to decide what is fair and equitable and then to determine public policy with reference to his or her views on fairness. See also **Sasfin** (*supra*) at 8C-9A; **Botha (now Griesel) and Another v Finanscredit (Pty) Ltd.** 1989 (3) SA 773(A) at 782 I-J.

[79] Is the effect of **Barkhuizen** that public policy is henceforth to be determined with reference only to those norms and values enshrined in the constitution? I do not think so. I believe the constitutional values have brought uniformity and more sensitivity to the values and norms of the concept of public policy and may have broadened its impact, but they are not exclusive of public policy in general. I, however, make no finding in this regard and leave the question open for determination by the S.C.A. and/or the C.C. It is difficult to conceive of any situation where public policy or the public interest is not catered for in the Bill of Rights, but this question does not arise on the facts of this case. As I will shortly demonstrate, the

issue in this case can be resolved with reference only to the constitutional values as constituting public policy.

[80] Our courts have over many years developed guidelines to determine whether or not a contract offends public policy. The constitutional imperatives and the determination of public policy with reference to the constitutional values and norms, have not, I believe, imperilled those guidelines. I will refer only to those I believe are relevant to this case.

[81] First; it must be determined whether the contract or term challenged is *per se* contrary to public policy; or whether it is its operation in the prevailing circumstances and facts of the case which renders it contrary to public policy. A contract, or a term thereof, may very often appear innocuous, but its effect in particular circumstances may very well offend public interest.

[82] The test in a contract said to be contrary to public opinion *per se* is often, but not always, to determine its tendency at the time the contract is concluded rather than the time of its proved results. See **Sasfin** (*supra*) at 14F; **Bafana Finance Mabopane v Makwaka & Another** 2006 (4) SA 581 SCA at 585F.

[83] In the present case it is not suggested, and nor can it be said, that the entrenchment clause is *per se* contrary to public policy. The municipality's case is that its operation, on the facts of this case, offends public policy. In such a case the test is to determine public policy at the time the court is asked to enforce to term having regard to the prevailing circumstances and

the effect of the order at that time. See: **National Chemsearch SA (Pty) Ltd v Borrowman & Another** 1979 (3) 1092(T) at 1107 E-H; **& Brisley** (*supra*) at 16H-17D; **Magna Alloys** (*supra*) at 894F-896E; **Drewtons (Pty) Ltd v Carlie** 1981 (4) SA 305 (C) at 313D.

[84] The cases mentioned above were all concerned with the question whether a restraint of trade clause offended public policy, but I can see no reason in logic or principle why this general rule should not be applicable in all cases where the effect, rather than the tendency, of the term is challenged. This approach was accepted by Cameron JA (as he then was) in **Brisley** (*supra*) at para 91, and was confirmed by the C.C. in the majority judgment of Ngcobo J in **Barkhuizen** p.341 para 56. I therefore believe that in determining public policy in this case, the court must look at the effect of its order at the time it is made and not at the time the contract was concluded.

[85] Second; the determination of fairness under the constitutional setting is not dependent on (in fact it is divorced from), the personal views of both the judge and the parties to the contract. The reasoning in **Brisley** (*supra*) at 16B-E is equally relevant and applicable in this case, and this is recognized by the C.C.

[86] In **Barkhuizen (***supra*) at 351 Moseneke DCJ said in para 98:

> *Public policy cannot be determined at the behest of the idiosyncrasies of individual contracting parties. If it were so, the determination of public policy would be held ransom by the infinite variations to be found in any set of contracting parties."*

[87] The learned Deputy Chief Justice seems to criticize the *"subjective approach"* advocated by the majority judgment delivered by Ngcobo J, but on my reading of the majority judgment Ngcobo J does not advocate a subjective approach, but rather an objective approach. The reference to public policy to be assessed having regard to *"... the circumstances and conduct of the parties ..."* in the majority judgment was intended to refer to the effect of the clause on the parties at the time the court was asked to enforce the clause, and not to their state of mind (it seems, with respect, that the learned Deputy Chief Justice does not make the distinction between a clause which is *per se contra* public policy and one, the implementation of which has the effect of being *contra* public policy).

[88] Both the majority judgment and the judgment of Moseneke DCJ agree that the concept of fairness must be determined with reference to reasonableness having regard to the public norms and values. In the words of Moseneke DCJ p.350 in par.96:

> *"The question to be asked is whether the stipulation clashes with public norms and whether the contractual term is so unreasonable as to offend public policy."*

[89] If the operation of the clause in the prevailing circumstances and on the facts of the case, at the time the court is asked to enforce the clause, is so manifestly unreasonable that it offends public policy, then it is voidable on the ground of unfairness. This involves, as Moseneke DCJ observed, an objective assessment of its impact on the parties (p. 350 para 96 and p. 352 para 104), and does not involve the court's own views of the matter or that of the parties.

[90] Neither the common law, nor the Constitution, require that a contract operates fairly. For the reasons mentioned earlier, fairness in itself is not a substantive imperative under the Constitution. The concept of fairness in the context of this case must therefore be judged in the manner in which the implementation of the etrenchment clause finds expression in the entire spectrum of constitutional norms and values.

[91] Third; it has repeatedly been held that public policy requires that parties should comply with contractual obligations that are freely and voluntarily entered into. See, for instance, **Brisley** p.35 at para.94 and p.15 para.23; **Barkhuizen** p.341 para.57.

[92] The maximum *pacta sunt servanda*, as noted in p.341 para.57 of **Barkhuizen,** also gives effect to the central constitutional values of freedom and dignity. In addition, I may add, it also gives effect to freedom of trade, occupation and profession. It ensures commercial certainty and plays a vital role in a stable economic environment.

[93] It follows from the aforesaid that the power to declare contracts contrary to public policy should be exercised sparingly and only in the clearest of cases. What is meant by *"the clearest of cases"* is explained in our case law by reference to terms such as *"... when the harm to the public is substantively incontestable ..."* and not depending on *"... the idiosyncratic inferences of a few judicial minds ...,"* and when *"... the impropriety of the transaction (is) convincingly established ..."* See, for instance **Sasfin** (*supra*) at 9H-E; **Brisley** (*supra*) at 18B-G.

[94] Fourth; and finally, I believe that in considering whether a contractual term is at variance with public policy, then it helps to identify the constitutional principle which informs public policy and which is said to be offended. Such principle is then balanced and measured against the challenged contractual term. As indicated, the challenged contractual term may be an entrenchment clause informed by *pacta sunt servanda;* or it may be a restraint of trade clause informed by the right of freedom to trade; or it may be generally unjust, unfair or unconscionable informed by the right to equality, human dignity and the like.

[95] In the present case, the challenged contractual term is the entrenchment clause protected by *pacta sunt servanda* and informed by the right to freedom and dignity, and by commercial expedience, certainty and stability. Those values must be measured against those values of public policy which are offended by the implementation of the entrenchment clause. What are the values of public policy which are said to be offended by the implementation of the entrenchment clause in the prevailing circumstances?

[96] For the sake of expediency let me conclude, for reasons I shall mention shortly, that I believe the legal and constitutional principles which may be offended by the implementation of the clause in the prevailing circumstances, relate to the municipality's right to just and procedurally fair administrative action and its right to a fair public hearing before an independent and impartial tribunal or forum. Those rights are expressed in s.s. 33 and 34 of the Constitution to which I shall shortly return.

[97] Having regard to the four guidelines above, I now turn to the question whether the operation of the entrenchment clause on the peculiar facts of this case and in the prevailing circumstances, will have the effect of offending public policy as particularly expressed in s.s. 33 and 34 of the Constitution. But first to return to the facts.

[98] Notwithstanding signature of the employment contract on 11 September 2007, it appears to be common cause that the municipal manager commenced employment, as alleged by him in para 6 of his founding affidavit, as far back as 17 June 2005. His role, responsibilities and functions as outlined in ss 55, 56 and 57 of the Local Government: Municipal Systems Act 32 of 2000 indicate that he employs one of the most senior positions in local government, if not the most senior. In terms of s.57 he is charged with the duty, *inter alia*, to conclude employment contracts with managers accountable directly to him, and which employment contracts contain the usual terms relating to disputes, disciplinary enquiries, arbitrations, dismissal, and the like. There is no suggestion in the papers that when he concluded his written employment contract on 11 September 2007, he contracted on unequal footing, or that he was not fully aware or did not understand its content. The probabilities that he was so aware and fully understood all his rights are overwhelming and I hold that to be so.

[99] The municipal manager does not deny the allegation that he initially *"wrongfully and unlawfully concealed the interim forensic report* (which contained the particulars of his alleged fraudulent acts) *from Deloittes & Touche from both the* (municipal) *Council and the Mayor as well as the CFO."*

[100] He did not challenge his suspension. He engaged the services of an attorney and was assisted by legal representation and participated fully in the disciplinary proceedings which followed. Knowing full well what the terms of his employment contract and what his rights are thereunder, he did not object to the procedure which was followed. He did not and still does not challenge the correctness of the finding of guilty of misconduct and misappropriation of funds, including unlawfully increasing his own salary and that of a few other managers. He was informed of the outcome of the disciplinary enquiry and of the recommendation to council that he be dismissed, and was invited to make representations to council as to why he should not be dismissed. He still did not object to the procedure or the findings. Instead, assisted by his attorney, he continued to participate in the process and made written submissions to council on the recommendation that he be dismissed.

[101] When it became clear that his dismissal was inevitable, he attempted to voluntary resign his position as municipal manager. The inference is strong that he did so not only to protect his future career path, but also to escape the financial disadvantages of being dismissed rather than to resign. Also that he accepted that he was correctly found guilty of serious misconduct, or at least that he did not challenge its correctness.

[102] After he was dismissed, for the first time, he challenged the procedure under clause 16 and invoked, in support thereof, the protection of the **Shifren** principle under clause 14. Does public policy permit him to do so under these circumstances? Put differently, is it in the public interest on the

particular facts of this case, that the **Shifren** principle be enforced? The answer to this question depends on how the implementation of the entrenchment clause will impact on the parties having regard to the facts of this case and the prevailing circumstances.

[103] The first consequence of the implementation of the entrenchment clause will be that his dismissal must be set aside and he must be reinstated in his former position as municipal manager against payment of his salary together with payment of arrear salaries from the time of his dismissal. It is not known what his salary was, but on the probabilities it was not insignificant. He will then be suspended pending the outcome of the arbitration and the recommendation to council. During this period he will be entitled to payment of his salary. On the facts of this case, there is no suggestion whatsoever that the outcome will be any different to the outcome of the disciplinary enquiry, namely that he will again be found guilty.

[104] The municipal manager will get a second bite of the cherry in the hope that he may be found not guilty, but that hope is not substantiated by any facts before us. Even if he is again found guilty, the financial benefits to him are substantial, with the added benefit that it gives him the opportunity of seeking alternative employment in the meantime without a tag of dismissal hanging from his neck.

[105] From the perspective of the municipality, the entire exercise will be one in futility, with great expense and inconvenience. The procedure will serve no purpose at all and the additional salary will be funded by the *fiscus* who will recover it from the members of the public.

[106] In **Hudson v Hudson and Another** 1927 AD 259 at 268 , DeVilliers JA said:

> *"When therefore the Court finds an attempt to use for ulterior purposes machinery devised for the better administration of justice; it is the duty of the Court to prevent such abuse."*

[107] The learned Judge relied on **Remmington v Scoles** (1897, 2 Ch. D. p.5) and referred with approval as follows to various *dictae* in the case:

> *"LINDLEY, L.J., at page 6: 'I think the learned Judge has not gone wrong when he says, as he does, that this is a defence which never ought to have been put in, and that it is a mere sham defence-not an honest defence, but framed with a view to gain time." And LOPES, L.J.: 'It has been set up, not honestly and* ***bona fide*** *as a substantial defence, but for the purpose of delay." The case of* ***Stephen v Garnett*** *(67 L.J. Q.B. 447) is instructive. In that case it was held that litigating identically the same question in a subsequent action is an abuse of the process of the Court. A. L. SMITH, L.J. expressed himself as follows: 'I do not base my judgment upon the ground that the question is* ***res judicata,*** *but upon another ground- namely, that the issue raised in this action is identically the same issue as that which was raised in the proceedings before the County Court Judge, when the question arose as to the taxation of costs."*

[108] I do not believe, on the facts of this case, that the municipal manager has a *bona fide* defence to the charges. He invokes the **Shifren** principle not for the legitimate purpose of vindicating his rights, but for ulterior purpose

of delaying his dismissal to his financial (and other) benefit and to the financial detriment of the municipality he serves. In my respectful view, a re-hearing before another tribunal will serve no legitimate purpose or interest and will result in the abuse of the process of law. This constitutes an infringement of the municipality's rights under s.34 of the Constitution and calls for the protection of those rights by this Court.

[109] Section 34 reads as follows:

> *"Everyone has the right to have any dispute that can be resolved by the application of law decided in a fair public hearing before a court or, where appropriate, another independent and impartial tribunal or forum."*

[110] It must be borne in mind that the municipality's case is not that s.34 renders the entrenchment clause 14, or the implementation thereof, unconstitutional. The direct application of s.34 does not apply. The case is that s.34 is simply one of many values and norms entrenched in the Constitution which collectively shape and inform public policy. In this sense, as **Barkhuizen** points out, s.34 has indirect application. In the interpretation of s.34 for present purposes, it must therefore be given an extensive meaning.

[111] Since our democratic order is found on, *inter alia*, the supremacy of the Constitution and the rule of law it is often described by analogy to the German constitutional term *"Rechtstaat"* or the Dutch term *"Regstaatidiee."* Because the sovereignty of parliament in the previous order is now substituted by the supremacy of the rule of law, section 33

(administrative action), 34 (civil litigation) and 35 (criminal proceedings) are foundational rights often described as the cornerstones of our democracy.

[112] Prof Devenish, **A commentary on the South African Bill of Rights,** p.486, describes s.34 as *"...fundamental to a viable and dynamic legal system having as its principal feature justifiable human right..."*

[113] Cheadle Davis Haysom, **South African Constitutional Law, The Bill of Rights,** p.28-1 states that s.34 guarantees *inter alia "...that no person will be deprived of a right* ***without due process of law ..."*** (my emphasis).

[114] The importance of s.34 and its place in our constitutional order was emphasized by the CC on a number of occasions. **Moise v Greater Germiston Transitional Local Council; Minister of Justice and Constitutional Development Intervening (Women's Legal Centre as Amicus Curi)** 2001 (4) SA 491 (CC) para. 23; **First National Bank of South Africa Ltd v Land and Agricultural Bank of South Africa and another** 2000(3) SA 626 (CC) at para.6.

[115] In **Beinash and another v Ernst and Young and others** 1999 (2) SA116(CC) at para.17 the court held that s.34 *"requires active protection"* and that *"the court is under a constitutional duty to protect* ***bona fide*** *litigants, the due process of Courts and the administration of justice."*

[116] Although the court in **Beinash (***supra***)** was dealing with the case of a vexatious litigant I believe it is inherent in s.34 that the duty of the

protection extends to all the processes of law, including hearings before an informal forum.

[117] It is clear from the above, and from a reading of s.34, that the rights enshrined therein are much wider than what the heading suggests, namely **Access to Courts.** It includes the resolution of disputes to be resolved according to due process of law. And *"due process of law"* not only includes concepts such as fairness, the right to legal representation, the hearing before and independent and impartial tribunal and so forth; but also the right to be protected against the **abuse** of the process of law.

[118] It has long been recognized under our common law that a court is entitled to protect itself and others against the abuse of its process (**Price Waterhouse Coopers Inc. v National Potato Co.op** 2004 (6) (SCA) SA 66 at 80 para.50-81G. and the cases there cited).

[119] The meaning of *"abuse of process"* has taken various forms and is expressed in a number of ways. A synopsis of the relevant cases and a summary of the various descriptions of the term appear in para. 50 of **Price Waterhouse Coopers** (*supra*) p.80-81 and I can do no better and nor can I add anything further.

[120] Without even attempting to offer any definitive meaning of the term, I believe the effect of the cases discussed and the *dicta* referred to in para.50 of **Price Waterhouse Coopers** can be summarized as follows:

[121] The due process of law is abused when the machinery devised for a fair hearing to resolve a justifiable dispute is not used for the vindication of *bona fide* rights or the enforcement of just claims, but when it is involved for other, ulterior or improper purposes such as, but not limited to:

1) Pursuing claims which are not *bona fide* or in which the applicant/plaintiff has no legitimate interest and are intended to cause the other party embarrassment or financial (or other) prejudice;

2) to unduly delay and frustrate the realization and finalization of legitimate claims in respect of which the respondent/defendant has no *bona fide* defence;

4) to cause frivolous or vexatious litigation, arbitration or informal hearings; or

5) achieving improper ends such as extortion, oppression or undue pressure and therefore using the process not intended for its legitimate purpose namely, to fairly, justly and speedily resolve *bona fide* and justifiable disputes.

[122] Nevertheless, it remains an important consideration that s.34 is a right open to both the municipality and the municipal manager in this case. Subject to any other limitations of this right under s.36(1) (which are not relevant for present purposes, but discussed in **Cheadle, et al** (*supra*) para. 28.4 and 28.9) it is axiomatic that s.34 is not available to a litigant whose

exercise of the right will result in an abuse of the process of law. In such a case the aim is destructive of the right to a fair hearing.

[123] It is trite that courts of law and the legal process generally are open to all. Only in extreme and exceptional cases will a court or the legal process close its door to anyone who wishes to prosecute an action. See: **Price Waterhouse Coopers** (*supra*) at 81F relying on **Western Assurance CO. v Caldwell's Trustee** 1918 AD 262 at 273-4. Mindful of this limitation, together with all the other limitations and cautionary rules discussed in this judgment, I am nevertheless of the view that none of the municipal manager's constitutional or contractual rights outweigh the municipality's right to due process of law.

[124] In terms of s.1(c) of the Constitution, the rule of law is a founding provision of our democratic order. For the reasons mentioned, the rule of law prohibits the abuse of the process of law. The rights to a fair hearing and just administrative action are guaranteed by s.s. 33 and 34, which includes the right to be protected against an abuse of the process of law. There can be no doubt, in my respectful view, that these rights all find expression in public policy and the public interest.

[125] Public policy, as expressed by the constitutional values and norms, does not tolerate the abuse of the process of law. The rights and freedoms under the Constitution are there to be used and not abused. Courts often find that litigants use their legal rights under the Constitution to manipulate legal proceedings by obtaining postponements and causing unwarranted delays, and by raising defences with improper objectives and motives. Sadly, this

trend seems to be on the increase. Public policy requires courts to put an end thereto.

[126] In balancing the *pacta sunt servanda* principle as expressed in **Shifren** against the right to engage the due process of law under s.34 and to be protected against an abuse thereof, I have no hesitation in coming to the conclusion, on the facts of this case, that public policy in this particular case favours the rule of law as a foundational cornerstone of our constitution. I therefore believe that the facts and circumstances of this case justify the departure from the **Shifren** principle.

[127] In all the circumstances of the case, I propose that the appeal should succeed and that the following order be made:

1. The appeal succeeds.
2. The order of the Court *a quo* is set aside and is replaced with an order in the following terms:

   "The application is dismissed with costs."

3. The 2nd Respondent is ordered to pay the costs of the appeal.

_____

ALKEMA J

JUDGE OF THE HIGH COURT

I agree :

_____

PILLAY J.

JUDGE OF THE HIGH COURT

I agree :

NDENGEZI AJ

ACTING JUDGE OF THE HIGH COURT

Heard on	**:**	**21 August 2009**
Delivered on	**:**	**12 November 2009**
For Appellant	:	Adv. D.C. Botma
Instructed by	:	Gravett Schoeman Van Rensburg & Moodley Inc. c/o Keightley Attorneys.
For Respondent	:	Mr. S. Dzingwa
Instructed by	:	Dzingwa & Associates