THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 74/2018

In the matter between:

THE TRUSTEES FOR THE TIME BEING OF THE OREGON TRUST (IT728/1995)	**FIRST APPELLANT**
SALE'S HIRE CC	**SECOND APPELLANT**

and

BEADICA 231 CC	**FIRST RESPONDENT**
BEADICA 232 CC	**SECOND RESPONDENT**
BEADICA 234 CC	**THIRD RESPONDENT**
BEADICA 235 CC	**FOURTH RESPONDENT**
NATIONAL EMPOWERMENT FUND	**FIFTH RESPONDENT**

Neutral citation: *Oregon Trust v BEADICA 231 CC* (74/2018) [2019] ZASCA 29 (28 March 2019)

Coram: Lewis ADP and Cachalia, Saldulker, Mbha and Schippers JJA

Heard: 20 February 2019

Delivered: 28 March 2019

Summary: The enforcement of terms of lease agreements leading to their termination was not contrary to public policy as being unconscionable in the particular circumstances of the case.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Davis J sitting as court of first instance, reported *sub nom Beadica 231 CC & others v Trustees, Oregon Trust & another* 2018 (1) SA 549 (WCC)):

(1) The appeal is upheld with the costs of two counsel.

(2) The order of the Western Cape Division of the High Court is set aside and replaced with:

'(a) The application is dismissed with costs, including those of two counsel, to be paid by the applicants jointly and severally.

(b) The first applicant and all other persons occupying or holding possession through it of 12 Marais St, Durbanville, Cape Town, are to be ejected from the premises within 30 calendar days of the date of this order.

(c) The second applicant and all other persons occupying or holding possession through it of 33 Rosmead Avenue, Claremont, Cape Town, are to be ejected from the premises within 30 calendar days of the date of this order.

(d) The third applicant and all other persons occupying or holding possession through it of Unit 9, Lekkerwater Road, Noordhoek, Cape Town are to be ejected from the premises within 30 calendar days of the date of this order.

(e) The fourth applicant and all other persons occupying or holding possession through it of 3 Main Road, Hout Bay Harbour, Cape Town, are to be ejected from the premises within 30 calendar days of the date of this order.

(f) The applicants are to pay the costs of the first respondent's counterclaim, jointly and severally.'

JUDGMENT

Lewis ADP (Cachalia, Saldulker, Mbha and Schippers JJA concurring)

[1] Mr Shaun Sale ran a business that let tools and building equipment to builders throughout Cape Town. He ran several outlets in different parts of the City and

employed managers and other staff at all the outlets. In due course, and as part of a black empowerment initiative by the National Empowerment Fund, he set up a franchising operation. The premises from which the businesses were run were in the main owned by the first appellant, the Oregon Trust, Sale being one of the three trustees of the trust. The franchise business was owned by a close corporation, Sale's Hire CC (Sales Hire), the second appellant. Sale is the only member of Sales Hire. The respondents are four close corporations, the members of which were formerly employees of Sales Hire, with whom Sales Hire entered into franchise agreements, and Oregon Trust let premises to them in which the franchised businesses were run. I shall refer to the respondent close corporations as 'the lessees'.

[2] The lease agreements were entered into between Oregon Trust and the lessees in May 2011 and commenced running on 1 August 2011: they were for a period of five years each. The enforcement of the terms of the leases is the issue in this appeal and I shall return to them in detail later. In brief, at this stage, they would have terminated on 31 July 2016. They all contained options to renew the leases for a further five years, on the giving of notice six months before termination, and subject to the rental for the renewal period being agreed. A mechanism for the agreement of rental was set out in each lease.

[3] The franchise agreements were concluded in October 2011, and were to endure for a period of ten years, anticipating, presumably, the renewal of the leases. Sales Hire also concluded a cooperation agreement with the National Empowerment Fund in terms of which it acknowledged that the Fund would finance the franchised businesses to formerly disadvantaged employees of Sales Hire by way of loans to operate the franchises. Sales Hire was appointed as the coordinator of the funding transactions. It undertook to assist the franchisees with 'back office' functions, to train the franchisees in the operation of the tool hiring business, and to support them in their operations. The franchisees were not party to this agreement but nothing turns on this.

[4] The options to renew the leases were not exercised by any of the lessees by 31 January 2016. They had purported to exercise their options in March 2016, but not in the terms required by the lease and two of them had made enquiries about

purchasing the leased premises as well. Oregon Trust had not responded to any correspondence in this regard save to say that Sale was away and would respond on his return. He did not do so. The leases terminated through the effluxion of time on 31 July 2016. Unsurprisingly Oregon Trust, through its attorneys, demanded that the lessees vacate the premises before 1 August 2016, but made its demands only very late in July.

[5] On 1 August 2016 the four lessees brought an urgent application, in the Western Cape Division of the High Court (the high court), for an order that they be permitted to remain in occupation of the leased premises, and that the Oregon Trust be prohibited from taking steps to evict them, in each case pending the determination of the question whether the options to renew the leases had been validly exercised.

[6] Oregon Trust brought a counter application for the eviction of the lessees on the basis that the leases had expired through the effluxion of time. The application and counter application were heard by Davis J. After a consideration of the development of the law of contract in South Africa in a constitutional democracy, he issued orders to the effect that the options to renew the leases had been validly exercised; and that the rentals were to be determined in accordance with the mechanism set out in the lease agreements. He also ordered that Oregon Trust was prohibited from evicting the lessees until 31 July 2021 or earlier in the event of a breach by any of the lessees. Davis J gave leave to appeal against his orders on the basis that his decision turned on the development of jurisprudence flowing from the decisions of the Constitutional Court in *Everfresh Market (Virginia) (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC) and *Botha v Rich NO* [2014] ZACC 11; 2014 (4) SA 124 (CC) and that the issue ought to be determined by this court.

[7] I shall deal with the terms of the agreement, and purported exercises of the rights to renew them, before considering the judgment of Davis J and the conclusions that he reached.

The terms of the lease agreements

[8] Each lease contained a clause dealing with the renewal of the lease. Clause 20, headed 'Renewal Period' stated:

'20.1 The Lessee shall have the right to extend the Lease Period by a further period [for five years] on the same terms and conditions as set out herein, save as to rental, provided that the Lessee gives the Lessor written notice of its exercising of the option of renewal at least six (6) months prior to the termination date.

20.2 The rental during the renewal period shall be mutually agreed to between the Lessor and the Lessee and reduced to writing at least three (3) months prior to the termination date.

20.3 In the event of the Lessor and the Lessee being unable to reach written agreement of the rental for the renewal period . . . then and in such event the rental for the renewal period shall be determined on the following basis:

. . .'

The clause then required the appointment of an expert to determine the rental, and failing the agreement on the expert, the Chairperson of the Estate Agency Affairs Board in the Western Cape would be called on to appoint an expert. The agreement embodied the usual terms, including that there could be no variation other than in writing signed by both parties.

[9] The lessees did purport to renew their leases in March 2016 (after the date when they should have done so). The first respondent, represented by Mr Allistair Fisher, wrote to the Oregon Trust on 29 March 2016. He said:

'This letter is a formal request to propose a renewal on our already existing lease agreement with the option to purchase.

I trust that this proposal will meet with your favourable consideration.'

[10] The third respondent, represented by Mr Donovan Lotter, wrote on 15 March 2016. The letter was headed "Offer to purchase of premises/renewal of lease of premises (Sales Hire Noordhoek)

'I, Mr D Lotter hereby would respectfully like to request your consideration of a offer to purchase premises, situated at . . .

Should you find my offer consideration favourable, please don't hesitate to contact me, to discuss same.

In the interim period, Could you kindly forward to us the draft of the renewal of premises lease for Sales Hire Noordhoek, current lease expiring 31 July 2016.

We will sincerely appreciate your timeous response to this request, as it is quite urgent.'

[11] On 3 March 2016 the accountant for the fourth respondent sent an email to Oregon Trust saying the reason for writing was 'that we check thru the lease agreement and saw that the termination date is 31 July 2016.' He continued: 'How soon can you draw up a new lease agreement for Gavin (the member of the fourth respondent) and can you also send me a draft copy for discussion purposes.'

[12] Oregon Trust did not respond to any of these letters, save that an employee wrote to one of the lessees stating that Sale was away and would deal with it on his return. On 22 July 2016, Oregon Trust's attorneys wrote to Fisher of the first respondent stating that it had not complied with clause 20 of the lease agreement in that it had not given notice of its intention to renew it on six months before its termination date. They notified Fisher 'to vacate the property on or before 31 July 2016'.

[13] The same letter was sent to Mr D T Porter of the third respondent, but only on 25 July 2016. The second and fourth respondents were treated slightly differently. They were notified on 29 July 2016 that the Oregon Trust was amenable to meeting to discuss a new agreement for the lease of the premises on 10 August 2016, and was willing to let the premises to them on a month to month basis until a new agreement was negotiated. A response was required by 31 July 2016. Neither of the respondents replied to that, but became party to the application issued on 1 August 2016 for an order that they had validly extended their leases.

The approach of the high court

[14] The lessees conceded that if the court were to enforce the strict terms of the leases they would have no case and Oregon Trust would be entitled to evict them from their premises. But they argued that contract law had become 'infused' with the notions of fairness and Ubuntu: that the leases had to be considered together with the franchise agreement for each franchisee, and the broader purpose of both the franchise and lease agreements had to be considered as the context. That context was one where Sales Hire had undertaken to the NEF that it would support the franchisees in their tool hire operations; that the franchises would endure for 10 years, and that it had thus been intended by Sales Hire, Oregon Trust and the lessees that the agreements of lease would also run for ten years. They relied in this regard on the decision of *Botha v Rich NO* (above) para 46:

Nkabinde J said:

'The principle of reciprocity falls squarely within this understanding [referred to in *Everfresh*, above] of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performance by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way. In this case, good faith is given expression through the principle of reciprocity and the *exceptio non adimpleti contractus*.'

[15] The context of the statement by Nkabinde J was that Mrs Botha had bought immovable property from a trust, the purchase price being payable in instalments. The contract provided that the trust was entitled to cancel in the event of Botha's breach, and to retain payments already made. Botha had paid three-quarters of the price when she fell into arrears. The trust sued for cancellation and eviction. She raised the defence that s 27 of the Alienation of Land Act 68 of 1981 provides that any purchaser who is in default, but who undertakes to pay the full price, and to register a bond over the property in favour of the seller to enable that, is entitled to demand transfer of the property on the registration of the bond. She had tendered to register a bond over the property and to pay the price. But she did not tender to pay the arrear instalments nor any other charges on the property. The trust demanded payment of all arrears.

[16] When she made a tender to pay all arrear charges, the trust did not accept it but sued for an order that the contract had been cancelled and that Botha be evicted. She counterclaimed for an order compelling the trust to transfer the property to her. The trust succeeded in the trial court and on appeal to a full court of the Northern Cape Division. She applied to the Constitutional Court for leave to appeal and succeeded on appeal even though she had not ever again tendered to pay arrear charges, accumulating over six years, and remained in breach of the contract. The Constitutional Court said (para 49):

'[T]o deprive Ms Botha of the opportunity to have the property transferred to her under s 27(1) and in the process cure her breach in regard to the arrears, would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid, and would thus be *unfair*. The other side of the coin is, however, that it

would be *equally disproportionate* to allow registration of transfer, without making that registration conditional upon payment of the arrears and the outstanding amounts levied in municipal rates, taxes and service fees. Accordingly an appropriate order in this regard will be made.' (My emphasis.)

[17] The decision has been severely criticized, and I shall return to the published comments made about it. For the moment it is significant to note that Davis J took the dictum in para 49 to mean that the Constitutional Court had 'invoked the principle of proportionality to determine whether, in such a case, the sanction claimed by the seller was proportionate to the consequence of the breach.' (Para 35.)

[18] Davis J considered the following circumstances to be relevant considerations in determining that the 'sanction' of termination and eviction was disproportionate to the failure by the lessees properly and timeously to renew the leases.

(a) The lessees were unsophisticated business people who did not understand the contractual provisions and their niceties and implications.

(b) The purpose of the whole scheme and the cooperation agreement with the NEF was to promote black economic empowerment (BEE) and the full participation by previously disadvantaged individuals in the economy. The application of the strict terms of the contracts would have been inimical to the empowerment project.

(c) The NEF had supported the lessees and had provided supporting affidavits to the effect that they had complied with their obligations under the franchise agreements, repaying their loans timeously. The franchisees would inevitably lose their businesses if they were to be evicted.

(d) The leases were tied to the franchise agreements, and, said Davis J, it was envisaged when the respective agreements were concluded that because the franchise agreements would endure over 10 years that the leases would effectively be of the same duration – hence the right to renew the leases for a further five years. The two agreements, he held, 'are inextricably bound to each other' (para 40).

[19] Davis J continued (para 40):

'If honouring a contract is not merely a matter of each side pursuing his or her own self-interest with regard to the other party's interest and that is not the exclusive lens through which our contract law should be evaluated, then, in order to promote a more nuanced focus, it must follow that the relief sought by the applicants should be granted. To contend that such a conclusion would undermine legal certainty is to take a somewhat myopic view of

the history of contract law. To repeat the point made by Wessels JA in *Weinerlein [Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 292]:

"The commentators put it thus: As a general proposition your claim may be supported by a strict interpretation of the law, but it cannot be supported in this particular case against your particular adversary, because to do so would be inequitable and unjust, for it would allow you, under the cloak of the law, to put forward a fraudulent claim. . . ."'

It will be recalled that *Weinerlein* was an instance where the court invoked the *exceptio doli* to allow for a claim for rectification. Few other instances of the successful invocation of the *exceptio doli* followed, and in 1988 Joubert JA (Jansen JA dissenting) declared its death: *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 (3) SA 580 (A). There have been attempts to revive it, especially in the light of the Constitutional Court judgment in *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC), which I shall discuss briefly later. Davis J did not purport to invoke the *exceptio doli* in this matter. It could not be said that Oregon Trust had attempted to use clause 20 of the lease agreements for a purpose not intended or in any way dishonest. It relied on the words of the contract and there was no suggestion made by the lessees that Oregon Trust was not being honest – only that it was relying on the strict application of the contract unfairly.

[20] The apparent basis upon which Davis J found that the lessees were entitled to relief appears in two forms in different paragraphs. Counsel for all parties were unable to say which constituted the basis for the decision. I discern two bases. He said (para 42):

'In this case I find that the *sanction was disproportionate* because the contracts signed maximized the interests of both parties and this meant that they intended ensuring that the franchise agreements be underpinned by the lease agreements. It does not follow that this conclusion implies that in every case a court will dispense with the strictures of a legal rule with the consequence that all or "most litigants will not turn to courts if they are uncertain of the law that will be applied to their decisions" [a quotation from M Wallis "Commercial Certainty and Constitutionalism: Are they Compatible' 2016 (133) *SALJ* 545 at 567] (my emphasis).

This principle appears to be derived from *Botha* – a court will not impose a disproportionate sanction for breach of contract.

[21] The second basis appears in para 43:

'[U]ntil 1988 courts operated at various times, on the basis that in exceptional cases the *exceptio doli* could be invoked. How much more so should the prism of the normative framework of the Constitution not provide judges with some residual basis by which to examine the substance of an agreement and to conclude that the sanction which might follow a strict application of a formal rule is and of itself insufficient to justify the relief sought, when the key intention of the parties can be clearly divined from as in this case, the substance of the two agreements read together. The Constitution demands an audit of all law and that demand cannot be defended by the idea that legal certainty will be compromised.'

[22] And in para 44:

'Legal certainty is a shibboleth, if it is meant to imply that inevitably there is one right answer that stares litigants in the face, so much so that there is never a risk that an opposite conclusion may not be reached by a court. . . .

[I]n this case, when the very idea of the transaction was to promote the interests of historically disadvantaged applicants to participate fully in the economy and to be embraced not simply as political but economic citizens in terms of agreements which were entered into for this purpose, more is surely required to justify the respondent's case than that applicants, without the requisite business knowledge, requested a renewal of their leases in a form which should have been more precise and should have been submitted within the specified dates.'

[23] While referring to the application of the *exceptio doli*, Davis J does not take that defence any further. And although referring to the difficulties expressed by other courts and writers in allowing hard cases to make uncertain law, he did not engage with them. Davis J (para 41) cited the following passage from the Wallis paper (at 566):

'[W]e must accept that the courts cannot resolve every case that excites the sympathies of judges, or lays hold upon the judicial mind as raising issues of unfairness, in favour of the party the judges perceive to have been unfairly treated. It is the nature of law and the judicial process that it is required to draw lines and define boundaries and sometimes cases that fall on the wrong side of the line will be of such a nature as to excite the sympathy of the judges. They are, after all, human. Sometimes, but only occasionally, they will prompt a reconsideration of existing law and some development. But if the court makes this the determinative factor it fails to discharge an obligation that lies at the heart of the rule of law. A rule of law based solely on the exercise of judicial discretion and a sense of reasonableness and fairness may be no rule at all.'

[24] The Wallis caution was sounded by this court previously in *Bredenkamp & others v Standard Bank of South Africa Ltd* [2010] ZASCA 75; 2010 (4) SA 468 (SCA). After analysing the judgments of the Constitutional Court in *Barkhuizen v Napier*, Harms DP said in *Bredenkamp* (para 39):

'A constitutional principle that tends to be overlooked, when generalized resort to constitutional values is made, is the principle of legality. Making rules of law discretionary or subject to value judgments may be destructive of the rule of law.'

This principle was reinforced in *Potgieter v Potgieter NO* [2011] ZASCA 181; 2012 (1) SA 637 (SCA) where Brand JA, after referring to *Bredenkamp* and other cases decided along these lines in this court, said (para 34):

'[T]he reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in *Preller & others v Jordaan* 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge.'

Public policy and *pacta sunt servanda*

[25] In the high court Davis J did not refer to *Bredenkamp* in his judgment, despite its binding force. (The statement of Kriegler J in *Ex parte Minister of Safety and Security: In re S v Walters* 2002 (4) SA 613 (CC) paras 60 to 61, that the decisions of this court bind the High Court, is still good law.) Harms DP pointed out that the principle of *pactum sunt servanda*, although fundamentally important in the law of contract, is not a 'holy cow' – para 37. It is, however, as Ngcobo J said in *Barkhuizen* (para 87), 'a profoundly moral principle, on which the coherence of any society relies.' Ngcobo J continued:

'It is also a universally recognized legal principle. But, the general rule that agreements must be honoured cannot apply to immoral agreements which violate public policy.'

[26] The reason for the continued application of the principle embodied in the maxim *pacta servanda sunt* is the need for certainty in commerce – what Davis J termed a 'shibboleth' (as I understand it, a principle that is not in practice adhered to, or that is out of date). By certainty I do not mean that there is a risk that a court will

interpret a contract differently from a party, as Davis J suggested. I mean that the parties will know what their contract means and that they are entitled to rely on its terms, unless they are against public policy or their enforcement would be unconscionable.

[27] The continued application of the *pacta servanda sunt* principle, and the importance of the principle, are demonstrated in two recent decisions of this court: *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* [2017] ZASCA 176; 2018 (2) SA 314 (SCA) and *Roazar CC v The Falls Supermarket CC* [2017] ZASCA 166; 2018 (3) SA 76 (SCA). In *Roazar* Tshiqi JA enforced a clause entitling a lessor to cancel a lease and to evict the lessee. The lessee had argued that there was a duty imposed on the parties to negotiate the terms of a new lease. The court rejected the notion that there was an obligation to negotiate in good faith, cogently explaining why this was unenforceable where no deadlock-breaking mechanism had been agreed (paras 20 to 23).

[28] In *Mohamed* the parties had entered into a lease in 2001 and it had been renewed, such that the lease had run for many years. It required the lessee to pay its rental by the 7th of each month. Failure to comply with this obligation would entitle the lessor to cancel the lease and repossess the property. In June 2014, through an error, the lessee's bank failed to pay one month's rental. The lessor gave notice of this to the lessee but said that should it occur again it would not give notice but would cancel. In October 2014 the bank paid the rental into the wrong bank account. The lessor gave notice to the lessee to vacate the premises, despite the fact that the breach was cured thereafter. In the court a quo, the lessee had argued that in the circumstances the reliance on the right to cancel, where the default was through no fault of the lessee, was manifestly unreasonable and contrary to public policy. The court a quo upheld the defence, considering that the principle that agreements should be honoured was no longer good law.

[29] On appeal to this court, the court found that the breach clause was not itself contrary to policy; there had been equality of bargaining power in so far as the parties were concerned; timely performance had been possible (the lessee should have monitored the performance of its bank) and the agreement had been entered

into freely. The appeal was thus upheld and the lessee was ordered to vacate the premises.

[30] Mathopo JA, writing for the court, said (para 21) that what had to be decided was whether the 'implementation' of the breach clause was manifestly unreasonable or unfair 'to the extent that it is contrary to public policy'. This, he said, called for a 'balancing act and weighing up of two considerations, namely the principle of *pacta sunt servanda* and the considerations of public policy, including of course constitutional imperatives'.

[31] Mathopo JA cited a passage in *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A), in which the majority held that a term that was unconscionable would not be enforced. Smalberger JA, for the majority, referred (at 8I-9A) to the judgment of Innes CJ in *Eastwood v Shepstone* 1902 TS 294 at 302:

'Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions which are against public policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void.'

[32] Smalberger JA continued (at 9A-C):

'No court should therefore shrink from the duty of declaring a contact contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness.'

The court in *Sasfin* referred also (at 9G-H) to the statement of Stratford CJ in *Jajbhay v Cassim* 1939 AD 537 at 544 that 'public policy should properly take into account the doing of simple justice between man and man'.

[33] But as Mathopo JA held in *Mohamed*, following Harms DP in *Bredenkamp*, the Constitutional Court in *Barkhuizen* did not introduce a principle that the enforcement of a valid term must 'be fair and reasonable even if no public policy consideration found in the Constitution or elsewhere is implicated' (*Mohamed* para

25 and *Bredenkamp* para 50). Had it been otherwise, said Harms DP, Ncgobo J would not have said in *Barkhuizen*, para 57):

'Self-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. The other consideration is that all persons have a right to seek judicial redress.'

[34] The issue remains one of public policy, therefore, as was found in *Mohamed's*. This court held that there were no policy considerations that rendered the lease unenforceable. Most recently, this court in *A B v Pridwin Preparatory School* [2018] ZASCA 150; 2019 (1) SA 327 (SCA) has set out the principles governing private contracts and public policy as follows (para 27):

'The relationship between private contracts and their control by the courts through the instrument of public policy, underpinned by the Constitution, is now clearly established. It is unnecessary to rehash all the learning from our courts on this topic. It suffices to set out the most important principles to be gleaned from them:

(i) Public policy demands that contracts freely and consciously entered into must be honoured;

(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;

(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;

(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds;

(vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.' (Footnotes omitted.)

[35] Thus although fairness and reasonableness inform policy they are not self-standing principles. And there are competing policy considerations, in particular, the need for certainty in commerce. Professor Dale Hutchison in a paper entitled 'From bona fides to Ubuntu: the quest for fairness in the South African Law of Contract' 2019 *Acta Juridica* (not yet published) describes the competing considerations as

'the most burning issue in the modern South African law of contract'. The competing goals of certainty and fairness give rise to what he terms 'intractable problems in contract law'. Hutchison writes:

'Certainty is a rule of law concern in commercial dealings: contracts being planned transactions, the application of the law must produce predictable outcomes. On the other hand, unless these outcomes are generally considered acceptable by fair and reasonable people in the particular context, contract law will lose its legitimacy.'

[36] Referring to the decision of this court in *Bank of Lisbon*, and the academic criticism of it that followed, Hutchison writes that a 'differently composed majority' of this court in *Sasfin* struck down a contract that was unconscionable and inequitable. The facts were unusual. Beukes, an anaesthetist, had executed a deed of cession in favour of the bank, Sasfin, that effectively placed the bank in control of Beukes's professional earnings for life, and did not afford him the right to terminate this situation. Smalberger JA found that this was 'clearly unconscionable and incompatible with the public interest' (at 13H). But he did warn that the power to strike down a contract as being contrary to policy should be exercised sparingly, a caution echoed by Cachalia JA in *Pridwin*.

[37] Davis J in the high court in this matter did not explicitly rely on policy considerations in tailoring the termination clause in the leases in question. He relied, as I have said, on the concept of disproportionality expressed in *Botha* (para 42 of his judgment). The decision in *Botha* is described by Hutchison (op cit) as 'embarrassingly poor'. The problem with that finding, and the decision in *Botha*, is described by Wallis (op cit p 557):

'What is of greater importance is that the court [in *Botha*] simply put on one side, and by its decision negated, the contractual rights of the seller. It did so apparently because of its view that it would be "disproportionate" for Ms Botha's default to result in her losing the opportunity to acquire the property. Why that was so was not explained. But there is now a decision by the Constitutional Court that a person who breaches their contract and is faced with the legitimate contractual termination thereof may resist cancellation by saying that, notwithstanding the terms of the contract, in their particular circumstances, that is a disproportionate response to their breach. But, if that is so, we can never know when a cancellation will be legitimate and when not. How is a party to know, when faced with a default by the other party, whether they are entitled to invoke and pursue their contractual

remedies? How does a lawyer advise a client wanting to know its remedies for contractual breach?'

[38] Quite so. The notion that a sanction for breach, or failure to comply with the terms of a contract, agreed on by the parties is disproportionate and therefore unenforceable, is entirely alien to South African contract law. And to recognize it would be to undermine the principle of legality. That does not mean that a sanction that is contrary to public policy, or that is unconscionable in the circumstances, is to be enforced. The question is really one that centres on policy – the legal convictions of the community, rooted now in the Constitution. What policy considerations were at play in this matter?

The policy considerations in issue

[39] There is nothing inherently offensive in the renewal clauses in the leases. The leases would have terminated had the lessees not been given the option to renew them. The only limitation on that right was that it had to be exercised in a particular manner and by a particular date. The requirement of six months' notice is eminently reasonable, given that the lessees and Oregon Trust would have to agree on the rental to be paid, or appoint an expert to determine the future rental of all the premises. And in the absence of agreement, Oregon Trust would have to find new tenants. It was open to the lessees to renew timeously and by giving proper notice. The leases may not have been between Oregon Trust and sophisticated business people (as the lessees suggested and Davis J found), but the representatives of the lessees had all operated franchises, and had previously been store or regional managers. They were not ignorant individuals. They may not have fully appreciated the niceties of the law, but they knew that they had to give notice – they attempted to do so after the notice period had elapsed.

[40] In *Barkhuizen*, the Constitutional Court had to determine whether the failure by an insured to comply with a time limitation clause in the insurance contract should non-suit him. In considering whether the time limitation was enforceable, Ngcobo J, for the majority, said (para 85):

'[W]ithout facts establishing why the applicant did not comply with the clause, I am unable to say that the enforcement of the clause would be unfair or unjust to the applicant. For all we

know, he may have neglected to comply with the clause in circumstances where he could have complied with it. And to allow him to avoid its consequence in these circumstances would be contrary to the doctrine of *pacta sunt servanda*. This would indeed be unfair to the respondent.'

[41] That is equally true in this matter. The lessees have not disclosed why they did not give notice of their intention to renew the leases by 31 January 2016. If they had advanced reasons why they did not comply, we would be better able to assess whether enforcement of the renewal clauses was, in the circumstances, unconscionable.

[42] Oregon Trust argues that the effect of the orders of the high court (to permit the lessees to occupy the premises for a further period of five years) was that new contracts were made for the parties by the court. That is in my view correct, and we should not endorse the approach. No consideration of public policy permits the making of contracts for parties by a court.

[43] The lessees, on the other hand, argue that termination of the leases was not favoured by public policy because it would result in the collapse of the franchised businesses and that would derail an empowerment initiative for previously disadvantaged individuals. The termination of the leases appeared to have no benefit for the lessor since the lessees had paid their rental and had not defaulted. And Oregon Trust had not indicated that any of the premises was available for hiring by other lessees.

[44] That argument ignores the fact that it was the lessees, through non-compliance with the renewal clause, who jeopardized their businesses. If they had at least attempted to explain why they had failed to give notice timeously, policy considerations might have been relevant. They have advanced as their principal policy consideration that Sale was not bona fide: as a trustee of Oregon Trust and the member of Sales Hire, he was determined to close down their businesses.

[45] This argument is not founded on any facts. The Oregon Trust and Sales Hire are different legal entities. If Sale was indeed the controlling mind of both entities, which was not established on the papers, his motive, if he had any, is not relevant.

In any event, Sale denied that he had any intention of destroying the lessees' businesses. It is his version that we must accept since there is nothing inherently implausible in it.

[46] In the circumstances I conclude that there are no considerations of public policy that render the renewal clause of the leases unenforceable. The demand for compliance with their terms was not unconscionable. The leases terminated on 31 July 2016 through the effluxion of time. When the lessees brought their urgent application on 1 August 2016 the leases had expired. There was no basis on which to resuscitate them. The appeal must accordingly succeed.

[47] In the result the following order is made:

(1) The appeal is upheld with the costs of two counsel.

(2) The order of the Western Cape Division of the High Court is set aside and replaced with:

'(a) The application is dismissed with costs, including those of two counsel, to be paid by the applicants jointly and severally.

(b) The first applicant and all other persons occupying or holding possession through it of 12 Marais St, Durbanville, Cape Town, are to be ejected from the premises within 30 calendar days of the date of this order.

(c) The second applicant and all other persons occupying or holding possession through it of 33 Rosmead Avenue, Claremont, Cape Town, are to be ejected from the premises within 30 calendar days of the date of this order.

(d) The third applicant and all other persons occupying or holding possession through it of Unit 9, Lekkerwater Road, Noordhoek, Cape Town are to be ejected from the premises within 30 calendar days of the date of this order.

(e) The fourth applicant and all other persons occupying or holding possession through it of 3 Main Road, Hout Bay Harbour, Cape Town, are to be ejected from the premises within 30 calendar days of the date of this order.

(f) The applicants are to pay the costs of the first respondent's counterclaim, jointly and severally.'

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C H Lewis

Acting Deputy President

APPEARANCES

For Appellants:	J Muller SC, with him H L du Toit (Heads also prepared by S Rapaport) Instructed by: De Klerk & Van Gend Inc., Cape Town McIntyre Van der Post, Bloemfontein
For 1st to 4th Respondents:	B J Manca SC, with him G G M Quixley Instructed by: ME Mohammed Attorneys-at-law, Athlone
For 5th Respondent:	No appearance Instructed by: Dentons South Africa, Cape Town