IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 109/2019
SCA Case 74/2018
WCC Case 13689/2016

In the matter between:

BEADICA 231 CC	First Applicant
BEADICA 232 CC	Second Applicant
BEADICA 234 CC	Third Applicant
BEADICA 235 CC	Fourth Applicant
and	
THE TRUSTEES FOR THE TIME BEING OF THE OREGON TRUST (IT 728/1995)	First Respondent
SALE'S HIRE CC	Second Respondent
NATIONAL EMPOWERMENT FUND	Third Respondent

APPLICANTS' SUBMISSIONS

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INTRODUCTION

1. The applicants (the "**lessees**") operate building equipment sales and hire businesses at premises leased from the first respondent (the "**Trust**"). They are franchisees. The franchisor is the second respondent ("**Sale's Hire**"). Mr Shaun Sale ("**Mr Sale**") is the sole member of Sale's Hire and one of three trustees of the Trust.

2. The lease agreements concluded between the lessees and the Trust each commenced on 1 August 2011 for an initial period of five years.[1] The lessees could exercise an option to renew the leases for a further five years if they gave at least six months' notice before the expiry of the initial period on 31 July 2016.[2]

3. The combined 10-year period of the leases corresponded with the 10-year initial period of the franchise agreement.[3] The franchise agreement requires the lessees to operate their businesses from the leased premises (defined in the franchise agreement as the "Approved Location").[4] It further provides that the franchisor may terminate the agreement if the franchisee is ejected from the Approved Location,[5] or if the lease agreement is terminated for any reason.[6]

4. The lessees provided renewal notices only in March 2016 – less than six months before the initial period expired.[7] The Trust offered no substantive response to those notices.[8] Later, in July 2016 (a matter of days before the expiry of the initial 5-year terms only),

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1 Each of the leases is substantially similar (FA para 18, record vol 1 p 11). A sample lease is attached as annexure FA5 to the founding affidavit, record vol 1 p 49ff.

2 Clause 20 of the leases, record vol 1 p71-72.

3 The franchise agreements are also substantially the same (FA para 32, record vol 1 p 16). A sample franchise agreement is at record vol 2 pp 91ff.

4 Clause 4.1,record vol 2 p 199, read with clause 2.5, record vol 2 p 96.

5 Clause 18.5, record vol 2 p 138.

6 Clause 18.17, record vol 2 p 139.

7 The renewal notices are annexure FA8, record vol 2 pp 153ff.

8 FA para 21, record vol 1 p 11; FA para 35, record vol 1 p 18.

the Trust gave the lessees notice of its termination of the leases.[9] The termination of the leases would mean that the lessees would have no premises from which to operate their businesses.

5. In response, the lessees brought an application in the High Court to declare that the renewal options had been validly exercised. Relying on *Barkhuizen*,[10] they contended that the strict enforcement of the renewal provisions of the leases would contrary to public policy and unjust in the circumstances of the case. The Trust in turn brought a counter-application for their eviction.[11]

6. The lessees are all black-owned enterprises. Each of their members was formerly an employee of Sale's Hire at one of its branches. The branches became franchised through a black economic empowerment ("**BEE**") transaction financed by the third respondent, the National Empowerment Fund (the "**NEF**").[12] The BEE transaction has so far been a success. The lessees' loans to the NEF have been repaid and they can now enjoy the full economic benefits of their businesses, unencumbered by their loan obligations.[13]

7. The lessees contended (and still do) that if the lease agreements were found to have terminated, that will bring an end to their franchise agreements, collapse their businesses and lead to the failure of a BEE initiative funded by public money.[14] A successful, publicly-funded BEE transaction would be shut down, effectively on one a matter of days' notice. Principally for these reasons, the lessees contended it was against public policy to strictly enforce the renewal provisions.

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9 FA para 22, record vol 1 pp 11-12. The letters are annexures FA6a-d, record vol 1 pp 82ff.

10 *Barkhuizen v Napier* 2007 (5) SA 323 (CC).

11 The notice of counter-application is at record vol 3 p 245.

12 FA para 27, vol 1 p 15.

13 NEF supporting affidavit in leave to appeal para 9, record vol 7 p 703; NEF affidavit in High Court para 35, record vol 5 p 508.

14 FA para 43, record vol 1 p 43.

8. In the High Court, Davis J found that the sanction of terminating the leases would be "*disproportionate*" in the circumstances.[15] He held in the lessees' favour and dismissed the Trust's eviction applications.[16] In reaching this conclusion, he relied on this Court's decision in *Botha v Rich NO*.[17]

9. The Supreme Court of Appeal (the "**SCA**") upheld the Trust's appeal.[18] Writing for the court, Lewis JA found that there were no considerations of public policy that rendered the renewal clauses of the leases unenforceable.[19] She held that Davis J failed to have sufficient regard to decisions of the SCA which stress the sanctity of contracts. The court found that the leases came to an end on 31 July 2016 and that the effect of Davis J's order was to revive the agreements and "*make*" new contracts for the parties – something not permitted by public policy.[20] Lewis JA also criticised Davis J's reliance on *Botha v Rich*,[21] and for ignoring the SCA's decision in *Bredenkamp* "*despite its binding force*".[22]

10. We submit that the SCA was wrong to criticise Davis J's reliance on Botha v Rich. Just as the decisions of the SCA having binding force on High Court judges, so too do the decisions of this Court have binding force on the SCA and all other judicial tribunals in South Africa.

11. Furthermore, the SCA relied too heavily on its own decisions, which emphasise the principle that contracts should be kept and the importance of certainty. In doing so, it impermissibly narrowed the reach and import of this Court's decisions in *Barkhuizen*

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15 *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* 2018 (1) SA 549 (WCC) (High Court judgment), para [42].

16 High Court judgment, para [45].

17 *Botha v Rich NO* 2014 (4) SA 124 (CC).

18 *Trustees for the Time Being of the Oregon Trust v Beadica 231 CC and Others* (74/2018) [2019] ZASCA 23 (28 March 2019) (SCA judgment).

19 SCA judgment, para [46].

20 SCA judgment, para [42].

21 SCA judgment, para [37].

22 SCA judgment, para [25], referring to *Bredenkamp & others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA).

and *Botha v Rich*. In formulating the principles to be applied in determining whether the enforcement of a contract will be contrary to public policy, the SCA has been unduly selective and has overlooked principles and considerations that have been endorsed and applied by this Court.[23]

12. We consider the following issues in these written submissions:

12.1. The requirements for leave to appeal;

12.2. The role of public policy in the enforcement of contractual clauses, entailing a review of the most important decisions of this court and the SCA;

12.3. Further facts relevant to the determination of this appeal (in addition to those mentioned above);

12.4. The decisions of the High Court and the SCA in the present matter; and

12.5. The grounds of appeal on which the lessees rely.

THE REQUIREMENTS FOR LEAVE TO APPEAL

A constitutional matter and an arguable point of law of public importance

13. Whether the strict enforcement of a contractual clause would be contrary to public policy for being unjust and or unfair is a constitutional issue.[24] As Ngcobo J stated in *Barkhuizen*, public policy is "*deeply rooted in our Constitution and the values which underlie it.*"[25] Thus, fairness is an important constitutional value and an integral component of public policy.[26]

14. Additionally, the matter concerns the successful implementation of a BEE initiative funded by the NEF, which was created by the National Empowerment Fund Act, 105 of

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23 *Barkhuizen supra*, para [73] and *Botha v Rich NO supra*, para [51].

24 *Barkhuizen supra*, para [15] and *Botha v Rich NO supra*, paras [23]–[24].

25 *Barkhuizen supra*, para [28].

26 *Cool Ideas 1186 CC v Hubbard and Another 2014 (4) SA 474 (CC), para [126]; Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC), para [80].

1998 (the "**NEF Act**") as a measure designed to promote the achievement of equality by protecting or advancing persons disadvantaged by unfair discrimination, as envisaged by section 9(2) of the Constitution. Indeed, the Preamble to the NEF Act expressly stipulates that it is a legislative measure contemplated by section 9 of the Constitution.

15. Black economic empowerment is an important policy objective, which this Court in *Allpay* recognised is intended "*not merely to afford inclusion or redistribution, but to involve black people in management and control of businesses, and to facilitate skills development.*"[27] This Court further held, "*[t]he transformation that our Constitution requires includes economic redress*".[28]

16. In determining that leave to appeal ought to be granted in that case, the court took into account the fact that the issue in the case "*involve[d] the protection and advancement of persons or categories of persons disadvantaged by past unfair discrimination.*"[29] Similar considerations apply in the present matter.

17. In addition to raising constitutional issues, this case also concerns critical and arguable points of law of general public importance, namely:

    17.1. the ambit of this Court's decision in *Barkhuizen* and whether it has been correctly applied by the SCA, in particular, whether the SCA's synthesis of the applicable principles accords with this Court's jurisprudence;

    17.2. the exact scope and impact of public policy on the enforcement of contractual terms;

    17.3. the considerations to be taken into account in determining whether the enforcement of a contractual provision will be contrary to public policy and thus

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27 *Allpay Consolidated Investment Holdings (Pty) Ltd and Others v Chief Executive Officer of the South African Social Security Agency and Others* 2014 (1) SA 604 (CC), para [49].

28 *Allpay supra*, para [46].

29 *Allpay supra,* para [4].

unconstitutional, in particular the manner in which constitutional rights and values must be implicated before a court will refrain from enforcing an otherwise unobjectionable contractual provision.

18. It is now indisputable that fairness is a constitutional value and an important aspect of public policy. The application of contract law must deliver outcomes that are generally considered to be fair and reasonable and it is imperative that this Court answers the question as to how this is to be achieved.

19. Put differently, no matter how desirable and important legal certainty may be, it cannot be an absolute principle and there is clearly a need for some discretion in the administration of justice to ensure, *inter-alia*, that the enforcement of a contractual term which causes great inequity to one of the parties should not be enforced in circumstances where to do so would be regarded as commercially unacceptable to reasonable and honest people having regard to the context.

The interests of justice

20. For the reasons addressed below, it is respectfully submitted that the lessees' prospects of success are good.

21. Additionally, the issues to be decided in the case are important:

21.1. First, they involve commercially significant questions about when contracts will and should be enforced. This is of obvious general public importance as contractual relations are at the bedrock of economic life;

21.2. Second, the questions of public policy that are at play are of deep social significance inasmuch as they involve section 9(2) of the Constitution and the constitutional value of the "*achievement of equality*" enshrined in section 1(a) of the Constitution;

21.3. Third, the circumstances under which contacts will be strictly enforced where the consequences will be the failure of an otherwise successful BEE transaction is of general public concern, particularly where the BEE transaction is publicly-funded by an institution such as the NEF.

22. Moreover, as discussed below, there are presently two lines of decisions concerning the role of public policy, good faith and fairness in the enforcement of contractual terms in South African law, one emanating from this Court, and the other from the SCA. This divergence in approach has been expressly recognised as problematic and undesirable by our lower courts. Indeed, in the very recent Gauteng Provincial Division full bench decision in *Atlantis Property Holdings CC v Atlantis Excel Service Station CC*,[30] Vally J in his minority judgment carefully analysed the landmark judgments of this Court and the SCA in this area and criticised decisions of the SCA (including in the present matter) for not following this Court. The following appears in his judgment:[31]

> *"That the CC and the SCA follow different approaches to the law of contract is certainly an unwelcome development: it has the potential of producing 'endless uncertainty and confusion' in the law. The SCA, whatever its misgivings, is bound by the decisions of the CC. South Africa, after all, has a single system of law – not one pronounced by the CC and another pronounced by the SCA. That the SCA refuses to follow the stare decisis principle is a matter for the SCA. This court, however, is bound by the CC's designation of the law and not that of the SCA, especially where there is, as in the present case, a divergence of views. I agree with the CC and hold the view that its approach is consonant with the values espoused in our Constitution."*

23. Similar concerns have been raised in academic commentary surrounding the issues. For example, Professor Hutchison has argued that "*the need for a clear and definitive ruling on the matter by the Constitutional Court has now become urgent*".[32]

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30 (A5030/2018) [2019] ZAGPPHC 150 (11 April 2019), unreported.

31 At para [45].

32 Dale Hutchison 'From bona fides to Ubuntu: the quest for fairness in the South African Law of Contract' 2019 *Acta Juridica* (forthcoming) at 21. See also Jacque Du Plessis 'Giving practical effect to good faith in the law of contract' (2018) 29 *Stellenbosch Law Review* 379; and Malcolm Wallis 'Commercial Certainty and Constitutionalism: Are they Compatible' (2016) 133 *South African Law Journal* 545.

24. There is a high public interest in the determination of which line of reasoning ought to be followed. This case presents this Court with an opportunity to provide a clear and definitive ruling on the matter.

THE ROLE OF PUBLIC POLICY IN THE ENFORCEMENT OF CONTRACTUAL TERMS

Pre-Constitution common law

25. Since before South Africa's constitutional era, our courts have always exercised a power to strike down and to decline to enforce contractual provisions which are contrary to public policy.[33]

26. In *Sasfin (Pty) Ltd v Beukes*,[34] the then Appellate Division struck down a cession *in securitatem debiti* which had effectively placed the appellant in immediate control of all of the respondents' earnings as a doctor, to recover his book debts (even if he had been indebted to the appellant in a lesser amount), and which could only be terminated by the appellant. Smalberger JA held that the situation was:

> *"so grossly exploitative of Beukes and must inevitably offend against the mores of the public to such an extent that it should be struck down on the grounds of public policy."*[35]

27. However, Smalberger JA stated that the power to declare contracts contrary to public policy is to be exercised "*sparingly*" and only in clear cases.[36] He also stressed that a judge must not strike down a contract simply because it offends his or her own personal sense of justice and fairness.[37]

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33 As Innes CJ said in Eastwood v Shepstone 1902 TS 294 at 392: "*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 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.*"

34 *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A).

35 *Sasfin v Beukes supra*, at 15E-F.

36 *Sasfin v Beukes supra*, at 9A-C.

37 *Ibid.*

Barkhuizen

28. The most significant judgment emanating from this Court dealing with the Constitution and its impact on the common law of contract is *Barkhuizen*. The facts of the case are well known. An insurance contract contained a time-limitation clause which required the insured (the applicant for leave to appeal in the case) to institute legal proceedings within 90 days of the repudiation of a claim. The insurer raised a special plea that proceedings had been brought out of time.[38]

29. By way of replication, the applicant contended that the 90-day period was contrary to public policy in that it required an unreasonably short time to institute action and constituted an infringement of the right of the insured to seek the assistance of the court. The applicant also alleged that the clause was contrary to section 34 of the Constitution (which guarantees the right of access to courts).[39]

30. Significantly, the High Court adjudicated the special plea separately and, for this purpose, the parties agreed a "*terse statement of facts*" recording no more than the terms of the contract, the occurrence of the accident, and the timelines for the claim, its repudiation and the institution of proceedings.[40]

31. The applicant's challenge was to the to the time-limitation clause itself – i.e. regardless of the particular circumstances of the case, he contended that the clause was contrary to public policy and section 34 of the Constitution. As a result, the statement of facts did not address any of the applicant's particular circumstances or why he had not instituted his claim within the contractual 90-day period.

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38 *Barkhuizen supra*, para [3].

39 *Barkhuizen supra*, para [5].

40 *Barkhuizen supra*, para [7].

32. The applicant was successful before the High Court which found that the time-bar clause was unconstitutional for breaching section 34. The High Court's finding was overturned on appeal by the SCA.[41]

33. In this Court, Ngcobo J (as he then was) rejected the High Court's direct application of the Bill of Rights in declaring the time-bar to be unconstitutional. He held that "*the proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of Rights*".[42] The case called for an indirect application of the Bill of Rights through the vehicle of public policy.[43]

34. Ngcobo J held that the relevant question in determining whether a time-limitation clause passes constitutional muster is whether the clause "*affords a contracting party an adequate and fair opportunity*" to have disputes resolved by a court.[44]

35. He held that determining fairness is a two-stage enquiry: first, is to determine whether the clause itself is unreasonable; and secondly, "*if the clause is reasonable, [a court must determine] whether it should be enforced in the light of the circumstances which prevented compliance with the time limitation clause.*"[45]

36. The second stage involves an enquiry into the circumstances that prevented compliance with the clause, particularly whether it was "*unreasonable to insist on*

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41 *Napier v Barkhuizen* 2006 (4) SA 1 (SCA).

42 *Barkhuizen supra*, para [30].

43 Langa CJ would have left the question open whether there may be some instances where a direct application of the Bill of Rights would be applicable, at para [186].

44 *Barkhuizen supra*, para [55].

45 *Barkhuizen supra*, para [56]. Moseneke DCJ dissented on this point, holding that the enquiry should stop at the first stage (at para [96]): "*The appropriate test as to whether a contractual term is at odds with public policy has little or nothing to do with whether the party seeking to avoid the consequences of the time bar clause was well-resourced or in a position to do so. 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. In the context of this case, the question to be posed is whether the provision itself unreasonably or unjustifiably limits the right to seek judicial redress. Ordinarily, the answer should not rest with the peculiar situation of the contracting parties, but with an objective assessment of the terms of their bargain.*"

compliance with the clause or impossible for the person to comply with the time limitation clause".[46] The court held that:

> *"What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to show that in the circumstances of the case there was good reason why there was a failure to comply."*[47]

37. The court went on to hold that the inquiry is "*whether in all the circumstances of the particular case, in particular, having regard to the reason for non-compliance with the clause, it would be contrary to public policy to enforce the clause*" and that "*[t]his would require the party seeking to avoid the enforcement of the clause to demonstrate that its enforcement would be unfair and unreasonable in the given circumstances.*"[48]

38. Ngcobo J held that:

> *"[w]hile it is necessary to recognise the doctrine of pacta sunt servanda, courts should be able to decline the enforcement of a time limitation clause if it would result in unfairness or would be unreasonable. This approach requires a person in the applicant's position to demonstrate that in the particular circumstances it would be unfair to insist on compliance with the clause."*[49]

39. He held further:

> *"Public policy imports the notions of fairness, justice and reasonableness. Public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. ... As has been observed, while public policy endorses the freedom of contract, it nevertheless recognises the need to do simple justice between the contracting parties. To hold that a court would be powerless in these circumstances would be to suggest that the hands of justice can be tied; in my view the hands of justice can never be tied under our constitutional order."*[50]

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46 *Barkhuizen supra*, para [58], emphasis added.

47 *Ibid*, emphasis added.

48 *Barkhuizen supra*, para [69], emphasis added.

49 *Barkhuizen supra*, para [70], emphasis added.

50 *Barkhuizen supra*, para [73], emphasis added.

40. Nevertheless, given that the parties had agreed a limited statement of facts, the court was unable to determine whether the enforcement of the clause was unfair in the circumstances. The particulars of claim and the statement of facts did not disclose the reason for non-compliance with the clause. The court found that "*without those facts it is impossible to say whether the enforcement of the clause against the applicant would be unfair and thus contrary to public policy*".[51]

41. We have quoted the above passages at length for the purposes of highlighting the following two points:

41.1. First, the repeated and largely unqualified causal link this Court appears to have drawn between unfairness and public policy: the Court stated in terms that public policy would preclude the enforcement of a contractual term if its enforcement would be unjust or unfair. (As discussed below, subsequent decisions of the SCA have qualified this broad proposition); and

41.2. Secondly, the court's emphasis that the particular circumstances of each case may determine whether the enforcement of a clause will be contrary to public policy.

42. Ngcobo J also appears to have contemplated that a judge's notion of fairness may inevitably have a role to play, but that when judges move into this territory, they should do so with care. In this regard, he held that finding a balance between (a) "*striking down the excesses*" of freedom of contract; and (b) permitting individuals the dignity and autonomy of regulating their own lives entails:

> "'*that intruding on apparently voluntarily concluded arrangements is a step that Judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on parties' individual arrangements'.*"[52]

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51 *Barkhuizen supra*, para [84].

52 *Barkhuizen supra*, para [12], citing *Napier supra*, para [13].

43. The court therefore accepted that it may be unavoidable that a judge's individual conception of fairness and justice may come into play, but cautioned that judges should take care when engaging in an exercise of this nature.

Bredenkamp

44. The SCA dealt with ambit of *Barkhuizen* in *Bredenkamp.* Mr Bredenkamp and entities related to him (the appellants) applied to the High Court for an interdict restraining Standard Bank from cancelling their banking contracts and closing their accounts after the bank had suspended their banking facilities.

45. Standard Bank initially did not inform the appellants of the reasons for terminating its relationship with them, but disclosed its reasons in the affidavits.[53] Mr Bredenkamp had been listed by the US Office of Foreign Asset Control (OFAC) for allegedly providing financial and logistical support to President Mugabe's government in Zimbabwe, and because an online report had alerted the bank to the fact that Mr Bredenkamp was allegedly involved in "*various business activities, including tobacco trading, grey-market arms trading and trafficking*".[54] The bank was concerned, *inter alia*, that if it continued to maintain the appellants' accounts, it might be perceived to be facilitating unlawful conduct.[55]

46. The bank maintained that it was both an express and implied term of the contract that it could terminate the relationship on reasonable notice.[56]

47. The appellants, on the other hand, contended that the contracts could only be terminated on good cause. Relying on *Barkhuizen*, they argued that all contractual provisions have to be "*reasonable*" and that if they are not, they are unconstitutional.

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53 *Bredenkamp supra*, paras [7] and [12].

54 *Bredenkamp supra*, paras [12]–[14].

55 *Bredenkamp supra*, para [17].

56 *Bredenkamp supra*, para [6].

They also contended that, in addition to the contractual provisions themselves having to be reasonable, their enforcement must also be reasonable.[57]

48. Their argument proceeded on the basis that *Barkhuizen* stands as authority for the proposition that fairness is a core value of the Bill of Rights and that it is therefore a broad requirement of our law generally. The implication of this argument would be that any conduct which is unfair would be in conflict with the Constitution, a proposition Harms DP (who wrote the judgment for the SCA) regarded as "*novel*".[58]

49. Before dealing with ambit of the *Barkhuizen* decision, the SCA highlighted four features of the case it considered important, the second of which is perhaps most relevant for the present case, namely that:

> *"although the appellants ... recited nearly every provision of the Bill of Rights, counsel stated that they do not suggest that the exercise of the right to terminate 'implicated' any constitutional principle. It is accordingly not their case that the closing of the account compromised constitutional democracy, or their dignity, freedom or right to equality and the like, and the expansive interpretation of the Bill of Rights does accordingly not arise ... The case is about fairness as an overarching principle, and nothing more."*[59]

50. As discussed in greater detail below, in the present case, the lessees do not merely allege that the strict enforcement of the renewal provisions of the leases in the present case would be unfair. Their complaint extends significantly further than mere unfairness to implicate foundational constitutional values and principles. As alluded to above, they maintain that the enforcement of the renewal provisions of the lease agreements would result in the termination of their businesses and would undermine the BEE transaction under which they acquired their businesses.

51. In addressing the implications of the *Barkhuizen* decision, Harms DP rejected the notion that the judgment established fairness an independent value against which the validity

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57 *Bredenkamp supra*, para [26].

58 *Bredenkamp supra*, para [27].

59 *Bredenkamp supra*, para [28].

of a contract or the constitutionality of its enforcement is to be evaluated. He reasoned that *Barkhuizen* was concerned with the constitutional right of access to justice. Drawing parallels with the established rules pertaining to contracts in restraint of trade, he found that where a specific constitutional right (access to courts in *Barkhuizen*) is limited by the terms of a contract, or by the enforcement of those terms, it must be determined whether the limitation is fair and reasonable in the circumstances.[60]

52. In this regard, addressing the second question of the two-pronged analysis postulated by *Barkhuizen* (namely whether the enforcement of an otherwise unobjectionable contractual term would be unreasonable or contrary to public policy), Harms DP stated:

> *"However, enforcement of a prima facie innocent contract may implicate an identified constitutional value. If the value is unjustifiably affected, the term will not be enforced."*[61]

53. Conversely, he held that Barkhuizen did not purport to hold that "the enforcement of a valid contractual term must be fair and reasonable, even if no public policy consideration found in the Constitution or elsewhere is implicated."[62]

54. It was obvious that, on the facts and circumstances in *Bredenkamp*, there were no constitutional values at play. The court was being asked to ease the perceived hardship sustained by a wealthy businessman who had been accused of being a smuggler and sanctions-buster and was being investigated for fraud.[63]

55. There were no constitutional or public policy reasons for the court to invalidate or impede the banking contracts or the enforcement of their terms. In this regard, the court concluded that the termination of the banking relationship "*did not offend any*

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60 *Bredenkamp supra*, paras [42]–[44].

61 *Bredenkamp supra*, para [47].

62 *Bredenkamp supra*, para [50].

63 *Bredenkamp supra*, para [19].

identifiable constitutional value and was not otherwise contrary to any public policy consideration."[64]

56. This Court in *Barkhuizen* did not mandate the requirement highlighted by the SCA in *Bredenkamp* that identifiable constitutional values must be offended before a court will refuse to enforce a contract on public policy grounds. We submit that *Bredenkamp* adopted an unduly restrictive interpretation of *Barkhuizen* that accords with its emphasis (that is threaded through all of its judgment in this area) upon certainty and *pacta sunt servanda*. Notably, Harms DP appears not to have taken into account the clear *dicta* of Ngcobo J that courts have the power to decline to enforce a contractual provision where that would be unfair or unreasonable when adjudged by public policy.[65]

57. In any event, when the courts apply the Bill of Rights to the common law indirectly, they invoke the "*spirit, purport and object of*"[66] or the "*objective normative value system*"[67] contained the Bill of Rights – a "*matrix*"[68] informed not only by specific rights, but also the foundational values of dignity, equality and freedom which permeate throughout Chapter 2 and the Constitution as a whole.

58. Since *Barkhuizen* and *Bredenkamp* were decided, this Court and the SCA have taken somewhat different approaches. This Court has upheld the more egalitarian and community-oriented themes which permeate throughout Ngcobo J's judgment in *Barkhuizen,* whereas the SCA has reiterated the value of legal certainty by stressing that judges should only decline to enforce a contract on public policy grounds in very limited instances.

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64 *Bredenkamp supra*, para [64].

65 *Barkhuizen supra*, para [70].

66 Constitution s 39(2).

67 *Carmichele v Minister of Safety and Security* 2001 (4) SA 938 (CC), para [54].

68 *Ibid.*

59. As will be apparent from the discussion below, the SCA has recently (in *AB v Pridwin*)[69] distilled a set of principles governing the "*relationship between private contracts and their control by the courts through the instrument of public policy*,"[70] which it has identified as having emerged from the jurisprudence in this area. These are quoted in paragraph 93 below. It has since applied its summary of the principles in at least two cases (including the present matter).

60. For the reasons discussed below, we submit that these principles diverge in certain material respects from this Court's dicta, particular those in *Barkhuizen*. In particular, the SCA has held,[71] relying on the pre-constitutional decision in *Sasfin v Beukes,*[72] that a court will use the power to decline to enforce a contract "s*paringly, and only in the clearest of cases in which harm to the public is substantially incontestable*". Yet there is nothing in this Court's decision in *Barkhuizen* that sets the bar this high. We submit that the SCA's synthesis is unduly narrow and does not take into account the breadth of the considerations and principles this Court has endorsed and applied.

The cases in this Court: Everfresh and Botha v Rich

61. The first subsequent case before this Court that dealt with these issues was *Everfresh*.[73] The case concerned whether the common law should be developed in light of the Constitution to make an agreement to negotiate the terms of a lease's renewal enforceable. Under the common law, an agreement to agree – a *pacta de contrahendo* – is not enforceable unless it contains a deadlock breaking mechanism,[74] which was absent in the case.

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69 *AB v Pridwin Preparatory School* 2019 (1) SA 327 (SCA).

70 *AB v Pridwin supra*, para [27].

71 *AB v Pridwin supra*, para [27(v)].

72 *Supra* at 9B-C.

73 *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC).

74 *Makate v Vodacom (Pty) Ltd* 2016 (4) SA 121 (CC) paras [95]–[96].

62. Everfresh (the applicant) had leased premises from the respondent's predecessor. It had a right to renew the lease on the same terms, "*save that the rentals for the renewal period shall be agreed upon between the Lessor and the Lessee at the time.*"[75]

63. When the applicant sought to renew the lease the respondent (Shoprite) refused to negotiate the new rental as it intended on developing the property. The respondent brought eviction proceedings against the applicant in the High Court and succeeded.[76] The court rejected the applicant's argument that the renewal clause required the respondent to negotiate in good faith, but that even if it did that would be too vague to be enforceable. Applications for leave to appeal to the SCA (in both the High Court and the SCA) were refused.

64. This Court set down the applicant's application for leave to appeal for hearing. A majority of the court dismissed the application. Moseneke DCJ held that it would not be in the interests of justice to grant leave, mostly because the issue of developing the common law had not been raised in the High Court or SCA.[77] Despite this conclusion, Moseneke DCJ did indicate that the applicant had some prospects of success. He held:

> *"Had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact ... Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour."*[78]

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75 *Everfresh supra*, para [3].

76 *Everfresh supra*, para [11].

77 *Everfresh supra*, para [67].

78 *Everfresh supra*, paras [71]–[72].

65. Yacoob J, who wrote the minority judgment, would have granted leave to appeal and sent the case back to the High Court for reconsideration. He held that it was "*implicit*" in the applicant's case that the common law would need to have been developed in light of the Constitution following this Court's judgment in *Carmichele*.[79] He highlighted the following in his judgment:

> *"The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone."*[80]

66. The next case decided by this Court was *Botha v Rich*, which has received some criticism in the academic world.[81] The SCA in its decision in the present matter endorsed the academic criticism of *Botha v Rich* (describing the judgment as "*embarrassingly poor*").[82]

67. Botha (the applicant) had purchased a building from the respondent to run a dry-cleaning business. The purchase price was payable in monthly instalments. For three years she paid the instalments, but stopped doing so for unknown reasons. The respondent sought to exercise its right to cancel the contract due to the non-payment. It brought proceedings for an order declaring that its right to cancel had been validly exercised and for the applicant's eviction. In turn, the applicant counterclaimed for an order that the property be registered in her name. She relied on section 27(1) of the

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79 *Everfresh supra*, para [32]. citing *Carmichele supra*.

80 *Everfresh supra*, para [23], emphasis added.

81 See Hutchinson, *op cit*; Wallis, *op cit*; Robert Sharrock 'Unfair enforcement of a contract: A step in the right direction? *Botha v Rich* and *Combined Developers v Arun Holdings*' (2015) 27 *South African Mercantile Law Journal* 174; and Deeksha Bhana & Anmari Meerkotter 'The impact of the Constitution on the Common Law of Contract: *Botha v Rich NO (CC)*' (2015) 132 *South African Law Journal* 494.

82 SCA judgment, para [37].

Alienation of Land Act, 68 of 1981, which allows a purchaser of immovable property who has paid more than half of the instalments to claim transfer of the property again registration of a mortgage bond by the seller securing the remaining payments.

68. The applicant failed in the High Court and in an appeal to a Full Court. After the SCA dismissed her application for special leave to appeal she approached the Constitutional Court for leave to appeal. She contended that allowing the respondent to cancel the contract would be unfair and contrary to public policy in the circumstances.[83]

69. Nkabinde J held for a unanimous court that the cancellation of the contract in the circumstances would be contrary to public policy. She held:

> *"[G]ranting cancellation – and therefore, in this case, forfeiture – in circumstances where three-quarters of the purchase price has already been paid would be a disproportionate penalty for the breach. In their application for cancellation the Trustees did not properly address the disproportionate burden their claim for relief would have on Ms Botha. They took the view that the question of forfeiture and restitution was independent of, and logically anterior to, the question of cancellation. That was a fundamental error. The fairness of awarding cancellation is self-evidently linked to the consequences of doing so. The Trustees' stance therefore meant that they could not justify this Court's awarding the relief they sought. In view of the above the cancellation application must fail."*[84]

70. With this paragraph, the court has crystallised a principle that where a party seeks to exercise a contractual right and that leads to a disproportionate sanction on the other party, a court may refuse to allow the first party to exercise the right.[85] Whether a sanction is disproportionate is to be evaluated in light of public policy and the specific circumstances of the case.

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83 *Botha v Rich supra*, para [23].

84 *Botha v Rich supra*, para [51].

85 This is how the SCA in this matter understood the import of *Botha v Rich*. See paragraph 160 of these submissions below.

71. The High Court in the present matter relied on the decision in Botha v Rich in finding that "the sanction [namely, termination of the lease agreements] was disproportionate".[86]

Recent cases in the SCA: Mohammed's Leisure Holdings, Roazar and AB v Pridwin

72. *Mohamed's Leisure*[87] is the first of a brace of recent judgments emanating from the SCA that have considered the implications of *Barkhuizen* and *Bredenkamp* and in which the SCA has reaffirmed the principles enunciated by Harms DP in *Bredenkamp*. It was followed by *Roazar CC v The Falls Supermarket CC*,[88] *AB v Pridwin Preparatory School*[89] and, finally, by its decision in the present matter. In what follows, we address its decisions in *Mohamed's Leisure*, *Roazar* and *AB v Pridwin*. We address these decisions in some detail for the purposes of outlining the progressive narrowing of the SCA's analysis into the summary of principles enunciated in *AB v Pridwin*.

Mohamed's Leisure Holdings v Southern Sun

73. *Mohamed's Leisure* concerned a lease over property from which the respondent operated a hotel, which formed part of the greater Tsogo Sun Hotel Group.[90] The respondent failed on two occasions to pay its rental on time, resulting in the landlord's termination of the lease. The respondent blamed its failure to pay its rent on time on its banker, Nedbank, which admitted culpability.[91]

74. On the first occasion the respondent failed to pay its rent on time, the landlord afforded the respondent a period of five days within which to remedy its breach and had "*pertinently warned the respondent that should it fail to pay rent on due date in future, no notice to remedy the breach would be given and the agreement would be cancelled*

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86 High Court judgment, para [42].

87 *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA).

88 *Roazar CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA).

89 *AB v Pridwin supra*.

90 *Mohamed's Leisure supra*, para [5].

91 *Mohamed's Leisure supra*, paras [7] and [8].

forthwith."[92] When rent was not paid on the due date on the second occasion, the landlord did not cancel immediately, but waited 12 days before doing so.[93]

75. The respondent argued, first, that the implementation of the cancellation clause in the circumstances was "*so manifestly unreasonable that it offends public policy*" and, secondly, "*the clause is unreasonable because it insists on compliance with its provisions regardless of the circumstances which prevented compliance therewith*".[94]

76. Relying on *Barkhuizen*, the respondent contended that the implementation of the clause in the circumstances of that case was "*not only objectively unreasonable but [was] also unfair and contrary to public policy.*"[95] It submitted that once it is established that there were circumstances which prevented compliance with the contractual provisions, insisting on compliance would be unfair and unreasonable.[96] The "*spirit of good faith, ubuntu and fairness require that parties should take a step back, reconsider their positions and not snatch at a bargain at the slightest contravention.*"[97]

77. The SCA found that the issue to be determined was whether the implementation of the clause permitting the landlord to terminate the lease was "*manifestly unreasonable or unfair to the extent that it is contrary to public policy*".[98] This enquiry called for a balancing of the principle of *pacta sunt servanda* against considerations of public policy, including constitutional imperatives.[99]

78. Referring to the decisions of *Sasfin v Beukes*,[100] *Wells v South African Alumenite Company*[101] and *Brisley v Drotsky*,[102] the SCA affirmed the importance of the principle

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92 *Mohamed's Leisure supra*, para [7].
93 *Mohamed's Leisure supra*, paras [8] and [11].
94 *Ibid.*
95 *Mohamed's Leisure supra*, para [13].
96 *Mohamed's Leisure supra*, para [16].
97 *Ibid.*
98 *Mohamed's Leisure supra*, para [21].
99 *Ibid.*
100 *Sasfin v Beukes supra.*
101 *Wells v South African Alumenite Company* 1927 AD 69.

of *pacta sunt servanda* and the interests of certainty it serves.[103] The court emphasised that a contract should not be declared contrary to public policy merely because its terms offend one's individual sense of propriety and fairness,[104] and that judges must act with restraint lest contract law becomes "*unacceptably uncertain*".[105]

79. The court endorsed its earlier interpretation in *Bredenkamp* of this Court's decision in *Barkhuizen*, in particular that Ncgobo J's reference to public policy having imported notions of fairness, justice and reasonableness did not extend these notions "*beyond instances in which public policy considerations found in the Constitution or elsewhere would be implicated.*"[106] As in the case of *Bredenkamp*, the SCA in *Mohamed's Leisure* did not consider that any such public policy or constitutional considerations were implicated in that case.

80. The court also took into account, *inter alia*, the facts that (a) the contract was on its face unobjectionable, (b) the parties occupied equal bargaining positions; and (c) the respondent could have diarised the date for performance.[107] It also took into account the fact that the respondent "*was at all material times aware or must have been aware of the implications of the cancellation clause*" and the fact that it had been drawn to its attention following the first breach that the contract would be cancelled immediately if there were a subsequent breach.[108] In light of these facts, the court concluded that it was disingenuous for the respondent to contend that by not having been afforded an opportunity to remedy its breach, the landlord was snatching a bargain.[109]

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102 *Brisley v Drotsky* 2002 (4) SA 1 (SCA).
103 *Mohamed's Leisure supra*, paras [22]–[24].
104 *Mohamed's Leisure supra*, para [22].
105 *Mohamed's Leisure supra*, para [24].
106 *Mohamed's Leisure supra*, para [25].
107 *Mohamed's Leisure supra*, para [28].
108 *Mohamed's Leisure supra*, para [29].
109 *Ibid.*

81. The court appears to have concluded that, taking into account all the above factual circumstances, there were no public policy questions at play.

82. The court held that the "*fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy*".[110] It found that, on the facts of that case, there was no evidence that the respondent's constitutional rights (the court referred specifically to dignity and equality) were infringed.[111] In this regard, the court echoed the principle enunciated in Bredenkamp that where the enforcement of a prima facie innocent contract implicates constitutional values, the enquiry shifts to whether the enforcement of the contract is justifiable in the circumstances. In *Mohamed's Leisure*, no such values were implicated.

83. In upholding the appeal and confirming the cancellation of the lease, the court concluded that it would be "*untenable to relax the maxim pacta sunt servanda in this case because that would be tantamount to the court then making the agreement for the parties*".[112]

Roazar CC v The Falls Supermarket CC

84. In *Roazar*, the appellant, Roazar CC, sought an order evicting the respondent, The Falls supermarket, from a shopping centre it owned at which The Falls had been conducting a Spar business under three interlinked lease agreements.

85. Roazar and The Falls disagreed on the interpretation of the relevant renewal provisions. The SCA found that the renewal clause required The Falls to give notice of its intention to renew at least one month before the expiry of the leases. The clause then anticipated a negotiation of the renewal terms. During the course of the negotiation, the

110 *Mohamed's Leisure supra*, para [30].

111 *Ibid.*

112 *Mohamed's Leisure supra*, para [32].

lease would continue on a month-to-month basis subject to one month's written notice of cancellation.[113]

86. Roazar gave one month's notice of termination as contemplated by the relevant clause. The Falls, however, argued that termination was not permitted until good faith negotiations regarding the renewal had taken place.

87. The SCA reiterated the general rule that an agreement to negotiate is not enforceable because of the absolute discretion vested in the parties to agree or disagree, but that an obligation to negotiate in good faith will be enforced where the agreement includes a deadlock-breaking mechanism.[114]

88. The SCA rejected The Falls' contention that the lease agreements in that case provided for a deadlock breaking mechanism.[115] The Falls consequently submitted, in the alternative, that the common law should be developed to recognise the validity of an agreement to negotiate, event where there is no deadlock-breaking mechanism.[116] In support of its argument, it relied on this Court's decision in *Everfresh*,[117] which the court considered in some detail, particularly the minority judgment of Yacoob J.

89. The SCA pointed out, however, that development of the common law to require good faith negotiations in the absence of a deadlock-breaking mechanism is not without complications. Citing its decision in *Bredenkamp*, the court emphasised that, in that case, the termination of the contract did not offend any identifiable constitutional values and no public policy considerations were implicated. The SCA had further identified the difficulties that would emerge in trying to establish whether in fact a party had

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113 *Roazar supra*, para [11].
114 *Roazar supra*, para [13].
115 *Roazar supra*, para [15].
116 *Roazar supra*, para [16].
117 *Everfresh supra*.

negotiated in good faith and what the obligation to negotiate in good faith would entail.[118]

90. The Falls had not indicated what criterion should be applied to determine whether the parties had negotiated in good faith, nor did it say how long the parties should negotiate.[119] On the facts, the court found that parties had been at loggerheads for two years and that Roazar had expressly stated that it had no intention of ever leasing its property to The Falls.[120] The SCA concluded that it would be against public policy for a court to coerce a lessor to conclude an agreement with a tenant whom it does not want to have as a tenant any longer, concluding that it is "*difficult to conceive how a court, in a purely business transaction, can rely on 'ubuntu' to import a term that was not intended by the parties and deny the other party the right to rely on the terms of a contract to terminate it.*"[121] The SCA consequently upheld the appeal and ordered The Falls' eviction.

AB v Pridwin Preparatory School[122]

91. In *AB v Pridwin*, the SCA considered, *inter alia*, the right of a private school to terminate the contracts between it and the parents of two learners in circumstances where the parents had on several occasions harassed members of the school's staff. The parents contented that the termination of the contracts violated their children's section 28 and 29 rights. They also challenged the termination on public policy grounds, contending that the termination provisions were unconstitutional and unenforceable inasmuch as

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118 *Roazar supra*, para [20].

119 *Roazar supra*, para [22].

120 *Roazar supra*, para [23].

121 *Roazar supra*, para [43].

122 We understand that an application for leave to appeal (case CCT 294/18) was argued before this Court on 16 May 2019. The Court has not handed down its judgment in that application at the time of filing these submissions.

they allow the school to cancel the contracts without following a fair procedure and/or without taking a reasonable decision.[123]

92. The court concluded that section 28 and 29 did not confer upon the parents a right to a hearing nor did they impose a duty upon the school to act reasonably before terminating the contracts.[124] The court further held that a right to a hearing also did not arise under the Promotion of Administrative Justice Act, 3 of 2000.[125]

93. The court further found that the enforcement of the termination provisions in the absence of a hearing was not contrary to public policy. In doing so, the SCA summarised the principles governing private contracts and public policy (derived from its previous decisions) as follows:[126]

> *"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;*

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123 *AB v Pridwin supra*, para [26].

124 *AB v Pridwin supra*, paras [29]–[48] and paras [64]-[74].

125 *AB v Pridwin supra*, paras [49]–[48].

126 *AB v Pridwin supra*, para [27], footnotes omitted.

(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."*

94. As alluded to above, we submit that this synthesis of principles is selective and unduly narrow. It fails to address all of the principles this Court has endorsed and applied. We address this submission in further detail below.

95. The court in *AB v Pridwin* found that, aside from an inapplicable communications protocol upon which the parents had relied, they had provided no other facts to support their case that the enforcement of the termination clause offends public policy in the circumstances of the case.[127]

96. The court found that the school's conduct was exemplary and that the parents simply wished to keep their children in the school until they found another satisfactory private school.[128] The court also took into account the facts that parents' attention was specifically drawn to certain clauses in the contracts, including those that set out the standard of conduct expected of them, the consequences for breach and the mutual right to terminate on notice.[129]

97. The court concluded that the contracts were not one sided or unduly onerous on one of the parties and that the parents had "*concluded the contracts freely, as autonomous individuals, alive to the consequences of what they were signing*" and that "*[p]ublic policy demands that they be held to their terms.*"[130]

FURTHER RELEVANT FACTS

98. Before addressing the judgments of the SCA and the High Court, we address in what follows certain relevant and material facts in addition to those already mentioned, which

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127 *AB v Pridwin supra*, para [78].

128 *AB v Pridwin supra*, para [79].

129 *AB v Pridwin supra*, para [80].

130 *Ibid.*

we submit are relevant to the enforceability of the renewal provisions of the leases and to an evaluation of the High Court and SCA judgments.

99. As noted above, after the lessees had given their (non-compliant) renewal notices in March 2016, the Trust did not respond, save to say that Mr Sale was out of town and thus that the Trust could only revert once the matter had been discussed with him.[131] Instead of subsequently reverting, the Trust served notice on each of the lessees at the end of July 2016 (a matter of days before the leases were due to expire) purporting to terminate the leases.

100. There was no suggestion at the time (nor has there been any suggestion since) that:

100.1. the lessees had not paid their rent or otherwise not duly observed their obligations under the lease agreements;

100.2. the provisions of the lease agreements were prejudicial to the Trust;

100.3. the Trust had looked for, or secured, replacement tenants; or

100.4. the Trust wished to utilise the premises itself or for a different purpose.

101. No relief was sought against Sale's Hire or the NEF in the High Court (save for costs in the event that either of them opposed the application). Sale's Hire, however, made common cause with the Trust and opposed the application. It also appealed against the High Court's order together with the Trust.[132] We address the role of Mr Sale and Sale's Hire in the litigation in further detail below.

102. As has been mentioned, the lessees are black-owned enterprises, which acquired their businesses from Sale's Hire under a black economic empowerment transaction financed by the NEF.

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131 Annexure FA9, record vol 2 p 157.

132 As appears from the judgment in the application for leave to appeal, record vol 7 pp 606-607.

103. The NEF filed affidavits in support of the lessees in the High Court[133] and has similarly filed an affidavit in support of their application for leave to appeal to this Court.[134]

104. In its affidavits, the NEF has stated, *inter alia*, that:

104.1. The NEF loaned a total amount of R22,774,107.00 to the lessees to enable them to acquire their businesses. Those funds were paid to Sale's Hire as the franchisor;[135]

104.2. The BEE transaction under which the lessees acquired their businesses fell "*squarely within the NEF"s legislative mandate*" to "*grow black economic participation*", particularly given the fact that the transaction envisaged "*the acquisition by historically disadvantaged individuals full equity ownership of the acquired businesses*";[136]

104.3. the approach of the Trust and Sale's Hire is inconsistent with the NEF's BEE objectives and those of the franchise transaction, as well as the cooperation agreement entered into between Sale's Hire and the NEF (the "**Co-Operation Agreement**");[137]

104.4. The relief sought by the Trust in the present matter will have the result that the lessees will be evicted from their premises and that their businesses will fail;[138]

104.5. The BEE transaction has so far been a success. The lessees diligently complied with their obligations in terms of the NEF loans, which have now been

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133 Record vol 5 p 498ff; vol 6 p 549ff.

134 Record vol 7 p 701.

135 NEF High Court affidavit, para 11, record vol 5 p 501. The Co-Operation Agreement is annexure FA11, record vol 2 pp 161ff.

136 NEF High Court affidavit, paras 9 and 10, record vol 5 pp 500-501; NEF CC affidavit, para 8, record vol 7 p 703.

137 NEF High Court affidavit, para 34, record vol 5 p 508. The Co-Operation Agreement is annexure FA11, record vol 2 pp 161ff.

138 NEF High Court affidavit, para 23, record vol 5 p 504; NEF CC affidavit, para 10, record vol 7 p 703.

repaid in full. The lessees are now in a position to enjoy the full economic benefits of their businesses, unencumbered by their loan obligations;[139]

104.6. The actions of the Trust and Sale's Hire have placed "*what would otherwise have been a BEE success story in grave jeopardy*".[140] It would be a devastating blow to the transformation objectives of the transaction if the lessees' businesses were to collapse and be taken away from them when they had diligently paid off their loans to the NEF and were finally in a position to enjoy the full economic benefit of their businesses;[141]

104.7. The failure of the lessees' businesses would entirely undermine the BEE objectives of the transaction inasmuch as Sale's Hire would have benefited from the purchase price it received for the businesses, but will soon be in a position to take back successful businesses for little or no consideration at all. The net effect of what should have been a successful BEE transaction will – ironically – be to benefit the original owner of the Sale's Hire business (Mr Sale) who is not an historically disadvantaged individual.[142]

105. In summary, the lessees contended (and still do) that if the lease agreements were found to have terminated, that will bring an end to their franchise agreements, collapse their businesses and lead to the failure of a BEE initiative funded by public money, while at the same time benefitting Mr Sale.[143] A successful, publicly-funded BEE transaction would be shut down, effectively on one a matter of days' notice.

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139 NEF supporting affidavit in leave to appeal para 9, record vol 7 p 703; NEF affidavit in High Court para 35, record vol 5 p 508.

140 NEF High Court affidavit, para 35, record vol 5 p 508.

141 NEF High Court affidavit, para 35, record vol 5 p 508. NEF CC affidavit, para 11, record vol 7 p 703.

142 NEF CC affidavit, para 12, record vol 7 pp 703-704.

143 FA para 43, record vol 1 p 43.

106. The High Court granted the lessees' application and dismissed the Trust and Sale's Hire's counter-application. The High Court granted Sale's Hire and the Trust leave to appeal to the SCA. The SCA upheld their appeal.

THE JUDGMENTS OF THE COURTS BELOW IN THIS CASE

The High Court Judgment

107. The High Court commenced its judgment by stating (in paragraph 1 thereof) that "the case goes to the heart of the debate as to what now constitutes the law of contract in constitutional South Africa".

108. The court framed the dispute in terms of the tension between the protection of individual freedom to contract and the need for "*communal coercive action through a State organ, which has as its ultimate objective, the construction of a community welded together from the wishes of individuals and flowing from the exercise of the individual freedoms which they claim*".[144]

109. The court relied on *Botha v Rich*,[145] in which this Court, according to Davis J, "*nodded in the direction of a more communitarian construction of the foundational values of freedom, dignity and equality in order to infuse a greater degree of fairness into the law of contract*" and spoke of the fact that honouring a contract "*cannot be a matter of each side pursuing his or her own self-interest ... without regard to the other party's interest*".[146]

110. The court found that:

110.1. the lessees' franchise agreements were coupled to the lease agreements and clearly contemplated that the franchised businesses would operate from the premises they presently occupy;

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144 High Court judgment, para [7].

145 *Supra*.

146 High Court judgment, para [8].

110.2. the lessees faced the real prospect that their business would close and/or that the franchise agreements would be terminated if their lease agreements are terminated, and that this would be a blow to a "*vitally important initiative designed to encourage ownership of business by historically disadvantaged people*";[147]

110.3. as noted above, the sanction of the termination of the leases and of the franchise business "*was disproportionate because the contracts ... maximised the interests of both parties and this meant that they intended ensuring that the franchise agreements be underpinned by the lease agreements*";[148]

110.4. in 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 which should have been submitted within the specified dates*".[149]

The SCA's Judgment

111. The SCA was heavily critical of the High Court's judgment. The thrust of Lewis JA's criticism is that the High Court did not pay sufficient heed to the decisions of the SCA that had upheld the importance of the principle of *pacta servanda sunt* and had

147 High Court judgment, para [39].
148 High Court judgment, para [42].
149 High Court judgment, para [44].

sacrificed legal certainty in favour of individual judges' perceptions of reasonableness and fairness.[150]

112. Lewis JA was particularly critical of Davis J's failure to refer to the SCA's decision in *Bredenkamp*[151] (in which Harms DP emphasised the principles of legality and certainty), "*despite its binding force*". The SCA saw fit to highlight that it remained good law that decisions of the SCA bind the High Court.[152]

113. Somewhat ironically, however, as we have already noted, the SCA itself endorsed academic criticism of this Court's decision in *Botha v Rich*.[153] The SCA was critical of the High Court's reliance on *Botha v Rich*, in particular, the High Court's application of the principle of proportionality, which it derived from that decision.[154]

114. The SCA also appeared to find fault with the perceived lack of clarity as to the basis for the High Court's decision.[155]

115. The SCA discussed in some detail its recent decisions concerning the role of public policy in the law of contract. Its discussion traversed *Bredenkamp*, *Potgieter v Potgieter*,[156] *Mohamed's Leisure*[157] and *Roazar CC v The Falls Supermarket CC*.[158]

116. The court concluded its discussion by quoting and endorsing the summary of the relevant principles it set forth in its decision in *AB v Pridwin*,[159] which are set out in paragraph 93 above.

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150 See, in particular, paragraph 24 of the SCA's judgment.
151 *Bredenkamp supra*.
152 SCA judgment, para [25].
153 SCA judgment, para [37].
154 SCA judgment, para [17].
155 SCA judgment, para [20].
156 *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA).
157 *Mohamed's Leisure supra*.
158 *Roazar supra*.
159 *AB v Pridwin supra*.

117. The SCA found[160] that "*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 court held that the requirement of six months' notice "*is eminently reasonable*".[161] It was open to the lessees to renew timeously and by giving proper notice. While the leases "*may not have been between Oregon Trust and sophisticated business people (as the lessees suggested and Davis J found), ... 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.*"[162]

118. The SCA referred to this Court's decision in *Barkhuizen*, where the reasons for the insured's failure to comply with the time limitation clause in the insurance contract in question had not been traversed. As discussed above, in the absence of those reasons, this Court was unable to determine whether the enforcement was unfair or unjust.[163] The SCA found that to be "*equally true in this matter*" as the lessees had not disclosed why they did not give notice of their intention to renew the leases by 31 January 2016. The court stated that, if the lessees had advanced reasons why they did not comply, it would be better able to assess whether the enforcement of the renewal clauses was unconscionable in the circumstances.[164]

119. The SCA accepted the Trust's contention that the effect of the High Court's orders (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. The SCA stated that it should not

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160 SCA judgment, para [39].
161 SCA judgment, para [39].
162 *Ibid.*
163 SCA judgment, para [41].
164 SCA judgment, para [41].

endorse this approach and that no consideration of public policy permits the making of contracts for parties by a court.[165]

120. Lewis JA referred to the lessees' contentions that:[166]

120.1. the 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; and

120.2. the termination of the leases appeared to have no benefit for the Trust since the lessees had paid their rental and had not defaulted, and the Trust had not indicated that any of the premises was available for hiring by other lessees.

121. She found, however, that this argument "*ignores the fact that it was the lessees, through non-compliance with the renewal clause, who jeopardized their businesses*".[167] She stated that, if they had "*at least attempted to explain why they had failed to give notice timeously, policy considerations might have been relevant*".[168]

122. The SCA stated that the lessees had advanced "*as their principal policy consideration*" that Mr Sale was not bona fide because, as a trustee of the Trust and the member of Sales Hire, he was determined to close down their businesses.[169] The court, however, found that that argument was not founded on any facts and that Mr Sale's motive was irrelevant. In any event, it found that it had to accept Mr Sale's denial that he had any intention of destroying the lessees' businesses since there was nothing inherently implausible in it.[170]

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165 SCA judgment, para [42].
166 SCA judgment, para [43].
167 SCA judgment, para [44].
168 *Ibid.*
169 *Ibid.*
170 SCA judgment, para [45].

123. As noted above, the SCA concluded that there were no considerations of public policy that rendered the renewal clauses of the lease agreements unenforceable and that the demand for compliance with their terms was not unconscionable. The SCA held that 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 and there was no basis on which to resuscitate them.[171]

GROUNDS OF APPEAL

124. The lessees rely on the following five broad grounds of appeal, each of which we discuss in turn

124.1. First, the SCA unduly narrowed the scope of the relevant factors that may be taken into account in the public policy analysis and the range of applicable principles to be applied;

124.2. Second, the SCA mischaracterised the policy considerations upon which the lessees rely;

124.3. Third, the SCA's findings concerning the motivation and conduct of Mr Sale, the Trust and Sale's is unsustainable on the papers;

124.4. Fourth, in finding that the High Court order had made new contracts for the parties, the SCA misconstrued the nature and effect of the High Court's order.

124.5. Fifth and related to the first ground of appeal referred to above, the SCA failed to give sufficient weight to this Court's earlier judgments and, in the case of *Botha v Rich*, completely disregarded that decision.

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171 SCA judgment, para [46].

Unduly narrow public policy analysis

125. As noted above, the SCA drew a parallel between the facts of the present matter and those in *Barkhuizen*, where this Court was unable to reach a conclusion that the enforcement of the time limitation clause in that case would be unfair or unjust because the reasons for the non-compliance with the clause had not been explored. The SCA found that, in the present case, the lessees had similarly not disclosed why they did not give their renewal notices in a timely manner and that, had they done so, the court would have been better able to assess whether the enforcement of the clauses was unconscionable. The court stated that if the lessees "*had at least attempted to explain why they had failed to give notice timeously, policy considerations might have been relevant*".[172]

126. In *Barkhuizen*, the question of the unreasonableness of the limitation clause came before the High Court by way of the adjudication of a separated special plea on the basis of an agreed "*terse statement of facts*". It was for this reason that the facts around the failure to bring an insurance claim within the period contemplated by the time limitation clause in question had not been canvassed.

127. Whilst this Court in *Barkhuizen* focussed on the reasons for non-compliance with the time limitation clause (and, more particularly, the failure to explain why it had not complied with), there was nothing to suggest that any other policy considerations were or could have been, at play. Unlike the present case, there was for example, no suggestion that the non-compliance with the time limitation clause threatened a BEE transaction or implicated any other constitutional values, nor was it suggested that permitting a claim that would otherwise have been barred would not prejudice the insurer.

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172 SCA judgment, para [44].

128. This Court in *Barkhuizen* did not find that the reasons for non-compliance with a time limitation clause (or any other contractual provision) would be the only (or overriding) consideration in determining whether the enforcement of the contract would be contrary to public policy. On the contrary, the court mandated an enquiry into all relevant circumstances.

129. In any event, the lessees submit that, in the present case, the broader factual matrix addressed in the papers underpins the analysis as to whether the enforcement of the renewal provisions – in the particular circumstances of this case – would be contrary to public policy and unconstitutional.

130. The facts of the present matter (and the manner in which they have been explored in the papers) are materially different from those in *Barkhuizen* – where there was only a "*terse*" statement of facts. In the present matter, the BEE nature of the franchise transaction has been fully canvassed on the papers (together with the risks of the failure of that transaction if the leases are cancelled), as have the relevant facts concerning the lessees' compliance with their obligations under the leases, the lack of prejudice to the Trust if the leases are renewed, and the Trust's failure to utilise the benefits conferred on it by the six-month notice period (i.e. to look for other tenants or advertise the premises).

131. The lessees submit that all these factors are relevant in determining whether the enforcement of the renewal clauses would – in the present circumstances – be contrary to public policy. As mentioned above, *Barkhuizen* requires <u>*all*</u> relevant factors (including the perceived paucity of the lessees' explanation for their failure to serve their renewal notices in a timely manner) to be weighed together.

132. It is respectfully submitted that the SCA misinterpreted the significance of this Court's findings in *Barkhuizen* (relating to the reasons for non-compliance with the contract)

and inappropriately elevated that consideration to be the primary or overriding consideration, which outweighed all other relevant factors.

133. With respect, it is difficult to understand how the SCA could have reached the conclusion that there were no considerations of public policy that rendered the renewal clauses of the lease agreements unenforceable taking into account the following:

133.1. The NEF is a legislative measure expressly designed to promote the achievement of equality by protecting or advancing persons disadvantaged by unfair discrimination, as contemplated in section 9(2) of the Constitution;

133.2. Black economic empowerment is an important policy objective which this Court has recognised is intended "*not merely to afford inclusion or redistribution, but to involve black people in management and control of businesses, and to facilitate skills development.*"[173]

134. The need to address the economic imbalances brought about by apartheid, through, for example, procurement policies, legislative measures such as the NEF Act and BEE transactions such as those funded by the NEF, was poignantly addressed by Mogoeng J (as he was then) in *Viking Pony*,[174] where he stated the following:

> *"One of the most vicious and degrading effects of racial discrimination in South Africa was the economic exclusion and exploitation of black people. Whether the origins of racism are to be found in the eighteenth and nineteenth century frontiers or in the subsequent development of industrial capitalism, the fact remains that our history excluded black people from access to productive economic assets. After 1948, this exclusion from economic power was accentuated and institutionalised on explicitly racially discriminatory grounds, further relegating most black people to abject poverty.*
>
> *Driven by the imperative to redress the imbalances of the past, the people of South Africa, through their democratic government, developed, among others, the broad-based black economic empowerment programme and the preferential procurement policy."*

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173 *Allpay supra*, para [49].

174 *Viking Pony Africa Pumps (Pty) Ltd t/a Tricom Africa v Hidro-Tech Systems (Pty) Ltd and Another* 2011 (1) SA 327 (CC), paras [1] and [2].

135. Moreover, as set out above this Court in *Barkhuizen* expressly recognised the achievement of equality as one of the values upon which our constitutional democracy is founded and which is represented by public policy.[175]

136. Where the failure of an otherwise successful BEE transaction – a measure designed to assist in the achievement of equality – is at risk, it is difficult to see how public policy considerations are not at play. The more so when the risk to the franchisees is materially graver than any prejudice that the Trust might sustain as a consequence of the renewal of the leases. Indeed, the Trust has demonstrated no prejudice at all. These considerations are further accentuated by the fact that Mr Sale (who is not historically disadvantaged) stands to benefit from a failure of the BEE transaction.

137. It is consequently submitted that, by focussing on the reasons for the lessees' non-compliance with the renewal clauses, the SCA unduly narrowed the scope of the relevant factors that may be taken into account in determining whether the enforcement of the renewal provisions of the lease agreements would be contrary to public policy.

138. Not only did the SCA unduly narrow the scope of the factors that may be taken into account in the public policy analysis, it has also adopted an unduly restrictive set of principles (namely those enunciated in *AB v Pridwin* quoted in paragraph 93 above) which it appears now routinely to apply in every case where it is called upon to refrain from enforcing a contract on public policy grounds. The summary has already since been quoted and applied by the SCA twice: in its decision in this case as well as in *South African Municipal Workers' Union National Provident Fund v Umzimkhulu Local Municipality*.[176]

139. This restrictive set of principles was not mandated or endorsed by this Court in *Barkhuizen* or in any subsequent decision. We have already referred to the SCA's

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175 See paragraph 13 above.

176 *South African Municipal Workers' Union National Provident Fund v Umzimkhulu Local Municipality and Others* (297/2018) [2019] ZASCA 41 (29 March 2019), as yet unreported, para [52].

affirmation of the pre-constitutional dictum in *Sasfin v Beukes*[177] that a court will use the power to decline to enforce a contract "s*paringly, and only in the clearest of cases in which harm to the public is substantially incontestable*". It is submitted that the SCA's endorsement of a pre-constitutional threshold for determining whether enforcement of a contractual term will be contrary to public policy is anachronistic and does not take into account the full transformative force of the Constitution and the values that it has infused into the common law. As Froneman J said in his concurring judgment in *Mokone*, "*[i]f there is a broad theme of the Constitution, it is to unshackle our law from this painful historical dichotomy and tension between law and fairness. The Constitution demands that they run together, hand in hand*" and that "*[t]he Constitution unashamedly tells us that we should no longer hesitate to bring the law in accord with constitutional notions of fairness and justice*".[178]

140. Not only is the SCA's endorsement of this restrictive principle inconsistent with this Court's jurisprudence, it also ignores other factors and principles mentioned by Smalberger JA in *Sasfin v Beukes*, in particular, his statement that "*a further, and not unimportant consideration is that 'public policy should properly take into account the doing of simple justice between man and man.*"[179] This *dictum* was expressly endorsed by Ngcobo J in *Barkhuizen*.[180]

141. The SCA's summary of principles also ignores the principle of proportionality (adopted by this Court in *Botha*) and the role and importance of ubuntu.

142. It is respectfully submitted that, in canonising the applicable principles in the manner it has done, the SCA has been selective and unduly restrictive. In has elevated the principle of *pacta sunt servanda*, and, in so doing, has ignored the broader range of considerations and principles at play, as enunciated in *Barkhuizen*, including the need

177 *Supra* at 9B-C.

178 *Mokone supra*, paras [79] and [80].

179 *Sasfin v Beukes supra*, at 9 G.

180 *Barkhuizen supra*, para [51].

to do simple justice between individuals and, equally importantly, the principle that "*[p]ublic policy is informed by the concept of ubuntu*".[181]

143. It is submitted that, without this Court's intervention, there is a danger that the SCA's restrictive list of principles will become entrenched and the promise of a more equitable and community focussed approach envisaged by *Barkhuizen* will be forgotten.

Applicants' principal policy consideration was not the bona fides of Mr Sale

144. As noted above, the SCA found that the lessees' "*principal policy consideration*" was that Mr Sale was not *bona fide* because, as a trustee of Oregon Trust and the member of Sales Hire, he was determined to close down their businesses. The court found that:

144.1. if Mr Sale was the controlling mind of both entities, which was not established on the papers, his motive, if he had any, is not relevant;

144.2. in any event, it had to accept Mr Sale's denial that he had any intention of destroying the lessees' businesses since there was nothing inherently implausible in it.[182]

145. Whilst the lessees did indeed contend that: (a) Mr Sale was the controlling mind of both the Trust and Sale's Hire; (b) he was intent on destroying their businesses; and (c) these were important relevant factors in the public policy analysis, these were not the "*primary policy considerations*" canvassed in the papers.

146. Instead, the lessees referred to these factors as part of the broad range of factual circumstances prevailing when they attempted to renew their leases. The lessees equally, however, relied on the *consequences* of the termination of the leases. The lessees specifically highlighted the BEE nature of the transaction and the threat to an otherwise successful BEE initiative.

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181 *Ibid.*

182 SCA judgment, para [45].

SCA's findings concerning Respondents' motivation are unsustainable

147. With respect, it is difficult to see how the lessees' contentions regarding the aligned purposes of the Trust and Sale's Hire could have been disregarded on the papers.

148. In the first instance, the court improperly applied the test in *Plascon Evans*[183] to uphold the respondents' (Sale's Hire and the Trust's) version in circumstances where the respondents had applied, by way of their own counter-application, for the eviction of the lessees from their premises. In the counter-application, the version of the lessees (as respondents) ought to have prevailed.

149. In any event, the manner in which the litigation was conducted makes it clear that the interests of the Trust and Sale's Hire (in evicting the lessees from their premises and causing their businesses to fail) were aligned:

149.1. Sale's Hire opposed the lessees' application,[184] when – if Mr Sale (wearing his hat as the franchisor) truly had the interests of the franchisees at heart – he should have supported their continued occupation of their premises and the uninterrupted operation of their businesses. At the very least, he ought not to have made common cause with the Trust in opposing the lessees' application;

149.2. Sale's Hire similarly joined in the Trust's appeal against Davis J's judgment and order. Again, had Sale's Hire been interested in promoting the lessees' businesses (as it claimed), it would not have appealed against the High Court's order, alternatively it would have confined its appeal to Davis J's costs award.

150. It is further submitted that the SCA erred in finding that the Trust and Sale's Hire's motives were irrelevant in the public policy analysis. Where the success of a BEE initiative is placed at risk by conduct that had no apparent advantage or benefits for the

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183 Which was recently applied by this Court in *Snyders and Others v De Jager and Others (Appeal)* 2017 (3) SA 545 (CC), para [70].

184 The resolution of Sale's Hire approving the opposition to the application is annexure SS4, record vol 3 p 281.

Trust, the Trust and Sale's Hire's motives are materially relevant to the public policy analysis.

The High Court did not make a new contract for the parties

151. The SCA accepted the Trust's contention that the effect of the High Court's orders (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. As noted above, the SCA stated that it should not endorse this approach and that no consideration of public policy permits the making of contracts for parties by a court.[185]

152. Had the renewal notice been properly served, the lease agreements would have been extended. The effect of the High Court's order is to *overlook* the deficiencies in the service of the renewal notices and to *regard them* as having been properly served. The consequence of this – as prescribed by the contract itself – is that the lease agreements were extended.

153. To illustrate how the renewal of the leases is a contractually mandated consequence of the application of the principles pertaining to enforceability of contractual provisions on public policy grounds, it is perhaps useful to postulate a hypothetical example where the applicability of different principles would (and must) have the same result and where a court would not regard itself as having made a contract for the parties.

154. The hypothetical example we propose is the following:

    154.1. The lessees indicated to Mr Sale (in his capacity as trustee of the Trust) in October 2015 (well before the January 2016 cut-off date contemplated by the leases) that they were contemplating renewing their leases, but had not yet served their notices to do so;

185 SCA judgment, para [42].

154.2. Mr Sale orally conveyed to them that he was happy for them to renew and that he would accept a notice of renewal as late as 31 March 2016;

154.3. The lessees served their renewal notices in March 2016, but Mr Sale then relied on the no waiver and no variation clauses[186] to insist that they ought to have served their renewal notices by 31 January 2016.

155. In those circumstances, the lessees would likely be able to rely on estoppel to hold Mr Sale to his oral promise. The application of estoppel – even if raised after the leases would otherwise have expired – would not be regarded as impermissibly reviving an expired contract or as making a contract for the parties. Notably, estoppel was imported into South African law from English equity.[187]

156. Regardless of the applicable principle (estoppel or non-enforcement on public policy grounds), the renewal of the leases is the contractual consequence of regarding the options as having been validly exercised. In both cases, the court "*overlooks*" the contractually non-compliant exercise notice and regards it as effective, thus renewing the contract.

157. It is consequently submitted that the High Court did not make a new contract for the parties. The renewal of the contract was the logical and contractual consequence of finding that the renewal notices were to be regarded as valid.

SCA's disregard of this Court's judgments

158. As we have already mentioned, the SCA endorsed academic criticism of this Court's decision in *Botha v Rich* and did not follow it. The lessees submit that it was inappropriate for the SCA to have done so, particularly after it criticised Davis J for

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186 Clause 28.3 and 29.1 of the lease at record vol 1 p 77.

187 Interestingly, Zimmerman explains that the courts used the *exceptio doli* as the vehicle to bring estoppel into our law – see Zimmerman, *op cit* at 221 referring to amongst others *Smith and Rance v Philips and B Lazarus v Levy and the Glencairn GM Co* 1893 Hertzog 50. See also JC De Wet "*Estoppel by representation" in die Suide-Afrikaanse Reg* (Thesis, Leiden 1939) at 10–11.

having failed to refer to and follow its decision in *Bredenkamp*. It is further submitted that the SCA improperly applied, and unduly restricted the reach of, this Court's decision in *Barkhuizen*.

159. In relation to *Botha v Rich*, the SCA referred to the academic writing of Wallis JA,[188] in which he criticised this Court's putting to one side and "*negating*" the contractual rights of the seller because it would be disproportionate for the purchaser's default to result in her losing the opportunity to acquire the property in question, as well as this Court's perceived failure to explain why it had done so.[189]

160. The SCA quoted Wallis JA's statement that *"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*".[190] Wallis JA complained that this decision was inimical to certainty in commerce.

161. Despite Wallis JA's express recognition that there was now a decision by the Constitutional Court to this effect, the SCA chose to ignore that decision and to approve Wallis's criticism of it. The SCA stated that "*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*". In so doing, the SCA ignored the binding force of this Court's decision.

162. As noted above, in *Barkhuizen*, this Court held that the inquiry into whether a clause ought to be enforced is "*whether in all the circumstances of the particular case, in particular, having regard to the reason for non-compliance with the clause, it would be contrary to public policy to enforce the clause*" and that *"[t]his would require the party*

188 Wallis *op cit*, at 567.

189 SCA judgment, para [37].

190 *Ibid.*

seeking to avoid the enforcement of the clause to demonstrate that its enforcement would be unfair and unreasonable in the given circumstances."[191]

163. *Barkhuizen* requires a broad enquiry into all relevant circumstances. As has already been mentioned, by focussing on the narrow question of the paucity in the lessees' reasons for non-compliance with the renewal provisions of the lease agreements, the SCA unduly narrowed the enquiry mandated by *Barkhuizen*.

164. The SCA's subsequent decisions addressed above (the principles of which are summarised in the *Pridwin* case quoted in paragraph 93 above) have impermissibly qualified and paired down the principles enunciated in *Barkhuizen*.

165. It is further submitted that the SCA has unduly focussed on the risk of contractual uncertainty and of the undesirability of allowing an individual judge's notions of fairness to determine the outcome of a matter.

166. As we have already noted, this Court in *Barkhuizen* expressly contemplated that a judge's notion of fairness will have a role to play. It cautioned, however, that when judges move into this territory, they should do so with care.[192]

167. The fact that the analysis may involve a measure of uncertainty is not in itself inimical to the rule of law or our constitutional dispensation. Indeed, as Jansen JA noted in his minority judgment in *Bank of Lisbon v De Ornelas,*[193] our law recognises several instances where the principle of *pacta sunt servanda* and the ideal of certainty giving way to other considerations. Jansen JA cited the following three examples:[194]

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191 *Barkhuizen supra*, para [69], emphasis added.

192 *Barkhuizen supra*, para [12], quoting *Napier v Barkhuizen supra*, para [13].

193 *Bank of Lisbon supra.*

194 At 614F – 615C.

167.1. A creditor may have a right to specific performance, but a court may in the exercise of its discretion refuse to make such an order. The court's discretion is "*aimed at preventing an injustice*";

167.2. Agreements in restraint of trade, where enforcement involves a value judgment;

167.3. Under the Conventional Penalties Act 15 of 1962 (which reinstated the common law) a court may reduce a stipulated penalty "*to such an extent as it may consider equitable in the circumstances*".

168. Whilst the principle of *pacta sunt servanda* is a key consideration, our law recognises that the certainty it provides must yield to other considerations, including notions of fairness in the above circumstances and also in cases where constitutional values are implicated (as recognised by *Barkhuizen*).

169. It is consequently submitted that the SCA did not properly apply this Court's dicta in both *Botha v Rich* and *Barkhuizen* and that a proper application of the principles in those cases would favour the granting of the relief sought by the lessees.

CONCLUSION AND RELIEF SOUGHT

170. It is respectfully submitted that, applying the principles set out in *Barkhuizen*, in all the circumstances of this case, the enforcement of the lease would be contrary to public policy.[195]

171. It is difficult to see how the "*flexible yardstick*"[196] of public policy could favour the termination of the lease agreements in circumstances where:

171.1. that would result in the collapse of the lessees' businesses and the failure of what would otherwise have been a successful BEE transaction aimed at

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195 *Barkhuizen supra*, para [69].

196 *Den Braven SA (Pty) Ltd v Pillay and Another* 2008 (6) SA 229 (D), para [35].

uplifting historically disadvantaged individuals and furthering the constitutional value of the achievement of equality;

171.2. on the other hand, the termination of the leases would appear to have no commercial or economic benefits for the Trust or society at large;

171.3. the NEF, the funder of the transaction and a statutory body created for the purposes of funding BEE transactions, has weighed into the dispute in favour of the lessees to contend that the leases should not be terminated; and

171.4. the Trust had not relied on the renewal provisions of the lease agreements to its prejudice (it had not assumed that the leases would not be renewed and used the 6-month period to find other tenants – let alone tenants who would occupy the premises on more beneficial terms).

172. Davis J's decision to refuse to enforce strictly the renewal provisions of the lease agreements in these circumstances is entirely consistent with the established principles of contract law in our constitutional era – as enunciated in *Barkhuizen.*

173. On the basis of what is set out above, we submit that:

173.1. leave to appeal should be granted: the matter raises constitutional issues and arguable points of law of general public importance, and it would be in the interests of justice for leave to be granted, particularly given the lessees' strong prospects of success and the importance of the issues raised; and

173.2. the appeal should be upheld with costs (including the costs of two counsel), with the consequence that the order of the SCA should be set aside and the order of the High Court upheld.

BJ MANCA SC

GGM QUIXLEY

Applicants' Counsel

Chambers, Cape Town

29 July 2019

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: **109/2019**
SCA CASE NO: **74/2018**
WCC CASE NO: **13689/2016**

In the matter between:

BEADICA 231 CC	First Applicant
BEADICA 232 CC	Second Applicant
BEADICA 234 CC	Third Applicant
BEADICA 235 CC	Fourth Applicant

and

THE TRUSTEES FOR THE TIME BEING OF THE OREGON TRUST (IT 728/1995)	First Respondent
SALE'S HIRE CC	Second Respondent
NATIONAL EMPOWERMENT FUND	Third Respondent

FIRST RESPONDENT'S WRITTEN ARGUMENT

INTRODUCTION

1. The issue in this matter is whether a lessee's failure to comply with the contractual terms of an option to renew a lease, where non-compliance would have the effect of the existing lease terminating through effluxion of time, can be cured by the application of public policy.

2. Contrary to the repeated assertions by the Applicants ("the Lessees") and in the submissions made on their behalf[1], the First Respondent ("the Trust") did not *terminate* the leases, on notice or otherwise. As fixed term leases they terminated through effluxion of time on their agreed termination date, namely, 31 July 2016. They terminated automatically, without any termination notice from the lessor being required.[2]

3. Each of the leases, however, contained a right of renewal. A right of renewal of this kind constitutes an option to renew.[3] The valid renewal of a lease in accordance with an option to renew brings into existence a new lease agreement, not the continuation of the old lease agreement.[4]

4. An option to renew is a form of *pactum de contrahendo*, ie, an offer to renew coupled with an offer to keep the offer open on the terms of the option.[5]

5. The exercise of the option occurs with the acceptance of the offer to renew and the normal contractual rules on the acceptance of offers, including those on the time within which and the manner and clarity of communication of acceptance, apply.[6]

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[1] **Record** Vol.1 p.21 para 43; Vol 7 p.652 para 23; Applicants' Submissions paras 4, 7, 99 and 105

[2] Glover, **Kerr's Law of Sale and Lease**, 4th ed (2014) at 570-571

[3] Cooper, **Landlord & Tenant**, 2nd ed (1994) at 346

[4] Cooper, **Landlord & Tenant**, *supra,* at 345; **Golden Fried Chicken (Pty) Ltd v Sirad Fast Foods CC** 2002 (1) SA 822 (SCA) at para [4]; **Shell SA (Pty) Ltd v Bezuidenhout & Others** 1978 (3) SA 981 (NPD) at 985C; **Fiat SA v Kolbe Motors** 1975 (2) SA 129 (O) at 139D-G

[5] Cooper, **Landlord & Tenant**, *supra,* at 346

[6] **Kerr's Law of Sale & Lease,** *supra,* at 548

6. Accordingly, acceptance of the offer – the lessee's election to exercise the right – to renew must be unequivocal[7] and the lessee must communicate his decision within the period stipulated in the lease.[8]

7. That is because after the time within which the option is to be exercised has passed, the right to renew lapses.[9]

8. The renewal option in the present case is contained in clause 20.1 of each of the leases.**[10]** It reads:

> "*The Lessee shall have the right to extend the Lease Period by a further period as set out in section 13 of the Schedule on the same terms and conditions as set out herein, save as to rental, provided that the Lessee gives the Lessor written notice of it's exercising of the option of renewal at least six (6) months prior to the termination date*."

9. The Lessees brought an application in the High Court to declare that the renewal options had been validly exercised, notwithstanding the Lessees' non-compliance with clause 20.1. The Lessees' case is summarised as follows in their heads of argument**[11]**:

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[7] Cooper, **Landlord & Tenant**, *supra,* at 384; **Boerne v Harris** 1949 (1) SA 793 (A) at 801

[8] Cooper, **Landlord & Tenant**, *supra,* at 347; **Biloden Properties (Pty) Ltd v Wilson** 1946 (NPD) 736 at 744; **Cope v Zeman & Another** 1966 (1) SA 431 (SWA) at 434B-F; **Rhoodie v Curitz** 1983 (2) SA 431 (CPD) at 438H-439G

[9] *Ibid* and cf **Pick n Pay Retailers (Pty) Ltd & Others v Eayrs & Others NNO** 2012 (1) SA 238 (SCA) at 246F

[10] **Record** Vol.1 p.171

[11] Applicants' Submissions paras 5 & 7

"*Relying on Barkhuizen … the lessees contended it was against public policy to strictly enforce the renewal provisions.*" (our emphasis)

10. The Lessees' case is therefore founded solely on public policy, as employed in **Barkhuizen**[12]. They do not contend that the renewal provisions themselves are contrary to public policy, merely the enforcement thereof.

11. Nor do the lessees contend that the common law should be developed.

12. In arguing that the judgment of the Supreme Court of Appeal ("the SCA") should be overturned, the central theme of the Lessee's contentions is that the SCA followed an overly-conservative approach and relied on certain controversial principles which are not supported by the judgments of this Court, particularly **Barkhuizen** and **Botha**[13].

13. The opposing contentions of the First Respondent ("the Trust") can be summarised as follows:

13.1 None of the Lessees validly exercised the right to renew its lease; and there is no precedent or principle for public policy to

[12] **Barkhuizen v Napier** 2007 (5) SA 323 (CC)

[13] **Botha and Another v Rich N.O. and Others** 2014 (4) SA 124 (CC)

be invoked in order for the Court to declare that new five year leases are deemed to have been concluded with the Trust.

13.2 To the extent that certain principles referred to in the judgment may properly be described as controversial, the SCA in the present matter did not place particular reliance on such controversial principles, but faithfully applied **Barkhuizen**.

13.3 On a proper interpretation of **Barkhuizen**, the test for determining whether the enforcement of a contractual term is unfair and therefore contrary to public policy, is whether there were circumstances which prevented compliance with the term ("preventing circumstances").

13.4 The **Barkhuizen** test was also applied as such in **Mohamed's Leisure**[14], whereas **Botha** is distinguishable.

13.5 Alternatively, if our submissions on the Barkhuizen test are incorrect, at the very least **Barkhuizen** set preventing circumstances as the dominant public policy consideration. In the present matter, the weighing up of all the relevant public policy considerations tips the scales in favour of enforcement of the renewal provisions.

[14] **Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd** 2018 (2) SA 314 (SCA)

PUBLIC POLICY CANNOT CREATE A COMPLETELY NEW AGREEMENT FOR THE PARTIES

14. As part of its rationale, the SCA held that no consideration of public policy permits the making of contracts for parties by a Court, and that that was the effect of the High Court's order.[15] In the present case, none of the Lessees gave notice of intention to renew their respective leases within the time, or in accordance with the requirements, of clause 20.1:

14.1 The First Applicant's letter of 29 March 2016 was a "*request to propose a renewal on our already existing lease agreement with the option to purchase*".[16] Not only did it fail to notify the Trust of an election to activate its right to renew, but the letter was coupled with a proposal to secure an option to purchase.

14.2 The Third Applicant's email of 3 March 2016 was principally a request to the Trust to consider an offer to purchase the premises, coupled with a request that the Trust forward a "*draft of the renewal of premises lease*".[17]

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[15] SCA's judgment, para [42] (now reported sub nominee **Trustees, Oregon Trust & Another v Beadica 231 (CC) & Others** 2019 (4) SA 517 (SCA))

[16] **Record** Vol. 2 p.155

[17] **Record** Vol. 2 p.156

14.3 The Fourth Applicant relies on a letter written by its accountant enquiring how soon a lease agreement could be drawn up and sent to him in draft "*for discussion purposes*".[18]

14.4 In relation to the Second Applicant, the Lessees were never able to produce any notice allegedly sent by it. Despite allegations that one was indeed sent in March 2016,[19] it seems clear on the papers that no such notice was in fact sent.[20]

15. At common law, therefore, none of the Lessees validly exercised a right to renew their respective lease agreements. By the time three of the lessees addressed the letters to the lessor referred to above, the right to renew no longer existed. By the time the Lessees launched their application in the High Court, the leases had terminated, automatically, through the effluxion of time.

16. The High Court's judgment was not simply a decision by a court declining specifically to enforce a contractual sanction, such as cancellation for breach (in which event the existing lease would simply continue until its agreed termination date). The High Court's decision had the effect of creating a new agreement, in the form of a new five year lease where, at common law, none had come into effect.

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[18] **Record** Vol. 2 p.157

[19] **Record** Vol. 6 Pied RA, para 5, p. 575

[20] **Record** Vol. 6 Annexure "**SA1**", p. 577-579; Seaward RA, paras 4-11, Vol. 6, p. 581-582

17. Such an outcome runs counter to the fundamental rule that the Court may not make a contract for the parties.[21]

18. Even if this Court has such power, there is no precedent in its decisions or those of the SCA for public policy (or estoppel[22]) being employed to achieve such a far-reaching result.

19. In order to achieve this result, this Court would have to develop the common law. In the SCA, however, the Lessees expressly disavowed any reliance on section 39(2) of the Constitution and do not submit in their submissions to this Court that the common law should be developed. There is in any event no doctrinal or principled basis on which the common law can or should be developed in this way.

BARKHUIZEN ON PUBLIC POLICY

20. Turning next to a more general discussion on the pronouncements found in **Barkhuizen**, they include the following ("the Barkhuizen principles"):

    20.1 *Pacta sunt servanda* gives effect to the central constitutional values of freedom and dignity. 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.[23]

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[21] **Sasfin v Beukes**, *supra*, at 16H-I; **Mohamed's Leisure**, *supra*, at 324J

[22] In the example in para 154 of Applicant's Submissions, an estoppel could not be upheld, as the effect of doing so would be to sanction non-compliance with a non-variation clause: **HNR Properties CC and Another v Standard Bank of SA Ltd** 2004 (4) SA 471 (SCA) para [21].

[23] **Barkhuizen** para [57]

20.2 *Pacta sunt servanda* is a profoundly moral principle, on which the coherence of any society relies. It is also a universally recognised legal principle. However, the principle will not apply where the particular term, or its enforcement, is contrary to public policy.[24]

20.3 The proper approach to the constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy.[25]

20.4 Public policy:

20.4.1 represents the legal convictions of the community;[26]

20.4.2 is deeply rooted in the Constitution and its underlying values;[27]

20.4.3 requires, in general, that parties should comply with their contractual obligations that have been freely and voluntarily undertaken;[28]

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[24] **Barkhuizen** para [87]

[25] **Barkhuizen** para [30]

[26] **Barkhuizen** para [28]

[27] **Barkhuizen** para [28]

[28] **Barkhuizen** para [57]

20.4.4 imports the notions of fairness, justice and reasonableness[29] and is informed by the concept of ubuntu.[30]

20.5 Intruding (through public policy) on apparently voluntarily concluded arrangements is a step that judges should countenance with care, particularly when it requires them to impose their individual conceptions of fairness and justice on the parties' individual arrangements.[31]

20.6 The concepts of justice, reasonableness and fairness also constitute good faith.[32] "*As the law currently stands, good faith is not a self-standing rule, but an underlying value that is given expression through existing rules of law*".[33]

20.7 The onus rests on the party seeking to avoid the enforcement of the term on grounds of public policy.[34]

21. In **Barkhuizen** this Court thus held that notions such as fairness, reasonableness and ubuntu could be employed to nullify a contractual term, or its enforcement, but only viewed through the portal of public

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[29] **Barkhuizen** para [73]

[30] **Barkhuizen** para [51]

[31] **Barkhuizen** para [70]

[32] **Barkhuizen** para [80]

[33] **Barkhuizen** para [82]

[34] **Barkhuizen** para [58]

policy. The question as to whether good faith should retain its limited role as the law currently stands, was expressly left open.[35]

22. Legal commentators have identified an ostensible controversy which has subsequently arisen, essentially concerning the issue whether good faith (or fairness) is indeed a substantive rule which could serve to invalidate a contractual term or its enforcement. The SCA has preferred to apply the law as it currently stands, whereas this Court, albeit *obiter*, has implied that good faith might have a more direct role to play in the development of the common law of contract.[36]

23. However, in the present case the issue regarding fairness as a substantive rule does not arise, as the Lessees have founded their case squarely on public policy.

24. In their heads of argument[37] counsel on behalf of the Lessees have identified two further ostensibly controversial pronouncements by the SCA, in **Pridwin**[38] and **Bredenkamp**[39] respectively, which, they contend, are not supported by **Barkhuizen**. As, we submit, the SCA's decision in the present matter did not turn on either of those

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[35] **Barkhuizen** para [82]

[36] **Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd** 2012 (1) SA 256 (CC) paras [71] – [72]

[37] Applicants' Submissions paras 56 & 60

[38] **AB and Another v Pridwin Preparatory School and Others** 2019 (1) SA 327 (SCA)

[39] **Bredenkamp and Others v Standard Bank of South Africa Ltd** 2010 (4) SA 468 (SCA)

pronouncements and they are not determining principles in the present matter, we comment only briefly on the Lessees' contentions.

25. First, the six principles governing private contracts and public policy, distilled by the SCA in **Pridwin**, evidently emanate from and correspond to the **Barkhuizen** principles. The Lessees, however, contend that **Pridwin**'s fifth principle is unduly stringent and not supported by precedent. The principle was formulated as follows:[40]

> "*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 contestable and does not depend on the idiosyncratic inferences of a few judicial minds*."

26. However:

26.1 That judicial restraint or caution is necessary when applying public policy was expressly acknowledged in one of the **Barkhuizen** principles, although only with reference to the formulation by Cameron JA (as he then was) in the court *a quo*.[41]

26.2 The SCA's formulation in **Pridwin** was derived not only from the pre-constitutional decision in **Sasfin**[42], but also the more recent

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[40] **Pridwin** para [27]

[41] **Barkhuizen** para [70]

[42] **Sasfin (Pty) Ltd v Beukes** 1989 (1) SA 1 (A)

decision in **Spence**[43] by the Court of Appeal for Ontario in Canada. In the Canadian common law system public policy is also gleaned from the Canadian Constitution, which includes a bill of rights. In **Spence** the court quoted from a judgment of the Canadian Supreme Court.[44]

26.3 Accordingly, it is submitted that this Court in **Barkhuizen** did not hold that the prevailing judicial restraint principle in relation to public policy in a contractual setting should be relaxed, but the formulation of the principle was considered more closely in **Pridwin**.

27. Second, in **Bredenkamp**[45] Harms DP made the following observation regarding **Barkhuizen**, with which the Lessees take issue:

> "*... I do not believe that the judgment* [in Barkhuizen] *held or purported to hold that the enforcement of a valid contractual term must be fair and reasonable, even if no public policy consideration found in the Constitution or elsewhere is implicated*."

28. In **Bredenkamp** Harms DP was merely pointing out that **Barkhuizen** held that the proper approach to the constitutional challenge to enforcement of a contractual term is to determine whether the

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[43] **Verolin Spence *et al* v BMO Trust Co** 2016 CanLII 34005 (SCC) para 41

[44] **Re Millar** [1938] S.C.R. 1 at 7

[45] **Bredenkamp** para [50]

enforcement would be so unfair that it is contrary to public policy. But **Barkhuizen** is not authority for fairness constituting a substantive, overarching rule.

29. The SCA's observation in **Bredenkamp** is clearly correct. All the references in **Barkhuizen** to fairness were made in the context of fairness as a concept informing public policy and as a test for the conformity of a contractual term to public policy (as the analysis of the test below confirms).

30. As the present matter raises neither the issue of the stringency of the judicial restraint principle, nor the issue of fairness as a substantive rule, the next question is the manner in which public policy is to be invoked – in accordance with **Barkhuizen –** in relation to the enforcement of the renewal clause. (**Barkhuizen**, similarly, involved the non-compliance with a contractually agreed time limit.)

BARKHUIZEN ON ENFORCEMENT CONTRARY TO PUBLIC POLICY

31. In **Barkhuizen** Ngcobo J formulated an edifice of tests for purposes of determining whether a contractual term *per se*, or its enforcement, would be contrary to public policy:

    31.1 First, Ngcobo J held that the applicable test for determining whether a time limitation clause is contrary to public policy,[46] is

[46] **Barkhuizen** para [49]

"fairness"[47]. It is evident from his judgment that he intended fairness here to bear its broad meaning, including notions such as reasonableness, justice and equity.

31.2 Thereafter, Ngcobo J formulated the test for determining such fairness as follows:[48]

> "*There are two questions to be asked in determining fairness. The first is whether the clause itself is unreasonable. Secondly, if the clause is reasonable, whether it should be enforced in the light of the circumstances which prevent compliance with the time limitation clause*."

31.3 According to Ngcobo J, the first question of the fairness test (whether the clause itself is unreasonable) involves the consideration of constitutional values in two respects:

31.3.1 *Pacta sunt servanda* must be weighed up against the constitutional right which is being implicated by the contractual terms in question.[49]

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[47] **Barkhuizen** paras [51] – [52]

[48] **Barkhuizen** para [56]

[49] **Barkhuizen** para [57]

31.3.2 If it is found that the objective terms are not inconsistent with public policy, “on their face”, the further issue will arise as to whether the terms are contrary to public policy in the light of “the relative situation of the contracting parties”, particularly the possibility of inequality of bargaining power.[50] In case of such inequality, the constitutional values of equality and dignity may be implicated to such an extent that they render the clause itself unreasonable and therefore contrary to public policy.[51]

32. Although the first question (whether the clause itself is unreasonable) does not arise in the present matter, it is significant that (a) the implicated constitutional right and (b) the relative situation of the contracting parties are considerations relevant only to the question whether the clause itself is unreasonable – not to the question whether its enforcement would be unreasonable.

33. As regards the second, presently relevant, question of the fairness test, in particular the phrase “*the circumstances which prevented compliance*” (“preventing circumstances”):

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[50] **Barkhuizen** para [59]

[51] **Barkhuizen** para [15]

33.1 The phrase is employed at the outset in the formulation of the general test for fairness, and prior to any consideration of the available evidence in the particular case.

33.2 Accordingly, as a matter of logic and interpretation it is incorrect to argue (as the Lessees appear to imply) that **Barkhuizen**'s focus on preventing circumstances was as a result of the absence of evidence thereof in that particular case.

33.3 More importantly, preventing circumstances are not described in the judgment merely as a relevant consideration, but as the very test for determining whether enforcement would be unfair, and thus contrary to public policy.

34. The following subsequent references in the judgment to preventing circumstances are significant, particularly as they were also made in general terms, without reference to the particular facts of the case:

34.1 "*The second question* [in determining fairness] *involves an inquiry into the* circumstances that prevented compliance *with the clause*."[52]

34.2 "*What this means in practical terms is that once it is accepted that the clause does not violate public policy and non-compliance with it is established, the claimant is required to*

[52] **Barkhuizen** para [58]

show that in the circumstances of the case there was a good reason why there was a failure to comply."[53]

34.3 "*The inquiry is whether in all the circumstances of the particular case, in particular, having regard to the reason for non-compliance with the clause, it would be contrary to public policy to enforce the clause*."[54] (our emphasis)

35. When it came to applying the second question of the fairness test to the facts of that case, Ngcobo J identified the absence of evidence of preventing circumstances only:

35.1 "*The difficulty in the present case is that the applicant has not furnished the reason for the non-compliance with the time clause … We are left to speculate on the reason for non-compliance. Without those facts it is impossible to say whether the enforcement of the clause against the applicant would be unfair and thus contrary to public policy.*"[55]

35.2 "*In the result, without 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*."[56] (our emphasis)

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[53] **Barkhuizen** para [58]

[54] **Barkhuizen** para [69]

[55] **Barkhuizen** para [84]

[56] **Barkhuizen** para [85]

36. In judging fairness of enforcement (the second question), Ngcobo J did not mention any other factor in respect of which this Court would have preferred to have the benefit of evidence – for example, the value of the insurance premiums paid by the applicant, or the full consequences of the loss of his vehicle and his claim. Nor did Ngcobo J again refer to the implicated constitutional right to seek judicial redress, or to the relative situation of the contracting parties.

37. The singular determining role of preventing circumstances, as indicated by the above *dicta*, illustrates that **Barkhuizen** is authority for the proposition that the presence of preventing circumstances is in fact the test for determining whether enforcement, at least of a provision providing for any time limitation, would be unfair and therefore contrary to public policy.

38. In the application of the test, preventing circumstances would therefore operate as a threshold; if no reason for the non-compliance with the term is provided, that would be the end of the inquiry. Should a reason be provided, the Court would then determine its cogency and in particular whether it pertains to preventing circumstances. The reason would then be weighed up against other potential considerations of public policy.

39. Part of the rationale for the inquiry into preventing circumstances was described Ngcobo J in the following terms:[57]

> "*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 consequences in these circumstances would be contrary to the doctrine of pacta sunt servanda. This would indeed be unfair to the respondent.*" (Our emphasis)

40. This passage of the judgment also confirms that, for example, innocent ignorance of the clause resulting in a neglect to comply will not constitute sufficient reason, if compliance had been possible.

41. In **Barkhuizen** the applicant launched his proceedings prior to this Court clarifying that also the enforcement of a contractual term could be avoided on grounds of public policy, if the complainant discharges his onus in that regard. The applicant's case in replication was merely that the clause itself was contrary to public policy.[58] It is therefore understandable that the applicant omitted to adduce evidence of the reason for his non-compliance.

42. The Lessees, however, have no such excuse. They approached the High Court on motion and on the express ground that enforcement of

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[57] **Barkhuizen** para [85]

[58] **Barkhuizen** para [5]

the renewal clause would be contrary to public policy.[59] They explain that they did so in reliance on **Barkhuizen**[60]. Yet, despite their onus, they failed to refer to any preventing circumstances. In this situation the inescapable inference is that there were no preventing circumstances and that they simply "*neglected to comply with the clause in the circumstances where they could have complied with it*", in the language of this Court in **Barkhuizen**.

43. The Lessees have thus simply failed the **Barkhuizen** test for unfairness of enforcement, and consequently failed the **Barkhuizen** test for enforcement being contrary to public policy.

THE BARKHUIZEN TEST APPLIED IN MOHAMED'S LEISURE

44. We turn next to refer to the SCA's decision in **Mohamed's Leisure**, for three reasons:

44.1 First, it is a recent judgment on the issue of whether the enforcement (implementation) of a clause in a lease, providing for a time limit, was contrary to public policy.

44.2 Second, the SCA applied the **Barkhuizen** test to the issue, without placing particular reliance on other (controversial) principles from previous SCA decisions, and held that such enforcement was not contrary to public policy.

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[59] **Record** Vol.1 p.13 para 24.2; **Record** Vol.1 p.23 para 47

[60] Applicants' Submissions para 5

44.3 Third, this Court unanimously dismissed the lessee's application for leave to appeal, on the basis that the appeal bore no prospects of success.[61]

45. The High Court[62] had considered the proportional prejudice either party would suffer resulting from eviction, as well as the Lessee's bank being to blame for the late payment, as being of crucial importance in its decision not to permit cancellation following breach.

46. On appeal the SCA considered the lessee's submissions regarding proportional prejudice and the lessor's lack of *bona fides*.[63] The SCA referred to certain of its own judgments, but consistently linked them to the supporting pronouncements of this Court in **Barkhuizen**. In the event the SCA found against the lessee by directly applying the **Barkhuizen** test. It did so in the following terms:[64]

> "*The following facts are critically relevant in the present case in applying the judgment of the Constitutional Court in Barkhuizen:*
>
> *(a) the terms of the contract are not, on their face, inconsistent with public policy;*
>
> *(b) the relative position of the parties was one of bargaining equality; … and*

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[61] Order dated 21 February 2018: **Record** Vol.7 p.727

[62] **Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd** 2017 (4) SA 243 (GJ) paras [27] – [35]

[63] **Mohamed's Leisure** (SCA) paras [19], [20], [30] & [31]

[64] **Mohamed's Leisure** (SCA) para [28]

> *(c) the performance on time was not impossible because the respondent could have diarised well ahead of time to monitor this important monthly payment and it could have effected other means of payment such as an electronic funds transfer. Against this background, it cannot be against public policy to apply the principle of* pacta sunt servanda *in this case*." (our emphasis)

47. The first two facts (*prima facie* consistency and bargaining equality) answered, in the negative, the first question of the **Barkhuizen** test, namely, whether the clause itself was unreasonable. The third fact (performance not impossible) answered, in the negative, the second question of the **Barkhuizen** test, namely, whether there were circumstances which prevented compliance with the clause.

48. The above quoted application of the **Barkhuizen** test contains and concluded the *ratio* for the SCA's decision. The final paragraphs of the judgment contain a brief discussion of the *ratio*, but did not add to it. Accordingly, the SCA's decision was not based on a simple conclusion that "*there were no public policy questions at play*", as the Lessees contend.[65] The SCA applied the absence of preventing circumstances as the test for the fairness of the enforcement of the time limit. This Court implicitly endorsed the SCA in dismissing the lessee's application for leave to appeal.

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[65] Applicants' Submissions para 81

BOTHA v RICH IS DISTINGUISHABLE

49. **Botha** was decided some four year prior to this Court's refusal of leave to appeal in **Mohamed's Leisure**. **Botha** principally concerned the interpretation and application of section 27(1) of the Alienation of Land Act in a contract of instalment sale.

50. Although this Court did not expressly refer to public policy or the **Barkhuizen** test, it also did not elevate notions of good faith or fairness to substantive rules of contract law. On the contrary, it endorsed the view that those notions underlie our law of contract, and have given rise to principles such as those of reciprocity and the *exceptio non adempleti contractus*.[66] Accordingly, in **Botha** this Court did not revisit or revise the **Barkhuizen** test.

51. In **Botha** this Court made the following two observations concerning disproportionality:[67]

51.1 "*In my view, to 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*."

51.2 "*For the same reasons mentioned above, granting cancellation – and therefore, in this case, forfeiture, in the circumstances*

[66] **Botha** paras [45] & [46]. See also footnote 64.

[67] **Botha** paras [49] & [51]

where three-quarters of the purchase price has already been paid would be a disproportionate penalty for the breach." (our emphasis)

52. Reading these two *dicta* together, this Court was of the view that:

52.1 in the particular statutory setting of that case, the sanction for breach of the instalment sale agreement would be cancellation resulting in (a) Botha's loss of her statutory right to claim ownership of the property and to cure her breach; and (b) forfeiture of three-quarters of the purchase price which she had already paid; and

52.2 as such, the sanction for breach would be disproportionate in relation to the considerable portion of the purchase price paid.

53. The facts and finding in **Botha** differ entirely from those in the present matter. Here there are no issues relating to an instalment sale governed by a unique statutory regime, forfeiture, breach, cancellation or sanction for breach. This case concerns the consequences of a failure to comply with the contractually agreed means by which to give effect to a right to conclude a new lease.

54. In the recent decision in **Atlantis Property**[68], the majority of a Full Bench of the Gauteng High Court similarly distinguished **Botha** and held that **Barkhuizen** would have applied, had the respondent opposed its eviction on the basis that the enforcement of the lease was contrary to public policy.

55. In the High Court, Davis J attempted to apply this Court's disproportionality observations in **Botha** to the very different facts of the present matter. In doing so the learned Judge did not refer to public policy and, with respect, mistakenly regarded this matter to involve the potential sanction of cancellation of the lease.[69] This prompted the SCA to observe that there is no principle that a disproportionate sanction for breach is unenforceable without more, but that a sanction which is contrary to public policy will not be enforced.[70] Nothing in **Botha** contradicts the SCA's discussion of the role played by public policy in the enforcement of contractual provisions.

56. The comprehensive judgment of this Court in **Barkhuizen**, containing principles and tests of general application, is particularly apposite to the facts of the present matter. It is accordingly submitted that the SCA was entirely correct in focussing on **Barkhuizen** instead, as it did in **Mohamed's Leisure**.

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[68] **Atlantis Property Holdings CC v Atlantis Exel Service Station CC** (A5030/2018) [2019] ZAGPJHC 160; [2019] 3 All SA 441 (GJ) at paras [30] – [31]

[69] **Record** Vol. 7 p.599 para [39]

[70] **Record** Vol. 7 p.636 para [38]

ALTERNATIVELY: PUBLIC POLICY CONSIDERATIONS FAVOUR ENFORCEMENT

57. Should this Court not agree with our interpretation and application of the **Barkhuizen** test, it is submitted in the alternative that:

57.1 at the very least, the **Barkhuizen** test places preventing circumstances as a paramount public policy consideration;

57.2 all the relevant public policy considerations must then be taken into account in a balancing process where the relative weight is assigned to each consideration; and

57.3 in such balancing process the absence of preventing circumstances will carry significant weight.

58. A further dominant consideration would be that if the Court were to validate the Lessees' failure to exercise the renewal option in accordance with the provisions of the leases, it would have the effect of the Court making new agreements for the parties. We have already made our submissions as to why the application of public policy cannot permissibly achieve such a result. If we are wrong in that regard, at the very least this novel use of public policy should not lightly be employed.

The Trust's public policy considerations

59. In paragraph 130 of their heads of argument, the Lessees identify four facts as relevant public policy considerations in their favour:

59.1 The potential collapse of a BEE franchise businesses;

59.2 The Lessees' compliance with their obligations under the leases;

59.3 The lack of prejudice to the Trust if the leases are renewed;

59.4 The Trust's failure to utilise the benefits of the six month notice period by canvassing new tenants.

60. We submit that the Lessees' four considerations are substantially outweighed by the following public policy considerations:

60.1 The absence of preventing circumstances.

60.2 The relief sought by the Lessees would have the effect of the Court creating new leases for the parties.

60.3 The emasculation of *pacta sunt servanda*, buttressed by the constitutional values of freedom and dignity and the principle of legality. The rule that agreements must be honoured provides certainty, not only as required in commerce but by "the coherence of any society".

60.4 The Trust is the owner of the premises. It accordingly has a fundamental right to property in respect thereof, which is of indefinite duration. The Lessees' right of tenancy, on the other hand, does not enjoy constitutional protection. It is, by its very nature, of limited duration.

60.5 The Trust has an obvious interest in the time limit and common law requisites of the renewal option, as it provides commercial

certainty as to whether its property would be encumbered by a new lease or whether the Trust could exploit its property as it wishes, and allows the Trust to plan accordingly.

60.6 The Trust has a fundamental right to associate and to disassociate with whomsoever it wishes.[71] This is particularly relevant in the context where it exercises such freedom, not by purporting to cancel the lease, but merely electing not to enter into a new lease.

60.7 The right to freedom of disassociation implies that it can be exercised without the necessity of disclosing the motive therefor. The Trust's motive for electing not to renew a lease is accordingly irrelevant.

60.8 By granting the relief sought the Court would be coercing the Trust to conclude leases with tenants whom it does not want to have as tenants any longer.[72]

60.9 The renewal option is not an atypical or obscure term of the lease. It relates directly to its duration. To a businessman - of any level of sophistication - the duration of a commercial lease would be vitally important. The uncomplicated covering summary schedule[73] of the lease makes it crystal clear that the

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[71] Constitution of the RSA, section 18

[72] **Roazar CC v The Fall Supermarket CC** 2018 (3) SA 76 (SCA) para [24]

[73] **Record** Vol. 1 p.51 item 7.2

lease would terminate on 31 July 2016, as confirmed by the duration clause.[74]

60.10 The renewal option contained in clause 20.1 is, equally, couched in simple language.

60.11 The representatives of the Lessees had previously been store or regional managers[75] and were evidently aware that giving notice was required from them in order to renew the leases. They were not completely ignorant individuals.

The Lessees' public policy considerations

61. The fact that the non-renewal of each lease may lead to the collapse of a BEE franchise business carries limited weight as a public policy consideration, by reason of the following:

61.1 Horizontally, the right to equality is infringed only by unfair discrimination as prohibited by section 9(4) of the Constitution. Allowing a lease to terminate through effluxion of time does not constitute an act of discrimination, merely because the termination would happen to impact negatively upon a BEE initiative, which, in turn, is broadly aimed at the promotion of equality.

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[74] Clause 3.1, **Record** Vol. 1 p.58

[75] **Record** Vol.1 p.25 para 51

61.2 By its very nature, a lease agreement is of limited duration. Consequently, termination of a lease through effluxion of time invariably has some measure of impact on the lessee's or even third parties' fundamental rights, such as access to housing (residence), trade, property in the form of goodwill (business), basic education (school), or access to health care services (clinic).

61.3 *Pacta sunt servanda* should therefore not be relaxed simply because a particular lease serves a constitutionally laudable endeavour.

61.4 In any event, the BEE initiative has been fulfilled, to the extent that the franchisees have repaid their loans[76] and have had the benefit of five profitable years of business.

61.5 In the process the franchisees doubtless acquired experience and expertise which they will be able to continue to exploit outside the particular franchise.

61.6 As the SCA pointed out,[77] it was not the Trust, but the Lessees, through their unexplained non-compliance with the renewal clause, who jeopardised their businesses.

62. The fact that the Lessees had complied with their obligations under the leases is a neutral fact in the present public policy analysis. The

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[76] **Record** Vol.5 p.508 para 35

[77] At para [44]

Lessees paid rental during the five year lease period, in exchange for which they had the benefit of operating their businesses from the premises for the same period.

63. It is incorrect that the Trust would not be prejudiced if the leases were renewed:

63.1 Forced renewal would mean that the Trust is unable to rely on the right afforded by the renewal option to allow the lease over its property to come to an end.

63.2 As pointed out earlier, forced renewal coerces the Trust into leases with tenants whom it clearly does not want as tenants any longer.

64. The Trust's "*failure to utilise the benefits conferred on it by the six month notice period*" is not a relevant public policy consideration.

64.1 The purpose of the six month notice period is to provide early certainty to the Trust as to whether it would be locked into a further five year lease or is free to exploit its property as it chooses. Such exploitation may include the Trust itself utilising the property, or selling it free of a lease.

64.2 The notice period is therefore not only aimed at providing the Trust with the opportunity to find a new tenant.

CONCLUSION

65. Accordingly, the First Respondent seeks an order in the following terms:

65.1 That the application for leave to appeal be dismissed;

65.2 Alternatively, that the appeal against the judgment of the SCA be dismissed;

65.3 That the First to Fourth Applicants be directed to pay the costs of the application for leave to appeal, including the costs of two counsel.

JEREMY MULLER SC

HL DU TOIT

First Respondent's Counsel
Chambers
Cape Town
14 August 2019