Atlantis Property Holdings CC v Atlantis Exel Service Station CC 2019 JDR 1012 (GJ)

Citation	2019 JDR 1012 (GJ)
Court	Gauteng Local Division, Johannesburg
Case no	A5030/2018; 40742/2017
Judge	L Windell J and I Opperman J
Heard	February 18, 2019
Judgment	April 11,2019
Appellant/ Plaintiff	Atlantis Property Holdings CC
Respondent/ Defendant	Atlantis Exel Service Station CC

Summary

Contract — Breach — Remedies — Cancellation — Whether party claiming cancellation obliged to act in good faith — Majority decision holding law of contract imposing no such obligation — Minority decision holding that Constitutional Court developed such obligation, and that it was bound thereby as opposed to contrary Supreme Court of Appeal authority.

Lease — Cancellation — Whether party claiming cancellation obliged to act in good faith — Law of contract imposing no such obligation, nor was such obligation developed by Constitutional Court.

Judgment

Windell J and Opperman J:

INTRODUCTION

[1] The appeal turns on a narrow question namely the interpretation of a written, fixed term, commercial lease agreement *("the agreement"*).

[2] The parties concluded the agreement in August 2016. In terms thereof, the respondent let from the appellant certain immovable property (*"the property"*) with effect from 1 March 2016. The property was rented and utilised by the respondent for the purposes of conducting a fuel filling station and a convenience store. In terms of the agreement the respondent occupied the property for a period of 6 (six) months *("the initial period")* after which the lease was extended for a period of 3 (three) years *("the renewal period"),* subject to the respondent having maintained its rental payments during the initial period. Approximately seventeen months after the conclusion of the agreement, and whilst the agreement was in the renewal period, the appellant terminated the agreement in terms of clause 22.1 which provides that the agreement may be terminated by either party serving the other notice of its intention to cancel the lease upon 30 (thirty) calendar days' notice. In terms of the cancellation letter, the respondent had to vacate the property on or before 31 July 2017. The respondent refused to vacate which led to the launch of an application for eviction on 25 October 2017.

[3] The eviction application was dismissed with costs by the court *a quo*. In essence the judge found that it would be untenable to interpret clause 22.1 to mean that the agreement permits either party to "escape" the fixed term agreement on 30 (thirty) days' notice. She held that the clause can only have a sensible meaning if it is taken to refer to the time period after the renewal period has run its course and the tenant has either exercised its option to renew the agreement or has been renewed tacitly. In other words, the court held that clause 22.1 was intended only to have application

after the expiry of the renewal period.

BACKGROUND FACTS

[4] The appellant alleged that the respondent had committed a number of breaches. It was as a result of these breaches that it elected to invoke the provisions of clause 22.1. Therefore, in compliance with clause 22.1, the appellant's attorney wrote to the respondent on 28 June 2017 informing the respondent of the cancellation of the agreement and that it was required to vacate on or before 31 July 2017. In the letter the appellant accused the respondent of not having a retail licence to sell Sasol products; that it had failed or refused to make payment of the rates and taxes, utility and services charges and that it was in arrears; that it had illegally tampered with the electricity meter in order to avoid paying in full for the consumption of electricity and that it had caused damage to the on-site generator which had to be repaired. The respondent responded to the letter, denied the alleged breaches and proposed a round table meeting to resolve the issues in an amicable manner. The appellant replied that it was not interested and was of the opinion that *'the time for negotiations has long past'* and '*it was simply not prepared to expend time and money on issues that are not capable of being resolved'*.

[5] The respondent refused to vacate and the appellant subsequently instituted an application wherein it sought the eviction of the respondent within 14 days of the order. In the answering affidavit the respondent disputed that it had committed any breach or that the agreement had been lawfully cancelled by the appellant. It contended that all amounts invoiced by the appellant had been paid and that Sasol's

termination of the supply agreement between Sasol and the respondent was as a result of false representations made by the appellant's sole member Bezuidenhout, to Sasol, and that Sasol was not entitled to terminate such agreement. The respondent also alleged that the appellant had, during the renewal period, decided to sell the property. Bezuidenhout and her employees then started harassing and hounding the respondent to get the respondent to vacate the property as the appellant was unable to sell it to its prospective buyer in circumstances where the respondent continued to lease the property. The respondent stated that it believed that the prospective buyer was insisting that the respondent vacate the property prior to any sale materialising. Accordingly, the respondent's continued occupation of the premises became a major impediment to the appellant selling to the prospective buyer. For this

reason the appellant began falsely accusing the respondent of various misdemeanours and breaches.

[6] The respondent further complained about the fact that, although the appellant had referred to the various alleged breaches by the respondent in its cancellation letter, it had failed to provide the respondent with 7 (seven) calendar days written notice to remedy the alleged breaches as it was obliged to do in terms of clause 20.1 *("the breach clause")* of the agreement. In par 21 of its answering affidavit the respondent contended as follows:

> "21. Accordingly the Applicant is not entitled to utilise the provisions of clause 22.1 to cancel the lease agreement. Quite clearly clause 22.1 is a remedy which can only be utilised after various breaches of annexure MHB2 has occurred and the Respondent has failed to remedy the said breaches within a seven (7) calendar day written notice. Clearly annexure MHB2 is not a monthly lease agreement and clause

> 22.1 does not afford the Applicant the right to cancel the said lease agreement on one month's notice prior to the expiry of the full term of annexure MHB2."

[7] In reply, the appellant persisted that the respondent was in breach of the agreement but averred that, as the agreement was terminated in terms of clause 22.1, and not in terms of the breach clause, it was not necessary to deal with the breaches in reply any further. It denied that the Sasol agreement was terminated as a result of misrepresentations by Bezuidenhout. It contended that the reason for the termination can be gleaned from Sasol's termination letter attached to the founding affidavit, namely that respondent had been trading without a retail license and that the respondent had on numerous occasions procured petroleum products from other suppliers without Sasol's consent. The appellant drew attention to the fact that, although the respondent had alleged that it was as a result of misrepresentations by Bezuidenhout that Sasol had cancelled the lease (which the appellant denied), the respondent had not disputed that it was trading without a licence and that it had procured petroleum products from other suppliers.

INTERPRETATION OF THE AGREEMENT

[8] The agreement provides for cancellation of the agreement in the event of a breach (Clause 20), and on 30 (thirty) days' notice (Clause 22). In cancelling the agreement the appellant invoked clause 22 and the application for eviction was based solely on the right to terminate in terms of clause 22. Clause 22 provides as follows:

> ***"*22. CANCELLATION OF LEASE**
>
> 22.1. The LESSOR and the LESSEE expressly and irrevocably record that this Lease may be terminated by either Party serving the other notice of its intention to cancel this Lease and upon 30 (thirty) calendar days' notice.
>
> 22.2 In the event that the LESSEE serves such a notice as described in clause 22.1 on the LESSOR; the following shall occur:
>
> 22.2.1. The LESSEE shall not be entitled to withhold any of the payments due under this Agreement during the 30-day period, notwithstanding when the LESSEE vacates the premises; and
>
> 22.2.2. The LESSEE shall immediately upon expiry of the 30- day period (or on any date prior to the expiry of this period) vacate the property. Upon the LESSEE

vacating the property the LESSEE shall not be entitled to remove any improvements to the PREMISES without the express written consent of the LESSOR.

22.3. In the event that the LESSOR serves such a notice as described in clause 22.1 on the LESSEE; the following shall occur:

22.3.1 The LESSOR shall be entitled to attend at the PREMISES with any prospective new tenant for the PREMISES and for purposes of allowing the prospective new tenant to view the PREMISES."

[9] The breach clause provides for the following:

"20. BREACH

20.1. In the event of the LESSEE committing a breach of any of the terms in this agreement and failing to remedy the breach within a period of 7 (Seven) calendar days after despatch of written notice calling upon the LESSEE to remedy the breach complained of, then the LESSOR shall be entitled, at its sole discretion and without prejudice to any of its other rights in law and or in terms of this agreement, either to claim specific performance of the terms contained in this Agreement or to cancel this agreement forthwith and without further notice, claim damages from the LESSEE, provided that if the

LESSEE commits a breach of the provisions of this agreement 3 (Three) times in any calendar year, then, upon the third breach, the LESSOR shall be immediately entitled to implement either of the above remedies, without first having to give the LESSEE written notice to rectify such breach.

20.2. Should this agreement be cancelled by the LESSEE for any reason whatsoever, the LESSEE and / or any other person occupying the PREMISES, shall immediately vacate the premises and allow the LESSOR to take occupation thereof.

20.3. Should either Party cancel alternatively should the LESSEE breach any provision of this Lease and fail to remedy same within 7 days of notice being transmitted to it to do so and the LESSEE remains in occupation the Premises, the LESSOR shall be entitled to immediately:

20.3.1. Make claim for the ejectment of the LESSEE from the Premises; and

20.3.2. To claim the full outstanding Rental amounts, as they would have been escalated in the future, for the remaining period over this Lease Agreement from the LESSEE as damages for the cancellation alternatively breach of the Lease Agreement.

20.4. Should the LESSOR cancel this Lease and the LESSEE dispute the said right to cancel the Lease and in the event that the LESSEE remains in occupation of the PREMISES, the LESSEE shall pending the determination of the dispute, continue to pay all amounts due by LESSEE in terms of this Lease on the due date thereof and the LESSOR shall be entitled to accept and recover such payments without prejudice to the LESSOR's claim for cancellation of this Lease or any other claims which the LESSOR may have arising out of such cancellation. Should the dispute be determined in favour of the LESSOR the payments made in terms of this clause shall be deemed be amounts paid by the LESSEE on account of damages suffered by LESSOR by reason of the cancellation of the Lease Agreement or the Unlawful holding over by the LESSEE or both.

[10] As stated earlier, after the initial period, the lease was renewed for a period of 3 (three) years. In terms of the agreement the Lessee is granted the option to renew

the lease on the same terms and conditions contained in the agreement after the expiry of the renewal period (Clause 4.1). The Lessee must exercise this option by giving written notice to the Lessor by no later than 3 (three) calendar

months prior to the expiry date of the agreement. It is common cause that the agreement was cancelled by the appellant before the expiry of the renewal period.

[11] In essence, the dispute between the parties centred on whether the appellant could cancel the agreement before the expiry of the fixed term. In the court *a quo* and in this appeal the respondent pinned its argument on two bases. **Firstly**: The agreement was not a monthly lease agreement and the appellant therefore did not have the right to cancel the agreement in terms of clause 22.1 before the expiry of the renewal period: **Secondly**: The appellant was not entitled to utilise the provisions of clause 22.1 to cancel the agreement as it is a remedy that can only be utilised after various breaches have occurred and the respondent has failed to remedy the breaches within seven (7) calendar days as provided for in the breach clause.

[12] The court *a quo* found that the cancellation under clause 22.1 was invalid given that the lease was still within its 3 (three) year renewal period. It held that as *"it is a normal approach to written leases generally that, on expiry of their defined period they are allowed to run from month- to- month"* that clause 22.1 refers to the time period after the initial and renewal periods have run their course and there has been an option to renew the lease exercised by the respondent and accepted by the appellant.

The right to cancel a fixed term lease.

[13] It is trite that in the interpretation of a document the *'inevitable point of departure is the language of the provision itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document'*. [1]

[14] There was no special factual matrix present at the time that the agreement was entered into that either party relied upon in this matter; neither is there subsequent conduct that was contended could influence the interpretive exercise. The agreement must accordingly be interpreted within the four corners of the document and within the limited factual matrix which results once the *Plascon Evans* [2] test has been applied, interpretation being a unitary exercise. However, the starting point remains the words of the document which are the only relevant medium through which the parties have expressed their contractual interests. Consideration must be given to the language used in the light of the ordinary rules of grammar and syntax. [3] Interpretation of an agreement does not stop at the literal meaning of the words. The court must have regard to the context in which the words in the contract were utilised to

[1] *Natal Joint Municipal Pension Fund v Endumeni Municipality 2012 (4) 593 (SCA)* at p604 C-D.

[2] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd*, 1984 (3) SA 623 (A)

[3] *Endumeni* at p614 A-B.

establish the intention of the parties. [4]

[15] The language used in clause 22 is unambiguous and clear. The parties

recorded that they '**expressly and irrevocably**' agree that the agreement may be terminated by either party giving 30 (thirty) days' notice. Clause 22.1 is a standard termination on notice clause commonly found in commercial contracts. It affords the right to both the appellant and the respondent to cancel the agreement by giving 30 (thirty) days' notice. It is not uncommon for parties to agree to combine characteristics of a fixed period lease with that of a periodical lease. This is known as a hybrid lease. Kerr [5] comments that in this way the parties have the security of a fixed term lease if the relationship is successful, but, if the circumstances change, the parties have the contractual flexibility to terminate the lease early. The appellant and the respondent clearly elected to introduce into their commercial relationship the flexibility that termination on notice would afford and there is no part of the language in clause 22.1 that does not communicate the unmistakable intention that both parties sought to preserve for themselves a right of "escape", on 30 (thirty) calendar days' notice.

Is Clause 22 only applicable in the event of a breach?

[16] The answer is that clause 22 is not only applicable in the event of a breach. Clause 22 not only provides for the cancellation of the agreement upon 30 (thirty) days' notice, but also regulates the position of both parties after such cancellation which is to be distinguished from the position of the parties in the event of a breach. Clause 22.2 provides that should the **Lessee** cancel, the Lessee shall vacate the

property immediately upon the expiry of the 30 (thirty) day period and the Lessee shall not be entitled to withhold any of the payments due under the agreement during the 30 (thirty) day period. In the event of the Lessor cancelling (clause 22.3), it makes provision for the **Lessor** to attend at the premises with any new prospective tenant for the purposes of allowing the prospective new tenant to view the premises. Clause 22 however does not specifically deal with the position of the Lessee in the event of cancellation by the Lessor. Clause 20.3, under the heading "BREACH" does. It provides that should **either** party cancel, **and the Lessee remains in occupation of the premises**, the Lessor shall be entitled to immediately make claim for the ejectment of the Lessee from the premises, and to claim the full outstanding rental amounts, as they would have escalated in the future, for the remaining period over the agreement from the Lessee as damages for the cancellation, alternatively breach of the agreement. At first glance there appears to be an ambiguity between clauses 22.2 and 20.3. But, looking at the contract as a

[4] *Novartis SA (Pty) Ltd v Maphil Trading (Pty) Ltd* 2016 (1) SA 518 (SCA) at [28].

[5] Kerr's Law of Sale and Lease Fourth Edition at page 371.

whole, it is only superficially problematic. Clause 20.3 read with Clause 22.2, clearly regulates the position where the Lessee refuses to vacate **after the expiry of the 30 (thirty) days' notice** and where it remains in the property. Should the lessor claim damages for the full unexpired portion it would of course remain open to the lessee to invoke the provisions of the Conventional Penalties Act, 15 of 1962. This feature does, however, not form part of this appeal. It may well be that the lessee could, under such circumstances argue that the implementation of such clause is against public policy.

Does Clause 22 apply in the period after the renewal period?

[17] The court *a quo* did not accept that clause 22 permits either party to cancel the agreement by giving 30 days' notice. She found that *"the clause can only have sensible meaning on the basis that it must be taken to refer to the time period after the prescribed initial and renewal periods have run their course and there has been an option to renew the lease exercised by the tenant and accepted by the landlord*."

[18] In arriving at this conclusion, the court *a quo* relied on clause 5.13. Clause 5.13 reads as follows:

> "5.13 Should the LESSEE vacate the PREMISES for any reason whatsoever within the Lease period, it shall be liable for the Rental payable for the full balance of the duration of the Lease period, until a suitable tenant has been found, as well as all costs including any Estate Agent's fee to source a suitable tenant;"

The judge held that it cannot mean that the Lessee can simply be given 30 (thirty) days to vacate the premises and that the Lessor would then be entitled to claim the full balance for the duration of the unexpired period of the lease until a suitable tenant has been found.

[19] This interpretation, in our view, fails to have due regard to what is set out in the ensuing clauses. Clause 5.13 specifically refers to a scenario where the Lessee **vacates** the premises for any reason outside the parameters already discussed. Clause 5.13 should not be read in isolation. In the context of the whole agreement, clause 5.13 is clearly not applicable to the situation where the **Lessor** cancels the agreement and where it gives notice to the Lessee to vacate in terms of clause 22.1. In the language of clause 22, the parties wished to emphasise their right to cancel

by mere notice, by recording "expressly and irrevocably" that the lease may be terminated upon 30 (thirty) days calendar notice. This clear language rules out any right of notice that would apply only during the period of the lease post the renewal period. There was therefore no reason for the court *a quo* to attach a meaning to clause 22 that was not intended by the parties. The court succumbed to the temptation to substitute what it regarded as reasonable, sensible and business-like for the words actually used, and failed to have regard to the constraints of the language. It is not within the power of a court to rewrite the agreement on terms that might be more commercially suitable or sensible. If parties conclude a clear agreement that is, in the view of the court, a bad agreement, even if only for one party (in this case both parties benefit

from the provisions of the clause) this does not provide a basis upon which a court can rewrite the agreement between them.

[20] As a last resort the respondent contended that the appellant had, to a large extent, prefaced both its cancellation letter and its founding affidavit on the respondent's alleged breaches of the agreement. Accordingly, there was nothing preventing the appellant from proceeding in terms of the breach clause for the eviction of the respondent from the leased premises. There is no merit in this argument. Clause 22.1 clearly provides the appellant with an alternative option to evict the respondent and the appellant is entitled to rely on clause 22.1. The appellant has given the requisite notice and has terminated the agreement. There is no other cogent defence advanced in the answering affidavit by the respondent, and accordingly the relief sought in the notice of motion should have been granted.

Public policy and good faith

[21] During the hearing of the appeal our brother Vally J, for the first time, raised the issue of good faith and subsequently penned a judgment based on it. We have had the benefit of reading the judgment. We disagree with him. These are our reasons.

[22] The scope and impact of public policy and good faith on private contracts has been considered by the Supreme Court of Appeal ("*the SCA"*) on more than one occasion now. In two recent matters the High Court granted leave to appeal to the SCA to specifically address these issues. In *Mohamed Leisure Holdings Pty Ltd v Southern Sun Hotel Interests (Pty) Ltd* [6] , Van Oosten J, in the court *a quo*, had held that although the respondent had agreed to the cancellation clause in a lease agreement, the eviction could not succeed as the implementation of the cancellation clause would be manifestly unreasonable, unfair and offend public policy. He further held that the common law principle of *pacta sunt servanda* should be developed by importing or infusing the principles of *ubuntu* and fairness into the law of contract. On appeal, the respondent argued that the breach clause should be interpreted to mean that parties to a contract ought to act in good faith which would render the clause flexible to accommodate the circumstances where a party is prevented by factors beyond her control from complying with the requirements of the clause. The respondent further contended that by giving effect to the clause it would be so manifestly unreasonable that it would offend public policy (as constituted by the

concept of good faith, *ubuntu*, fairness and simple justice between individuals) and the Court was obliged to, in construing the impugned clause, promote the spirit, purport and objects of the Bill of Rights. The SCA found in favour of the landlord and dismissed the appeal.

[6] 2018 (2) SA 314 (SCA).

[23] In coming to this conclusion, Mathopo JA discussed, with reference to *Barkhuizen v Napier,* [7] how the question of substantive fairness of a contract (or a contractual clause) is to be approached in its application of the contractual doctrine of the public policy test. He held as follows:

> "The Constitutional Court introduced a second (subjective) stage to the public policy test in terms of which a contract (or contractual clause) must not only be objectively reasonable in order for it to be valid but its effect must also be subjectively reasonable in the particular circumstances in order for it to be enforceable. This approach facilitates a more purposive adjudication and a substantively fair outcome for contracting parties." [8]

[24] The SCA considered that there was no complaint that the impugned clause was objectively unconscionable and no allegation was made that the lease agreement was not concluded freely. There was also no evidence or contention advanced by either of the parties that there was an unequal bargaining power between them. Evidently the respondent was at all material times aware or must have been aware of the implications of the cancellation clause. It was therefore held that against this

background, it cannot be against public policy to apply the principle of *pacta sunt servanda.* At par [30] and [32] the court concluded as follows:

> "[30] 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. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party's relative power is an issue. There is no evidence that the respondent's constitutional rights to dignity and equality were infringed. It was impermissible for the high court to develop the common law of contract by infusing the spirit of *ubuntu* and good faith so as to invalidate the term or clause in question.
>
> [32] The result may well be unpalatable to the respondent. It must therefore bear the consequences of its agent's (bank) failure in paying the October rental on due date. Its defence was clearly to restrict the lawful reach of the contract and to limit what can be regulated by way of a contractual agreement between parties, in circumstances where the terms of the contract were clear and unambiguous. In this case the parties freely and with the requisite *animus contrahendi* agreed to negotiate in good faith and to conclude further substantive agreements which were renewed over a period of time. 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."

[25] The respondent, aggrieved by the SCA's decision, applied to the Constitutional Court for leave to appeal. It was refused.

[26] In the matter of *The Trustees for the time being of the Oregon Trust v Beadica* 231 CC [9] , Davis J granted leave to appeal against his orders on the basis that "*his decision turned on the development of jurisprudence flowing from the decisions of*

[7] 2007 (5) SA 323 (CC).

[8] At [15].

[9] 2019 JDR 0602 (SCA).

the Constitutional Court in Everfresh and Botha and that the issue ought to be determined by the SCA." [10] He found the following factors to be relevant considerations in determining that the 'sanction' of termination and eviction was disproportionate to the failure by the Lessees to properly and timeously renew the leases:

> "(1) The Lessees were unsophisticated business people who did not understand the contractual provisions and their niceties and implications.
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> (2) The purpose of the whole scheme and the cooperation agreement with the NEF was to promote black economic empowerment (BEE) and the full participation by previously disadvantaged individuals in the economy. The application of the strict terms of the contracts would have been inimical to the empowerment project.
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> (3) The NEF had supported the Lessees and had provided supporting affidavits to the effect that they had complied with their obligations under the franchise agreements, repaying their loans timeously. The franchisees would inevitably lose their businesses if they were to be evicted.
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> (4) The leases were tied to the franchise agreements, and it was envisaged when the respective agreements were concluded that because the franchise agreements would endure over 10 years that the leases would effectively be of the same duration – hence the right to renew the leases for a further five years. The two agreements, are therefore inextricably bound to each other." [11]

[27] The SCA dismissed the appeal and found that the issue remains one of public policy and although fairness and reasonableness inform policy they are not self-

standing principles. This is also the position that the Constitutional Court took in Barkhuizen *v Napier* [12] *.* Ngobo J, writing for the majority, said the following:

> "[27] What then is the proper approach of constitutional challenges to contractual terms where both parties are private parties? ……...
>
> [28] Ordinarily constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community; it represents those values that are held most dear by the society. ……
>
> [30] In our view 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. This approach leaves space for the doctrine of *pacta sunt servanda* to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore, that the approach that was followed by the High Court is not the proper approach to adjudicating the constitutionality of contractual terms."

[28] Recently, in *AB and Another v Pridwin Preparatory School and Others,* [13] Cachalia JA stated that the relationship between private contracts and their

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[10] *Beadica 231 CC and Others v Trustees Oregon Trust and Another* 2018 (1) SA 549 (WCC).

[11] *Beadica* supra at [40]

[12] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) paras 27-30.

[13] 2019 (1) SA 327 (SCA) at [27]

control by the courts through the instrument of public policy, underpinned by the Constitution, is now clearly established and that it is unnecessary to rehash all the learning from our courts on this topic. At par [27] he sets out the most important principles to be gleaned from them:

> "(1) Public policy demands that contracts freely and consciously entered into must be honoured;
>
> (2) A court will declare invalid a contract that is *prima facie* inimical to a constitutional value or principle, or otherwise contrary to public policy;
>
> (3) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;
>
> (4) The party who attacks the contract or its enforcement bears the onus to establish the facts;
>
> (5) 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;
>
> (6) 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."

[29] The parties had agreed on a right to cancel the agreement upon 30 days' notice. The termination of the agreement in terms of clause 22 does not offend any identifiable constitutional value and is not otherwise contrary to any other public policy consideration. It is fundamentally fair that each party should know what their bargain is and should be entitled to rely on it unless it offends public policy including the values embedded in the Constitution. [14]

[30] Vally J has placed much reliance on the dicta at paras [45] to [46] in *Botha v Rich NO* [15] . Not only were the facts materially different to the current situation but the case also dealt with the interpretation and application of legislation dealing with property acquisition. The core question was whether a purchaser as contemplated in section 27(1) of the Alienation of Land Act, 68 of 1981 ("*the Act*"), was limited to cancellation ie whether the legislation had ousted the common-law remedy of specific performance. The Constitutional Court held that specific performance was available to such a purchaser. That being so, Mrs Botha was, relying on section 27, entitled to insist on registration of the property into her name against payment of all arrears. The origins of the *exceptio non adimpleti contractus* were explored in paragraphs [45] and [46] of the judgment. The comments were made in the context of the legislation under discussion and the application thereof to the particular facts.

[31] More problematic though is the fact that the respondent did not oppose the application for its eviction on the basis that the enforcement of the agreement was contrary to public policy and the respondent provided facts to support a case that the enforcement of clause 22 offends public policy in the circumstances of this case. As stated above, fairness and reasonableness are

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[14] *Roazar CC v The Falls Supermarket CC*, 2018 (3) SA 76 (SCA) at para [20] and [23]

[15] 2014 (4) SA 124 (CC)

not free-standing grounds which can be used to impugn the terms of a contract. In any event, there is nothing on the face of clause 22.1, or intrinsically, that offends any constitutional value or principle or is otherwise contrary to public policy. In *Barkhuizen*, Ngobo J stated 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 a good reason why there was a failure to comply."

[32] This court is bound by the facts as set out in the papers and the pleadings. In his judgment, Vally J accepts that clause 22.1 allows either party to escape the agreement on 30 (thirty) calendar days' notice. He however then proceeds to find that clause 22.1, while there for the benefit of both parties, can only be invoked by either of them when acting in good faith. Assuming, without accepting, that considerations of good faith could be applied in the manner advocated by our brother Vally J, the factual substrata for a finding of the absence of good faith, is precarious. By way of example: The appellant attached to its founding affidavit a letter from Sasol in terms of which Sasol had cancelled its agreement with the respondent on the basis that the respondent had been trading without a retail license and had procured petroleum products from foreign suppliers without Sasol's consent. The respondent contended that Sasol had cancelled the agreement as a result of representations made by the appellant to Sasol. What the respondent did not do is to dispute the correctness of the reasons for the termination. For purposes of this application therefore it must be accepted that the respondent did not have a license and that it procured petroleum products from foreign suppliers without Sasol's consent.

[33] It is accepted by all three judges of this full court that clause 22 is not *prima facie* contrary to public policy. What needs to be shown is that the enforcement, in the particular circumstances of this case, is against public policy. The high water

mark of the respondent's case, as per our brother's understanding of the facts, is that the appellant had not intended for the respondent to remedy its breach/es, but rather, that it wanted to sell its property. This objective, ie to want to sell ones property, is not in conflict with any constitutional value and it follows that there can exist no impediment against the enforcement of clause 22 on this basis.

[34] Vally J further finds that the respondent in essence raised the *exeptio doli generalis* defence because '*the respondent maintains that the appellant's invocation of clause 22.1 is mala fide, or to put it differently, the appellant is not acting in good faith by invoking the clause'* and *'that clause 22.1 is not being utilised for purpose'.* Such assertion is not supported by the facts or by legal argument i.e the *exceptio doli generalis* was not mentioned by name, or in substance, and was never the case for the respondent. The unenforceability of clause 22.1 or the absence of good faith in invoking clause 22.1 was not raised on the papers. This was not an issue before us nor was it dealt with in the

judgment of the court *a quo*. It would be undesirable for this court to deal with important issues of law without the benefit of legal argument from the litigants. In *Cape Town City v Aurecon SA (Pty) Ltd,* [16] the Constitutional Court stressed the fact that the benefit of full argument is indispensable in the decision-making process and to *"proceed unaided with complex legal questions is likely to give rise to unpredictable and altogether unintended consequences".* The respondents' case, as can be gleaned from the heads of argument, was simply that on a proper construction of the agreement the

appellant was not entitled to terminate the agreement on 30 (thirty) calendar days' notice during the renewal period. [17]

[35] It is further trite that a party must plead its cause of action in the court of first instance so as to warn other parties of the case they have to meet and the relief sought against them. This is a fundamental principle of fairness in the conduct of litigation and promotes the parties' rights to a fair hearing which is guaranteed by section 34 of the Constitution. [18] In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd,* [19] the court declined to deal with the issue of good faith because the appellant had failed to properly raise the issue before the high court and dismissed the application. This court did not have the benefit of legal argument nor was this issue fully ventilated at the hearing. In *Albutt v Centre for the Study of Violence and Reconciliation and Others,* [20] the Constitutional Court observed the following:

> "Sound judicial policy requires us to decide only that which is demanded by the facts of the case and is necessary for its proper disposal. This is particularly so in constitutional matters, where jurisprudence must be allowed to develop incrementally. At times it may be tempting, as in the present case, to go beyond that which is strictly necessary for a proper disposition of the case. Judicial wisdom requires us to resist the temptation and to wait for an occasion when both the facts and the proper disposition of the case require an issue to be confronted. This is not the occasion to do so".

CONCLUSION

[36] This case concerns the interpretation of clause 22.1 of the agreement which, we have all agreed, entitles the parties to escape the agreement during the renewal period. The unenforceability of clause 22.1 based on the *exeptio doli generalis* or otherwise, [21] was never raised by the respondent.

[37] Because it wasn't raised we do not consider it appropriate to entertain it.

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[16] 2017 (4) SA 223 (CC).

[17] See paragraphs 2.14, 4.11, 5.1, 5.1.1, 5.1.2 of the respondent's heads of argument.

[18] *South African Police Service v Solidarity obo Barnard* [2014] ZACC 23 at [202]

[19] 2012 (1) SA 256 (CC).

[20] 2010 (3) SA 293 (CC).

[21] The concepts of bona fides, disproportionality, *mala fides* are used in various contexts.

Having said that, and should we be wrong on this, we would be compelled to conclude that our brother Vally J's construction of the law on this issue is misplaced. Having regard to our understanding of the law relating to the role of good faith and reasonableness in the law of contract as it has developed and as summarised herein, we would conclude that it cannot be against public policy, in the circumstances of this case, to apply *pacta sunt servanda*.

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

(1) The appeal is upheld.

(2) The order of the court *a quo* is substituted with the following order:

1. The applicant's termination of the lease agreement dated 9 August 2016 in respect of the premises described as the Fuel

Filling Station and Convenience Store situated at 81 La Rochelle Road, Trojan, Johannesburg ('the premises') is declared to be lawful effective 31 July 2017.

2. The respondent is evicted from the premises and:
   a. is ordered to vacate the premises within a period of 14 (fourteen) days from the date of this order;
   b. in the event that the respondent fails to vacate the premises within the period stated herein, the Sheriff of the High Court, Gauteng Local Division, Johannesburg, or his lawfully appointed deputy, is authorised and directed to evict the respondent and all persons holding title by, through or under it from the premises.
3. The respondent is ordered to pay the costs of the application in the court *a quo* on the scale as between attorney and client.

(3) The respondent is ordered to pay the costs of the appeal, including the costs in respect of the application for leave to appeal, on the attorney and client scale.

L.WINDELL

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

I agree

I.OPPERMAN

JUDGE OF THE HIGH COURT

GAUTENG LOCAL DIVISION, JOHANNESBURG

APPEARANCES

Counsel for the Appellant:	Advocate D. Vetten
Instructed by:	Edward S Classen & Associates
Counsel for the Respondent:	Advocate S. L. Ress
Instructed by:	Naiker Ooni Wadia Inc

Judgment

Vally J:

Introduction

[1] The appellant is aggrieved at having failed to secure an order in the court *a quo* (presided by Fischer J) where it sought to evict the respondent from its premises. The appellant is also aggrieved at having to pay the costs incurred by the respondent for defending itself against the endeavours of the appellant. The court *a quo* granted it leave to ventilate its grievance in this court in the hope that it could be relieved of the burden of the order made against it.

The lease agreement

[2] The appellant and the respondent, which are both commercial entities, concluded a written contract of lease on 9 August 2016, wherein the appellant leased to the respondent certain premises described as a "*Fuelling Station and Convenience Store*". The lease commenced on 1 March 2016 and was for an initial period of six (6) months, terminating on 30 August 2016. It was then immediately and automatically extended for a period of three (3) years.

[3] The agreement allowed for the respondent to indicate to the appellant three months prior to the expiry of the three (3) years that it wished to renew the agreement, but the appellant had the right to decline the respondent's wish to renew the agreement within seven days of receipt of such notice.

[4] The agreement spells out the rights and obligations of the appellant and the respondent. It is clearly one-sided in that the appellant acquires mostly rights and the respondent mostly obligations. There are four clauses which the court *a quo* found to be of particular importance in coming to its conclusion that the appellant should fail in its endeavour to evict the respondent. They are:

Clause 5.13

> "Should the Lessee [respondent] vacate the PREMISES for any reason whatsoever within the Lease period [three years after the renewal of the first six months, which ended on 30 August 2016], it shall be liable for the Rental payable for the full balance of the duration of the Lease period, until a suitable tenant has been found, as well as all costs including any Estate Agent's fee to source a suitable tenant;"

Clause: 5.17

> "The LESSEE shall not make any alteration or additions to the said PREMISES without the written consent of the LESSOR first had [sic] and

> obtained which consent shall not be unreasonably withheld and, unless otherwise agreed upon in writing, any alteration or additions made shall be the property of the LESSSOR and the LESSEE shall not be entitled to any compensation therefor. …"

Clause 5.18

> "At the termination of this Lease, whether by effluxion of time or otherwise the LESSOR shall, at its own option, be entitled to call upon the LESSEE to restore the PREMISES to the same condition as they were before the alterations or additions, in which event the LESSOR shall not be obliged to compensate the

LESSEE in respect thereof;"

Clause 13.2.2

"should the LESSOR not require the removal thereof then all such alterations, additions or improvements shall become the property of the LESSOR and the LESSEE shall be deemed to have waived any claims of whatever nature arising out of such alterations, additions or improvements to the PREMISES and the LESSOR shall not be required to compensate the LESSEE in any manner in respect thereof."

[5] The agreement contains a breach clause and a cancellation clause. The breach clause contains two sub-clauses and the cancellation clause contains one sub-clause that are of particular importance in the resolution of the dispute between the parties. Respectively, they read:

The breach sub-clauses

Clause 20.2 (strangely, this clause appears under the head: Breach)

"Should this agreement be cancelled by the LESSEE for any reason whatsoever, the LESSEE and/or any other person occupying the PREMISES, shall immediately vacate the PREMISES and allow the LESSOR to take occupation thereof."

Clause 20.3

"Should either Party cancel alternatively should the LESSEE breach any provision of this Lease and fail to remedy same within 7 days of notice

being transmitted to it to do so and the LESSEE remains in occupation of the Premises, the LESSOR shall be entitled to immediately:

20.3.1 Make claim for the ejectment of the LESSEE from the Premises; and

20.3.2 To claim the full outstanding Rental amounts, as they would have been escalated in the future, for the remaining period over this Lease Agreement from the LESSEE as damages for the cancellation alternatively breach of the Lease Agreement."

Clause 22.1 (the cancellation clause)

"The LESSOR and the LESSEE expressly and irrevocably record that this Lease may be terminated by either Party serving the other notice of its intention to cancel this Lease and upon 30 (thirty) calendar days' notice."

[6] It is immediately noticeable that the breach and cancellation clauses do not sit comfortably with each other. The cancellation clause allows either party to give the other party thirty (30) days' notice that it intends to terminate the agreement. If the respondent (lessee) is the one that gave the notice, it would mean that the respondent should vacate within thirty days of giving it. However, in terms of the breach clause the moment the respondent gave notice of termination, it had to vacate. It no longer would enjoy the benefit of using the premises for thirty days from the date of notice.

[7] Finally there is the normal non-variation clause but it is of no import to the determination of the issues in the case.

Circumstances that led to the application for the respondent's eviction

[8] Not long after the lease was in operation the parties experienced difficulties with each other's conduct. The appellant claimed that the respondent

was culpable for a number of breaches, which led it to seek recourse to the provisions of the cancellation clause (clause 22.1) in order to protect its interests. To this end its attorney wrote to the respondent on 28 June 2017 informing the respondent that it had invoked the provisions of clause 22.1. The reasons for invoking this clause were given as:

[8.1] the respondent does not hold a retail licence to sell Sasol (a company that sells petroleum products to retail outlets, such as the respondent) products;

[8.2] the respondent has illegally tampered with the electricity meter in order to avoid paying in full for the consumption of electricity;

[8.3] the respondent caused damage to the on-site generator, which had to be repaired by the appellant;

[8.4] after acknowledging that it damaged the generator, the respondent failed to reimburse the appellant for the cost of the repairs;

[8.5] the respondent has failed to exercise the duty of care imposed upon it by the agreement.

[9] The respondent's attorneys responded on 3 July 2017 to this letter. They denied each of the allegations referred to in [8]. The denial was amplified with supporting documents. The response concludes with the following paragraph:

> "[The respondent] has previously proposed and further proposes that a round table meeting be held to resolve all the remaining issues as

> contained in your letters as received. Our client wishes for this issue to be resolved in an amicable manner."

[10] The appellant was not interested in furthering any discussion with the respondent. Its attorney replied on 7 July 2017 to the attorney for the respondent stating:

> "The crux of the matter is that, whether you agree or not, your client is in breach of the Lease Agreement as is set out in our client's aforementioned Notice of Cancellation. Additionally, and notwithstanding your client's breaches of the agreement, our client is entitled to cancel the Lease Agreement in terms of clause 22 of the said Agreement and as it has validly done."

[11] In the same letter the appellant gave the respondent until 31 July 2017 to vacate the premises. The respondent refused to comply. Almost four months later, on 31 October 2017, the appellant served its application in the court *a quo* seeking, *inter alia*, the ejectment of the respondent. The application was based solely on the right of the appellant in terms of clause 22.1 to cancel the agreement. The respondent opposed the application on the basis that the appellant was not entitled to cancel the agreement and therefore, according to it, the claim for ejectment was not legally sound. The respondent proceeded to allege that the appellant had an ulterior purpose in cancelling the agreement and seeking its ejectment. To this end, it pointed out that very soon after the thirty-six month period of the agreement commenced, in August 2016, the appellant decided to sell the premises but found that the agreement presented an insurmountable obstacle to this objective. Consequently, it began harassing the respondent in the hope that the respondent might find greater solace in

cancelling the agreement and vacating the premises. The harassment took the form of falsely accusing the respondent of breaching the agreement, as well as

inciting Sasol (the petroleum licencing and supplying company) to terminate its business relationship with the respondent. The detailed nature of these allegations are dealt with in [46] - [48] below. The alleged harassment failed to yield the appellant's desired outcome. As a result, claims the respondent, the appellant sought refuge in the provisions of clause 22.1. The respondent also drew attention to the fact that the appellant took almost four months after its attorney wrote the letter cancelling the agreement to bring the application. The respondent goes further and contends that the intention of the parties, and the only sensible interpretation of clause 22.1, was that it can only be invoked by either party if the other party is culpable for breaching a material provision of the agreement. As the appellant could not show such a breach it was not entitled to cancel the agreement as per clause 22.1. In reply, the appellant failed to attend to the allegations that it had, and has, an ulterior motive for cancelling the agreement, and that it had engaged in bad faith conduct as soon as it found the agreement had become an "*albatross*" that had to be discarded. The appellant, on the other hand, believed that there was no need for it to deal with these allegations. According to it, the plain language of clause 22.1 leads to a single ineluctable conclusion that it requires no reason for cancelling the agreement and therefore the issue of motive for the cancellation is irrelevant. Cancellation was there for the taking. And it was there for both parties.

The judgment of the court *a quo*

[12] The court *a quo* came to the conclusion that clause 22.1 does not carry the meaning accorded to it by the appellant. It did not accept that the plain meaning of the clause was that either party could cancel the lease at any time

during the six months period (the initial period) or the thirty-six month period (the renewal period) thereafter. It said in this regard:

> "The clause can only have sensible meaning on the basis that it must be taken to refer to the time period after the prescribed initial and renewal periods have run their course and there has been an option to renew the lease exercised by the tenant and accepted by the landlord." [22]

[13] The court *a quo* found further that this conclusion is "*fortified*" by clause 5.13 which protected the appellant from any loss of rental income should the respondent vacate the premises any time prior to the expiry of the lease. It provides that should the respondent vacate the premises "*for any reason*" whatsoever, it shall be liable for the rental of the unexpired period of the lease or for a shorter period if a suitable tenant was found during the unexpired period. Clause 5.13 is so broad that it covers a vacation of the premises by the respondent at the instance of the appellant, as would occur here if the cancellation by the appellant is allowed to stand. The court *a quo* found the

[22] Judgement of court *a quo* at [6]

operation of the clause - apart from being "*so inherently inequitable as to be unenforceable for public policy*" - was:

> "… contrary to all reason in a commercial context: why should a business concern make the necessary commitment of resources to the fitting out of the business at the premises and to the creation of goodwill there – if this can be brought to naught within a matter of weeks at the whim of the landlord?" [23]

[14] According to this interpretation, clause 22.1 can only be invoked by the appellant after the entire lease period had expired and if the respondent had not vacated the premises. In terms of the common law should a lease period expire and the tenant remains in possession of the premises with the consent of the

landlord, the lease agreement on the same terms and conditions as set out in the expired agreement on a month to month basis is deemed to be concluded between the parties. According to the court *a quo* clause 22.1 is merely a re-statement of the common law.

Does clause 22.1 only come into operation once the agreement expires by effluxion of time?

[15] It is settled law that a proper construction of a written contract rests in giving meaning to words utilised in the document, read in the context of the entire document and with regard to any relevant background material that provides insight into the intention of the parties. [24]

[16] In my view there can be no doubt that clause 22.1 allows for both the appellant and the respondent to cancel the agreement during the course of its lifetime. In this view, I regretfully part company with the court *a quo*. The plain meaning of the words used in the clause leaves no room for any doubt or ambiguity. The words used are clear and crisp. The parties had "irrevocably and expressly" recorded that they were each entitled to walk away from the agreement by terminating it on thirty (30) calendar days' notice. There is also no doubt in my mind that the termination could produce harsh consequences for the respondent. These eventuate by virtue of the operation of clauses 5.13 (which makes it liable for the full rental of the unexpired period of the agreement or for

any period for which the premises remain unlet, even though it no longer enjoys the benefits accrued by usage of the premises), 5.17 (which denies the respondent any compensation for alterations or additions it made to the premises), 5.18 (which compels it to restore the premises to its pre-agreement

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[23] *Id* at [9]

[24] *Bastion Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 at [17]; *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011 (3) SA 148 (SCA) at [25] – [30]; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) AT [18]; *Thomas v Minister of Defence and Military Veterans* 2015 (1) SA 253 (SCA) at [8]

state if the appellant requests such), and 13.2.2 (which caters for the situation where the appellant elects not to exercise its right to request that premises be restored to its pre-agreement state by ensuring that the appellant automatically enjoys the full benefit of the alterations and additions made by the respondent without having to compensate the respondent therefor). But, the harsh consequence is no reason to hold that clause 22.1 should be read in a manner that it cannot be invoked while the agreement subsists. To hold so would make clause 22.1 valueless. The court *a quo* concluded that the clause is merely a re-statement of the common law position which treats the terms of a lease agreement such as this one as binding on the parties when the agreement has terminated by the effluxion of time but the lessee has not, whether by agreement or not, vacated the premises. The conclusion, in my view, is strained. To reach such a conclusion it would be necessary to add the phrase, "*In the event of this Lease terminating with the effluxion of time and the LESSEE has not vacated the PREMISES then*" at the beginning of the clause. Thus, the clause would read:

> "In the event of this Lease terminating with the effluxion of time and the LESSEE has not vacated the PREMISES then the LESSOR and the LESSEE expressly and irrevocably record that this Lease may be terminated by either Party serving the other notice of its intention to cancel this Lease and upon 30 (thirty) calendar days' notice." (Underlined portion added)

If this is what the parties intended clause 22.1 to mean they could easily have incorporated the phrase into the clause.

[17] I hold that clause 22.1 allows either party to escape the stranglehold of the agreement on thirty calendar days' notice. Does this mean that the appellant should succeed? Not necessarily so. It has to be remembered that the respondent maintains that the appellant's invocation of clause 22.1 is *mala fide*, or to put it differently, the appellant is not acting in good faith by invoking the clause. In essence, the defence against the ejectment is that clause 22.1 is not being utilised for purpose. For this reason the appellant should not be allowed to invoke or enforce it. In order to give proper consideration to this claim it is necessary to return to basic principles and to the development of our law of contract in the recent past decades. A convenient place to begin would be with the concept, *exceptio doli generalis*.

Exceptio doli generalis (exceptio) and considerations of public policy

[18] The *exceptio* is a defence raised against the enforcement of a contract, or a term therein, on the grounds that the plaintiff's or applicant's conduct is not in good faith. Our courts have wrestled with the role and relevance of the *exceptio* for some time. The attention given to it peaked in *Bank of Lisbon* [25] where it provided the sole basis for determining the outcome. The majority (per Joubert JA) concluded that the principle was never incorporated into our law. [26] So strongly did Joubert JA feel about it that he boldly pronounced its death:

[25] *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A)

[26] *Id* at 605H-607A

"All things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generalis* as a superfluous, defunct anachronism. *Requiescat in pace.*" [27]

Jansen JA (in a minority of one) came to the opposite conclusion: that it had always been part of our law, and further that if it was not explicitly incorporated into our law the time for its incorporation had arrived. Its utility, it was noted, rested in preventing the injustice that might prevail in a particular case if the plain reading of the terms of a contract was allowed to have decisive effect. The position adopted by Jansen JA was first mooted in an earlier judgment by him where he referred to the distinction in Roman law between the *judicia bonae fidei* and *judicia stricti juris*. A case decided on the latter approach involved a judge reaching a conclusion "*according to the strict rules of the old law*", while in the former approach the case would be decided "*in accordance with what the community as such considered acting in good faith in the specific circumstances to be.*" The former approach is to be preferred simply because a decision based on the latter approach "*could be inequitable in effect.*" [28] In the light of this, Jansen JA came to the conclusion that a court following the former approach "*had wide powers of complementing or restricting the duties of parties, of implying terms, in accordance with the requirements of justice, reasonableness and fairness*." [29] It was the community's concept of what is good faith in a particular matter that was relevant and that concept incorporated "*justice, reasonableness and fairness*." Jansen JA maintained that our law had evolved to the point where it had discarded the *judicia stricti juris* approach in favour of the *judicia bonae fidei* one. Hence, his dissenting judgment in *Bank of Lisbon*.

[19] Soon after considering *Bank of Lisbon*, the Appellate Division (now Supreme Court of Appeal (SCA)) was entrusted with *Sasfin*. [30] In *Sasfin* the court came to the conclusion that our common law "*does not recognise agreements that are contrary to public policy*" [31] or "*contrary to the moral sense of the community.*" [32] Interestingly, Jansen JA was part of the *Sasfin* bench. *Sasfin* approached the issue from the perspective of public policy or *boni mores* of the community. It did not re-open the discourse on the *exceptio.* Subsequent courts too did not re-open the discourse on the *exceptio* in great detail, but they continued to determine contractual disputes, especially those involving restraints of trade, on the basis that the agreement either in whole or in part

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[27] *Id* at 607A-B

[28] *Tuckers Land and Development Corporation v Hovis* 1980 (1) SA 645 (A) at 651C-D

[29] *Id* at 651E

[30] *Sasfin v Beukes* 1989 (1) SA 1 (A)

[31] *Id* at 7H

[32] *Id* at 8A

should be consonant with the *boni mores* of the community. On this basis they have on countless occasions, relying on *Sasfin* as authoritative learning, held that agreements or parts thereof should not be enforced on the ground that they constitute an affront to the *boni mores* of the community. It is important to note though that the court in *Sasfin* was at pains to caution future courts from interfering with contracts simply because they believed the contract in whole or in part conflicted with "*public policy*" or the "*boni mores of the community.*" The caution is unequivocal:

> "The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power." [33] (Emphasis added.)

This is particularly so, because adherence to contractual obligations and exercising of contractual rights is itself a very forceful public policy. This public policy is inherent in the right to contract freely. [34]

[20] However, the issue resurfaced some ten years after *Bank of Lisbon*, in *Saayman*. [35] Therein Olivier JA in a minority judgment reconsidered the role of public policy and *bona fides* (good faith) in resolving a contractual dispute. The learned judge of appeal examined numerous authorities and came to the conclusion that since the early 1900's our courts had utilised the principle of good faith to avoid an injustice from prevailing by the strict application of the law. Thus, Olivier JA found that many cases had been decided on the basis that the principle of good faith was an integral part of our law of contract and that it had a significant role to play in this area of law; [36] *Sasfin* was merely a more recent application of the principle. In *Saayman*, Olivier JA reiterated what Jansen JA had said in *Bank of Lisbon* and in *Truckers Land and Development*. Five years later, in *Brisley* [37] Olivier JA was faced with having to defend this view. Once again, the learned judge of appeal was in the minority. *Brisley* dealt with the application of the famous non-variation clause (also known as the "*Shifren clause*"). The majority (Harms, Streicher and Brand JJA together with a concurring judgment by Cameron JA) came to the conclusion that the principle of good faith was not the decisive factor in determining the issue of whether to uphold the whole or part of a contract. The other equally important factor was that of holding parties to their

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[33] *Id* at 9B

[34] *Id* at 9E-F. See the cases cited therein

[35] *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) at 321H-I

[36] *Id* at 321H-I. The *dictum* at 326G is explicit in this regard: "*I am convinced that the principles of good faith, founded in public policy, still play and must continue to play, a significant role in our law of contract.*"

[37] *Brisley v Drotsky* 2002 (4) SA 1 (SCA)

bargain: *pacta sunt servanda*. The main concern for the majority was that the principle of good faith had been applied in such a manner by courts, particularly *puisne* courts, to decide cases on the basis of what the judges sitting in those courts thought to be reasonable or fair. In other words, they utilised the principle of good faith as a gateway to introduce concepts of reasonableness or fairness into the law of contract, and by so doing gave themselves a licence to depart from the other fundamental principle of *pacta sunt servanda*. Applying the principle of *pacta sunt servanda,* which in their view enjoyed superior status to the principle of good faith, led them to conclude that the application of the non-variation clause was determinative of the dispute between the parties. Cameron JA (as he then was), on the other hand, presented a slightly more nuanced account of the law. He considered the import of the *Constitution of the Republic of SA, Act 108 of 1996* (the Constitution) and came to the conclusion that "*neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith.*" [38] Fundamental to the logic of Cameron JA was that courts must prioritise contractual autonomy, which is part of the constitutional value of *"freedom*" and is derived from "*the constitutional value of dignity.*" [39] In contrast, for Olivier JA, "*our law clearly finds itself situated in a developmental phase where contractual justice is emerging more than ever before as a moral and legal norm of immense importance.*" [40]

[21] Not long after *Brisley* the SCA had occasion, in *Afrox Healthcare*, [41] to re-consider the issue in the light of our constitutional values. The facts in *Afrox Healthcare* had a sad tinge to them. Mr Strydom contracted with a private hospital for medical services, necessary for his healthcare. The contract was a standard one that all persons who seek the services of the hospital were required to sign if they wished to have recourse to the hospital's services. These contracts are also referred to in the literature as "*contracts of adhesion*". It contained a clause which indemnified the hospital for all acts of negligence, save for wilful ones, regardless of the consequence(s) of the negligence. In other words, even if death resulted from the negligence the hospital was immunised from liability. Anyway, as it so happened a nurse was negligent, causing Mr Strydom harm. He sued Afrox but faced the hurdle of the indemnity clause, which Afrox invoked. He challenged the validity thereof on the basis that it was not pointed out to him when he signed the contract (here he relied on established authority [42]), it was contrary to public policy and was in conflict

[38] *Id* at [93]

[39] *Id* at [94]

[40] Id at [72]. The judgment is in Afirkaans and the particular *dictum* reads: "*Dit is duidelik dat ons reg in 'n ontwikkelingsfase is waar kontraktuele geregtigheid meer as ooit tevore as 'n morele en juridiese norm van groot belang op die voorgrond tree.*"

[41] *Afrox Helathcare Limited v Strydom* 2002 (6) SA 21 (SCA)

[42] *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 316C-318C

with the principle of good faith. He also invoked his right to healthcare in terms of s 27(1) of the Constitution. The SCA, per Brand JA, was not persuaded by any of his contentions. Accepting that the clause should not hold sway if it was against public policy, he came to the conclusion that there was an elementary and basic principle of law that contracts entered into voluntarily and freely by parties with capacity should be enforced. This basic rule was part of public policy and if it was to be applied it could not be held that the indemnity clause was contrary to public policy. [43] Brand JA found

that the argument about good faith was not sufficiently persuasive to displace the conclusion that the contract and its terms should be adhered to in circumstances where it was freely and voluntarily concluded:

> "As to the role and function of abstract notions such as good faith, reasonableness and fairness, it was decided by the majority in *Brisley* that, although these considerations constitute the substructure of our law of contract, they do not provide an independent or 'free-floating' basis for setting aside or limiting the operation of contractual provisions. Otherwise stated, although these abstract notions represent justification for and inform the rules of 'hard law', they do not constitute rules of 'hard law' themselves. When it comes to setting aside or the enforcement of contractual provisions, a court has no general discretion to act on abstract notions such as good faith and fairness. It is bound to apply the rules of hard law." [44] (Emphasis added.)

[22] The judgment in *Afrox Healthcare* raises concerns from the perspective of public policy: to allow a hospital to avoid all consequences for any negligence that the hospital staff may be responsible for simply on the basis of upholding the *pacta sunt servanda* principle without more is, with respect, giving an interpretation to public policy that is one-sided. While it is important to recognise that public policy requires upholding the terms of a contract, it is also public policy to renounce terms that are an affront to the *boni mores* of society. By way of illustration: the morals of society were found to trump the need to uphold the contract in *Sasfin*. In the same vein I would have no difficulty in refusing to uphold a contract between a hospital and a patient which immunised a hospital from the negligence of its staff in a case where the patient visited the hospital for a minor surgery and then left with her leg amputated or worse because of the negligence of the hospital staff. In my view, the terms of the contract notwithstanding, the

boni mores of society do not allow for the hospital to escape liability in such a case. In contrast, according to the learning in *Afrox Healthcare*, the terms of the contract without more are all important and ought to be decisive.

[23] That said, there can be no doubt that the more recent judgments of the SCA

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[43] *Afrox Healthcare*, n 20 at [23] – [24]

[44] *Id* at [32]. Translation has been provided by Brand JA himself in Fritz Brand and Douglas Brodie, *Good faith in Contract Law* in Zimmerman, Visser and Reid (eds), *Mixed legal systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) at 108

have unequivocally endorsed the views of Joubert JA on the *exceptio*. The court was alive to the fact that the judgments may be juxtaposed with that of *Sasfin,* and therefore made it clear that it had no difficulty with the finding in *Sasfin* since, in their view, denying the validity of a contract or part thereof on the grounds of public policy is not the same as denying it on the grounds of good faith. The test is consistency with public policy and not with "*good faith, reasonableness and fairness*", for these, according to Brand JA, are "*abstract notions*". The conclusions of *Brisley* and of *Afrox Healthcare* attracted the attention of scholars, many of whom were critical of separating "*good faith, fairness and reasonableness*" from "*public policy*" in so stark a manner. [45] Many of the scholars found the distinction to be problematic. In one such scholarly piece the authors contended that the judgments were out of sync with the values embedded in our constitutional dispensation and that instead they represented an "*increasing conservatism in the judiciary's attitude toward open-ended constitutional values.*" [46]

[24] In 2006 the issue resurfaced in *Barkhuizen*. [47] Here the contestation involved a time-bar clause in an insurance contract. The clause stated that the claimant must serve summons on the insurer within ninety (90) days of the insurer repudiating the claim, failing which the insurer was automatically absolved of all liability. There was no debate that the claimant concluded the contract voluntarily and freely. The claimant brought his claim outside the ninety day period. The insurer invoked the clause in a special plea, as a result of which the parties requested that the court consider the matter on the basis of a stated case. This led to the court being furnished with very little factual information. The parties approached the matter on the basis of principle. The claimant claimed that the clause was contrary to public policy in that it denied him his constitutional right to access court. [48] In the High Court the claimant decided to re-focus his cause of action solely on the constitutionality of the clause. The High Court agreed with him that the clause breached his constitutional right to access courts. The matter came before the SCA. Its judgment was penned by Cameron J who it will be recalled was part of the majority in *Brisley*. Referring both to *Brisley* and *Afrox Healthcare* Cameron JA reiterated that our law of contract, like all law in SA, is subject to the Constitution. Echoing what was said there, the SCA understood the law to be that if a contract in whole or in part was offensive to public policy the courts were enjoined to declare the whole or the part invalid, and that public policy was informed by the constitutional values of dignity, freedom, respect for human rights, non-racialism and non-sexism.

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[45] Some of these are listed in fn 4 in *Napier v Barkhuizen* 2006 (4) SA 1 (SCA), but there are many more than those listed therein. No purpose would be served by listing them all.

[46] D Bhana and M Pieterse, *Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited*, 2005 SALJ 865 at 872

[47] *Napier v Barkhuizen* , n 24, fn 4

[48] Section 34 of the Constitution provides that everyone has a right to have any dispute resolved publically in a hearing before a court.

However, holding a contract or part thereof to be invalid for being incompatible with public

policy is very different from declaring it invalid on the grounds of good faith. To this end, Cameron JA categorically reminds the reader that:

> "*Brisley* rejected the notion that the Constitution and its value system confer on judges a general jurisdiction to declare contracts invalid because of what they perceive as unjust, or power to decide that contractual terms cannot be enforced on the basis of imprecise notions of good faith." [49] (Emphasis added.)

[25] Cameron JA found that the evidence placed before the court as to the rationale for the time-bar clause was threadbare and therefore the High Court's decision was problematic. This was so because the insurer needed to know within a reasonable time if it faced litigation. Whether 90 days might be reasonable or not depended on factual evidence and that was not presented to the court. [50] Hence, Cameron JA came to the conclusion that the claimant had failed to show that he did not conclude the contract freely "*and in the exercise of his constitutional rights to dignity, equality and freedom*" [51] , and therefore was not able to dislodge the insurer's reliance on the clause. The reasoning is simple: the claimant concluded a bargain, which included the time-bar clause, and was bound by the terms of that bargain. Put differently, the insurer's reliance on the clause was legitimate since that was the bargain it secured and on the evidence presented there had been no offence caused to public policy. In such a circumstance the insurer was entitled to the fruits of its bargain.

[26] Aggrieved at the outcome and taking issue with the supporting reasoning thereof the claimant sought assistance from the Constitutional Court (CC). The

CC agreed with the SCA that the case involved constitutional issues, and on that basis granted him audience. In the CC the claimant claimed that the clause was unenforceable because it was contrary to public policy and that it was "*unfair*". The claimant, no doubt, steered away from the argument that the clause should not be enforced because to do so would breach the notion of good faith precisely because of Cameron JA's comment that such a notion was too "*imprecise*" [52] to be of any value in determining the matter. However, and interestingly, the insurer attempted to meet the argument of the clause contravening public policy by invoking the very "*imprecise notion*" of good faith: it contended that the clause did not contravene public policy because it:

> "should be read with the implied term that parties to a contract ought to act *bona fide* (in good faith). This implied provision, so the argument went, rendered the clause flexible enough to accommodate the circumstances where the [claimant] is prevented by factors

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[49] *Napier v Barkhuizen*, n 24, at [7]

[50] *Id* at [10]

[51] *Id* at [28]

[52] See quotation from the judgment of the SCA in [23] above

beyond his control from complying with the requirements of the clause." [53]

[27] On the issue of the fairness of the clause, the majority judgment of Ngcobo J (as he then was) identified two questions that had to be answered in the determination of whether the clause was fair or not: was the clause "*unreasonable*", and if not, should it be enforced "*in the light of the circumstances which prevented compliance*" [54] therewith?

[28] On the issue of public policy, the CC recognised that the denial of judicial redress could be both a breach of the claimant's s 34 constitutional rights as well as a contravention of public policy. In such a case, the s 34 right was a reflection of public policy. On the issue of the time-bar and public policy the majority judgment pronounced:

> "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. Public policy, it should be recalled, 'is the general sense of justice of the community, the *boni mores*, manifested in public opinion.' Thus where a claimant seeks to avoid the enforcement of a time limitation clause on the basis that non-compliance with it was caused by factors beyond his or her control, it is inconceivable that a court would hold the claimant to such a clause. The enforcement of a time limitation clause in such circumstances would result in an injustice and would no doubt be contrary to public policy. 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." [55]

The conclusion regarding public policy and the need to do justice between the parties notwithstanding, it must not be forgotten that the onus of showing that enforcement of the clause is contrary to public policy rests with the claimant, who may be able to discharge it by showing that non-compliance was beyond his control. This the claimant failed to do. In short, the claimant had failed to discharge the onus of showing that "*it would be unfair or unjust to enforce*" [56] the time-bar clause. On that basis the majority judgment dismissed his appeal. In other words, the clause would only have been offensive to public policy if the claimant was able to show that its operation was unfair or unjust to him. The

[53] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at [21]

[54] *Id* at [56]. The *dictum* reads:

"**The determination of fairness**

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 prevented compliance with the time limitation clause".

[55] *Id* at [73] footnote omitted

[56] *Id* at [86]

minority, in two separate judgments by Moseneke DCJ and Sachs J, agreed with the conclusion of the majority regarding the role of public policy in contractual law but disagreed on the outcome of the appeal. In the view of Moseneke DCJ the determination of whether a particular clause in a contract offends public policy is an objective one. Whether the claimant found the offending clause to operate unfairly or unjustly was irrelevant. If the clause, viewed objectively, offended public policy the courts should refuse to enforce it. In this case, the clause was "*on its face, unreasonable and unjust.*" [57] Sachs J agreed with Moseneke DCJ on this point. For them, as the matter was adjudicated on the special plea raised by the insurer, the claimant should not be disadvantaged by the lack of evidence regarding the circumstances which prevented him from complying with the terms of the clause. Hence, they were of the view that the appeal should have been upheld – the time-bar clause should have been declared invalid – and the matter should have been remitted to the High Court for further adjudication.

[30] The CC's majority judgment generated some debate in the legal community. This, to some extent, was galvanised by the fact that the concepts of fairness and reasonableness were collapsed into one in the judgment and many read the *dictum* at [56] [58] of the judgment to mean that all contractual provisions had to be reasonable to be fair in order to pass constitutional muster.

[31] A short while after the CC judgment came out, an individual, Mr Bredenkamp, had his contract with his bank (Standard Bank) terminated by the

bank. He was informed by the bank that it no longer wished to do business with him, as any association with him placed it at great risk of punitive measures being taken against it by the US government, and of suffering a great loss of business with other international banks. Mr Bredenkamp attempted to interdict the bank from terminating the contract on the basis that the bank's conduct was unreasonable and therefore unconstitutional. The matter came before the SCA. Harms DP, writing for a unanimous court, pointed out that the CC in *Barkhuizen* did not make any finding to the effect that "*fairness*" is now recognised as a fundamental or "*core*" constitutional value that infused all contracts. [59] This interpretation was not endorsed in two subsequent cases by the CC as we will see below. Anyway, since the case brought by Mr Bredenkamp was one "*about fairness … and nothing more*", [60] it has to be borne in mind that fairness applies to both parties, and to the extent that this may become a legitimate issue in a case, courts are enjoined to examine the matter from the view of both sides. [61]

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[57] *Id* at [119]

[58] Referred to in [27] and n 33 above.

[59] *Bredenkamp and others v Standard Bank of South Africa* 2010 (4) SA 468 (SCA) at [27] – [28]

[60] *Bredenkamp*, n 38 at [30]

[61] *Id* at [65]

In that case, the bank did not act unfairly by terminating the account. Harms DP had no difficulty with acknowledging that the concept of *bona fidei* was inherent in our law of contract. He reiterated what Jansen JA said that "(a)*ll contracts in our law are considered to be bonae fidei.*" [62] Even Joubert JA accepted this. [63]

[32] However, in my view, on the facts there was no doubt that the bank acted *bona fidei* in terminating the contract. The bank could not be expected to keep Mr Bredenkamp's account open to its own detriment. It was therefore entitled to

rely on the common law as there was no termination clause in the contract. The bank acted in good faith. [64] Thus, even if Mr Bredenkamp was to allege that the bank's conduct violated the principle of good faith, he would nevertheless, in my view, lose on the facts.

[33] Neither the CC judgment in *Barkhuizen* nor the SCA judgment in *Bredenkamp* sealed the debate. In *Everfresh* [65] the CC was once again confronted with the issue of good faith. There the parties concluded a contract of lease, which provided for the lessee (Everfresh) to renew that contract upon its expiry. Everfresh had to give notice of its desire to renew the contract and the lessor (Shoprite) would then negotiate a rental price for the renewed contract. Shoprite refused to negotiate a new rental price, thereby denying Everfresh the opportunity to renew the contract. Prior to the expiry date Everfresh gave notice of its desire to renew the contract and proposed an increase of 10% in the rental. Shoprite rejected the offer. Upon the expiry of the contract Shoprite sought the ejectment of Everfresh and was met with a claim that such relief was unlawful because Everfresh invoked the option to renew the contract. It was agreed though that at best for Everfresh it had an option to renew the contract and not a right to an automatic renewal. The option was contingent upon Shoprite agreeing to an increased rental. However, Everfresh contended that Shoprite was duty-bound to make an effort to negotiate the increase in rental in good faith by at the very least making a counter-offer. Its failure to do so rendered its efforts to eject Everfresh unlawful. The High Court agreed with Shoprite that it was under no

contractual duty to agree to a new rental or to make a counter-offer. It found that the option was no more than a promise to negotiate in good faith, but such a promise was too vague and imprecise to be enforceable. This finding was in accordance with the common law as enunciated by the SCA in *Southernport*. [66]

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[62] *Id* at [33], See: *Tuckers Land and Development Corporation*, n 7 at 651B-C

[63] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 433B

[64] *Bredenkamp,* n 38 at [57]

[65] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC)

[66] *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA)

Accordingly, it ordered the ejectment. The SCA refused Everfresh leave to appeal. The matter was brought to the CC on the basis that the conduct of Shoprite flouted the values enshrined in the Constitution and was contrary to public policy. It argued that these values and public policy required Shoprite to negotiate a new rental with it in good faith. It contended that the common law of contract as enunciated in *Southernport* should be developed in accordance with the injunction imposed upon all courts by s 39(2) of the Constitution. [67] This argument was not raised in the High Court, or even in the application for leave to appeal to the SCA. Two judgments were rendered by the CC. The majority came to the conclusion that Everfresh should not be allowed to raise the constitutional point for the first time in the CC and dismissed the appeal. The minority judgment believed that it would have been more appropriate to refer the matter back to the High Court for it to consider the argument raised by Everfresh. The two judgments nevertheless agreed on one principle which was that where a contract contains a provision requiring parties to negotiate further (an amendment for example, or as in *Everfresh*, a renewal of the contract upon its expiry) that provision must be interpreted in the context of:

> "… the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, … Contracting parts certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would

> be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement in good faith."[68] (Underlining added.)

Similarly, according to Yacoob J the contract must be interpreted:

> "against the backdrop of an understanding that good faith should be encouraged in contracts and a party should be held to its bargain." [69] (Underlining added.)

As I read the judgments they both endorse the *pacta sunt servanda* principle. In both judgments the conclusion reached was that provisions requiring further negotiation must be interpreted in such a way as to make it meaningful rather than nullifying it. To this end the judgments can hardly be said to be revolutionary. They do so by imposing a duty to act in good faith on the party who accepted the obligation to negotiate further at the appropriate time, i.e. when the contract expired. However, an obligation to negotiate in good faith is not an obligation to reach agreement. Good faith negotiations can, and often do, break down. Good faith negotiation also does not mean that a party is precluded from pursuing its own interests: on the contrary it is perfectly legitimate for it to pursue its own interests and yet be acting in good faith. In both judgments there was no suggestion that Shoprite was not acting in good faith simply because it pursued its own interests by rejecting any increase in

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[67] Section 39(2) requires all courts to develop the common law in a manner that promotes "*the spirit, purport and objects of the Bill of Rights*".

[68] *Everfresh* n 44, at [72]. See also [69]

[69] *Id* at [37]

rental offered by Everfresh. All the two judgments said was that Shoprite should not be allowed to simply refuse to engage with Everfresh because that would be contrary to the letter and the spirit of the obligation it voluntarily and freely accepted when it concluded the contract. Both judgments held that it would be wrong to find that the provision imposing

this obligation was too vague and uncertain to be enforced, as such a finding would allow Shoprite to escape an obligation it adopted and which at the very least gave Everfresh the benefit or opportunity to engage in *bona fide* negotiations with Shoprite at the expiry of the contract. It bears mentioning that the courts by applying the law requiring that parties act in good faith towards each other are not necessarily making a contract for the parties as is clearly demonstrated here. The CC was upholding the contract by giving the clause - the duty to negotiate an extension of the contract clause - a meaningful interpretation. Hence, the judgments are an excellent example of how, by relying on the principle of good faith, the other important principle of *pacta sunt servanda* is not necessarily or always modified, qualified or compromised. The two judgments demonstrate that the two principles can in certain circumstances enjoy co-extensive existence.

[34] What is clear though is that *Everfresh* has left a deep imprint on this terrain of the law. Contract law as enunciated by the SCA in *Brisley* (the majority judgment), *Afrox Healthcare*, *Napier* and to a lesser extent *Bredenkamp* was transformed. In their stead the approaches of Jansen JA in *Tuckers Land and Development Corporation* [70] and *Bank of Lisbon* as well as that of Olivier JA in *Brisley* that contractual parties were required to act in good faith towards each other was endorsed by the CC. Good faith according to those judgments incorporated the concepts of "*reasonableness and fairness*". The CC agreed.

[35] The CC had occasion to reconsider the approach in *Botha*. [71] In this case, Mrs Botha concluded an instalment agreement for the purchase of immovable land with a trust represented by Mr Rich. Mrs Botha was give possession of the land during the currency of the agreement. The agreement contained a clause to the effect that should Botha breach the agreement (failure to pay any instalment due would constitute a breach) the trust was entitled to keep the purchase price paid thus far (forfeiture clause), cancel the agreement (cancellation clause) and seek the ejectment of Mrs Botha. After having paid three-quarters of the purchase price, Mrs Botha defaulted on the instalments. The trust applied to the High Court to declare the agreement cancelled and order that Botha be ejected from the land. At the same time the trust claimed that it was entitled to keep all the payments made by Mrs Botha in terms of the forfeiture clause. Mrs Botha relying on s 27(1) of the Alienation of Land Act, 68 of 1981 (the Act) counter-applied for the land to be registered into her name. Section 27(1) provides, amongst others, that if a purchaser has paid "*not less than 50%*" of the

[70] See n 7

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

purchase price, it shall be entitled to demand that the seller transfer the land into the purchaser's name. However, the High Court found in favour of the trust in every respect. The matter came before the SCA on petition for leave to appeal. The SCA granted leave to the full bench of the High Court, who dismissed the appeal. Botha applied to the CC for assistance. At the CC she repeated her claims that in the light of her having paid three-quarters of the purchase price, the cancellation of the agreement contravened public policy and therefore should not be enforced: alternatively if the cancellation clause was upheld she was entitled

to a refund of the amounts paid towards the purchase price – in other words, the forfeiture clause should not be enforced.

[30] The CC, noting that all bilateral contracts, such as the one in the case, are infused with the principle of reciprocity, and more importantly that the principle was flouted by Mrs Botha by virtue of her being in arrears with the instalments, said the following:

> "To the extent that the rigid application of the principle of reciprocity may in particular circumstances lead to injustice, our law of contract, based as it is on the principle of good faith, contains the necessary flexibility to ensure fairness. In *Tuckers Land and Development Corporation* [72] it was pointed out that the concepts of justice, reasonableness and fairness historically constituted good faith in contract. The principle of reciprocity originated in these notions. This accords with the requirements of good faith." [73]

And:

> "[The provisions of the Act] are in accordance with the constitutional values of reciprocal recognition of the dignity, freedom and equal worth of others, in this case those of the respective contracting parties. The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way." [74] (Underlining added.)

[37] On this reasoning, at the heart of which lies, once again, the principle of good faith, the CC upheld the appeal and ordered the trust to register the land in

the name of Mrs Botha, subject to her purging her default. Incidentally Cameron J (as he now is) concurred in the judgment, despite his earlier misgivings about good faith being an "*imprecise notion*" [75] . In essence, the CC refused to

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[72] *Tuckers Land and Development Corporation*, n 7 at 651 - 2

[73] *Botha*, n 50 at [45]

[74] *Id* at [46]

[75] See the quotation from his judgment in [20] above

enforce both the forfeiture and the cancellation clauses. It bears mentioning that the CC ensured that a balance between the interests of Mrs Botha and that of the trust was maintained. This is manifest in the order it issued. To explain the order it utilised the term "*disproportionate*":

> "[T]o deprive Ms Botha of the opportunity to have the property transferred to her under s 27(1) and in the process cure her breach in regard to the arrears, would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid, and would thus be unfair. The other side of the coin is, however, that it would be equally disproportionate to allow registration of transfer, without making that registration conditional upon payment of the arrears and the outstanding amounts levied in municipal rates, taxes and service fees. Accordingly an appropriate order in this regard will be made." [76]

[38] In my reading, the CC in *Botha* crystallised what it had already stated in *Barkhuizen* and in *Everfresh*. It therefore, in my view, did not endorse Harms DP's interpretation of its judgment in *Barkhuizen.*

[39] This then is the present state of our law of contract. Though I have to say that the underlined sentence in the *dictum* quoted above in [36] does give me pause for concern if it were to be interpreted to mean that a party can never pursue its own interests in negotiations and act in good faith at the same time. In my view, courts should not find that because a party pursues its own interests to the detriment of its negotiating or contractual partner it is not negotiating or acting in good faith. This is why the judgment in *Bredenkamp* has to be correct, even if

viewed through the lens of good faith. The fact that Mr Bredenkamp was severely prejudiced by the conduct of the bank pursuing its own interests it is not a basis for finding that the bank was not acting in good faith. In fact, it demonstrated that the pursuit of its own interests was proof of its good faith. Similarly, if Shoprite, in the course of meeting whatever evidence that Everfresh brought was able to show that it acted in good faith, even though it pursued its own interests to the detriment of Everfresh, there should have been no reason to force it agree to an extension of the agreement. To repeat what I say above, a duty to negotiate in good faith is not a compulsion to reach agreement. In *Botha,* Mrs Botha acknowledging her default had offered to purge her default so that the contract could remain alive, alternatively she asked for the payments she made towards the purchase to be refunded. The refusal of the trust to entertain either of the two without more or explaining itself and to insist on applying the letter of the agreement cannot be held to be an act of good faith.

[40] The CC has now in a unanimous judgment spoken unambiguously. Incidentally, Cameron J (as he now is) concurred with the judgment. Nevertheless, it seems the SCA elects to dissent. In a very recent judgment the SCA in *BEADICA* [77] refused to follow the CC's lead in *Botha*.

[41] *BEADICA* was concerned with a dispute between a lessor (Oregon Trust) and

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[76] *Botha* n 50 at [49]

[77] *Trustees for the Time Being of the Oregon Trust v BEADICA 231 CC and Others* [2019] ZASCA 23 (28 March 2019)

four lessees, each of whom entered into a separate contract of lease with the Oregon Trust. The four lessees conducted franchised businesses on the

premises let to them. The lease contracts were for a period of five years each and they commenced running on 1 August 2011. The lessees each had an option to renew the leases for a further five years, failing which the leases would terminate on 31 July 2016. To ensure that the option was meaningful a mechanism to determine future rental was incorporated into the lease contract. To exercise the option the lessees were required to inform the lessor six months prior to 31 July 2016 that they intended to renew the contract. The lease agreements resulted from each of the lessees having concluded a franchise agreement with a Mr Sale. Mr Sale was also the sole member of the lessor. The franchise agreements provided that the franchise businesses were to operate from the leased premises. The lessees failed to notify the lessor timeously of their desire to exercise their options – instead of informing the lessor by 31 January 2016, they only informed it in March 2016, with two of them indicating that they wished to purchase the leased premises. In response the lessor stated that Mr Sale was not available but it would respond as soon as he returned. No further response was received. Instead, on 29 July 2016, the attorneys for the lessor informed each of the lessees that they were expected to vacate the premises by 31 July 2016. The lessees brought an application in the Cape High Court interdicting the lessor from ejecting them pending the determination of a claim by them that they validly exercised the option. The lessor counter-applied for their ejectment. The High Court, per Davis J, came to the conclusion that while they failed to comply with the requirement to inform the lessor by 31 January 2016 that they intended to renew the leases, the lessees nevertheless substantively complied with the requirement to timeously inform the lessor. [78] He

went further to find that by relying on the termination of the agreement by effluxion of time, the lessor effectively imposed a sanction on the lessees for failing to inform it timeously of their intention to renew the leases. Such a sanction was, in his view, a "*disproportionate sanction*". Given the particular facts of the case, Davis J came to the conclusion that it would constitute "*capital punishment.*" [79] The concept is commonly used in our labour law, where the sanction of dismissal is readily accepted by all labour law practitioners to be equivalent to "*capital punishment*". On this logic, Davis J ordered the lessor to comply with the option clause, which contained a mechanism for determining the future rental for the use of the premises.

[42] The SCA, per Lewis JA, was of the view that to decide a contractual dispute on the basis of fairness, and to fashion a remedy on the basis of "*disproportionality*", which was the approach that informed the CC's decision in

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[78] *Beadica 231 CC & others v Trustees, Oregon Trust & another* 2018 (1) SA 549 (WCC) at [39]

[79] *Id* at [39] and at [42]

Botha, is *contra* the fundamental principle of rule of law in that it firmly sets the law on the path of uncertainty. In contrast the SCA was of the view that the principle of *pacta sunt servanda* principle should reign supreme for it produced certainty in the law. Incidentally, Davis J did address the issue of certainty in contractual law and said that in his view, certainty is a "*shibboleth*". [80] Not so according to the SCA. According to it, "(t)*he reason for the continued application of the principle embodied in the maxim pacta servanda sunt is the need for certainty in commerce*" [81] And, *pacta sunt servanda* can only be circumvented in

cases where it conflicts with public policy. The SCA, however, did not envision this very qualification as undermining the "*need for certainty in commerce*."

[43] Lewis JA came to the conclusion that the lessees did not advance any reasons, apart from claiming to be uneducated persons, for not giving timeous notice of the intention to renew the lease agreement. In this sense the case was on all fours with that of *Barkhuizen* where a failure to explain a default was the basis upon which the majority in the CC refused the defaulting party the relief it sought. By not explaining why they were unable to comply with the terms of the lease agreement, the lessees had failed to demonstrate why the enforcement of the termination clause was contrary to public policy. Unlike the High Court, the SCA rejected the claims of the lessees that they were uneducated and that Mr Sale, as the sole trustee, was motivated to destroy their businesses. On the latter issue, the SCA said that Mr Sale's "*motive, if he had any, was not relevant.*" [82]

[44] In short, to the extent that the CC in *Botha* saw it necessary to qualify the *pacta sunt servanda* principle by reference to the concepts of "*good faith*", "*fairness*" or "*disproportionality*" (which according to the SCA are different from public policy consideration) it has, according to the SCA, undermined the rule of law. So strongly did the SCA feel about this that Lewis JA showed no hesitation in approvingly quoting the view of an academic who described the CC's judgment in *Botha* as being "*embarrassingly poor*." [83] The description is unfortunate and in

my view should not have been repeated by the SCA. It is unhelpful and does not enlighten the discourse.

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[80] *Id* at [44]

[81] n 56, at [26]. Lewis JA referred to two other judgments from the SCA in support of this conclusion. They are: *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) and *Roazar CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA)

[82] n 56, at [45]

[83] *Id* at [37]

[45] 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*"[84] 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.[85] 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. In my judgment it is important not to sanctify any one principle or constitutional value to the detriment, or in total disregard, of others especially in cases where two (or more) constituional principles or values clash. On this logic, *pacta sunt servanda* cannot be elevated above all else. Contractual arrangements and the conduct of the parties bound by them are, over time, far too robust, rich and complex to be understood simply through the bare bones of the *pacta sunt servanda* principle without regard to the "*principle of good faith*, [which] *contains the necessary flexibility to ensure fairness"*. The development of contract law by the CC, in my judgment, captures this basic fact and attempts to give it practical meaning by inviting parites and courts to be vigilant, thorough, fair to all sides affected by or involved in the contractual

relationshsip and most of all respectful of all the constituional values that arise in a contractual dispute. However, had it not spoken on the subject, I would have applied the SCA's account of the law, even though I find myself in disagreement with it.

Application of the legal principles as laid out by the CC to the facts of the case

[46] In the present case the respondent's opposition to the cancellation of the agreement was, *inter alia*, that the appellant was not entitled to invoke the cancellation clause for ulterior purpose. [86] Factual averments to this effect were placed before the court in the answering affidavit. This is brought to the fore in the following terms in the answering affidavit:

> "13. After the lease was automatically extended for a further period of 36 months in terms of clauses 2.3 and 2.4 the [Appellant] decided that it wished to sell the entire property upon which the lease premises is [sic] situated. In amplification hereof Bezuidenhout and her employees began harassing and hounding the Respondent for purposes of trying to ensure that the Respondent vacated the leased premises as the Applicant was unable to sell the leased premises to its potential new purchaser in circumstances where the Respondent continued to lease the premises in terms of [the agreement].
>
> 14. The Respondent believes that the new prospective purchaser was insisting that the Respondent vacate the leased premises prior to any sale materialising. Accordingly, the Respondent's continued occupation of the leased premises became a major impediment

[84] *Bloemfontein Town Council v Richter* 1938 AD 195 at 232

[85] *Pharmaceutical Manufacturers Association of South Africa and Another: In re: Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at [49]

[86] See [11] above

to the [Appellant] selling the property to a prospective purchaser.

15. For this reason the [Appellant] began falsely accusing the Respondent of various misdemeanours and breaches. One of these so called breaches was that the Respondent caused on site damage to the generator which then had to be repaired. Whilst it is correct there was a problem with the generator, the Respondent in no way contributed towards this problem. City Power disconnected the generator which was interfering with the

electricity at the leased property. Furthermore, as the Respondent was desperate for the generator to be operative as a result of frequent power cuts that were taking place in the area the Respondent agreed to pay for the repair of the generator.

16 It is denied that the Respondent failed and refused to make payment to the [Appellant] of the utility cost due, owing and payable as at 28 June 2017. In amplification hereof, the [Appellant] fails to set out what those utility costs being referred to in this paragraph were and furthermore, fails to produce any proof that the Respondent was invoiced by the [Appellant] for the utility cost due for the said period. Whenever the Respondent was invoiced by the [Appellant] for utility cost due, the Respondent would pay those costs.

17. Furthermore, the Respondent requested a breakdown of amounts as mentioned in an email to the [Appellant] dated 15 June 2017 but never received the said breakdown. I annex hereto the aforesaid email … Annexed to [Appellant's] founding affidavit is a letter from the Respondent's attorneys of record, … in terms of which it denied that the Respondent has in any way or manner breached any of the terms of the [agreement] as alleged or at all. I confirm the correctness of the allegations set out in the said letter and pray that the terms of the said letter be regarded as if specifically incorporated herein.

18. Accordingly, the Respondent emphatically denies that it has breached any of the provisions of the [agreement] as alleged or at all." [87] (Emphasis added).

[47] The claims may not be true, but if that was the case, the appellant was obliged to dispute them and place factual evidence before the court. Instead it replied as follows:

"AD PARAGRAPHS 13 – 18

10. The founding affidavit makes it clear that the [agreement] was cancelled by the [appellant] pursuant to its right in clause 22.1 of the [agreement], namely to terminate the lease by serving on the respondent a notice of its intention to cancel the lease upon thirty (30) calendar days' notice.

11. This right of the [appellant] is one that it may elect to pursue whether or not the respondent is in breach of the [agreement]

12. The [appellant] persists that the respondent has breached the [agreement] in, amongst other the manner set out in paragraph 13 of the founding affidavit. I have, however, been advised that given the fact that the [appellant] relies on its right to cancel the [agreement] on notice to the respondent, it is not necessary to deal with the breaches of the [agreement] committed by the respondent during the subsistence of the [agreement] neither with any of the allegations contained in paragraphs 13 to 18 of the answering affidavit." [88] (Emphasis added).

[48] The respondent goes further to allege that the appellant "*has been contacting Sasol* (one of the respondent's suppliers) *and the respondent's other suppliers, and based on false facts instructed the said suppliers and more particularly Sasol to terminate its supply agreement with the*" respondent. The respondent

[87] Paragraphs 13 – 18 of the answering affidavit

[88] Paragraphs 10 – 12 of the replying affidavit

made this allegation in the face of the appellant's claim that the respondent had received a termination notice from one of its suppliers of petroleum products, Sasol. In support of the claim the appellant annexed a copy of the letter the respondent received from Sasol. To its credit the appellant denied the allegation, but in bald terms. It could at the very least have gone a step further and explained how it came to possess a letter that was sent to the respondent by Sasol and is no doubt privy to Sasol and the respondent only as it affects their private business relationship which the appellant has no role in.

[49] In my view the essence of the averments made on behalf of the respondent were to the effect that the appellant, in its quest to sell the property, attempted to get the respondent to vacate the premises by employing methods and means that effectively breached its duty of good faith towards the

respondent. In particular, it "*harassed and hounded*" the respondent's employees, made false allegations of breach against the respondent and interfered with the relationship between the respondent and its suppliers, so that the respondent would vacate the premises. As I say above these averments may be false, but it was up to the appellant to say so and to place the relevant facts before court so that they could be assessed. The appellant refused to deal with them. It took the view that they were irrelevant. Consequently, on the rule outlined in *Plascon-Evans* [89] the undisputed averments of the respondent constitute the factual substratum upon which the dispute has to be resolved. And to the extent that it denied that it interfered with the business relationship between the respondent and Sasol its denial was bare and therefore inadequate in terms of the *Plascon-Evans* rule as clarified in *Wightman*. [90] According to these facts the respondent wished to relieve itself of the agreement because it became an insuperable burden to its motive to sell the property.

[50] At the hearing this issue was raised with Mr Vetten for the appellant. It was put to him that these facts relate to the issue of good faith. He conceded that the averments do in essence challenge the good faith commitment of the appellant, but relying on the SCA's approach to the law of contract (as canvassed in the cases mentioned above), maintained that since good faith, especially in the form of reasonableness and fairness, was not part of our law of contract there was no need for the appellant to meet the challenge. And he conceded that the challenge was not met. Mr Ress, in response, insisted that the challenge was

raised and went so far as to say that at the hearing before the court *a quo* the discourse for a time focussed on the learning presented by the CC in *Barkhuizen* and *Everfresh*. In reply Mr Vetten said that his memory was slightly

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[89] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635; *Wightman/ t/a J W Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at [12] – [13]

[90] *Id*.

more faded than that of Mr Ress and therefore he was not able to confirm or deny that the issue was canvassed at the hearing in the court *a quo*. However, it was his submission that the issue of good faith, especially in the form of fairness and reasonableness, was not material to the determination of the dispute.

[51] I, therefore, hold that the issue of good faith was material to the determination of the dispute. The facts that have a bearing on this issue were raised by the respondent. They were established by application of the legal principles applicable to motion proceedings. The respondent in these circumstances had every right to argue that the appellant failed to act in good faith, and that its recourse to clause 22.1 was not borne of good faith. Mr Ress did so and Mr Vetten's response was that the law is set out by the SCA which this court, he reminded us, is bound by. That is as far as the matter on this issue was taken. But, Mr Vetten did not dispute that the issue was raised.

[52] Windell and Opperman JJ disagree with me. They say that the issue of good faith was never pleaded nor argued before us. My reasons for holding otherwise are clearly set out in the preceding paragraphs. In their joint judgment they place heavy emphasis on the question of the role and importance of pleadings in the determination of disputes by courts. I do not underestimate the importance of pleadings. However, there is one aspect that I wish to highlight. It

is that pleadings are rarely, if ever, perfect. For this reason courts have for almost a century now, accepted without more the *dictum* of Innes CJ:

> "The object of pleading is to define the issues: and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for the inference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been." [91]

[53] Although I hold that the facts allowing for the respondent to contend that the appellant was not acting in good faith when it sought to invoke clause 22.1, in any event on the principle set out by Innes CJ, I believe the respondent was well within its rights to argue that the appellant failed to adhere to its duty to, at all material times, act in good faith towards the respondent. It placed certain relevant facts before the Court. It did not have to explicitly spell out that the appellant did not in accordance with its contractual obligation act in good faith towards it. That was a matter it could argue as long as it restricted itself to the facts placed before the Court. The appellant could not, in that event, claim prejudice. Mr Vetten certainly did not do so. After all, his client, on advice, voluntarily and explicitly elected not to place contrary facts before the court. The real dispute between the parties was the right of the appellant to invoke

[91] *Robinson v Randfontein Estates G. M. Co. Ltd* 1925 AD 173 at 178; *Shill v Milner* 1937 AD 101 at 105; *Stead v Conradie en Andere* 1995 (2) SA 82 (SCA) at 122B-C

clause 22.1 to secure the ejectment of the respondent. The right of the appellant was subject to its obligation to at all material times act in good faith towards the respondent. The respondent did not, in its answering affidavit, step outside of the

issue in dispute, nor did it fail to place material facts concerning the element of good faith before the court. It was, therefore, legally competent for it to canvass this element at the hearing and this court is, in its duty to do justice by the parties, free to deal with it.

[54] I have no difficulty with the proposition that an owner of a property should have an unfettered right to alienate the property. All owners do, and I believe should, have that right as long as they themselves do not encumber the property, or where by alienating the property they affect the rights that others have acquired over the property. In this case, the appellant of its own accord encumbered the property and by so doing conferred rights upon the respondent. The appellant's right to alienate its property must be understood in this context. I also do not believe that the appellant was prevented from ever alienating the property as long as the agreement subsisted. My view is that it had to do so in a manner that did not breach its duty of good faith towards the respondent, which duty it voluntarily adopted by concluding the agreement. And, I repeat what I say above, this does not mean that it would have breached its duty of good faith by pursuing its own interests to the detriment of the respondent. Unfortunately for it, it failed to make that case, or to put it differently, it failed to meet the case of the respondent. In contrast, in *Bredenkamp* the bank made that case.

[55] Finally, Windell and Opperman JJ say that my "*construction of the law is misplaced*." In my reading, our disagreement lies in the fact that I hold the view that the law of contract has advanced since *Sasfin*. I have extensively explained

the development that occurred since *Sasfin* hereinabove. It is unfortunate that they believe this "*construction*" to be "*misplaced*".

[56] To sum up. On the facts established by application of the principles set out in *Plascon-Evans* and their application to the law as set out by the CC, I hold that clause 22.1 does not avail the appellant. In other words, the appellant acted contrary to its duty of good faith towards the respondent, and when that failed to yield it the desired result it sought refuge in clause 22.1. Under these circumstances it should not be allowed safe passage. Accordingly, in my view, the clause should not in the present circumstances be enforced by the court. Hence, I would issue an order dismissing the appeal with costs.

Judgment

Vally J:

Introduction

[1] The appellant is aggrieved at having failed to secure an order in the court *a quo*

(presided by Fischer J) where it sought to evict the respondent from its premises. The appellant is also aggrieved at having to pay the costs incurred by the respondent for defending itself against the endeavours of the appellant. The court *a quo* granted it leave to ventilate its grievance in this court in the hope that it could be relieved of the burden of the order made against it.

The lease agreement

[2] The appellant and the respondent, which are both commercial entities, concluded a written contract of lease on 9 August 2016, wherein the appellant leased to the respondent certain premises described as a "*Fuelling Station and Convenience Store*". The lease commenced on 1 March 2016 and was for an initial period of six (6) months, terminating on 30 August 2016. It was then immediately and automatically extended for a period of three (3) years.

[3] The agreement allowed for the respondent to indicate to the appellant three months prior to the expiry of the three (3) years that it wished to renew the agreement, but the appellant had the right to decline the respondent's wish to renew the agreement within seven days of receipt of such notice.

[4] The agreement spells out the rights and obligations of the appellant and the respondent. It is clearly one-sided in that the appellant acquires mostly rights and the respondent mostly obligations. There are four clauses which the court *a quo* found to be of particular importance in coming to its conclusion that the appellant should fail in its endeavour to evict the respondent. They are:

Clause 5.13

> "Should the Lessee [respondent] vacate the PREMISES for any reason whatsoever within the Lease period [three years after the renewal of the first six months, which ended on 30 August 2016], it shall be liable for the Rental payable for the full balance of the duration of the Lease period, until a suitable tenant has been found, as well as all costs including any Estate Agent's fee to source a suitable tenant;"

Clause: 5.17

> "The LESSEE shall not make any alteration or additions to the said PREMISES without the written consent of the LESSOR first had [sic] and

> obtained which consent shall not be unreasonably withheld and, unless otherwise agreed upon in writing, any alteration or additions made shall be the property of the LESSSOR and the LESSEE shall not be entitled to any compensation therefor. …"

Clause 5.18

> "At the termination of this Lease, whether by effluxion of time or otherwise the LESSOR shall, at its own option, be entitled to call upon the LESSEE to restore the PREMISES to the same condition as they were before the alterations or additions, in which event the LESSOR shall not be obliged to compensate the LESSEE in respect thereof;"

Clause 13.2.2

> "should the LESSOR not require the removal thereof then all such alterations, additions or improvements shall become the property of the LESSOR and the LESSEE shall be deemed to have waived any claims of whatever nature arising

out of such alterations, additions or improvements to the PREMISES and the LESSOR shall not be required to compensate the LESSEE in any manner in respect thereof."

[5] The agreement contains a breach clause and a cancellation clause. The breach clause contains two sub-clauses and the cancellation clause contains one sub-clause that are of particular importance in the resolution of the dispute between the parties. Respectively, they read:

The breach sub-clauses

Clause 20.2 (strangely, this clause appears under the head: Breach)

"Should this agreement be cancelled by the LESSEE for any reason whatsoever, the LESSEE and/or any other person occupying the PREMISES, shall immediately vacate the PREMISES and allow the LESSOR to take occupation thereof."

Clause 20.3

"Should either Party cancel alternatively should the LESSEE breach any provision of this Lease and fail to remedy same within 7 days of notice

being transmitted to it to do so and the LESSEE remains in occupation of the Premises, the LESSOR shall be entitled to immediately:

20.3.1 Make claim for the ejectment of the LESSEE from the Premises; and

20.3.2 To claim the full outstanding Rental amounts, as they would have been escalated in the future, for the remaining period over this Lease Agreement from the LESSEE as damages for the cancellation alternatively breach of the Lease Agreement."

Clause 22.1 (the cancellation clause)

"The LESSOR and the LESSEE expressly and irrevocably record that this Lease may be terminated by either Party serving the other notice of its intention to cancel this Lease and upon 30 (thirty) calendar days' notice."

[6] It is immediately noticeable that the breach and cancellation clauses do not sit comfortably with each other. The cancellation clause allows either party to give the other party thirty (30) days' notice that it intends to terminate the agreement. If the respondent (lessee) is the one that gave the notice, it would mean that the respondent should vacate within thirty days of giving it. However, in terms of the breach clause the moment the respondent gave notice of termination, it had to vacate. It no longer would enjoy the benefit of using the premises for thirty days from the date of notice.

[7] Finally there is the normal non-variation clause but it is of no import to the determination of the issues in the case.

Circumstances that led to the application for the respondent's eviction

[8] Not long after the lease was in operation the parties experienced difficulties with each other's conduct. The appellant claimed that the respondent

was culpable for a number of breaches, which led it to seek recourse to the provisions of the cancellation clause (clause 22.1) in order to protect its interests. To this end its attorney wrote to the respondent on 28 June 2017 informing the respondent that it had invoked the provisions of clause 22.1. The

reasons for invoking this clause were given as:

[8.1] the respondent does not hold a retail licence to sell Sasol (a company that sells petroleum products to retail outlets, such as the respondent) products;

[8.2] the respondent has illegally tampered with the electricity meter in order to avoid paying in full for the consumption of electricity;

[8.3] the respondent caused damage to the on-site generator, which had to be repaired by the appellant;

[8.4] after acknowledging that it damaged the generator, the respondent failed to reimburse the appellant for the cost of the repairs;

[8.5] the respondent has failed to exercise the duty of care imposed upon it by the agreement.

[9] The respondent's attorneys responded on 3 July 2017 to this letter. They denied each of the allegations referred to in [8]. The denial was amplified with supporting documents. The response concludes with the following paragraph:

> "[The respondent] has previously proposed and further proposes that a round table meeting be held to resolve all the remaining issues as

> contained in your letters as received. Our client wishes for this issue to be resolved in an amicable manner."

[10] The appellant was not interested in furthering any discussion with the respondent. Its attorney replied on 7 July 2017 to the attorney for the respondent stating:

> "The crux of the matter is that, whether you agree or not, your client is in breach of the Lease Agreement as is set out in our client's aforementioned Notice of Cancellation. Additionally, and notwithstanding your client's breaches of the agreement, our client is entitled to cancel the Lease Agreement in terms of clause 22 of the said Agreement and as it has validly done."

[11] In the same letter the appellant gave the respondent until 31 July 2017 to vacate the premises. The respondent refused to comply. Almost four months later, on 31 October 2017, the appellant served its application in the court *a quo* seeking, *inter alia*, the ejectment of the respondent. The application was based solely on the right of the appellant in terms of clause 22.1 to cancel the agreement. The respondent opposed the application on the basis that the appellant was not entitled to cancel the agreement and therefore, according to it, the claim for ejectment was not legally sound. The respondent proceeded to allege that the appellant had an ulterior purpose in cancelling the agreement and seeking its ejectment. To this end, it pointed out that very soon after the thirty-six month period of the agreement commenced, in August 2016, the appellant decided to sell the premises but found that the agreement presented an insurmountable obstacle to this objective. Consequently, it began harassing the respondent in the hope that the respondent might find greater solace in cancelling the agreement and vacating the premises. The harassment took the form of falsely accusing the respondent of breaching the agreement, as well as

inciting Sasol (the petroleum licencing and supplying company) to terminate its business relationship with the respondent. The detailed nature of these allegations are dealt with in [46] - [48] below. The alleged harassment failed to yield the appellant's desired outcome. As a result, claims the respondent, the appellant sought refuge in the provisions of clause 22.1. The respondent also drew attention to the fact that the appellant took almost four months after its attorney wrote the letter cancelling the agreement to bring the application. The respondent goes further and contends that the intention of the parties, and the only sensible interpretation of clause 22.1, was that it can only be invoked by either party if the other party is culpable for breaching a material provision of the agreement. As the appellant could not show such a breach it was not entitled to cancel the agreement as per clause 22.1. In reply, the appellant failed to attend to the allegations that it had, and has, an ulterior motive for cancelling the agreement, and that it had engaged in bad faith conduct as soon as it found the agreement had become an "*albatross*" that had to be discarded. The appellant, on the other hand, believed that there was no need for it to deal with these allegations. According to it, the plain language of clause 22.1 leads to a single ineluctable conclusion that it requires no reason for cancelling the agreement and therefore the issue of motive for the cancellation is irrelevant. Cancellation was there for the taking. And it was there for both parties.

The judgment of the court *a quo*

[12] The court *a quo* came to the conclusion that clause 22.1 does not carry the meaning accorded to it by the appellant. It did not accept that the plain meaning of the clause was that either party could cancel the lease at any time

during the six months period (the initial period) or the thirty-six month period (the renewal period) thereafter. It said in this regard:

> "The clause can only have sensible meaning on the basis that it must be taken to refer to the time period after the prescribed initial and renewal periods have run their course and there has been an option to renew the lease exercised by the tenant and accepted by the landlord." [92]

[13] The court *a quo* found further that this conclusion is "*fortified*" by clause 5.13 which protected the appellant from any loss of rental income should the respondent vacate the premises any time prior to the expiry of the lease. It provides that should the respondent vacate the premises "*for any reason*" whatsoever, it shall be liable for the rental of the unexpired period of the lease or for a shorter period if a suitable tenant was found during the unexpired period. Clause 5.13 is so broad that it covers a vacation of the premises by the respondent at the instance of the appellant, as would occur here if the cancellation by the appellant is allowed to stand. The court *a quo* found the operation of the clause - apart from being "*so inherently inequitable as to be unenforceable for public policy*" - was:

> "… contrary to all reason in a commercial context: why should a business concern make the necessary commitment of resources to the fitting out of the business at the premises

[92] Judgement of court *a quo* at [6]

and to the creation of goodwill there – if this can be brought to naught within a matter of weeks at the whim of the landlord?" [93]

[14] According to this interpretation, clause 22.1 can only be invoked by the appellant after the entire lease period had expired and if the respondent had not vacated the premises. In terms of the common law should a lease period expire and the tenant remains in possession of the premises with the consent of the

landlord, the lease agreement on the same terms and conditions as set out in the expired agreement on a month to month basis is deemed to be concluded between the parties. According to the court *a quo* clause 22.1 is merely a re-statement of the common law.

Does clause 22.1 only come into operation once the agreement expires by effluxion of time?

[15] It is settled law that a proper construction of a written contract rests in giving meaning to words utilised in the document, read in the context of the entire document and with regard to any relevant background material that provides insight into the intention of the parties. [94]

[16] In my view there can be no doubt that clause 22.1 allows for both the appellant and the respondent to cancel the agreement during the course of its lifetime. In this view, I regretfully part company with the court *a quo*. The plain meaning of the words used in the clause leaves no room for any doubt or ambiguity. The words used are clear and crisp. The parties had "irrevocably and expressly" recorded that they were each entitled to walk away from the agreement by terminating it on thirty (30) calendar days' notice. There is also no doubt in my mind that the termination could produce harsh consequences for the respondent. These eventuate by virtue of the operation of clauses 5.13 (which makes it liable for the full rental of the unexpired period of the agreement or for

any period for which the premises remain unlet, even though it no longer enjoys the benefits accrued by usage of the premises), 5.17 (which denies the respondent any compensation for alterations or additions it made to the premises), 5.18 (which compels it to restore the premises to its pre-agreement state if the appellant requests such), and 13.2.2 (which caters for the situation where the appellant elects not to exercise its right to request that premises be restored to its pre-agreement state by ensuring that the appellant automatically enjoys the full benefit of the alterations and additions made by the respondent

[93] *Id* at [9]

[94] *Bastion Financial Services (Pty) Ltd v General Hendrik Schoeman Primary School* 2008 (5) SA 1 at [17]; *South African Airways (Pty) Ltd v Aviation Union of South Africa and Others* 2011 (3) SA 148 (SCA) at [25] – [30]; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) AT [18]; *Thomas v Minister of Defence and Military Veterans* 2015 (1) SA 253 (SCA) at [8]

without having to compensate the respondent therefor). But, the harsh consequence is no reason to hold that clause 22.1 should be read in a manner that it cannot be invoked while the agreement subsists. To hold so would make clause 22.1 valueless. The court *a quo* concluded that the clause is merely a re-statement of the common law position which treats the terms of a lease agreement such as this one as binding on the parties when the agreement has terminated by the effluxion of time but the lessee has not, whether by agreement or not, vacated the premises. The conclusion, in my view, is strained. To reach such a conclusion it would be necessary to add the phrase, "*In the event of this Lease terminating with the effluxion of time and the LESSEE has not vacated the PREMISES then*" at the beginning of the clause. Thus, the clause would read:

> "In the event of this Lease terminating with the effluxion of time and the LESSEE has not vacated the PREMISES then the LESSOR and the LESSEE expressly and irrevocably record that this Lease may be terminated by either Party serving the other notice of its intention to cancel this Lease and upon 30 (thirty) calendar days' notice." (Underlined portion added)

If this is what the parties intended clause 22.1 to mean they could easily have incorporated the phrase into the clause.

[17] I hold that clause 22.1 allows either party to escape the stranglehold of the agreement on thirty calendar days' notice. Does this mean that the appellant should succeed? Not necessarily so. It has to be remembered that the respondent maintains that the appellant's invocation of clause 22.1 is *mala fide*, or to put it differently, the appellant is not acting in good faith by invoking the clause. In essence, the defence against the ejectment is that clause 22.1 is not being utilised for purpose. For this reason the appellant should not be allowed to invoke or enforce it. In order to give proper consideration to this claim it is necessary to return to basic principles and to the development of our law of contract in the recent past decades. A convenient place to begin would be with the concept, *exceptio doli generalis*.

Exceptio doli generalis (exceptio) and considerations of public policy

[18] The *exceptio* is a defence raised against the enforcement of a contract, or a term therein, on the grounds that the plaintiff's or applicant's conduct is not in good faith. Our courts have wrestled with the role and relevance of the *exceptio* for some time. The attention given to it peaked in *Bank of Lisbon* [95] where it provided the sole basis for determining the outcome. The majority (per Joubert JA) concluded that the principle was never incorporated into our law. [96] So strongly did Joubert JA feel about it that he boldly pronounced its death:

> "All things considered, the time has now arrived, in my judgment, once and for all, to bury the *exceptio doli generalis* as a superfluous, defunct anachronism. *Requiescat in pace.*"

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[95] *Bank of Lisbon and South Africa Ltd v De Ornelas and Another* 1988 (3) SA 580 (A)

[96] *Id* at 605H-607A

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Jansen JA (in a minority of one) came to the opposite conclusion: that it had always been part of our law, and further that if it was not explicitly incorporated into our law the time for its incorporation had arrived. Its utility, it was noted, rested in preventing the injustice that might prevail in a particular case if the plain reading of the terms of a contract was allowed to have decisive effect. The position adopted by Jansen JA was first mooted in an earlier judgment by him where he referred to the distinction in Roman law between the *judicia bonae fidei* and *judicia stricti juris*. A case decided on the latter approach involved a judge reaching a conclusion "*according to the strict rules of the old law*", while in the former approach the case would be decided "*in accordance with what the community as such considered acting in good faith in the specific circumstances to be.*" The former approach is to be preferred simply because a decision based on the latter approach "*could be inequitable in effect.*" [98] In the light of this, Jansen JA came to the conclusion that a court following the former approach "*had wide powers of complementing or restricting the duties of parties, of implying terms, in accordance with the requirements of justice, reasonableness and fairness*." [99] It was the community's concept of what is good faith in a particular matter that was relevant and that concept incorporated "*justice, reasonableness and fairness*." Jansen JA maintained that our law had evolved to the point where it had discarded the *judicia stricti juris* approach in favour of the *judicia bonae fidei* one. Hence, his dissenting judgment in *Bank of Lisbon*.

[19] Soon after considering *Bank of Lisbon*, the Appellate Division (now Supreme Court of Appeal (SCA)) was entrusted with *Sasfin*. [100] In *Sasfin* the court came to the conclusion that our common law "*does not recognise agreements that are contrary to public policy*" [101] or "*contrary to the moral sense of the community.*" [102] Interestingly, Jansen JA was part of the *Sasfin* bench. *Sasfin* approached the issue from the perspective of public policy or *boni mores* of the community. It did not re-open the discourse on the *exceptio.* Subsequent courts too did not re-open the discourse on the *exceptio* in great detail, but they continued to determine contractual disputes, especially those involving restraints of trade, on the basis that the agreement either in whole or in part should be consonant with the *boni mores* of the community. On this basis they have on countless occasions, relying on *Sasfin* as authoritative learning, held

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[97] *Id* at 607A-B

[98] *Tuckers Land and Development Corporation v Hovis* 1980 (1) SA 645 (A) at 651C-D

[99] *Id* at 651E

[100] *Sasfin v Beukes* 1989 (1) SA 1 (A)

[101] *Id* at 7H

[102] *Id* at 8A

that agreements or parts thereof should not be enforced on the ground that they constitute an affront to the *boni mores* of the community. It is important to note though that the court in *Sasfin* was at pains to caution future courts from interfering with contracts simply because they believed the contract in whole or in part conflicted with "*public policy*" or the "*boni mores of the community.*" The caution is unequivocal:

> "The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power." [103] (Emphasis added.)

This is particularly so, because adherence to contractual obligations and exercising of contractual rights is itself a very forceful public policy. This public policy is inherent in the right to contract freely. [104]

[20] However, the issue resurfaced some ten years after *Bank of Lisbon*, in *Saayman*. [105] Therein Olivier JA in a minority judgment reconsidered the role of public policy and *bona fides* (good faith) in resolving a contractual dispute. The learned judge of appeal examined numerous authorities and came to the conclusion that since the early 1900's our courts had utilised the principle of good faith to avoid an injustice from prevailing by the strict application of the law. Thus, Olivier JA found that many cases had been decided on the basis that the principle of good faith was an integral part of our law of contract and that it had a significant role to play in this area of law; [106] *Sasfin* was merely a more recent application of the principle. In *Saayman*, Olivier JA reiterated what Jansen JA had said in *Bank of Lisbon* and in *Truckers Land and Development*. Five years later, in *Brisley* [107] Olivier JA was faced with having to defend this view. Once again, the learned judge of appeal was in the minority. *Brisley* dealt with the application of the famous non-variation clause (also known as the "*Shifren clause*"). The majority (Harms, Streicher and Brand JJA together with a concurring judgment by Cameron JA) came to the conclusion that the principle of good faith was not the decisive factor in determining the issue of whether to uphold the whole or part of a contract. The other equally important factor was that of holding parties to their

bargain: *pacta sunt servanda*. The main concern for the majority was that the principle of good faith had been applied in such a manner by courts, particularly

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[103] *Id* at 9B

[104] *Id* at 9E-F. See the cases cited therein

[105] *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 (4) SA 302 (SCA) at 321H-I

[106] *Id* at 321H-I. The *dictum* at 326G is explicit in this regard: "*I am convinced that the principles of good faith, founded in public policy, still play and must continue to play, a significant role in our law of contract.*"

[107] *Brisley v Drotsky* 2002 (4) SA 1 (SCA)

puisne courts, to decide cases on the basis of what the judges sitting in those courts thought to be reasonable or fair. In other words, they utilised the principle of good faith as a gateway to introduce concepts of reasonableness or fairness into the law of contract, and by so doing gave themselves a licence to depart from the other fundamental principle of *pacta sunt servanda*. Applying the principle of *pacta sunt servanda,* which in their view enjoyed superior status to the principle of good faith, led them to conclude that the application of the non-variation clause was determinative of the dispute between the parties. Cameron JA (as he then was), on the other hand, presented a slightly more nuanced account of the law. He considered the import of the *Constitution of the Republic of SA, Act 108 of 1996* (the Constitution) and came to the conclusion that "*neither the Constitution nor the value system it embodies give the courts a general jurisdiction to invalidate contracts on the basis of judicially perceived notions of unjustness or to determine their enforceability on the basis of imprecise notions of good faith.*" [108] Fundamental to the logic of Cameron JA was that courts must prioritise contractual autonomy, which is part of the constitutional value of *"freedom*" and is derived from "*the constitutional value of dignity.*" [109] In contrast, for Olivier JA, "*our law clearly finds itself situated in a developmental phase where contractual justice is emerging more than ever before as a moral and legal norm of immense importance.*" [110]

[21] Not long after *Brisley* the SCA had occasion, in *Afrox Healthcare*, [111] to re-consider the issue in the light of our constitutional values. The facts in *Afrox Healthcare* had a sad tinge to them. Mr Strydom contracted with a private hospital for medical services, necessary for his healthcare. The contract was a standard one that all persons who seek the services of the hospital were required to sign if they wished to have recourse to the hospital's services. These contracts are also referred to in the literature as "*contracts of adhesion*". It contained a clause which indemnified the hospital for all acts of negligence, save for wilful ones, regardless of the consequence(s) of the negligence. In other words, even if death resulted from the negligence the hospital was immunised from liability. Anyway, as it so happened a nurse was negligent, causing Mr Strydom harm. He sued Afrox but faced the hurdle of the indemnity clause, which Afrox invoked. He challenged the validity thereof on the basis that it was not pointed out to him when he signed the contract (here he relied on established authority [112]), it was contrary to public policy and was in conflict with the principle of good faith. He also invoked his right to healthcare in terms of s 27(1) of the Constitution. The SCA, per Brand JA, was not persuaded by

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[108] *Id* at [93]

[109] *Id* at [94]

[110] Id at [72]. The judgment is in Afirkaans and the particular *dictum* reads: "*Dit is duidelik dat ons reg in 'n ontwikkelingsfase is waar kontraktuele geregtigheid meer as ooit tevore as 'n morele en juridiese norm van groot belang op die voorgrond tree.*"

[111] *Afrox Helathcare Limited v Strydom* 2002 (6) SA 21 (SCA)

[112] *Spindrifter (Pty) Ltd v Lester Donovan (Pty) Ltd* 1986 (1) SA 303 (A) at 316C-318C

any of his contentions. Accepting that the clause should not hold sway if it was against public policy, he came to the conclusion that there was an elementary and basic principle of law that contracts entered into voluntarily and freely by parties with capacity should be enforced. This basic rule was part of public policy and if it was to be applied it could not be held that the indemnity clause was contrary to public policy. [113] Brand JA found

that the argument about good faith was not sufficiently persuasive to displace the conclusion that the contract and its terms should be adhered to in circumstances where it was freely and voluntarily concluded:

> "As to the role and function of abstract notions such as good faith, reasonableness and fairness, it was decided by the majority in *Brisley* that, although these considerations constitute the substructure of our law of contract, they do not provide an independent or 'free-floating' basis for setting aside or limiting the operation of contractual provisions. Otherwise stated, although these abstract notions represent justification for and inform the rules of 'hard law', they do not constitute rules of 'hard law' themselves. When it comes to setting aside or the enforcement of contractual provisions, a court has no general discretion to act on abstract notions such as good faith and fairness. It is bound to apply the rules of hard law." [114] (Emphasis added.)

[22] The judgment in *Afrox Healthcare* raises concerns from the perspective of public policy: to allow a hospital to avoid all consequences for any negligence that the hospital staff may be responsible for simply on the basis of upholding the *pacta sunt servanda* principle without more is, with respect, giving an interpretation to public policy that is one-sided. While it is important to recognise that public policy requires upholding the terms of a contract, it is also public policy to renounce terms that are an affront to the *boni mores* of society. By way of illustration: the morals of society were found to trump the need to uphold the contract in *Sasfin*. In the same vein I would have no difficulty in refusing to uphold a contract between a hospital and a patient which immunised a hospital from the negligence of its staff in a case where the patient visited the hospital for a minor surgery and then left with her leg amputated or worse because of the negligence of the hospital staff. In my view, the terms of the contract notwithstanding, the

boni mores of society do not allow for the hospital to escape liability in such a case. In contrast, according to the learning in *Afrox Healthcare*, the terms of the contract without more are all important and ought to be decisive.

[23] That said, there can be no doubt that the more recent judgments of the SCA have unequivocally endorsed the views of Joubert JA on the *exceptio*. The court was alive to the fact that the judgments may be juxtaposed with that of

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[113] *Afrox Healthcare*, n 20 at [23] – [24]

[114] *Id* at [32]. Translation has been provided by Brand JA himself in Fritz Brand and Douglas Brodie, *Good faith in Contract Law* in Zimmerman, Visser and Reid (eds), *Mixed legal systems in Comparative Perspective: Property and Obligations in Scotland and South Africa* (2004) at 108

Sasfin, and therefore made it clear that it had no difficulty with the finding in *Sasfin* since, in their view, denying the validity of a contract or part thereof on the grounds of public policy is not the same as denying it on the grounds of good faith. The test is consistency with public policy and not with "*good faith, reasonableness and fairness*", for these, according to Brand JA, are "*abstract notions*". The conclusions of *Brisley* and of *Afrox Healthcare* attracted the attention of scholars, many of whom were critical of separating "*good faith, fairness and reasonableness*" from "*public policy*" in so stark a manner. [115] Many of the scholars found the distinction to be problematic. In one such scholarly piece the authors contended that the judgments were out of sync with the values embedded in our constitutional dispensation and that instead they represented an "*increasing conservatism in the judiciary's attitude toward open-ended constitutional values.*" [116]

[24] In 2006 the issue resurfaced in *Barkhuizen*. [117] Here the contestation involved a time-bar clause in an insurance contract. The clause stated that the claimant must serve summons on the insurer within ninety (90) days of the insurer repudiating the claim, failing which the insurer was automatically absolved of all liability. There was no debate that the claimant concluded the contract voluntarily and freely. The claimant brought his claim outside the ninety day period. The insurer invoked the clause in a special plea, as a result of which the parties requested that the court consider the matter on the basis of a stated case. This led to the court being furnished with very little factual information. The parties approached the matter on the basis of principle. The claimant claimed that the clause was contrary to public policy in that it denied him his constitutional right to access court. [118] In the High Court the claimant decided to re-focus his cause of action solely on the constitutionality of the clause. The High Court agreed with him that the clause breached his constitutional right to access courts. The matter came before the SCA. Its judgment was penned by Cameron J who it will be recalled was part of the majority in *Brisley*. Referring both to *Brisley* and *Afrox Healthcare* Cameron JA reiterated that our law of contract, like all law in SA, is subject to the Constitution. Echoing what was said there, the SCA understood the law to be that if a contract in whole or in part was offensive to public policy the courts were enjoined to declare the whole or the part invalid, and that public policy was informed by the constitutional values of dignity, freedom, respect for human rights, non-racialism and non-sexism. However, holding a contract or part thereof to be invalid for being incompatible with public

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[115] Some of these are listed in fn 4 in *Napier v Barkhuizen* 2006 (4) SA 1 (SCA), but there are many more than those listed therein. No purpose would be served by listing them all.

[116] D Bhana and M Pieterse, *Towards a reconciliation of contract law and constitutional values: Brisley and Afrox revisited*, 2005 SALJ 865 at 872

[117] *Napier v Barkhuizen* , n 24, fn 4

[118] Section 34 of the Constitution provides that everyone has a right to have any dispute resolved publically in a hearing before a court.

policy is very different from declaring it invalid on the grounds of good faith. To this end, Cameron JA categorically reminds the reader that:

> "*Brisley* rejected the notion that the Constitution and its value system confer on judges a general jurisdiction to declare contracts invalid because of what they perceive as unjust, or power to decide that contractual terms cannot be enforced on the basis of imprecise notions of good faith." [119] (Emphasis added.)

[25] Cameron JA found that the evidence placed before the court as to the rationale for the time-bar clause was threadbare and therefore the High Court's decision was problematic. This was so because the insurer needed to know within a reasonable time if it faced litigation. Whether 90 days might be reasonable or not depended on factual evidence and that was not presented to the court. [120] Hence, Cameron JA came to the conclusion that the claimant had failed to show that he did not conclude the contract freely "*and in the exercise of his constitutional rights to dignity, equality and freedom*" [121] , and therefore was not able to dislodge the insurer's reliance on the clause. The reasoning is simple: the claimant concluded a bargain, which included the time-bar clause, and was bound by the terms of that bargain. Put differently, the insurer's reliance on the clause was legitimate since that was the bargain it secured and on the evidence presented there had been no offence caused to public policy. In such a circumstance the insurer was entitled to the fruits of its bargain.

[26] Aggrieved at the outcome and taking issue with the supporting reasoning thereof the claimant sought assistance from the Constitutional Court (CC). The

CC agreed with the SCA that the case involved constitutional issues, and on that basis granted him audience. In the CC the claimant claimed that the clause was unenforceable because it was contrary to public policy and that it was "*unfair*". The claimant, no doubt, steered away from the argument that the clause should not be enforced because to do so would breach the notion of good faith precisely because of Cameron JA's comment that such a notion was too "*imprecise*" [122] to be of any value in determining the matter. However, and interestingly, the insurer attempted to meet the argument of the clause contravening public policy by invoking the very "*imprecise notion*" of good faith: it contended that the clause did not contravene public policy because it:

> "should be read with the implied term that parties to a contract ought to act *bona fide* (in good faith). This implied provision, so the argument went, rendered the clause flexible enough to accommodate the circumstances where the [claimant] is prevented by factors beyond his control from complying with the requirements of the clause." [123]

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[119] *Napier v Barkhuizen*, n 24, at [7]

[120] *Id* at [10]

[121] *Id* at [28]

[122] See quotation from the judgment of the SCA in [23] above

[123] *Barkhuizen v Napier* 2007 (5) SA 323 (CC) at [21]

[27] On the issue of the fairness of the clause, the majority judgment of Ngcobo J (as he then was) identified two questions that had to be answered in the determination of whether the clause was fair or not: was the clause "*unreasonable*", and if not, should it be enforced "*in the light of the circumstances which prevented compliance*" [124] therewith?

[28] On the issue of public policy, the CC recognised that the denial of judicial redress could be both a breach of the claimant's s 34 constitutional rights as well as a contravention of public policy. In such a case, the s 34 right was a reflection of public policy. On the issue of the time-bar and public policy the majority judgment pronounced:

> "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. Public policy, it should be recalled, 'is the general sense of justice of the community, the *boni mores*, manifested in public opinion.' Thus where a claimant seeks to avoid the enforcement of a time limitation clause on the basis that non-compliance with it was caused by factors beyond his or her control, it is inconceivable that a court would hold the claimant to such a clause. The enforcement of a time limitation clause in such circumstances would result in an injustice and would no doubt be contrary to public policy. 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." [125]

The conclusion regarding public policy and the need to do justice between the parties notwithstanding, it must not be forgotten that the onus of showing that enforcement of the clause is contrary to public policy rests with the claimant, who may be able to discharge it by showing that non-compliance was beyond his control. This the claimant failed to do. In short, the claimant had failed to discharge the onus of showing that "*it would be unfair or unjust to enforce*" [126] the time-bar clause. On that basis the majority judgment dismissed his appeal. In other words, the clause would only have been offensive to public policy if the claimant was able to show that its operation was unfair or unjust to him. The

minority, in two separate judgments by Moseneke DCJ and Sachs J, agreed with the conclusion of the majority regarding the role of public policy in

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[124] *Id* at [56]. The *dictum* reads:

"**The determination of fairness**

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 prevented compliance with the time limitation clause".

[125] *Id* at [73] footnote omitted

[126] *Id* at [86]

contractual law but disagreed on the outcome of the appeal. In the view of Moseneke DCJ the determination of whether a particular clause in a contract offends public policy is an objective one. Whether the claimant found the offending clause to operate unfairly or unjustly was irrelevant. If the clause, viewed objectively, offended public policy the courts should refuse to enforce it. In this case, the clause was "*on its face, unreasonable and unjust.*" [127] Sachs J agreed with Moseneke DCJ on this point. For them, as the matter was adjudicated on the special plea raised by the insurer, the claimant should not be disadvantaged by the lack of evidence regarding the circumstances which prevented him from complying with the terms of the clause. Hence, they were of the view that the appeal should have been upheld – the time-bar clause should have been declared invalid – and the matter should have been remitted to the High Court for further adjudication.

[30] The CC's majority judgment generated some debate in the legal community. This, to some extent, was galvanised by the fact that the concepts of fairness and reasonableness were collapsed into one in the judgment and many read the *dictum* at [56] [128] of the judgment to mean that all contractual provisions had to be reasonable to be fair in order to pass constitutional muster.

[31] A short while after the CC judgment came out, an individual, Mr Bredenkamp, had his contract with his bank (Standard Bank) terminated by the

bank. He was informed by the bank that it no longer wished to do business with him, as any association with him placed it at great risk of punitive measures being taken against it by the US government, and of suffering a great loss of business with other international banks. Mr Bredenkamp attempted to interdict the bank from terminating the contract on the basis that the bank's conduct was unreasonable and therefore unconstitutional. The matter came before the SCA. Harms DP, writing for a unanimous court, pointed out that the CC in *Barkhuizen* did not make any finding to the effect that "*fairness*" is now recognised as a fundamental or "*core*" constitutional value that infused all contracts. [129] This interpretation was not endorsed in two subsequent cases by the CC as we will see below. Anyway, since the case brought by Mr Bredenkamp was one "*about fairness … and nothing more*", [130] it has to be borne in mind that fairness applies to both parties, and to the extent that this may become a legitimate issue in a case, courts are enjoined to examine the matter from the view of both sides. [131] In that case, the bank did not act unfairly by terminating the account. Harms DP had no difficulty with acknowledging that the concept of *bona fidei*

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[127] *Id* at [119]

[128] Referred to in [27] and n 33 above.

[129] *Bredenkamp and others v Standard Bank of South Africa* 2010 (4) SA 468 (SCA) at [27] – [28]

[130] *Bredenkamp*, n 38 at [30]

[131] *Id* at [65]

was inherent in our law of contract. He reiterated what Jansen JA said that "(a)*ll contracts in our law are considered to be bonae fidei.*" [132] Even Joubert JA accepted this. [133]

[32] However, in my view, on the facts there was no doubt that the bank acted *bona fidei* in terminating the contract. The bank could not be expected to keep Mr Bredenkamp's account open to its own detriment. It was therefore entitled to

rely on the common law as there was no termination clause in the contract. The bank acted in good faith. [134] Thus, even if Mr Bredenkamp was to allege that the bank's conduct violated the principle of good faith, he would nevertheless, in my view, lose on the facts.

[33] Neither the CC judgment in *Barkhuizen* nor the SCA judgment in *Bredenkamp* sealed the debate. In *Everfresh* [135] the CC was once again confronted with the issue of good faith. There the parties concluded a contract of lease, which provided for the lessee (Everfresh) to renew that contract upon its expiry. Everfresh had to give notice of its desire to renew the contract and the lessor (Shoprite) would then negotiate a rental price for the renewed contract. Shoprite refused to negotiate a new rental price, thereby denying Everfresh the opportunity to renew the contract. Prior to the expiry date Everfresh gave notice of its desire to renew the contract and proposed an increase of 10% in the rental. Shoprite rejected the offer. Upon the expiry of the contract Shoprite sought the ejectment of Everfresh and was met with a claim that such relief was unlawful because Everfresh invoked the option to renew the contract. It was agreed though that at best for Everfresh it had an option to renew the contract and not a right to an automatic renewal. The option was contingent upon Shoprite agreeing to an increased rental. However, Everfresh contended that Shoprite was duty-bound to make an effort to negotiate the increase in rental in good faith by at the very least making a counter-offer. Its failure to do so rendered its efforts to eject Everfresh unlawful. The High Court agreed with Shoprite that it was under no

contractual duty to agree to a new rental or to make a counter-offer. It found that the option was no more than a promise to negotiate in good faith, but such a promise was too vague and imprecise to be enforceable. This finding was in accordance with the common law as enunciated by the SCA in *Southernport*. [136] Accordingly, it ordered the ejectment. The SCA refused Everfresh leave to

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[132] *Id* at [33], See: *Tuckers Land and Development Corporation*, n 7 at 651B-C

[133] *Mutual and Federal Insurance Co Ltd v Oudtshoorn Municipality* 1985 (1) SA 419 (A) at 433B

[134] *Bredenkamp,* n 38 at [57]

[135] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC)

[136] *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA)

appeal. The matter was brought to the CC on the basis that the conduct of Shoprite flouted the values enshrined in the Constitution and was contrary to public policy. It argued that these values and public policy required Shoprite to negotiate a new rental with it in good faith. It contended that the common law of contract as enunciated in *Southernport* should be developed in accordance with the injunction imposed upon all courts by s 39(2) of the Constitution. [137] This argument was not raised in the High Court, or even in the application for leave to appeal to the SCA. Two judgments were rendered by the CC. The majority came to the conclusion that Everfresh should not be allowed to raise the constitutional point for the first time in the CC and dismissed the appeal. The minority judgment believed that it would have been more appropriate to refer the matter back to the High Court for it to consider the argument raised by Everfresh. The two judgments nevertheless agreed on one principle which was that where a contract contains a provision requiring parties to negotiate further (an amendment for example, or as in *Everfresh*, a renewal of the contract upon its expiry) that provision must be interpreted in the context of:

> "… the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, … Contracting parts certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would

> be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement in good faith."[138] (Underlining added.)

Similarly, according to Yacoob J the contract must be interpreted:

> "against the backdrop of an understanding that good faith should be encouraged in contracts and a party should be held to its bargain." [139] (Underlining added.)

As I read the judgments they both endorse the *pacta sunt servanda* principle. In both judgments the conclusion reached was that provisions requiring further negotiation must be interpreted in such a way as to make it meaningful rather than nullifying it. To this end the judgments can hardly be said to be revolutionary. They do so by imposing a duty to act in good faith on the party who accepted the obligation to negotiate further at the appropriate time, i.e. when the contract expired. However, an obligation to negotiate in good faith is not an obligation to reach agreement. Good faith negotiations can, and often do, break down. Good faith negotiation also does not mean that a party is precluded from pursuing its own interests: on the contrary it is perfectly legitimate for it to pursue its own interests and yet be acting in good faith. In both judgments there was no suggestion that Shoprite was not acting in good faith simply because it pursued its own interests by rejecting any increase in rental offered by Everfresh. All the two judgments said was that Shoprite should

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[137] Section 39(2) requires all courts to develop the common law in a manner that promotes "*the spirit, purport and objects of the Bill of Rights*".

[138] *Everfresh* n 44, at [72]. See also [69]

[139] *Id* at [37]

not be allowed to simply refuse to engage with Everfresh because that would be contrary to the letter and the spirit of the obligation it voluntarily and freely accepted when it concluded the contract. Both judgments held that it would be wrong to find that the provision imposing

this obligation was too vague and uncertain to be enforced, as such a finding would allow Shoprite to escape an obligation it adopted and which at the very least gave Everfresh the benefit or opportunity to engage in *bona fide* negotiations with Shoprite at the expiry of the contract. It bears mentioning that the courts by applying the law requiring that parties act in good faith towards each other are not necessarily making a contract for the parties as is clearly demonstrated here. The CC was upholding the contract by giving the clause - the duty to negotiate an extension of the contract clause - a meaningful interpretation. Hence, the judgments are an excellent example of how, by relying on the principle of good faith, the other important principle of *pacta sunt servanda* is not necessarily or always modified, qualified or compromised. The two judgments demonstrate that the two principles can in certain circumstances enjoy co-extensive existence.

[34] What is clear though is that *Everfresh* has left a deep imprint on this terrain of the law. Contract law as enunciated by the SCA in *Brisley* (the majority judgment), *Afrox Healthcare*, *Napier* and to a lesser extent *Bredenkamp* was transformed. In their stead the approaches of Jansen JA in *Tuckers Land and Development Corporation* [140] and *Bank of Lisbon* as well as that of Olivier JA in *Brisley* that contractual parties were required to act in good faith towards each other was endorsed by the CC. Good faith according to those judgments incorporated the concepts of "*reasonableness and fairness*". The CC agreed.

[35] The CC had occasion to reconsider the approach in *Botha*. [141] In this case, Mrs Botha concluded an instalment agreement for the purchase of immovable land with a trust represented by Mr Rich. Mrs Botha was give possession of the land during the currency of the agreement. The agreement contained a clause to the effect that should Botha breach the agreement (failure to pay any instalment due would constitute a breach) the trust was entitled to keep the purchase price paid thus far (forfeiture clause), cancel the agreement (cancellation clause) and seek the ejectment of Mrs Botha. After having paid three-quarters of the purchase price, Mrs Botha defaulted on the instalments. The trust applied to the High Court to declare the agreement cancelled and order that Botha be ejected from the land. At the same time the trust claimed that it was entitled to keep all the payments made by Mrs Botha in terms of the forfeiture clause. Mrs Botha relying on s 27(1) of the Alienation of Land Act, 68 of 1981 (the Act) counter-applied for the land to be registered into her name. Section 27(1) provides, amongst others, that if a purchaser has paid "*not less than 50%*" of the purchase price, it shall be entitled to demand that the seller transfer the land

[140] See n 7

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

into the purchaser's name. However, the High Court found in favour of the trust in every respect. The matter came before the SCA on petition for leave to appeal. The SCA granted leave to the full bench of the High Court, who dismissed the appeal. Botha applied to the CC for assistance. At the CC she repeated her claims that in the light of her having paid three-quarters of the purchase price, the cancellation of the agreement contravened public policy and therefore should not be enforced: alternatively if the cancellation clause was upheld she was entitled

to a refund of the amounts paid towards the purchase price – in other words, the forfeiture clause should not be enforced.

[30] The CC, noting that all bilateral contracts, such as the one in the case, are infused with the principle of reciprocity, and more importantly that the principle was flouted by Mrs Botha by virtue of her being in arrears with the instalments, said the following:

> "To the extent that the rigid application of the principle of reciprocity may in particular circumstances lead to injustice, our law of contract, based as it is on the principle of good faith, contains the necessary flexibility to ensure fairness. In *Tuckers Land and Development Corporation* [142] it was pointed out that the concepts of justice, reasonableness and fairness historically constituted good faith in contract. The principle of reciprocity originated in these notions. This accords with the requirements of good faith." [143]

And:

> "[The provisions of the Act] are in accordance with the constitutional values of reciprocal recognition of the dignity, freedom and equal worth of others, in this case those of the respective contracting parties. The principle of reciprocity falls squarely within this understanding of good faith and freedom of contract, based on one's own dignity and freedom as well as respect for the dignity and freedom of others. Bilateral contracts are almost invariably cooperative ventures where two parties have reached a deal involving performances by each in order to benefit both. Honouring that contract cannot therefore be a matter of each side pursuing his or her own self-interest without regard to the other party's interests. Good faith is the lens through which we come to understand contracts in that way." [144] (Underlining added.)

[37] On this reasoning, at the heart of which lies, once again, the principle of good faith, the CC upheld the appeal and ordered the trust to register the land in

the name of Mrs Botha, subject to her purging her default. Incidentally Cameron J (as he now is) concurred in the judgment, despite his earlier misgivings about good faith being an "*imprecise notion*" [145] . In essence, the CC refused to enforce both the forfeiture and the cancellation clauses. It bears mentioning

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[142] *Tuckers Land and Development Corporation*, n 7 at 651 - 2

[143] *Botha*, n 50 at [45]

[144] *Id* at [46]

[145] See the quotation from his judgment in [20] above

that the CC ensured that a balance between the interests of Mrs Botha and that of the trust was maintained. This is manifest in the order it issued. To explain the order it utilised the term "*disproportionate*":

> "[T]o deprive Ms Botha of the opportunity to have the property transferred to her under s 27(1) and in the process cure her breach in regard to the arrears, would be a disproportionate sanction in relation to the considerable portion of the purchase price she has already paid, and would thus be unfair. The other side of the coin is, however, that it would be equally disproportionate to allow registration of transfer, without making that registration conditional upon payment of the arrears and the outstanding amounts levied in municipal rates, taxes and service fees. Accordingly an appropriate order in this regard will be made." [146]

[38] In my reading, the CC in *Botha* crystallised what it had already stated in *Barkhuizen* and in *Everfresh*. It therefore, in my view, did not endorse Harms DP's interpretation of its judgment in *Barkhuizen.*

[39] This then is the present state of our law of contract. Though I have to say that the underlined sentence in the *dictum* quoted above in [36] does give me pause for concern if it were to be interpreted to mean that a party can never pursue its own interests in negotiations and act in good faith at the same time. In my view, courts should not find that because a party pursues its own interests to the detriment of its negotiating or contractual partner it is not negotiating or acting in good faith. This is why the judgment in *Bredenkamp* has to be correct, even if

viewed through the lens of good faith. The fact that Mr Bredenkamp was severely prejudiced by the conduct of the bank pursuing its own interests it is not a basis for finding that the bank was not acting in good faith. In fact, it demonstrated that the pursuit of its own interests was proof of its good faith. Similarly, if Shoprite, in the course of meeting whatever evidence that Everfresh brought was able to show that it acted in good faith, even though it pursued its own interests to the detriment of Everfresh, there should have been no reason to force it agree to an extension of the agreement. To repeat what I say above, a duty to negotiate in good faith is not a compulsion to reach agreement. In *Botha,* Mrs Botha acknowledging her default had offered to purge her default so that the contract could remain alive, alternatively she asked for the payments she made towards the purchase to be refunded. The refusal of the trust to entertain either of the two without more or explaining itself and to insist on applying the letter of the agreement cannot be held to be an act of good faith.

[40] The CC has now in a unanimous judgment spoken unambiguously. Incidentally, Cameron J (as he now is) concurred with the judgment. Nevertheless, it seems the SCA elects to dissent. In a very recent judgment the SCA in *BEADICA* [147] refused to follow the CC's lead in *Botha*.

[41] *BEADICA* was concerned with a dispute between a lessor (Oregon Trust) and four lessees, each of whom entered into a separate contract of lease with the

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[146] *Botha* n 50 at [49]

[147] *Trustees for the Time Being of the Oregon Trust v BEADICA 231 CC and Others* [2019] ZASCA 23 (28 March 2019)

Oregon Trust. The four lessees conducted franchised businesses on the

premises let to them. The lease contracts were for a period of five years each and they commenced running on 1 August 2011. The lessees each had an option to renew the leases for a further five years, failing which the leases would terminate on 31 July 2016. To ensure that the option was meaningful a mechanism to determine future rental was incorporated into the lease contract. To exercise the option the lessees were required to inform the lessor six months prior to 31 July 2016 that they intended to renew the contract. The lease agreements resulted from each of the lessees having concluded a franchise agreement with a Mr Sale. Mr Sale was also the sole member of the lessor. The franchise agreements provided that the franchise businesses were to operate from the leased premises. The lessees failed to notify the lessor timeously of their desire to exercise their options – instead of informing the lessor by 31 January 2016, they only informed it in March 2016, with two of them indicating that they wished to purchase the leased premises. In response the lessor stated that Mr Sale was not available but it would respond as soon as he returned. No further response was received. Instead, on 29 July 2016, the attorneys for the lessor informed each of the lessees that they were expected to vacate the premises by 31 July 2016. The lessees brought an application in the Cape High Court interdicting the lessor from ejecting them pending the determination of a claim by them that they validly exercised the option. The lessor counter-applied for their ejectment. The High Court, per Davis J, came to the conclusion that while they failed to comply with the requirement to inform the lessor by 31 January 2016 that they intended to renew the leases, the lessees nevertheless substantively complied with the requirement to timeously inform the lessor. [148] He

went further to find that by relying on the termination of the agreement by effluxion of time, the lessor effectively imposed a sanction on the lessees for failing to inform it timeously of their intention to renew the leases. Such a sanction was, in his view, a "*disproportionate sanction*". Given the particular facts of the case, Davis J came to the conclusion that it would constitute "*capital punishment.*" [149] The concept is commonly used in our labour law, where the sanction of dismissal is readily accepted by all labour law practitioners to be equivalent to "*capital punishment*". On this logic, Davis J ordered the lessor to comply with the option clause, which contained a mechanism for determining the future rental for the use of the premises.

[42] The SCA, per Lewis JA, was of the view that to decide a contractual dispute on the basis of fairness, and to fashion a remedy on the basis of "*disproportionality*", which was the approach that informed the CC's decision in *Botha*, is *contra* the fundamental principle of rule of law in that it firmly sets the

[148] *Beadica 231 CC & others v Trustees, Oregon Trust & another* 2018 (1) SA 549 (WCC) at [39]

[149] *Id* at [39] and at [42]

law on the path of uncertainty. In contrast the SCA was of the view that the principle of *pacta sunt servanda* principle should reign supreme for it produced certainty in the law. Incidentally, Davis J did address the issue of certainty in contractual law and said that in his view, certainty is a "*shibboleth*". [150] Not so according to the SCA. According to it, "(t)*he reason for the continued application of the principle embodied in the maxim pacta servanda sunt is the need for certainty in commerce*" [151] And, *pacta sunt servanda* can only be circumvented in

cases where it conflicts with public policy. The SCA, however, did not envision this very qualification as undermining the "*need for certainty in commerce*."

[43] Lewis JA came to the conclusion that the lessees did not advance any reasons, apart from claiming to be uneducated persons, for not giving timeous notice of the intention to renew the lease agreement. In this sense the case was on all fours with that of *Barkhuizen* where a failure to explain a default was the basis upon which the majority in the CC refused the defaulting party the relief it sought. By not explaining why they were unable to comply with the terms of the lease agreement, the lessees had failed to demonstrate why the enforcement of the termination clause was contrary to public policy. Unlike the High Court, the SCA rejected the claims of the lessees that they were uneducated and that Mr Sale, as the sole trustee, was motivated to destroy their businesses. On the latter issue, the SCA said that Mr Sale's "*motive, if he had any, was not relevant.*" [152]

[44] In short, to the extent that the CC in *Botha* saw it necessary to qualify the *pacta sunt servanda* principle by reference to the concepts of "*good faith*", "*fairness*" or "*disproportionality*" (which according to the SCA are different from public policy consideration) it has, according to the SCA, undermined the rule of law. So strongly did the SCA feel about this that Lewis JA showed no hesitation in approvingly quoting the view of an academic who described the CC's judgment in *Botha* as being "*embarrassingly poor*." [153] The description is unfortunate and in

my view should not have been repeated by the SCA. It is unhelpful and does not enlighten the discourse.

[45] That the CC and the SCA follow different approaches to the law of contract is

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[150] *Id* at [44]

[151] n 56, at [26]. Lewis JA referred to two other judgments from the SCA in support of this conclusion. They are: *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) Ltd* 2018 (2) SA 314 (SCA) and *Roazar CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA)

[152] n 56, at [45]

[153] *Id* at [37]

certainly an unwelcome development: it has the potential of producing "*endless uncertainty and confusion*"[154] 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.[155] 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. In my judgment it is important not to sanctify any one principle or constitutional value to the detriment, or in total disregard, of others especially in cases where two (or more) constituional principles or values clash. On this logic, *pacta sunt servanda* cannot be elevated above all else. Contractual arrangements and the conduct of the parties bound by them are, over time, far too robust, rich and complex to be understood simply through the bare bones of the *pacta sunt servanda* principle without regard to the "*principle of good faith*, [which] *contains the necessary flexibility to ensure fairness"*. The development of contract law by the CC, in my judgment, captures this basic fact and attempts to give it practical meaning by inviting parites and courts to be vigilant, thorough, fair to all sides affected by or involved in the contractual

relationshsip and most of all respectful of all the constituional values that arise in a contractual dispute. However, had it not spoken on the subject, I would have applied the SCA's account of the law, even though I find myself in disagreement with it.

Application of the legal principles as laid out by the CC to the facts of the case

[46] In the present case the respondent's opposition to the cancellation of the agreement was, *inter alia*, that the appellant was not entitled to invoke the cancellation clause for ulterior purpose. [156] Factual averments to this effect were placed before the court in the answering affidavit. This is brought to the fore in the following terms in the answering affidavit:

"13. After the lease was automatically extended for a further period of 36 months in terms of clauses 2.3 and 2.4 the [Appellant] decided that it wished to sell the entire property upon which the lease premises is [sic] situated. In amplification hereof Bezuidenhout and her employees began harassing and hounding the Respondent for purposes of trying to ensure that the Respondent vacated the leased premises as the Applicant was unable to sell the leased premises to its potential new purchaser in circumstances where the Respondent continued to lease the premises in terms of [the agreement].

14. The Respondent believes that the new prospective purchaser was insisting that the Respondent vacate the leased premises prior to any sale materialising. Accordingly, the Respondent's continued occupation of the leased premises became a major impediment to the [Appellant] selling the property to a prospective purchaser.

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[154] *Bloemfontein Town Council v Richter* 1938 AD 195 at 232

[155] *Pharmaceutical Manufacturers Association of South Africa and Another: In re: Ex Parte President of the Republic of South Africa and Others* 2000 (2) SA 674 (CC) at [49]

[156] See [11] above

15. For this reason the [Appellant] began falsely accusing the Respondent of various misdemeanours and breaches. One of these so called breaches was that the Respondent caused on site damage to the generator which then had to be repaired. Whilst it is correct there was a problem with the generator, the Respondent in no way contributed towards this problem. City Power disconnected the generator which was interfering with the

electricity at the leased property. Furthermore, as the Respondent was desperate for the generator to be operative as a result of frequent power cuts that were taking place in the area the Respondent agreed to pay for the repair of the generator.

16 It is denied that the Respondent failed and refused to make payment to the [Appellant] of the utility cost due, owing and payable as at 28 June 2017. In amplification hereof, the [Appellant] fails to set out what those utility costs being referred to in this paragraph were and furthermore, fails to produce any proof that the Respondent was invoiced by the [Appellant] for the utility cost due for the said period. Whenever the Respondent was invoiced by the [Appellant] for utility cost due, the Respondent would pay those costs.

17. Furthermore, the Respondent requested a breakdown of amounts as mentioned in an email to the [Appellant] dated 15 June 2017 but never received the said breakdown. I annex hereto the aforesaid email … Annexed to [Appellant's] founding affidavit is a letter from the Respondent's attorneys of record, … in terms of which it denied that the Respondent has in any way or manner breached any of the terms of the [agreement] as alleged or at all. I confirm the correctness of the allegations set out in the said letter and pray that the terms of the said letter be regarded as if specifically incorporated herein.

18. Accordingly, the Respondent emphatically denies that it has breached any of the provisions of the [agreement] as alleged or at all." [157] (Emphasis added).

[47] The claims may not be true, but if that was the case, the appellant was obliged to dispute them and place factual evidence before the court. Instead it replied as follows:

"AD PARAGRAPHS 13 – 18

10. The founding affidavit makes it clear that the [agreement] was cancelled by the [appellant] pursuant to its right in clause 22.1 of the [agreement], namely to terminate the lease by serving on the respondent a notice of its intention to cancel the lease upon thirty (30) calendar days' notice.

11. This right of the [appellant] is one that it may elect to pursue whether or not the respondent is in breach of the [agreement]

12. The [appellant] persists that the respondent has breached the [agreement] in, amongst other the manner set out in paragraph 13 of the founding affidavit. I have, however, been advised that given the fact that the [appellant] relies on its right to cancel the [agreement] on notice to the respondent, it is not necessary to deal with the breaches of the [agreement] committed by the respondent during the subsistence of the [agreement] neither with any of the allegations contained in paragraphs 13 to 18 of the answering affidavit." [158] (Emphasis added).

[48] The respondent goes further to allege that the appellant "*has been contacting Sasol* (one of the respondent's suppliers) *and the respondent's other suppliers, and based on false facts instructed the said suppliers and more particularly Sasol to terminate its supply agreement with the*" respondent. The respondent made this allegation in the face of the appellant's claim that the respondent had

[157] Paragraphs 13 – 18 of the answering affidavit

[158] Paragraphs 10 – 12 of the replying affidavit

received a termination notice from one of its suppliers of petroleum products, Sasol. In support of the claim the appellant annexed a copy of the letter the respondent received from Sasol. To its credit the appellant denied the allegation, but in bald terms. It could at the very least have gone a step further and explained how it came to possess a letter that was sent to the respondent by Sasol and is no doubt privy to Sasol and the respondent only as it affects their private business relationship which the appellant has no role in.

[49] In my view the essence of the averments made on behalf of the respondent were to the effect that the appellant, in its quest to sell the property, attempted to get the respondent to vacate the premises by employing methods and means that effectively breached its duty of good faith towards the

respondent. In particular, it "*harassed and hounded*" the respondent's employees, made false allegations of breach against the respondent and interfered with the relationship between the respondent and its suppliers, so that the respondent would vacate the premises. As I say above these averments may be false, but it was up to the appellant to say so and to place the relevant facts before court so that they could be assessed. The appellant refused to deal with them. It took the view that they were irrelevant. Consequently, on the rule outlined in *Plascon-Evans* [159] the undisputed averments of the respondent constitute the factual substratum upon which the dispute has to be resolved. And to the extent that it denied that it interfered with the business relationship between the respondent and Sasol its denial was bare and therefore inadequate in terms of the *Plascon-Evans* rule as clarified in *Wightman*. [160] According to these facts the respondent wished to relieve itself of the agreement because it became an insuperable burden to its motive to sell the property.

[50] At the hearing this issue was raised with Mr Vetten for the appellant. It was put to him that these facts relate to the issue of good faith. He conceded that the averments do in essence challenge the good faith commitment of the appellant, but relying on the SCA's approach to the law of contract (as canvassed in the cases mentioned above), maintained that since good faith, especially in the form of reasonableness and fairness, was not part of our law of contract there was no need for the appellant to meet the challenge. And he conceded that the challenge was not met. Mr Ress, in response, insisted that the challenge was

raised and went so far as to say that at the hearing before the court *a quo* the discourse for a time focussed on the learning presented by the CC in *Barkhuizen* and *Everfresh*. In reply Mr Vetten said that his memory was slightly more faded than that of Mr Ress and therefore he was not able to confirm or

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[159] *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635; *Wightman/ t/a J W Construction v Headfour (Pty) Ltd* 2008 (3) SA 371 (SCA) at [12] – [13]

[160] *Id*.

deny that the issue was canvassed at the hearing in the court *a quo*. However, it was his submission that the issue of good faith, especially in the form of fairness and reasonableness, was not material to the determination of the dispute.

[51] I, therefore, hold that the issue of good faith was material to the determination of the dispute. The facts that have a bearing on this issue were raised by the respondent. They were established by application of the legal principles applicable to motion proceedings. The respondent in these circumstances had every right to argue that the appellant failed to act in good faith, and that its recourse to clause 22.1 was not borne of good faith. Mr Ress did so and Mr Vetten's response was that the law is set out by the SCA which this court, he reminded us, is bound by. That is as far as the matter on this issue was taken. But, Mr Vetten did not dispute that the issue was raised.

[52] Windell and Opperman JJ disagree with me. They say that the issue of good faith was never pleaded nor argued before us. My reasons for holding otherwise are clearly set out in the preceding paragraphs. In their joint judgment they place heavy emphasis on the question of the role and importance of pleadings in the determination of disputes by courts. I do not underestimate the importance of pleadings. However, there is one aspect that I wish to highlight. It

is that pleadings are rarely, if ever, perfect. For this reason courts have for almost a century now, accepted without more the *dictum* of Innes CJ:

> "The object of pleading is to define the issues: and parties will be kept strictly to their pleas where any departure would cause prejudice or would prevent full enquiry. But within those limits the Court has a wide discretion. For pleadings are made for the Court, not the Court for pleadings. And where a party has had every facility to place all the facts before the trial Court and the investigation into all the circumstances has been as thorough and as patient as in this instance, there is no justification for the inference by an appellate tribunal, merely because the pleading of the opponent has not been as explicit as it might have been." [161]

[53] Although I hold that the facts allowing for the respondent to contend that the appellant was not acting in good faith when it sought to invoke clause 22.1, in any event on the principle set out by Innes CJ, I believe the respondent was well within its rights to argue that the appellant failed to adhere to its duty to, at all material times, act in good faith towards the respondent. It placed certain relevant facts before the Court. It did not have to explicitly spell out that the appellant did not in accordance with its contractual obligation act in good faith towards it. That was a matter it could argue as long as it restricted itself to the facts placed before the Court. The appellant could not, in that event, claim prejudice. Mr Vetten certainly did not do so. After all, his client, on advice, voluntarily and explicitly elected not to place contrary facts before the court. The real dispute between the parties was the right of the appellant to invoke clause 22.1 to secure the ejectment of the respondent. The right of the

[161] *Robinson v Randfontein Estates G. M. Co. Ltd* 1925 AD 173 at 178; *Shill v Milner* 1937 AD 101 at 105; *Stead v Conradie en Andere* 1995 (2) SA 82 (SCA) at 122B-C

appellant was subject to its obligation to at all material times act in good faith towards the respondent. The respondent did not, in its answering affidavit, step outside of the

issue in dispute, nor did it fail to place material facts concerning the element of good faith before the court. It was, therefore, legally competent for it to canvass this element at the hearing and this court is, in its duty to do justice by the parties, free to deal with it.

[54] I have no difficulty with the proposition that an owner of a property should have an unfettered right to alienate the property. All owners do, and I believe should, have that right as long as they themselves do not encumber the property, or where by alienating the property they affect the rights that others have acquired over the property. In this case, the appellant of its own accord encumbered the property and by so doing conferred rights upon the respondent. The appellant's right to alienate its property must be understood in this context. I also do not believe that the appellant was prevented from ever alienating the property as long as the agreement subsisted. My view is that it had to do so in a manner that did not breach its duty of good faith towards the respondent, which duty it voluntarily adopted by concluding the agreement. And, I repeat what I say above, this does not mean that it would have breached its duty of good faith by pursuing its own interests to the detriment of the respondent. Unfortunately for it, it failed to make that case, or to put it differently, it failed to meet the case of the respondent. In contrast, in *Bredenkamp* the bank made that case.

[55] Finally, Windell and Opperman JJ say that my "*construction of the law is misplaced*." In my reading, our disagreement lies in the fact that I hold the view that the law of contract has advanced since *Sasfin*. I have extensively explained

the development that occurred since *Sasfin* hereinabove. It is unfortunate that they believe this "*construction*" to be "*misplaced*".

[56] To sum up. On the facts established by application of the principles set out in *Plascon-Evans* and their application to the law as set out by the CC, I hold that clause 22.1 does not avail the appellant. In other words, the appellant acted contrary to its duty of good faith towards the respondent, and when that failed to yield it the desired result it sought refuge in clause 22.1. Under these circumstances it should not be allowed safe passage. Accordingly, in my view, the clause should not in the present circumstances be enforced by the court. Hence, I would issue an order dismissing the appeal with costs.

Vally J

Date of hearing:	18 February 2019
Date of judgment:	11 April 2019
For the Appellant:	D Vetten
Instructed by:	Edward S Claasen & Associates

For the Respondent:	S Ress
Instructed by:	Naicker Ooni Wadia Inc