

BACKGROUND

As part of a black empowerment initiative by the National Empowerment Fund ("NEF"), various franchise agreements were concluded between Sales Hire CC ("Sales Hire") and four close corporations, the members of which were former employees of Sales Hire ("Lessees"). In addition, a cooperation agreement was entered into between Sales Hire and the NEF in terms of which, amongst others, Sales Hire undertook to assist and support the Lessees in their franchise operations.

The sole member of Sales Hire, Shaun Sale, was also one of the trustees of the Oregon Trust; the trust which owned the premises from which the franchise businesses were run.

The lease agreements concluded between Oregon Trust and the Lessees contained options to renew the leases for a further five years, provided notice was given six months before termination and that the new rental was agreed to per the mechanism in the leases.

The Lessees purported to exercise their option to renew but not in accordance with the requirements set out in the leases. As such, Oregon Trust sought to evict the Lessees on the basis that the leases had expired.

High Court ("HC"):

The Lessees argued that contract law had become 'infused' with the notions of fairness and Ubuntu. That, despite the strict terms of the leases, considerations of good faith and the broader purpose of both the franchise and lease agreements had to be considered as the context.

That context was one where Sales Hire had undertaken to the NEF that it would support the franchisees in their operations; that the franchise agreements would endure for 10 years and that it had thus been intended that the agreements of lease would also run for ten years.

The HC held that terminating the leases was disproportionate to the breach and the argument for legal certainty, on its own, should not be a restraint to the clear intention of the parties; which was to advance historically disadvantaged persons.

Supreme Court of Appeal ("SCA"):

The SCA found that *"although fairness and reasonableness inform policy they are not self-standing principles. And there are competing policy considerations, in particular, the need for certainty in commerce."* The HC did not rule on the basis of public policy but rather on the concept of disproportionality which, whilst a principle, is not in itself a policy consideration.

On a review of the leases, the SCA held that there was nothing inherently offensive in the renewal clauses. The only limitation was that it had to be exercised in a particular manner and by a particular date. The requirement of six months' notice was reasonable given that, in the absence of agreement, Oregon Trust would have to find new tenants. Further, that while the Lessees may not be *"sophisticated business people"* they *"were not ignorant individuals"*.

The SCA stated that it was the Lessees, through non-compliance with the renewal clause, who jeopardized their businesses without reason.

HELD

The SCA found that the breach clause was not itself contrary to policy; there had been equality of bargaining power in so far as the parties were concerned, timely performance had been possible and the agreement had been entered into freely. The appeal was thus upheld and the Lessees were ordered to vacate the premises.

VALUE

This case confirms that contracting parties still need to consider public policy when not only agreeing to terms but also enforcing same. However, without violations of public policy, a claim of good faith will not be sufficient to overrule consensus.

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