

IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

CASE No.: **5526/2022**

Reportable: YES/NO

Of Interest to other Judges: YES/NO

Circulate to Magistrates: YES/NO

In the matter between:

JACOBUS JOHANNES HERCULES STASSEN N.O.

First Applicant

DONALD LAAS N.O.

Second Applicant

ADRIAAN JOHANNES VAN JAARSVELDT N.O.

Third Applicant

ELIZE BERNADETTE DAVIDS N.O.

Fourth Applicant

ABRAHAM HERMANUS LEACH N.O.

Fifth Applicant

MARTHINUS THEUNISSEN KRIEL N.O.

Sixth Applicant

LEHANDRI VAN JAARSVELDT N.O.

Seventh Applicant

[In their capacity as trustees for the time being of the
SKOUGRONDE ONTWIKKELINGS TRUST TMP 2799(B)]

and

JOSEPH REYNOLDS CHEMALY N.O.

First Respondent

MICHAEL NICOLAS GEORGIU N.O.

Second Respondent

ADRIANA GEORGIU N.O.

Third Respondent

[In their capacity as trustees for the time being of the

MICHAEL FAMILY TRUST TMP 2502]

MANGAUNG METROPOLITAN MUNICIPALITY

Fourth Respondent

FIRSTRAND BANK LIMITED

Fifth Respondent

JUDGMENT BY:

VAN RHYN, J

HEARD ON:

10 AUGUST 2023

DELIVERED ON:

6 OCTOBER 2023

INTRODUCTION.

- [1] The first to seventh applicants are the trustees of the Skougronde Ontwikkelings Trust, Number TMP 2799(B) (the “Applicant Trust”). Mangaung Metropolitan Municipality, is the owner of the immovable property known as the Bloemfontein Showgrounds. During 1998 the Applicant Trust obtained a cession of a notarial lease of the said property. A certain section of the property undergone commercial development. This section of the Bloemfontein Showgrounds is known as the Showgate Shopping Centre. The Applicant Trust concluded a notarial sub-lease (the “Sub-Lease”), ending in 2049, with Monema Properties CC pertaining to the Showgate Shopping Centre. It is this specific section of the property that forms the subject of this application.
- [2] The Sub-Lease of the Showgate Shopping Centre was registered in the Deeds

Office, Bloemfontein, as a Notarial Deed of Cession of a Sub-Lease under registration number K 138/1999L on 22 February 1999. On 22 August 2006 Monema Properties CC ceded its right, title and interest in terms of the Sub-Lease to the Michael Family Trust, Number TMP2502 (the “Respondent Trust”). The first, second and third respondents are cited in their capacity as the trustees of the Respondent Trust.

- [3] The fourth respondent is the Mangaung Metropolitan Municipality, against whom no relief is sought. The fourth respondent did not partake in this application.
- [4] The fifth respondent is FirstRand Bank Limited with registration number 1929/001225/06 (“FirstRand Bank”) On 28 June 2018 the Respondent Trust and FirstRand Bank conclude a facility agreement (“the facility agreement”) in terms whereof FirstRand Bank undertook to make a loan facility available to the Respondent Trust, subject to the fulfilment of various conditions precedent. It was a condition precedent of the facility agreement, that the Applicant Trust needed to consent, *inter alia*, to the registration of a mortgage bond and a security cession over the Sub-Lease. The Respondent Trust and FirstRand Bank opposes the relief sought by the Applicant Trust.

THE CONTRACTUAL RELATIONSHIP.

- [5] It is the Applicant Trust’s case that it was entitled to cancel the Sub-Lease agreement concluded between it and the Respondent Trust on seven days’ written notice and that it, in fact, afforded the Respondent Trust more than 30 days’ notice to remedy its default thereof. The Applicant Trust moves for a declaratory order in the following terms:

“5.1 It be declared that the Notarial Sub-Lease under registration number K138/1999L, as amended by the Notarial Addendum thereto dated 17 August 2006 under registration number K968/2006S and the Agreement of Sub-Lease dated 21 February 2008 with its addendum dated 18 August 2014 between the Skougronde Ontwikkelings Trust, number TMP2799(B) and the Michael Family Trust, number TMP2502, are cancelled.

5.2 The First- to Third Respondents (The Michael Family Trust) be ordered to forthwith vacate, which shall include the performance of all actions germane to relinquishing effective control over the property, whether as sub-lessee, sub-sub-lessor, lessor, beneficial occupier or account holder *vis a vis* the Fourth Respondent, and including taking any and all necessary steps to cause the cancellation of the sub-sub lease agreements they have concluded with any third party, in respect of the property defined as the “Premises” in the Notarial Sub-Lease under a registration number K138/1999L and the subsequent Agreement of Sub-Lease dated 21 February 2008 and defined as “additional premises” in the addendum dated 18 August 2014 to the latter to agreement.

5.3 The First- to Third Respondents (The Michael Family Trust), be ordered to pay the costs of this application on attorney and client scale.”

[6] The Applicant Trust and the Respondent Trust were, from 5 September 2006, contractual counterparts in terms of the Sub-Lease. The lease period would endure until the date, one day prior to the date of commencement of the lease in the year 2049, on which date the Sub-Lessee undertakes to vacate the premises and hand undisturbed occupation and possession thereof to the Sub-Lessor, the Applicant Trust. The Sub-Lease was amended, to include an extension of the parking areas. The amendments to the Sub-Lease are not material to the present application.

[7] The monthly rental was agreed to be the sum of R17 000.00 plus Value Added Tax thereon for the first period of 12 months where after the monthly rental shall increasing by 10% for the first ten-year period of the lease. The rate of escalation after the expiry of the first ten-year period, was to be agreed upon between the parties. From the numerous statements appended to the founding affidavit it is evident that, at the relevant time, the monthly rental amounted to R 131 491.00 and rent for parking to the sum of R 23 394.35.

[8] The rental was payable monthly in advance, the first payment to be made on the

date of commencement of the lease and all subsequent payments were to be made on or before the same day of each of every subsequent month. The Respondent Trust was required to pay all rates, taxes, charges and levies payable by the Applicant Trust to the lessor in respect of the premises. The Respondent Trust would be required to pay all municipal charges, including any deposits, in respect of water and/or electricity and/or sewerage and/or storm water and/or refuse removal in respect of the premises and will, upon demand, refund to the sub-lessor any amounts paid by the sub-lessor in advance of the date of commencement of the Sub-Lease in respect of such items.

- [9] In the event of breach, clause 12.1.1 of the Sub-Lease agreement provided that in the event that the Respondent Trust fails to carry out or comply with any of the terms or conditions of the Sub-Lease and persists with such failure for thirty (30) days after written notice requiring such default to be remedied; or, in terms of the provisions of clause 12.1.2, the Respondent Trust fails to make any of the payments required, including payment in full of the rental and persists with such failure for seven (7) days after written notice requiring such default to be remedied, then and in such event the Applicant Trust will be entitled forthwith and without any prior notice to terminate the Sub-Lease by a written notice to the Respondent Trust without prejudice to all rights of the Applicant Trust or to sue for and recover any payment of monies due or damage for breach of contract or otherwise howsoever.
- [10] The Sub-Lease also contains the following entrenched formalities clauses: The provisions of the Sub-lease will continue to be of full force and effect and binding on both parties notwithstanding any indulgence, extension of time, relaxation of latitude shown, which may be shown or given by one party to the other party, and no such indulgence will constitute a waiver of any of the rights of neither of the parties (as per clause 14). No variation or amendment of the Sub-Lease or addition thereto or consensual cancellation thereof will have any force or effect unless reduced to writing and signed by the Applicant Trust and the Respondent Trust or the agents acting under written authority (as per clause 15).
- [11] Clause 16 provides that no waiver of any of the terms and conditions of the Sub-Lease will be binding for any purpose unless expressed in writing and signed by the

parties, and any such waiver will be effective only in the specific instance and for the purpose given. No failure or delay on the part of either party in exercising any right, power or privilege will operate as a waiver, nor will any single or partial exercise of any right, power or privilege preclude any other or further exercise thereof or the exercise of any other right, power or privilege.

- [12] The Sub-Lease also provided that any dispute arising from or in connection with the Sub-Lease shall be finally resolved in accordance with the rules of the Arbitration Foundation of Southern Africa. Even though the Respondent Trust, in their answering affidavit, sought to stay this application in terms of the provisions of section 6(2) of the Arbitration Act¹ pending the outcome of arbitration proceedings, the Respondent Trust abandoned any reliance upon the provisions of the arbitration clause.
- [13] On 29 June 2018 the Respondent Trust and FirstRand Bank concluded a facility agreement ('the facility agreement') in terms of which FirstRand Bank undertook to make a loan facility available to the Respondent Trust. The Applicant Trust consented to the registration of a first covering mortgage bond and to the conclusion of a deed of cession *in securitatem debiti* over the Sub-Lease in favour of FirstRand Bank. It was in the Respondent Trust's interests and benefit that it secures this loan and to achieve this to ensure that the conditions precedent to the facility agreement were all fulfilled.
- [14] In order to secure appropriate undertakings from the Applicant Trust, FirstRand Bank furnished the Respondent Trust with a draft letter of undertaking. The second respondent, Mr. Michael Georgiou instructed Ms Lindie Koupis of E G Cooper Majiedt Attorneys to assist the Respondent Trust in obtaining the undertakings from the Applicant Trust. In an endeavour to negotiate an acceptable notice period Ms Koupis addressed an email to Mr Emile Els, the Applicant Trust's attorney of record at McIntyre Van der Post Incorporated, proposing that the Respondent Trust would be afforded a further period of 45 days to remedy a breach of the Sub-Lease after the expiry of the initial notice period.

¹ Act 42 of 1965.

[15] This additional notice period of 45 days was not acceptable to the Chief Executive Officer of the Applicant Trust, Ms Elsje Prinsloo. Mr. Michael Giorgiou, with the assistance of Ms Lindie Koupis, negotiated an acceptable notice period with Ms Elsje Prinsloo and subsequent to confirmation from FirstRand Bank's representative, Ms Ruth Boake, the Applicant Trust furnished an undertaking in terms whereof the curtailed further notice period was agreed upon. The undertaking is recorded in annexure "FA10" to the founding affidavit. The relevant provisions of the undertaking ("FA10") provide as follows:

" 2. We hereby consent, to the extent required in terms of the SubLease, to:

2.1 the conclusion of the Cession by the SubLessee;

2.2 the registration of the Mortgage Bond by the SubLessee over the SubLease (and undertake, if applicable, to sign any documentation or consents required by the applicable Deeds Registry to procure such registration).

3. We further undertake, in favour of the Lender, that:

3.1 for as long as the SubLessee is indebted to the Lender under and in terms of the Mortgage Bond, the SubLessor shall not be entitled to cancel the SubLease in consequence of default by the SubLessee unless:

3.1.1 the SubLessor has given the Lender notice of the default in question and its intention to cancel the SubLease as a consequence thereof;

3.1.2 a reasonable period of time, being not less than twenty (20) days, has passed subsequent to:

3.1.2.1 the date of delivery at the abovementioned address (being the Lender's chosen domicilium citandi et executandi for purposes hereof) by the Lender of such notice; or

3.1.2.2 the expiry of the period stated in any notice to the Lessee, a copy of which shall be simultaneously provided (as stipulated in 3.1.2.1) to the Lender, within which the SubLessee is required to remedy the default; whichever is the later date, within which to procure that such default is a remedied:

3.2 for as long as the SubLessee is indebted to the Lender under and in terms of the Mortgage Bond, any purported cancellation or termination of the SubLease by either party thereto which is contrary to the provisions of this clause will be invalid and of no force or effect whatsoever.”

[16] It is common cause that it routinely occurred that the Respondent Trust failed to pay the rental due to the Applicant Trust in terms of the Sub-Lease on the first day of each month. The Respondent Trust’s continual failure to pay the rental amounts timeously, resulted in the Applicant Trust’s attorneys having to, almost on a monthly basis, address a letter of demand where after the Respondent Trust would then either rectify its breach or request an extension of time, to which the Applicant Trust had acceded on numerous occasions.

[17] Each of the invoices issued to the Respondent Trust for payment of rental recorded that payment thereof was due on the seventh day of the month and interest would be charged from the fifteenth day of the month. Notwithstanding the terms of the Sub-Lease, the Respondent Trust accordingly did not pay the rental on the first day of the month. The Respondent Trust contends that it applied the payment terms recorded in the invoices rendered to it by the Applicant Trust.

[18] During October 2020 the Applicant Trust appointed McIntyre Van der Post Inc. attorneys to assist with the collection of rentals from the Respondent Trust. Several letters of demand by McIntyre van der Post Inc. were addressed to the Respondent Trust to demand payment of arrear rental and other charges. On 7 June 2022 a letter of demand was addressed to the Respondent Trust. On 24 June 2022, E G Cooper Majiedt Inc., the attorneys on behalf of the Respondent Trust, formally requested and indulgence. The request for an indulgence was met on 27 June 2022 by an email in reply that the Applicant Trust was not prepared to grant the Respondent Trust an extension. On behalf of the Respondent Trust reliance is

placed on the fact that, for the first time since the inception of the parties' business relationship, the request for an indulgence was denied.

- [19] On 26 July 2022 a demand for payment of the rental and other amounts due for July 2022 was addressed to the Respondent Trust. Notwithstanding the terms of the Sub-Lease, that the period of seven days was applicable to remedy a breach, the Applicant Trust afforded the Respondent Trust a period of 20 days to pay the arrear amounts. On 11 August 2022 Mr Els of McIntyre van der Post addressed an email to E G Cooper Majiedt to remind the Respondent Trust that payment of the July rental and other amounts was due on or before 15 August 2022 in terms of the demand dated 26 July 2022.
- [20] On 15 August 2022, E G Cooper Majiedt requested an extension to pay the July amounts by 2 September 2022. The following day, 16 August 2022 McIntyre van der Post granted the requested extension subject to the Respondent Trust also paying legal costs in the amount of R20 297.50. On 24 August 2022 McIntyre van der Post addressed a letter of demand to the Respondent Trust for payment of the rental amount, electricity consumption, municipal rental and water consumption within 20 days from the date thereof, failing which the Applicant Trust intended to cancel the Sub-lease.
- [21] On 13 September 2022 the time period afforded to the Respondent Trust in terms of the letter of demand dated 24 August 2022 expired. The Respondent Trust failed to pay the August 2022 rental amount that was due on or before 1 August 2022. On 15 September 2022 the Respondent Trust queried the municipal rental amounts where after Mr Els responded that such queries should be addressed to the municipality directly. On 27 September 2022 the Applicant Trusts, through McIntyre van der Post, addressed a letter to the Respondent Trust cancelling the Sub-lease. On 30 September 2022 the Respondent Trust paid the arrear amounts and was, according to its contention, no longer in breach of the Sub-lease.

ARGUMENTS ON BEHALF OF THE APPLICANT TRUST.

- [22] Counsel on behalf of the Applicant Trust, Mr Grobler SC (appearing with Mr Van der Merwe) argued that the only true question in this application, having regard to the

constitutional imperatives of Ubuntu, fairness and reasonableness infused into the common law, under the circumstances of this matter and the defence advanced by the Respondent Trust, is whether or not the enforcement of the contractual terms of the Sub-lease will be against public policy. In essence the Applicant Trust's case is that it lawfully and validly cancelled the Sub-Lease agreement and that the application concern questions of law and the interpretation of the provisions of the agreement(s) concluded between the parties.

- [23] Mr Grobler SC argued that, on the basis that the Respondent Trust and FirstRand Bank rely upon FA10 given by the Applicant Trust to FirstRand Bank as the basis for the contention that the Sub-lease was not lawfully cancelled, it will be imperative for the court to find that FA10 amounted to a valid amendment of the Sub-Lease. It is however the Applicant Trust's case that FA10 does not constitute an agreement nor do the provisions contained therein amount to a variation of the terms of the Sub-Lease.
- [24] The Applicant Trust provided its consent to the Respondent Trust to ceded its rights, title and interest in and to the Sub-Lease to FirstRand Bank as security for the Respondent Trust's obligations *vis-à-vis* FirstRand Bank and to register a bond over the Sub-Lease. Furthermore, the Applicant Trust undertook, in favour of FirstRand Bank, for as long as the Respondent Trust is indebted to FirstRand Bank in terms of the said mortgage bond, not to cancel the Sub-lease unless it has given reasonable notice of at least 20 days of the Respondent Trust's default and the Applicant Trust's intention to cancel the Sub-Lease.
- [25] However, the Applicant Trust is not a party to the mortgage bond and in as far as FirstRand Bank has acquired real rights under the mortgage bond, such rights, *ex facie* the mortgage bond, do not include any right to notice as a pre-requisite for cancellation of the Sub-Lease. The mortgage bond was registered without the Applicant Trust being a party thereto. The mortgage bond specifically does not provide for a right to enforce or impose upon the Applicant Trust a specific notice period which must be complied with *vis a vis* the Respondent Trust as a pre-requisite to cancellation of the Sub-lease.

- [26] The Respondent Trust is not a party to FA10, nor was the undertaking as per FA10 directed to the Respondent Trust. Neither the Respondent Trust nor FirstRand Bank signed FA10. The Respondent Trust has not required any rights in terms of FA10. During argument Mr Grobler SC, with reference to appendix 8, appendix 9 and appendix 10 to the facility agreement (appended to the answering affidavit), contended that the capital repayment schedule indicate that the first repayment by the Respondent Trust was scheduled to commence on 1 November 2018 with the final repayment to be effected on 1 October 2021.
- [27] FA10 provided that any purported cancellation or termination of the Sub-Lease by either party which is contrary to the provisions of FA10 will be of no force or effect for as long as the Respondent Trust is indebted to FirstRand Bank under and in terms of the mortgage bond. The cancellation of the Sub-Lease occurred on 26 September 2022, a date subsequent to the final repayment date, namely 1 October 2021, with the result that FirstRand Bank's and the Respondent Trust's reliance upon the provisions of clause 3.2 of FA10 do not hold water.
- [28] On behalf of the Applicant Trust it is contended that neither FirstRand Bank nor the Respondent Trust addressed the issue whether the provisions of the facility agreement have been complied with or not. The Applicant Trust is not privy to the information and as a result of the Respondent Trust's failure to grapple with the amount due, if any, in terms of the mortgage bond, so the argument goes, the contention that the Applicant Trust was obliged to adhere to the time period as per FA10 did not come out of the starting blocks.
- [29] The Applicant Trust provided the Respondent Trust, in a show of good faith, with a period of 27 days to rectify its failure to pay the rental and other amounts whereas only a period of 7 days as agreed upon in terms of the Sub-Lease would have been sufficient. No variation, by way of an addendum of the Sub-Lease agreement occurred. The Respondent Trust and FirstRand Bank have therefore failed to advance a defence valid in law. The application thus stands to be granted with costs.

THE ARGUMENTS ON BEHALF OF THE RESPONDENT TRUST AND FIRST

RAND BANK.

- [30] Mr Symon SC, counsel on behalf of the respondents, argued that the Applicant Trust furnished express undertakings recorded in annexure FA10 that it would not cancel the Sub-Lease unless it afforded the Respondent Trust an additional notice period of 20 days after the expiry of the initial notice. The Applicant Trust did not comply with the undertaking as set out in FA10 and its cancellation of the Sub-Lease is accordingly of no force and effect. The Applicant Trust attempts to avoid the undertaking on the basis of a technical argument that the Sub-Lease includes a non-variation clause requiring that any amendment thereto must be reduced to writing and signed by both parties.
- [31] Mr. Symon SC argued that the Applicant Trust's reliance on the non-variation clause embodied in the Sub-Lease is untenable. On a proper construction of the undertaking, it is a *stipulatio alteri* and the non-variation clause does not apply thereto. In any event, and with reference to **Gray v Waterfront Auctioneers (Pty) Ltd**² a contracting party may not rely on a non-variation clause in bad faith.
- [32] Even if the undertaking is not a *stipulatio alteri* or the Sub-Lease was not varied to include the terms of FA10, the Applicant Trust's reliance upon strict terms of the Sub-Lease, contrary to the provisions of FA10 to justify its cancellation of the Sub-Lease cannot be countenanced on the grounds of public policy. The Applicant Trust never previously insisted that the Respondent Trust must strictly comply with the terms of the Sub-Lease and it granted the Respondent Trust indulgences on numerous occasions regarding non-compliance with the provisions of the Sub-Lease. Furthermore, the correspondence addressed on behalf of the Applicant Trust prior to cancellation of the Sub-Lease, created the impression that the Applicant Trust did not seriously intend to cancel the Sub-Lease. As a result, the application stands to be dismissed with costs.

APPLICABLE LEGAL PRINCIPLES AND THE APPLICATION THEREOF TO THE FACTS.

- [33] The principle that the courts will enforce contracts, expressed as *pacta sunt*

² 1996 (2) SA 662 (W) at 668.

servanda, is obviously necessary as a general principle. The general rule that parties to an agreement are as free to vary or discharge the contract as they were to make it, is subject to limitations. When the parties impose restrictions on their own power of subsequent variation or cancellation of their contract they will incorporate a non-variation clause in their contract.

- [34] On the one hand it limits contractual freedom by curtailing the parties' ability to change their minds and alter the contract, but on the other hand, this limitation is in itself a manifestation of the parties' contractual freedom pursuant to which they, by prior agreement, agreed to this limitation in order "...to enhance certainty in their future dealings and to minimise disputes between them"³. A situation in which the same argument of freedom of contract or *pacta sunt servanda* may lead to two opposite conclusions is possible when a non-variation clause appears in a contract.
- [35] The Appellate Division, in the judgment of **SA Sentrale Ko-op Graanmaatskappy Bpk v Shifren en Andere**⁴ favoured the position where the original contract must be respected and a subsequent agreement, that is not in writing, must be ignored. An attempt to agree informally on a topic covered by a non-variation clause, including cancellation and an extension of time for payment, or to vary informally a contract containing a non-variation clause must therefore fail.
- [36] The Shifren principle certainly has its worth. It has thus been consistently reaffirmed by the courts. However, the Shifren principle remains controversial. This is because in practice, its application frequently leads to harsh and unfair results as it allows a party to go back on his or her word, notwithstanding the other party's good faith reliance upon it. The Supreme Court of Appeal introduced a proviso that, because a non-variation clause curtails common law freedom to contract, it must be restrictively interpreted.⁵
- [37] In **Brisley v Drotsky**⁶, the Supreme Court of Appeal had to consider the question how the courts ought best to mitigate the Shifren principle's frequently inequitable

³ *Brisley v Drotsky* 2002 (4) SA 1 (SCA) para 89.

⁴ 1964 (4) SA 769 (A).

⁵ *Randcoal Services Ltd v Randgold and Exploration Co Ltd* 1998 (4) SA 825 (SCA) at 841E- 842D.

⁶ 2002 (4) SA 1 (SCA) paras 88-95.

effects. The majority dismissed the view of Olivier JA in **Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman**⁷ to develop the concept of good faith in the law of contract and held that the lack of good faith could not be accepted as an independent basis for setting aside or not enforcing contractual provisions. However, through the separate concurring judgment of Cameron JA (as he then was), the door was opened to the possibility of loosening the “Shifren shackle”⁸.

[38] In **South African Forestry Co Ltd v York Timbers Ltd**⁹ Brand JA, with reference to **Brisley v Drotsky** and **Afrox Healthcare Bpk v Strydom**¹⁰ held as follows:

“In addition, it was held in *Brisley* and *Afrox Healthcare* that – within the protective limit of public policy that the courts have carefully developed, and consequent judicial control of contractual performance and enforcement – constitutional values such as dignity, equality and freedom require that courts approach their task of striking down or declining to enforce contracts that parties have freely concluded, with perceptive restraint”.¹¹

Cameron JA predicted that the appropriate tool to mitigate potential hardship caused by the Shifren principle would be the age-old doctrine of public policy. He formulated this prediction as follows in **Brisley v Drotsky**:

“It is not difficult to envisage situations in which contracts that offend these fundamentals of our new social compact will be struck down as offensive to public policy. They will be struck down because the Constitution requires it, and the values it enshrines will guide the courts in doing so.”¹²

[39] In **Barkhuizen v Napier**¹³ the foundations were laid as to the approach with regard to constitutional challenges to contractual terms and to ensure that “... the common law, under the impulse of the values of our new constitutional order is called upon to shoulder the burden of grappling in its own quiet and incremental manner with

⁷ 1997 (4) SA 302 (A) 318.

⁸ Nyandeni Local Municipality v Hlazo 2010 (4) SA 261 (ECM) para1.

⁹ 2005 (3) SA 323 (SCA).

¹⁰ 2002 (6) SA 21 (SCA).

¹¹ At [27].

¹² At [92].

¹³ 2007 (5) SA 323 (CC).

appropriate legal regulation to ensure basic equity in the daily dealings of ordinary people.¹⁴ Since then the courts have refused to enforce a non-variation clause on the basis that enforcement of the Shifren principle would offend public policy.¹⁵

[40] In the matter at hand, it routinely, since 2011, occurred that the Respondent Trust did not pay the rentals due to the Applicant Trust in terms of the Sub-Lease on the first day of each month, and most often not even on the seventh day of each month as per the invoices submitted by the Applicant Trust to the Respondent Trust. Mr Grobler SC mentioned that, as a result of the continued habitual breach, “an automatic repeat function” of the breach letter issued by the attorney’s acting on behalf of the Applicant Trust, “would have come in handy”.

[41] A fundamental point of departure in this matter is the undertaking contained in FA10 and its interpretation. The approach to interpretation is succinctly summarised in **Natal Joint Municipal Pension Fund v Edumeni Municipality**¹⁶ which held as follows:

“The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusiness-like results or undermines the

¹⁴ At [184].

¹⁵ Nyandeni Local Municipality v Hlazo 2010 (4) SA 261; Steyn v Karee Kloof Melkery (Pty) Ltd unreported case no

2009/45448 [2011] ZAGPJHC 228 (30 November 2011).

¹⁶ 2012 (4) SA 593 (SCA).

apparent purpose of the document. Judges must be alert to and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. 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...”¹⁷

- [42] It is evident that the Applicant Trust accepted the terms of FA10 as legally binding on it. The Applicant Trust was assisted by its attorney to finalise the terms thereof. Furthermore, the Applicant Trust knew that FirstRand Bank would rely on the undertaking sought to advance a loan facility to the Respondent Trust and consented to the registration of the mortgage bond over the Sub-Lease in favour of FirstRand Bank.
- [43] FA10 was furnished to First Rand Bank almost five years prior to the hearing of this matter. During this period, the Applicant Trust did not raise a dispute or concern that the terms of FA10 were nugatory and effectively serve no purpose. The stance that the terms of FA10 are effectively meaningless was adopted for the first time in this application. Notwithstanding the Applicant Trust’s contentions, it not only agreed with the terms of FA10 but also complied with the contents thereof by notifying FirstRand Bank that the Respondent Trust had breached the provisions of the Sub-Lease and were afforded 20 days (instead of seven days as per the Sub-Lease) to remedy its breaches of the Sub-Lease.
- [44] However, from the contents of the founding affidavit deposed to by Ms Elsje Prinsloo on behalf of the Applicant Trust, it is evident that an error or misunderstanding regarding the interpretation of FA10 occurred. In the founding affidavit it is stated that on request of FirstRand Bank, the Applicant Trust provided consent to the Respondent Trust to cede its rights, title and interest in and to the

¹⁷ At [18].

Sub-Lease to FirstRand Bank, provided consent to register a mortgage bond and undertook in favour of FirstRand Bank that:

“... for as long as the Respondent Trust is indebted to FNB in terms of the said bond, that the Trust would not cancel the sub-lease, unless it has given reasonable notice of at least twenty (20) days of the Respondent Trust’s default and the Applicant Trust’s intention to cancel at FNB’s chosen *domicilium* address, being [...] M[...] Place, [...] F[...] Drive, Sandton.”

[45] What is quoted above is not a true reflection of the contents of FA10. FA10, in simple terms, recorded the undertaking by the Applicant Trust in favour of FirstRand Bank as follows: for as long as the Respondent Trust is indebted to the Lender (FirstRand Bank) in terms of the mortgage bond, the Applicant Trust shall not be entitled to cancel the Sub-Lease in consequence of default by the Respondent Trust unless-

1. the Applicant Trust has given FirstRand Bank notice of the default (by the Respondent Trust) and its intention to cancel the Sub-lease; and
 2. a reasonable period of time, being not less than 20 days has passed subsequent to:
 - 2.1 the date of delivery to FirstRand Bank at its *domicilium* address of such notice; or
 - 2.2 the expiry of the period stated in a notice (letter of demand) to the Respondent Trust, a copy of which notice shall simultaneously be provided to FirstRand Bank, within which the Respondent Trust is required to remedy the default;
- whichever is the later date, within which to procure that such default is remedied. (emphasis added)

- [46] On 24 August 2022 the Respondent Trust was afforded 20 days, in terms of the demand, to remedy its breach of the sub-Lease. On 27 September 2022 the Applicant Trust's attorneys addressed a letter to the Respondent Trust cancelling the Sub-Lease. On a proper reading of FA10, the Applicant Trust furnished an express undertaking that it would not cancel the Sub-Lease unless it afforded the Respondent Trust an additional period of 20 days after the expiry of the period stated in the notice. In the notice of demand, the period is not stated as 7 days as per the Sub-Lease, but 20 days. Therefore, the Applicant Trust was only entitled to cancel the Sub-Lease in consequence of default of the Respondent Trust subsequent to the expiry of 20 days (in accordance with FA10) after the lapse of the 20-day period stated in the notice dated 24 August 2022. The initial 20-day period expired on 13 September 2022. The additional 20-day period expired on 3 October 2022.
- [47] On its own version, and as Mr Grobler SC contended, in a show of good faith, the Applicant Trust afforded the Respondent Trust 13 days more than it could have done to remedy its breach of the Sub-Lease. The Respondent Trust contends, on various grounds, that the purported cancellation is not valid. One reason being that the cancellation is premature. The day for payment of the monthly rental and other amounts was concluded to be the first day of every month. However, the invoices issued by the Applicant Trust indicated the date for payment to be the 7th day of each month.
- [48] The Sub-Lease lays down a procedure for the cancellation hereof. The Applicant Trust did not follow the procedure in respect of the time period within which the Respondent Trust had to be afforded to comply with the Sub-Lease. The letters of demand appended to the founding affidavit all provide for 20 days to rectify the breach, not 7 days as per the Sub-Lease. In my view the Applicant Trust cannot rely solely on this fact to validly cancel the Sub-Lease. In order for the Applicant Trust to succeed in this regard it had to show that it complied strictly with the peremptory provisions of the Sub-Lease. On its own version, the Applicant Trust did not comply with the time period to be afforded to the Respondent Trust. The Applicant Trust now falls back on the non-variation clause. The Applicant Trust's conduct prior to its purported cancellation of the Sub-Lease contradicted its demand for strict

compliance with the terms of the Sub-Lease.

[49] The Applicant Trust contends that the Respondent Trust and FirstRand Bank have not made the point clear in their answering affidavits that enforcement of the right to cancel the Sub-Lease would be against public policy. I do not agree with this contention. Under the heading “Public Policy” the point that the Applicant Trust’s belated reliance on the strict terms of the Sub-Lease on only 7 days’ notice in an attempt to cancel it, is contrary to public policy. The reasons for this contention is addressed in not less than 3 pages. On behalf of the Respondent Trust and First Rand Bank it is therefore argued that the facts and circumstances of this matter justify a departure from the Shifren principle.

[50] The Applicant Trust’s reliance on the non-variation clause to defeat the undertaking contained in FA10 is misplaced as it does not accord with the proper interpretation thereof. In **Grey v Waterfront**¹⁸ the court summarised the limitations to the Shifren principle as follows:

Even if the non-variation clause had been relevant because the parties’ conduct amounted to a variation of the lease, the applicant may well have been precluded from praying it in aid because, as it is put by Christie in *The Law of Contract in South Africa* 2nd ed at 535, ‘a party whose conduct is “fraudulent, or unconscionable, or a manifestation of bad faith” (referring to *Resisto Dairy (Pty) Ltd v Auto Protection Insurance Co Ltd* 1962 (3) SA 565 (C) at 571 F per Rose-now J) ‘will not be permitted to rely on a non-variation clause (referring to *Leyland (SA (Pty) Ltd v J Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271 (W) at 272H-273A).

[51] The basic idea is that parties must be bound by the contracts they enter into. This concept results in the principal that non-contracting parties, in no way connected to the contract, are not bound by the terms thereof. The doctrine of privity of contract means that parties who are not privy to a contract cannot sue or be sued on it. It is against the background of privity of contract that the value of a contract for the

¹⁸ (supra) at 668H.

benefit of a third party, or *stipulatio alteri* (or *ius quaesitum tertio*) can be appreciated.

- [52] A *stipulatio alteri* has various constructions depending on the circumstances in which it is concluded and the intention of the parties. The conclusion that a contract for the benefit of a third party is really a misnomer was drawn by Schreiner JA in his dissenting judgment in **Crookes v Watson**¹⁹ where it was held as follows:

“...what is not very appropriately styled a contract for the benefit of a third party is not simply a contract designed to benefit a third person; it is a contract between two persons that is designed to enable a third person to come in as a party to a contract with one of the other two.”

- [53] What is referred to as the intention to benefit a third party is not actually an intention to enrich the third party, but an intention to empower the third party to adopt and become a party to the contract if he so wishes.²⁰ In **McCullough v Fernwood Estate Ltd**²¹ Innes CJ described a *stipulatio alteri* in the following terms:

“An agreement for the benefit of a third person is often referred to in the books as a stipulation. This must not be taken, however, in the narrow meaning of the Civil law, for in that sense the stipulatio did not exist in Holland. It is merely a convenient expression to denote that the object of the agreement is to secure some advantage for the third person. It may happen that the benefit carries with it a corresponding obligation. And in such a case it follows that the two would go together. The third person could not take advantage of one term of the contract and reject the other. The acceptance of the benefit would involve the undertaking of the consequent obligation. The third person having once notified his acceptance and thus established a *vinculum juris* between himself and the promisor would be liable to be sued, as well as entitled to sue. If, for instance, the stipulated benefit took the form of an option to purchase

¹⁹ 1956 (1) SA 277 (A) at 291C.

²⁰ *Bursey v Bursey* [1997] 4 All SA 580 (E) 592F.

²¹ 1920 AD 204 at page 205 – 206.

specified property at a certain price, the acceptance of the offer would involve a liability to pay the price which could be legally enforced. Otherwise the third person would be in the position of being able to sue upon a contract involving reciprocal obligations without being liable to an action if he refused to discharge his part of them.”

[54] Acceptance by the third party may be express or implied and, where the contract is a beneficial one, will not require strong evidence to support it.²² In the matter at hand, the Respondent Trust (stipulator) negotiated the terms of FA10 with the Applicant Trust (promisor) for the benefit of FirstRand Bank, which benefit FirstRand Bank accepted. No further formalities were prescribed for the conclusion of the *stipulatio alteri*.

[55] The Sub-Lease itself does not disclose any intention to include FirstRand Bank as a party thereto. FA10 however complies with the basic requirements of a *stipulatio alteri* in favour of FirstRand Bank and that, as a result thereof, a contractual right to comply with the notice period ensued. Consequently, FirstRand Bank became a party²³ to the Sub-Lease with the result that the Applicant Trust was obliged to comply with the terms of FA10 as between it and FirstRand Bank before it could cancel the Sub-Lease. The *vinculum iuris* or legal bond created upon acceptance of the benefit by FirstRand Bank is between the third party and the promisor.²⁴

[56] In amplification of FA10, a mortgage bond was registered over the Sub-Lease in favour of FirstRand Bank. FirstRand Bank's rights in terms of the mortgage bond accordingly became fused with the terms of the Sub-Lease.²⁵ For the registration of a notarial bond, specially hypothecating a registered lease or sublease, the deed of lease or sublease shall be endorsed by the Registrar of the Deeds Office in terms of the provisions of section 82 of the Deeds' Registries Act²⁶ (the “Deeds Act”)

[57] The Respondent Trust and FirstRand Bank as well as the Applicant Trust approved

²² *Estate Greenberg v Rosenberg and Greenberg* 1925 TPD 924 930.

²³ *Joel Melamed & Hurwitz v Cleveland Estates; Melamed & Hurwitz v Vornor Investments (Pty) Ltd* 1984 (3) SA 155 (A) at 172A

²⁴ *Eldacc (Pty) Ltd v Bidvest Properties (Pty) Ltd* 682/10 [2011] ZASCA144 (26 September 2011).

²⁵ *Standard Bank of South Africa Ltd v Saunderson and Others* 2006 (2) SA 264 (SCA) at [2].

²⁶ Act 47 of 1937.

of the additional notice period as per FA10. It is a preclusion from acting contrary to a firm written commitment which was accepted by all the parties. The attack by the Applicant Trust on the basis that the schedule of payments, appended to the answering affidavit, indicates that the loan amount should have been settled by the time of the purported cancellation, cannot be sustained in the face of the unequivocal allegation by Ms Boake of FirstRand Bank confirming an ongoing debt, at all material times, which is substantial.

- [58] This application is opposed by FirstRand Bank on the grounds that it is the holder of both the mortgage bond and the security cession over the Sub-Lease. The security cession agreement was signed on 29 June 2018 and the mortgage bond was registered during November 2018. From the answering affidavit deposed to by Ms Boake it is evident that "...the indebtedness at present, is well in excess of the amounts secured in respect of the mortgage bond." The argument raised on behalf of FirstRand Bank is that the registration of the mortgage bond affords FirstRand Bank real rights over the Sub-lease in terms of, *inter alia*, the provisions of the Deeds Act.
- [59] Mr Rudolph (appearing with Mr Symon SC) argued that the Applicant Trust is obliged to comply with the provisions of the Deeds Act before it may cancel the Sub-Lease. In terms of the provisions of section 82(3) of the Deeds Act the provisions of section 56(1) shall apply *mutatis mutandis* in respect of any mortgage bond registered over a lease as opposed to a mortgage bond registered over immovable property. In turn, section 56(1) provides that no transfer of mortgaged land shall be attested or executed by the Registrar and no cession of a mortgaged lease of the immovable property, or of any mortgaged real right in land, shall be registered until the bond has been cancelled or the land, lease, or right has been released from the operation of the bond with the consent in writing of the holder thereof.
- [60] Section 78(1) of the Deeds Act provides, *inter alia*, for the cancellation of a lease or sub-lease upon termination. This section is silent on the situation where a mortgage bond has also been registered over the sub-lease that is the subject matter of an application in terms of section 78 for the cancellation of the lease or

sub-lease. On behalf of the Respondent Trust and FirstRand Bank it is submitted that before a party may make application in terms of the provisions of section 78 of the Deeds Act, the mortgage bond must first be cancelled or the lease or sub-lease, as the case may be, must first be released from the operation of the mortgage bond.

- [61] This, Mr Rudolph argued, creates tension between the rights of a lessor (or sub-lessor) as opposed to a bondholder as to whose rights should take precedence. Normally, if a registered lease or sub-lease terminates by the effluxion of time, it would be uncontroversial for the land owner or leaseholder to obtain the consent of the bondholder to release the registered lease from the operation of the mortgage bond. However, if a party wishes to terminate a registered lease due to a breach thereof, that party would have to obtain the written consent of the bondholder to release it from the operation of the bond.
- [62] FirstRand Bank opposes the relief claimed by the Applicant Trust and is not prepared to consent to the cancellation of the Sub-Lease, the mortgage bond and the security cession, and will only do so after the full balance owed to it by the Respondent Trust is settled. Even if the Applicant Trust was entitled to cancel the Sub-Lease, its purported cancellation thereof would only be effective once the Sub-Lease, together with the mortgage bond is lawfully and validly cancelled in accordance with the provisions of the said Deeds Act. FirstRand Bank is therefore still vested with its rights and is thus entitled to exercise all of those rights in terms of the mortgage bond and/or the cession including, but not limited to, the right to sell its rights in execution, purchase, realise or transfer the Sub-Lease.
- [63] On behalf of the Applicant Trust it was submitted that there is no provision in the mortgage bond providing for any notice period pertaining to the cancellation of the Sub-lease. FA10, approved to by all the parties, cannot be seen as an alteration of the terms of the mortgage bond. Cancellation of the Sub-Lease is an indivisible and unitary act. If it is accepted that FA10 precludes a cancellation of the Sub-Lease in respect of FirstRand Bank, it also precludes a cancellation against the Respondent Trust. The cancellation of the Sub-Lease cannot simultaneously be ineffective against FirstRand Bank but effective against the Respondent Trust.

[64] The Applicant Trust, by seeking to cancel the Sub-Lease, is acting contrary to and thus in breach of FA10. FirstRand Bank, in opposition, has set out how its security would be endangered. In **Beadica 231 CC and Others v Trustees, Oregon Trust**²⁷ it was held that:

“ ... contractual relations are the bedrock of economic activity and our economic development is dependent, to a large extent, on the willingness of parties to enter into contractual relationships. If parties are confident that contracts that they enter into will be upheld, then they will be incentivised to contract with other parties for their mutual gain. Without this confidence, the very motivation for social coordination is diminished. It is indeed crucial to economic development that individuals should be able to trust that all contracting parties will be bound by obligations willingly assumed.”²⁸

In **Beadica**, the Constitutional Court furthermore held that “... our constitutional project will be imperilled if courts denude the principle of *pacta sunt servanda*.”²⁹ *Pacta sunt servanda* therefore continues to play a crucial role in the judicial control of contracts.

[65] It was accordingly reasonable for FirstRand Bank to have expected that the Applicant Trust, and the Respondent Trust, would comply with the terms of FA10. Apparently the Applicant Trust endeavoured to comply with the terms of FA10. It afforded the Respondent Trust a period of twenty days to remedy its breaches of the Sub-Lease and every notice furnished to the Respondent Trust was also furnished to FirstRand Bank. However, a misinterpretation of the terms provided in FA10 led to the understanding that the Applicant Trust afforded the Respondent Trust a period of more than 27 days to rectify its breach, whereas on a proper construction of the period as per clause 12.1.2 of the Sub-Lease read with the terms of FA10, the Respondent Trust should have been afforded a period of 40 days to rectify its breach(s). This is as a result of a period of 20 days and not 7 days

²⁷ 2020 (5) SA 247 (CC).

²⁸ *Beadica* at [84].

²⁹ *Beadica* at [85].

afforded in the letter of demand.

- [66] On behalf of the respondents it is therefore argued that it would be untenable to disregard the facts underlying this application. It is trite law that the factual issues (to the extent that they are disputed) must be determined on the respondents' version.³⁰ The question therefore is: would public policy countenance an arrangement to give an additional notice period to effect an indivisible cancellation of the Sub-Lease and then fall back on the Shirfen-principle to deny it?
- [67] A further argument advanced on behalf of the Respondent Trust is the Applicant Trust's failure to demand strict compliance with the terms of the Sub-Lease and to indulge the late performance by the Respondent Trust for more than a decade. On 24 June 2022 the Respondent Trust requested a further indulgence, which on 27 June 2022 was refused. The Applicant Trust, however already by that time, was indulging late performance. On 26 July 2022 a demand to comply with the terms of the Sub-Lease on threat of cancellation was issued. In this demand 20 days to comply, contrary to the 7 days of the Sub-Lease, was afforded. This period is an indication that the Applicant Trust was once again prepared to indulge the Respondent Trust's defective performance.
- [68] On 11 August 2022 the Respondent Trust sought a further indulgence to comply with the demand of 26 July 2022. Contrary to the stance adopted by the Applicant Trust during June 2022, a further indulgence was granted. This, as contended by the Respondent Trust, is an indication that the threat of cancellation was not seriously intended. On 15 August 2022 the Respondent Trust sought a further indulgence to pay the amounts demanded on 26 July 2022. The following day (16 August 2022) the request for a further indulgence was granted.
- [69] On 24 August 2022 a demand, reserving the right to cancel the Sub-Lease in the event of non-compliance, in terms of which the Respondent Trust was again afforded 20 days (not 7 days in terms of the Sub-Lease) to rectify its breaches was issued. The 20- day period expired on 13 September 2022. In an email dated 20

³⁰ Plascon-Evans Paints (TVL) Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

September, the attorneys on behalf of the Applicant Trust did not refer to any intention to cancel the Sub-Lease. The Respondent Trust therefore finds further support for its argument that the Applicant Trust lulled the Respondent Trust into a sense of false security, in the Applicant Trust's continued indulgences and failure to take a firm stance regarding the Respondent Trust's non-compliances with the terms of the Sub-Lease.

[70] On 27 September 2022 the cancellation letter to the Respondent Trust was issued. In **Edward L Bateman Ltd v Combined Metal and Wire Works (Pty) Ltd**³¹ the question whether a creditor who has acquiesced, expressly or by implication and without complaint, to a long series of defective performances by his debtor, was to be precluded from invoking the late payments as a ground for cancellation of the agreement between them was adjudicated. Colman J held that, having regard of the particular facts and circumstances of the case, it was clear that the period of indulgences had come to an end, as had the cordial or sympathetic or co-operative relationship, which had given rise to the indulgences.³²

[71] Colman J, with reference to **Garlick Ltd v Phillips**³³ concluded that it is not every prior indulgence by a creditor which will be recognised as a basis for the application of the principle applied in the **Garlick-** matter. What is required is "... a long continued course of conduct consisting of the defective performance by one party acquiesced in by the other."³⁴ A single defective performance by a debtor will not suffice. Nor will the mere acceptance of two defective performances suffice. The surrounding circumstances, including the relationship between the parties, are often to be relevant. An indulgence or series of indulgences granted during a period of cordiality will not support an entitlement to expect similar indulgences.

[72] The rule in **Garlick** is an equitable principle resting upon the injustice of the consequences that may follow if a creditor were allowed to lull his debtor into the belief that strict performance was not required and then, without warning, to demand the full contractual relief provided for as a consequence of defective

³¹ 1975 (3) SA 497 (W).

³² Bateman (supra) at 501H.

³³ 1949 (1) SA 121 AD

³⁴ Garlick (supra) p131.

performances. From the facts in the matter at hand it is clear that the Applicant Trust acquiesced to the defective performances of the Respondent Trust for more than a decade. As Mr Grobler SC mentioned, a repeat function of the demand letter would have come in handy. For an extended period of time the Applicant Trust did not demand strict compliance with the terms of the Sub-Lease. The Applicant Trust created the impression that it was prepared to accept the Respondent Trust's late performance and lulled the Respondent Trust into a sense of security that such performance remains acceptable.

- [73] Furthermore, for a considerable time, not only once or twice, but for many months, the Applicant Trust created the impression by representations made in the letters of demand that it accepted the terms of FA10 by providing the additional time period of twenty days within which the Respondent Trust had to comply with the terms of the Sub-Lease. A clear and unambiguous representation was made through the letters of demand and the subsequent conduct of the Applicant Trust, by accepting late payment of rentals and other amounts. Obviously, the Respondent Trust relied upon the representations and conduct of the Applicant Trust, which now appears to have been to their detriment.

CONCLUSION.

- [74] In **Barkhuizen v Napier** it was held that a party who seeks to avoid the enforcement of a contractual term is required to demonstrate good reason for failing to comply with the term. The rational for this is:

“For all we know he may have neglected to comply with the clause in circumstances where he could have complied with it. And to allow him to avoid its consequences in these circumstances would be contrary to the doctrine of *pacta sunt servanda*. This would indeed be unfair to the respondent.”³⁵

The Constitutional Court resolved the role of public policy in the enforcement of contract in **Beadica** and held that **Barkhuizen** remains the leading authority

³⁵ Barkhuizen (supra) at para 85.

regarding the role of public policy in contracts. **Barkhuizen** enunciated a two- stage approach in determining whether a contractual provision is contrary to public policy. In the first stage it is determined whether the provision is *per se* contrary to public policy. The Respondent Trust does not challenge clause 12.1.2 of the Sub-Lease on the basis that it is *per se* contrary to public policy. The Respondent Trust's challenge is focussed on the second stage of the **Barkhuizen** inquiry, that if the clause is consistent with public policy, whether it should be enforced taking into consideration the relevant circumstances.

[75] Having regard to the circumstances of the matter at hand the Applicant Trust's conduct is wholly inconsistent with an intention to carry out the strict terms of the Sub-Lease and reflects a clear indication of a commitment to comply with the provisions of FA10. The Applicant Trust allowed the extended period of 20 days, albeit not as the parties intended per FA10, but by providing an additional period within which the Respondent Trust is to rectify its breaches of the Sub-Lease. I am of the view that the application should be dismissed, firstly on the basis that the computation of the period provided to the Respondent Trust and also to FirstRand Bank, namely 32 days, does not comply with the time period provided to the Respondent Trust as per the letter of demand read with the additional time per FA10. On a correct interpretation of the letter of demand and FA10, the Respondent Trust was afforded 40 days to rectify its breaches. On this basis alone, the cancellation is premature and of no force and effect.

[76] Secondly, the Applicant Trust's reliance on the non-variation clause embodied in the Sub-Lease is untenable on the basis that FA10 complies with the basic requirement of a *stipulation alteri*. The Applicant Trust expressly affirmed therein that it would not attempt to cancel the Sub-Lease contrary to the terms of FA10. The Shifren clause contained in the Sub-Lease does not apply to FA10. In any event the principle of *pacta sunt servanda* equally applies to FA10.

[77] Furthermore, if the Applicant Trust's cancellation of the Sub-Lease is allowed contrary to FA10, it would negate FirstRand Bank's real rights registered over the Sub-Lease. FirstRand Bank did not provide its written consent for the release of the Sub-lease from the operation of the mortgage bond in terms of the provisions of

section 56(1) of the Deeds Act. The Applicant Trust did not seek any relief in this regard in its notice of motion.

[78] In the event that this court is wrong in finding that FA10 amounts to a *stipulatio alteri*, it amounts to a recording of the terms that supplemented or added to the provisions of the Sub-Lease governing the procedure for cancellation thereof. To enforce the contractual terms of the Sub-Lease would, having regard to all the facts and circumstances of this matter, be unfair, unreasonable or unduly harsh upon the Respondent Trust and FirstRand Bank. In all the circumstances of this matter, it would be contrary to public policy to cancel the Sub-Lease and to enforce the cancellation clause in that it would be unreasonable, unfair and untenable to disregard FA10 under circumstances where the Applicant Trust agreed to FA10 and implemented the terms thereof.

[79] The Constitutional Court held that the impact of the Constitution on the enforcement of contractual terms through the determination of public policy, is profound.³⁶ The public policy imperative to enforce contractual obligations that have been undertaken on a voluntarily basis recognises the autonomy of contracting parties. In **Beadica** the public policy imperative was explained as follows:

“This imperative provides the requisite legal certainty to allow persons to arrange their affairs in reliance on the undertakings of the other parties to a contract, and to coordinate their conduct for their mutual benefit. While the explanation provided is not the only relevant consideration, it is critical in the overall assessment of whether enforcement would be contrary to public policy in all the particular facts and circumstances of a case.”³⁷

[80] The facts of this matter indicate that the Applicant Trust did not strictly comply with the terms and provisions of the Sub-Lease. Numerous indulgences were afforded to the Respondent Trust over an extended period of time, regarding non-compliance with the Sub-Lease. The Respondent Trust displayed a long continued course of conduct consistent of defective performance of the Sub-Lease acquiesced in by the

³⁶ *Beadica* (supra) at [71].

³⁷ *Beadica* (supra) at [92].

Applicant Trust. The Applicant Trust's reliance upon the cancellation clause in the Sub-Lease, alternatively upon the Applicant Trust's interpretation of how the extended time period should be calculated as per the terms of FA10 and the letter of demand, is unconscionable having regard to all the circumstances of this matter.

[81] The Respondent Trust and FirstRand Bank submit that the enforcement of the strict terms of the Sub-Lease in respect of the cancellation thereof, would be contrary to public policy. I am satisfied that the respondents provided a sufficient and adequate explanation how the enforcement of the terms of the Sub-Lease and the Applicant Trust's reliance upon the non-variation clause, would be contrary to public policy. The respondents have succeeded in discharging the onus resting on them to demonstrate that, in the circumstances of this case, the enforcement of the cancellation of the Sub-Lease would be contrary to public policy. There is no reason that cost should not follow the result.

[82] ORDER:

1. The application is dismissed with costs, including the costs of two counsel.

I VAN RHYN
JUDGE OF THE HIGH COURT,
FREE STATE DIVISION, BLOEMFONTEIN

On behalf of the Applicant:
SC

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