REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION, JOHANNESBURG

(1) REPORTABLE: No
(2) OF INTEREST TO OTHER JUDGES: No

12/10/2021
DATE

SIGNATURE

Case No.: 2021/47033

CATO RIDGE GAS COMPANY (PTY) LIMITED Applicant

and

BP SOUTHERN AFRICA (PTY) LIMITED Respondent

JUDGMENT

This judgment is handed down electronically by circulation to the parties' or their legal representatives by email (as the case may be) and uploading it to the electronic file of this matter on CaseLines.

Gilbert AJ:

1. The applicant as lessee and franchisee conducts a flagship service station and ancillary business on the N3 Highway, North bound, Cato Ridge, KwaZulu-Natal in terms of a lease agreement and a franchise agreement with the

respondent. The applicant seeks urgent interim relief primarily directed at interdicting the respondent as lessor and franchisor from revamping and/or refurbishing and/or altering the leased premises, which consists of the petrol forecourt, a convenience store and restaurant premises. The respondent intends commencing those renovations as soon as possible so as to complete them by the Christmas festive season and has delayed doing so until 18 October 2021 to facilitate the determination of these urgent court proceedings, having previously indicated that it intended commencing renovations from 10 October 2021. The applicant accordingly approached this court on an urgent basis because if it does not obtain the interim interdict that it seeks, those renovations will commence, disrupting its use of the leased premises.

2. Both in the papers and during argument a variety of issues arose, some of which are more pertinent than others. I have been assisted by the informative arguments made by the respective counsel. The parties require an urgent determination of these proceedings so as to arrange their affairs. This precludes me from preparing a more elegantly crafted judgment than might otherwise have been the case.

3. On 10 September 2021, contractors arrived at the leased premises in preparation for the commencement of renovations in early October 2021. This alerted the applicant to the imminent renovations. Although the applicant's tenure of the leased premises has been on a month-to-month basis from around February 2020 (before then the applicant enjoyed occupation of the premises

under a long term lease), and the applicant was alive to the reality that at some point the respondent as lessor and franchisor would seek to make renovations, it was only on 10 September 2021 when this became imminent. Those contractors returned again on 15 September 2021. The applicant's attorneys addressed several items of correspondence to the respondent and its attorneys, demanding undertakings that the renovations would not commence. I do not propose dealing with all these items of the correspondence. Reference to some items will suffice.

4. On 15 September 2021 the applicant's attorneys addressed a letter to the respondent's attorneys recording that third party contractors had arrived on site and had informed the applicant that they intended commencing renovations on 1 October 2021, and that the applicant was dissatisfied with this state of affairs. The letter demanded an undertaking that these renovations would not take place until the applicant had transferred ownership and possession of its business conducted from the leased premises to a new owner, alternatively until end of an anticipated mediation process, and that failing an undertaking urgent interdictory proceedings would be launched.

5. On 17 September 2021, the respondent's attorneys reverted stating that as the respondent was a large corporate, it needed time to take instructions and that it would endeavour to do so as soon as possible, and hopefully by Monday, 20 September 2021. That date arrived, on which the respondent's attorneys indicated that their client still needed more time to consult internally in relation to the issues raised by the applicant's attorney in its letter, and

proposed responding more substantively to the issues by Monday, 27 September 2021. This would cause a delay, at the request of the respondent, of a week. The respondent further recorded in that reply that no refurbishment or revamp would then take place before 11 October 2021.

6. The applicant's long-term lease agreement terminated by the effluxion of time by about February 2020, the respondent declining to renew the lease. This meant that a new operator of the forecourt and related business would have to be installed in the leased premises, after concluding its own lease and franchise agreements with the respondent and having purchased the applicant's business. The applicant is permitted to sell its business conducted on the respondent's property but the purchaser must be approved by the respondent given the nature of the business, which is to conduct a BP-branded service station franchise. But this would take time and so the parties accepted that the applicant would remain in occupation of the leased premises on a month-to-month basis and continue to conduct the business.

7. The applicant proceeded to find a prospective purchaser for its business. But the respondent declined to consent to that prospective purchaser, for various reasons. This resulted in dissatisfaction between the parties as to the potential sale and transfer of the applicant's business to a new purchaser, including the identification of a prospective purchaser that was acceptable to the respondent. This state of affairs would endure from at least the end of the long-term lease until shortly before the launch of these proceedings.

8. During this period, pursuant to a consent agreement concluded after mediation proceedings, a process was agreed between the applicant and the respondent for purposes of identifying and sourcing a satisfactory purchaser for the applicant's business and who would be acceptable to the respondent as the new lessee and franchisee. Although this process under the consent agreement too proved to be problematic, the respondent was ultimately able to source an acceptable purchaser for the applicant's business on 23 September 2021 for a purchase consideration of some R41.1 million, which appears to be acceptable to the applicant. The applicant and that prospective purchaser as identified by the respondent are presently in negotiations, it would appear. But the applicant did not know until 28 or 29 September 2021 that the respondent had so identified a prospective purchaser, when the respondent's consultant informed the applicant per telephone that a suitable purchaser had been found and with which the applicant must engage. On the respondent's own version it had already identified this prospective purchaser on 23 September 2021 but the respondent delayed informing the applicant of this for a week. No reason was given for this delay.

9. The relevance of this is that in its attorneys' letter of 20 September 2021 the respondent proposed reverting by 27 September 2021. It would have been expected that once the prospective purchaser had been identified by the respondent on 23 September 2021 and given that it wanted to urgently commence renovations and in the context of the letter-writing that was already taking place between their respective attorneys, the respondent would have lost no time in informing the applicant of the prospective purchaser and seeking that

the applicant engage with that prospective purchaser. Further letter-writing would follow, including a letter from the respondent's attorneys on 23 September 2021 pointing out that the further attendance of the contractors on site was only for preparatory work. Notably, the respondent did not disclose in that letter that a purchaser had been identified, but seems to have been holding its cards close to its chest.

10. On 27 September 2021, the date by which the respondent proposed reverting to the applicant's demand of 15 September 2021, the respondents' attorneys in a very short letter recorded that the respondent "*to date, [has] been unable to conclude its internal consultations regarding this matter*" and therefore required still more time. The respondent repeated its undertaking not to commence any refurbishments until 11 October 2021. By then (27 September 2021) the respondent had identified a prospective purchaser but for some reason still did not inform the applicant of this development.

11. Understandably, this uncertainty was unacceptable to the applicant. The applicant had not yet been informed that a prospective purchase had been identified and it had not been furnished with a substantive response to its demand of 15 September 2021. And the only undertaking that had been given by the respondent was that renovations would not commence before 11 October 2021.

12. In light of this uncertainty, the applicant's attorneys addressed a letter to the respondent's attorney on 29 September 2021, again demanding an undertaking in the terms of its demand of 15 September 2021 (namely that no

refurbishing would take place until the sale process had been concluded, alternatively pending the outcome of anticipated mediation proceedings).

13. On 30 September 2021, the respondent's attorneys addressed the following somewhat ambivalent letter to the applicant's attorneys:

> "2. *We are instructed and confirm as follows:*
>
> *2.1* *BPSA has conditionally identified a prospective purchaser and subject to certain internal processes being completed, this (and the identity of the prospective purchaser) should be formally communicated to your client in the near future; and*
>
> *2.2* *in the interim, BPSA or its contractors will not carry out construction or refurbishment work at the site until the process in 2.1 above has been completed (i.e., your client has received a formal notification referred to above) and/or our client informs you in writing that it intends to proceed to carry out such work.*"

14. This response only heightened the applicant's uncertainty, resulting in the applicant's attorneys addressing a letter to the respondent's attorneys on 30 September 2021 furnishing the respondent a final opportunity to provide the required undertaking by 10h00 the next day that renovations would not commence, failing which urgent proceedings would be launched.

15. The demanded undertaking was not forthcoming and on Friday, 1 October 2021 the applicant launched these urgent proceedings.

16. On the same day, Friday 1 October 2021, the respondent's attorneys addressed a letter refuting any obligation on the respondent's part not to commence refurbishment, particularly for the period contended for by the applicant and that in the circumstances it would defend any urgent proceedings. The letter is lengthy and is written as a precursor of what would ultimately be the respondent's case made out in its answering affidavit. Nonetheless in this letter the respondent recorded that it would delay commencing with the refurbishment until at least a first formal introduction had taken place between the applicant and the prospective purchaser, which would be no later than Friday, 15 October 2021.

17. The respondent contends that in light of this letter the applicant should have been more circumspect in approaching the court for urgent relief, and at least should have been more circumspect in requiring the urgent court to hear this matter on Friday, 8 October 2021, being the date for which it was enrolled, rather than on Tuesday as is the long entrenched practice of this court, which in this instance would be 12 October 2021. This, the respondent argues, would have given the parties more time to attend to the matter, including for it to deal with any new material that surfaced in the applicant's replying affidavit.

18. In my view, the applicant has made out a sufficient basis for urgency. It was only on 10 September 2021 that the applicant can be said to have a sufficiently reasonable apprehension that renovations would commence imminently and so it cannot be faulted for not having been more proactive before then. In my view, as demonstrated by the correspondence, the applicant cannot be faulted for the

delays caused by it first seeking undertakings from the respondent so as to avoid urgent proceedings. The respondent did ask for various indulgences to consider its position and to respond. The applicant acceded to those requests. Having asked for those indulgences and having been granted those indulgences, the respondent cannot seek to fault the applicant in not having launched these proceedings earlier. It also remains unexplained why when time was of the essence the respondent sought indulgences, particularly when it had already identified a prospective purchaser for the business as early as 23 September 2021.

19. The respondent had made it plain that it intended commencing with its renovations, initially from 11 October 2021, and then from 18 October 2021. The applicant accordingly was entitled to approach court for urgent relief as otherwise that which it seeks to interdict would occur.

20. I am also persuaded that the applicant has made out a sufficient case for this matter to be heard on the Friday, rather than the following Tuesday. The respondent's delaying of the commencement of its refurbishment to 18 October 2021 came too late to avert the urgency of the matter and the enrolment of the matter for the Friday. Had the respondent come earlier with its revised date when renovations would commence, perhaps the applicant could have been faulted for seeking that the matter be heard on a day other than a Tuesday. But the respondent did not.

21. In the circumstances, I find that the matter is sufficiently urgent to be heard on an urgent basis, that the truncation of the usual periods for the exchange of

affidavits is appropriate and commensurate with the degree of urgency and that the set down of the application for Friday, 8 October 2021 is justified.

22. These facts relating to my reasoning why the matter is urgent also assists in giving some context to the balance of this judgment.

23. As the formulation of the relief that is sought by the applicant is particularly important, I set out verbatim the interdictory relief that is sought by the applicant in its notice of motion:

> "*2. Thw Respondent is hereby interdicted – pending the completion of the sale of the business (with franchises) conducted by the Applicant on the premises known as BP Ridge Oasis, N3 North bound, Cato Ridge, KwaZulu-Natal, 3680 (including buildings thereon) and transfer to a purchaser approved by the Respondent, ALTERNATIVELY pending the commencement of the mediation process by the giving of written notice within 30 days of this order by the Applicant to the Respondent, and the finalisation of such process by mediation and/or arbitration – from:*
>
> *2.1 revamping and/or refurbishing and/or altering the premises known as the BP Ridge Oasis, N3 North bound, Cato Ridge, KwaZulu-Natal, 3680 (including buildings thereon);*
>
> *2.2 interfering, directly or indirectly through third parties, with the use and enjoyment and conduct in the business of the applicant on the premises known as the BP Ridge Oasis, N3 North bound, Cato Ridge, KwaZulu-Natal, 3680 (including buildings thereon).*"

24. The respondent submits that this relief is final in effect and therefore the requirements of a final interdict need to be satisfied, including that the applicant has a clear right to the relief that it seeks. I do not propose deciding this issue, which is not an uncomplicated exercise,[1] but will proceed on a basis favourable to the applicant, namely that which it seeks is interim interdictory relief and therefore it need satisfy the requirements for that relief, particularly that it has a *prima facie* case although open to some doubt.

25. The respondent argues that the difficulty experienced by the applicant in articulating that *prima facie* right is demonstrative of why it has no such right to found interim relief. Typically in interdict proceedings it is not overly difficult for an applicant to articulate or identify its *prima facie* right. The disputes that usually arise in relation to the *prima facie* right is not as to its articulation or identification but rather as to the strength or weakness of that articulated *prima facie* right based upon on the evidence.

26. I raised with counsel during argument whether a court in considering whether to grant an interim interdict can adopt the position that having considered the affidavits, there may be some or other *prima facie* right available to the applicant although its precise formulation appeared elusive. Respondent's counsel submitted that the court cannot do so and that in the absence of the applicant being able to articulate a legally cognisable right as a first step, before considering the prospects of that right being proven in due course, then an

[1] See the discussion in *Andalusite Resources (Pty) Ltd v Investec Bank Ltd and Another* 2020 (1) SA 140 (GJ), particularly para 21 to 24.

interim interdict could not be granted. With this I agree. I did not understand applicant's counsel for the applicant to submit otherwise.

27. In the well-known *Gool v Minister of Justice* 1955 (2) SA 682 (C) at 688D-E, Ogilvie Thompson J in discussing the requirement of a *prima facie* right in this context said that *"In my view the criterion on an applicant's own averred or admitted facts is: should (not could) the applicant on those facts obtain final relief at the trial"*. Should the applicant not be able to demonstrate on the facts averred by it that it should obtain final relief in due course, then a *prima facie* right, although open to some doubt, will not have been established. And this presupposes that the facts averred by the applicant give rise to a legally cognisable right.

28. Importantly, for these proceedings, a consideration of the *prima facie* right must be in conjunction with the interim interdictory relief actually sought. It would not avail an applicant to demonstrate a *prima facie* right that would sustain relief other than that which is sought. An applicant approaches court for specific interdictory relief and therefore must establish the requirements for that interdictory relief, and not for some other interim interdictory relief that could have been sought and potentially granted but which was not.

29. Allied to this, an applicant cannot expect a court to engage in a pruning process whereby the court is called upon, under the guise of a discretion, to prune the over-ambitious from the relief that is sought and so grant interim relief in a lesser form that is sustainable on the asserted *prima facie* right. Similarly, a court cannot be expected to engage in a grafting exercise to graft on to the relief

actually sought that which may be sustainable based upon the asserted *prima facie* right, but which was not actually sought. A court should be cautious of casting about in the affidavits for an appropriate *prima facie* right, although open to some doubt, that may sustain interim interdictory relief where the parties themselves in their affidavits do not seek to assert that particular right.

30. I accept that there may be scope for a greater degree of judicial activism in certain instances, such as when dealing with unrepresented parties who may be inarticulate in the relief they formulate or who may fail to delineate their cause of action with the precision that a legal practitioner would, or for example, when dealing with minor children where the court acts as an upper guardian. In these proceedings, both parties are corporate concerns in relation to commercial dealings worth tens of millions of rands (the proposed purchase price for the applicant's business exceeds R41 million).

31. What then is the *prima facie* right, although open to some doubt, that the applicant asserts in its founding affidavit as the basis for interim interdictory relief preventing the respondent from renovating the leased premises pending the completion of the sale and transfer of the applicant's business to a purchaser, alternatively the finalisation of a mediation and/or arbitration process?

32. The founding affidavit in paragraphs 18 to 21 identifies the right as follows:

> "*18. Prima facie Right: CRGC has a prima facie right, based on contract (as set out below), and based on the constitutional principle of* ubuntu *that parties in enforcement of a contract are*

to act in fairness, with reasonableness, so that justice may be done between them and for the benefit of the community (being all the staff of CRGC) impacted by their contractual engagement. At the very least clause 13 as read with clause 16 of the Standard Terms and Conditions of the Lease Agreement require BPSA to give written notice of alterations – which they failed to do – and it is implied or natural, that such would be reasonable notice which clearly is also not present.

19. Ubuntu *is a sophisticated ethic on which society functions – it undergirds our contractual relationship, or at the very least permeates such – so that contracting parties for their own sake, as well as for the sake of the community impacted by their relationship, are build up by interactions and enforcement of rights in a reasonable manner. CRGC has been acting in such* ubuntu *by calling upon BPSA repeatedly, and by giving extension after extension, for the provision of such undertaking from 15 September 2021 to present. CRGC has in fact further shown* ubuntu *by not pursuing its rights after BPSA's* mala fide *breached the Consent Agreement reached at the pervious [sic] mediation proceedings. BPSA has however not acted with any* ubuntu *– and has been strong-arming CRGC with its tactics and breaches, from the threatened alterations in March 2020, to the breach of the Consent Agreement in February/March 2021, to the current threatened alterations and ignoring the calls for a reasonable undertaking in this respect.*

20. There is no longer the primacy of the principle of sanctity of contracts – which BPSA attempts to use to force itself upon CRGC in respect of the revamp – but it is now part of the constitutional factors to be taken into account in the judicial control by a court in the enforcement of contacts – as set out by the Constitutional Court in BEADICA 231 CC v TRUSTEES, OREGON TRUST AND OTHERS 2020 (5) SA 247 (CC) at

paragraph 72 to 78 thereof. Such contractual rights are not to be considered in isolation, including the enforcement thereof – and in this instance CRGC has clearly shown the relevant right to the interdict requested, which would prevent the enforcement by BPSA of rights in a manner which is unfair, unreasonable, and unjust, and uphold the rights of CRGC in a manner that is indeed fair, reasonable and just to both parties.

21. The test is establishing a right that may be open to some doubt, and for this the court takes into account the facts set out by CRGC together with the facts set out by BPSA which CRGC is not able to dispute (so undisputed facts by BPSA, due to the nature of such facts or law in the context)."

(The emphasis is mine).

33. During argument I invited the applicant's counsel to articulate the *prima facie* right. That right was articulated as the right of the applicant as lessee to use and enjoy the premises. This was then refined to the right of the applicant to insist that the respondent comply with clause 16.6 of the lease agreement, which, was argued, properly interpreted and applied requires of the respondent to give prior reasonable notice before commencing proceedings, and which the applicant contends has not taken place. The further submission was made that the enforcement of the lease agreement, and particularly those clauses that entitled the respondent to effect refurbishments must be done in a manner that is not unreasonable, unfair or unjust and that the respondent's enforcement of its rights in these particular circumstances in and of itself creates a *prima facie* right to prevent what would be the unreasonable, unfair or unjust enforcement of that right, with reliance being placed *inter alia* on *Beadica 231 CC and others*

v Trustees for the Time-Being of the Oregon Trust and others 2020 (5) SA 247 (CC). This articulation of the *prima facie* right is in line with what is asserted in the founding affidavit, not adding much and understandably so as the applicant is required to make out its case in its founding affidavit.

34. The *prima facie* right asserted by the applicant, at its most basic, is that as lessee it is entitled to the use and enjoyment of the premises as envisaged in terms of the lease agreement. The applicant accordingly seeks to found its *prima facie* right in the contractual relationship between the parties. The applicant does not seek to assert a *prima facie* right on an extracontractual basis.

35. I deal first with the applicant's reliance on the terms of the lease agreement which it contends entitles it to particular notice before renovations can be commenced.

36. Clause 13 of the Lease Agreement, which is headed "LESSOR'S ACCESS TO THE LEASED PREMISES)" provides as follows:

> "*13.1 The Lessor shall have the right through its employees or contractors at any time to enter the Leased Premises for the purposes of inspection or for doing any work thereon which the Lessor wishes to undertake.*
>
> *13.2 The provisions of this clause 13 apply to anything on or within the Leased Premises, including, but not limited to, the Storage and Dispensing Equipment.*

13.3 Without derogating from the generality or specificity of the right of the Lessor to access the Leased Premises in terms of this clause 13, and without imposing any obligation upon the Lessor in the exercise of its rights of access, the Lessor shall endeavour to exercise its rights of access in such manner as will cause as little interference as possible to the Lessee's business, provided, however that the provisions of clause 16.7 shall be of full application in all its terms in respect of the rights of access granted herein."

37. Clause 16 which is headed "ALTERATIONS TO PREMISES" has the following relevant sub-clauses:

"*16.3 The Lessor shall have the right, at its own cost, to make such structural improvements, alterations and additions to the Leased Premises as it deems fit. For such purpose the Lessor shall be entitled to:*

(a) erect scaffolding, hoarding and building equipment in, at, near or in front of the Leased Premises in such a manner as may be reasonably necessary for the work being performed; and

(b) have all such rights of access to any portion of the Leased Premises as may be reasonably necessary for the purposes detailed in this clause 16, and

(c) paint, sign write and decorate the exterior of the Buildings from time to time as it may in its discretion deem advisable, and to its own colours, designs and specifications, which it may in its discretion vary from time to time.

16.4 The Lessee acknowledges that it could suffer inconvenience and loss of beneficial occupation of the Leased Premises during the period of any structural improvements, alterations and/or additions.

16.5 The Lessee acknowledges that it may be necessary for its business operations to be partially or totally suspended during the period of the structural improvements, alterations and additions, and the Lessee hereby agrees to such suspension as and when required by the Lessor.

16.6 Notwithstanding the terms of clause 16.5, the Lessor shall prior to commencing any improvements, alterations and additions pursuant to clause 16.3, advise the Lessee in writing of the projected completion date thereof, and in carrying out such improvements, alterations or additions, shall endeavour to cause as little interference as possible to the Lessee's beneficial occupation of the Leased Premises.

16.7 The Lessee shall in any event have no claim against the Lessor or its officers or servants or agents for compensation, damages or otherwise, resulting from the said inconvenience or loss of beneficial occupation by reason of the exercise by the Lessor of its rights as detailed herein. In particular, the Lessee shall not:

(a) have any right to cancel the Lease;

(b) be entitled to any remission of rent;

(c) be entitled to any compensation or damages (including consequential damages) in respect of any loss or damage which the Lessee may suffer as a result of the loss of business, damage to property or improvements thereon, arising from the lawful exercise by the Lessor

> *of its rights as contained in clause 16.3, provided that the Lessor may, at its sole discretion, elect to pay such compensation.*"

38. The applicant argues that clause 16.6 must be interpreted and applied in such a way to require of the respondent as lessor to give the applicant prior notice of its intention to commence improvements, alterations and additions and to inform the applicant in writing of the projected completion date. The respondent argues that this is not what clause 16.6 provides. Rather, the respondent argues, clause 16.6 requires the respondent as lessor before commencing the improvements, alterations and additions to inform the applicant as lessee that it would be doing so and in writing inform it of the projected completion date. This, the respondent argues, took place at the very least by no later than receipt by the applicant of the answering affidavit in these proceedings, which clearly records that the projected completion date of the renovations would be 15 December 2021. Further, the respondent argues, the applicant on its own version knew from 10 September 2021 that the respondent intended commencing improvements, alterations and additions from early October 2021, as that is what after all triggered these urgent proceedings.

39. The respondent further argues that this is fortified by clause 13.1, which gives the respondent as lessor the right "*at any time*" to enter upon the premises, and by clause 13.2, which expressly provides that the respondent can do anything on or within the premises. This, the respondent argues, undermines an argument that some form of reasonable notice must be given in advance.

40. In my view, there is some merit to applicant's argument - in form of a *prima facie* right although open to some doubt - that reasonable prior notice is required from the respondent before renovations can commence. Although clause 16.6 does not expressly state that reasonable advance notice must be given, there is some room in the interpretation and application of that clause to find that some form of reasonable prior notice is required, particularly if the requirements of good faith and *ubuntu* are to inform that exercise.[2]

41. The difficulty though, as identified by the respondent's counsel during argument, what then is that reasonable notice period. Given the vagueness of the *prima facie* right as expressed in the founding affidavit, it is not entirely unsurprising that the applicant in its founding affidavit does not assert what that reasonable notice period would be and so afford the respondent an opportunity in its answering affidavit to deal with that asserted reasonable notice period.

42. But the difficulty goes further than a deficiency in the founding affidavit on this aspect. As already discussed, there must be a legally cognisable link between the asserted *prima facie* right and interdictory relief sought including the interim period for which it is sought. The applicant does not seek interim interdictory relief pending the expiration of a reasonable notice period. If the applicant's complaint is, as it is, that the respondent has not given reasonable prior notice of its intention to commence renovations, then it would have been expected that the interim interdict would be limited to the duration of that reasonable

[2] *Capitec Bank Holdings Limited and Another v Coral Lagoon Investments 194 (Pty) Ltd and Others* (470/2020) [2021] ZASCA 99 (09 July 2021), para 67.

notice period (or until a dispute in relation thereto has been determined, assuming that the asserted reasonable period lasts longer than the time taken to determine the dispute in relation thereto).

43. In the present instance, the applicant seeks interim relief pending the completion of the sale and transfer of is business to a purchaser. No case is made out that this is the same as the reasonable notice period required upon the applicant's interpretation and application of clause 16.3 of the lease agreement.

44. Neither is a case made out that the period taken to finalise a mediation and/or arbitration process is linked to reasonable advance notice under clause 16.3.

45. To put is plainly, there is a disconnect between the *prima facie* right relied upon and the interim relief claimed. A failure by the respondent to give reasonable prior notice in terms of clause 16.3 is not legally connected to a sale and transfer of the applicant's business to a purchaser, at least on the case sought to be made out in the papers. While the applicant seeks interim interdict until a sale and transfer of its business to a purchaser, it has not established a right, even on a *prima facie* basis, that it can insist that the respondent hold off in its renovations until then. As most for the applicant, it can require of the respondent to hold off on renovations until reasonable notice has been given, but that is not the interdictory relief sought.

46. The applicant also relies on what it contends is a *prima facie* right that the respondent's contractual right to undertake renovations to the leased premises

be enforced is a manner which is not unreasonable, unfair or unjust. I have had regard to the cases referred to by the parties' counsel, including *Beadica 231 CC and Others v Trustees, Oregon Trust and Others* 2020 (5) SA 247 (CC) and *Capitec* above, and have considered the parties' submissions, including the heads of argument by the respondent's counsel.

47. Theron J for the majority in *Beadica* at paragraph 79 writes *"[t]here is agreement between this court and the Supreme Court of Appeal that abstract values do not provide a free-standing basis upon which a court may interfere in contractual relationships"* and continues in paragraph 80 that:

> *"[80] It emerges clearly from the discussion above that the divergence between the jurisprudence of this court and that of the Supreme Court of Appeal is more perceived than real. Our law has always, to a greater or lesser extent, recognised the role of equity (encompassing the notions of good faith, fairness and reasonableness) as a factor in assessing the terms and the enforcement of contracts. Indeed, it is clear that these values play a profound role in our law of contract under our new constitutional dispensation. However, a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh. These abstract values have not been accorded autonomous, self-standing status as contractual requirements. Their application is mediated through the rules of contract law including the rule that a court may not enforce contractual terms where the term or its enforcement would be contrary to public policy. It is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it".*

48. In my view, the applicant's asserted *prima facie* right relies on the abstract values of fairness, reasonableness, justness and *ubuntu* being applied on a free-standing basis. This is impermissible. The respondent's enforcement of its expressly agreed contractual right to effect renovations is not challenged advanced in the founding affidavit as being contrary to public policy. No constitutional right is implicated as having been infringed. No mention is made of any doctrine of common law that needs to be developed by the court in performing a creative, informative and controlling function so as to afford the applicant a *prima facie* right.[3]

49. In its naked form, the applicant's *prima facie* right that it asserts is that the respondent is required to effect renovations fairly, reasonably and justly, but as is clear from *Beadica* there is no general and self-standing obligation on a contracting party to act fairly, reasonably and justly. To repeat, *"[i]t is only where a contractual term, or its enforcement, is so unfair, unreasonable or unjust that it is contrary to public policy that a court may refuse to enforce it"*.[4]

50. There is also, again, a disconnect between the asserted *prima facie* right and the relief sought by the applicant. The applicant does not assert what it contends would be a reasonable, fair and just enforcement by the respondent of its contractual right to effect renovations to the premises, and seek to frame its interdictory relief with reference to that. While it may be that the respondent insisting that the renovations take place now, as expressly permitted in terms

[3] *Beadica,* majority judgment at para 73.

[4] *Beadica*, majority judgment at para 80.

of the lease agreement, rather than after the sale and transfer of the applicant's business to a purchaser, as the applicant wants, would be harsh on the applicant and at least some of its employees, *"a court may not refuse to enforce contractual terms on the basis that the enforcement would, in its subjective view, be unfair, unreasonable or unduly harsh"*.[5]

51. The present lease is on a month-to-month basis. The interim relief that is sought by the applicant, if granted, fails, in my view, to take cognisance that the respondent is entitled to give notice terminating the lease. If the lease is terminated, then no basis is made out why the applicant can remain in occupation and therefore continue to insist that no renovations take place for a period extending beyond the notice period. I put to the applicant's counsel whether termination of the lease agreement on notice would bring an end to the interim interdict if it has already been granted, to which the response was that it would not because the interdict if granted is pending the completion of the sale and transfer of the business to a purchaser and if that had not yet taken place, the interdict would remain in place. The interim interdict if granted in effect gives the applicant security of tenure without any basis made out for why the applicant would be entitled to remain in occupation of the premises beyond the lawful termination of the lease agreement in notice. This again illustrates the disconnect between the interdictory relief that is sought, particularly the temporal nature thereof, and the underlying *prima facie* right which is asserted as a basis for that relief.

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[5] *Beadica*, majority, para 80.

52. The lease agreement does provide for mediation:

> "*38.1 The Parties agree to attempt to resolve any dispute, question or difference arising at any time between the Parties to this Lease in regard to the matter arising out of, or the rights and duties of any of the Parties hereto, or the interpretation or termination of, or any matter arising out of the termination or the rectification of this Lease by mediation, which, failing agreement between them on the procedure and the identity of the mediator, shall be conducted under the then current mediation procedure of the Arbitration Foundation of South Africa ("AFSA"), and by a mediator nominated by AFSA.*
>
> *38.2 The parties undertake to participate in good faith participation in mediation before pursuing any other available legal or equitable remedy, including litigation, arbitration or other dispute resolution procedure.*
>
> *38.3 Either Party ("the initiating Party") may commence the mediation process by giving written notice to the other, setting out the subject matter of the dispute, question or difference or the relief requested. Within ten (10) days after the receipt of such notice, the other Party shall deliver a written response to the initiating Party's notice. The initial mediation session shall be held within thirty (30) days after the initial notice.*"

53. The applicant does not seek to rely upon this clause as a self-standing basis giving rise to a *prima facie* right why interim interdictory relief should be granted. No mention of mediation is made in its description of its *prima facie* right in its founding affidavit. The applicant's reference to mediation is for purposes of advancing an alternate period for which the interim relief is to remain in place rather than as a self-standing basis giving rise to a *prima facie* right.

54. That an interim interdict linked to the finalisation of a mediation process may be short-lived[6] and would therefore not suit the applicant's commercial imperatives to remain in occupation of the premises until its business is transferred to a purchaser, which may take up to a year, may have informed the applicant in the framing of its relief, particularly for how long that interim relief is to remain in place. Also telling, in my view, is that the applicant has not actually initiated a mediation process, although it is within its power to do so, but instead requires interim interdictory relief pending the finalisation of a mediation process that it must still initiate by giving written notice within thirty days of an order. Clause 38.3 requires no more of the applicant than to give notice to the respondent setting out the subject matter of the dispute, question or difference or the relief requested. Although the applicant asserts in its founding affidavit that formulating the disputes is *"a very involved process"*, which has been complicated by a change of attorneys and counsel, this is unpersuasive. It appears simple enough for the applicant to have furnished notice to the respondent stating that the dispute, question or difference to be mediated was the respondent's insistence to commence with renovations now whereas the applicant did not want that to happen. Unlike the precision that may be required when formulating a particular right or cause of action that is the subject of litigation, whether by way of court or arbitration proceedings, a referral of a dispute, question or difference to mediation does not require such precision.

[6] Clause 38 stipulates periods for the conduct of the mediation process.

55. Even should the applicant's affidavits be read generously as asserting the mediation process in clause 38 of the lease agreement as giving rise in and of itself to a *prima facie* right, in my discretion I am disinclined to grant an interim interdict in circumstances where the applicant has delayed in initiating the mediation proceedings that underlie that asserted *prima facie* right.

56. The overall impression created from considering the disconnect between the interdictory relief sought by the applicant, particularly its temporal nature, and the *prima facie* rights asserted in the applicant's affidavits is that the applicant seeks an interim interdict of a significantly longer duration than is justified by the *prima facie* rights it asserts, assuming that it can establish those *prima facie* rights. The applicant seeks as its primary relief interdictory relief pending the completion of the sale process as this would suit its commercial imperatives of remaining in the leased premises without the interference of renovations until transfer of the business to the new purchaser. But, as already found, the applicant has not established a *prima facie* right that it is entitled to remain in the premises until transfer of the business to the new purchaser. Although interim relief pending the outcome of a mediation process would be of a shorter duration, again the applicant in the formulation of its relief has chosen to seek of the court to grant interdictory relief of a considerably longer nature. The applicant does not only seek, when framing the period that the alternative interim interdictory relief is to remain in place, that it remain in place pending the finalisation of the mediation process but also the finalisation of the arbitration process. The applicant argues that this is appropriate because of what it contends is the respondent's failure to abide the outcome of the previous

mediation process, and as the respondent may do so again, so the applicant argues, it is appropriate that the interim interdict remains in place pending the outcome of arbitration proceedings following upon the mediation proceedings. The applicant has not identified the *prima facie* right that is linked to and would justify interim relief of that duration, or in the formulation of the relief what the dispute is that is required to be resolved by arbitration.

57. Perhaps realising these difficulties, I was invited in replying argument for the applicant, through the exercise of discretion, to curtail or otherwise effectively adapt the interim relief that is being sought in the notice of motion. For example, I was invited to potentially limit the relief to only restraining renovations in respect of the convenient store as it was those renovations that once effected would be particularly prejudicial to the respondent. This is because the convenient store, once renovated, would be converted to a Pick n Pay convenience store and that because the applicant was not a Pick n Pay franchisee, it would not be able to make use of that convenient store and so would lose the use of that part of leased premises permanently. The applicant argues that this is not what was envisaged in the lease agreement, i.e. it was not envisaged that the respondent could permissibly effect renovations that would effectively prevent the applicant from enjoying the use of the premises once completed. There is merit to this. The difficulty is that it is not interdict that was sought of the court in the notice of motion and was not the interdictory relief that the respondent was called upon to oppose. As the respondent's counsel submitted, the respondent's position, and the evidence adduced by it in the

answering affidavit, may have been different if confronted with this curtailed form of relief,

58. The court was also invited during argument in reply to remove the interim interdict being linked to the outcome of the arbitration process and be limited only to the finalisation of the mediation process, and so ease any concern that the interdictory relief if granted would be too long. Again, this is not the interdict that was sought by the applicant, and which the respondent was called upon to oppose. A more circumspect framing of interim relief linked to the outcome of an already initiated mediation process in terms of clause 38 of the lease agreement may have elicited a different response or approach from the respondent.

59. To conclude on this issue, the applicant's demand of 15 September 2021 in paragraph 7, sums up the situation in the applicant's own words:

> *"As BPSA is presently completing the sale of the (i) garage, petrol-filling and service station; convenience store; Wild Bean Café; automatic teller machine facility; and quick service restaurant ("the garage premises") together with the (ii) QSR business, comprising Steers and Debonairs franchises, which is owned by Sanroy Trading (Pty) ltd ("the QSR business"), <u>it is not beyond expectation that the revamp / refurbishment be delayed until such time the sale is completed and our Client has transferred ownership and possession to the new owner</u>".*
>
> *(my emphasis).*

60. Although founding and replying affidavits were delivered, the applicant did not ultimately get much further than what it has recorded at the outset on 15 September 2021, namely that it had an expectation – and nothing much more – that the renovations be delayed until it had sold and transferred its business to a purchaser.

61. To return to the test from Ogilvie Thompson J in *Gool v Minister of Justice*[7] - should (not could) the applicant on its own averred facts or the admitted facts obtain final relief in due course - I find that the applicant should not.

62. I am therefore unpersuaded that the applicant has established a *prima facie* right, although open to some doubt, that would found the interim relief that it seeks

63. In the circumstances, it is unnecessary to deal in any detail with the remaining requirements of an interim interdict. I mention that the harm of which the applicant complains, other than potentially in relation to its inability to make use of the convenient store once it is converted to a Pick n Pay outlet, is harm which the parties envisaged and expressly regulated for in clauses 16.4, 16.5 and 16.7 of the lease agreement on the basis that the applicant accepts that it may suffer such harm and for which it accepts that it can have no claim against the respondent. Having expressly taken upon itself the risk of that harm, there is considerably less scope for the applicant to contend that such harm is legally cognisable for purposes of demonstrating the remaining requirements of an

[7] Above, at 688D-E.

interim interdict. The applicant is on stronger grounds when it comes to the harm that results from the convenient store being converted through the renovations to a Pick n Pay outlet that it cannot use as it is not a Pick n Pay franchise, but, again, that is not the interim relief which the applicant seeks of the court, other than by way of a belated invitation during replying argument to potentially limit the interim relief to restraining renovations to the convenient store.

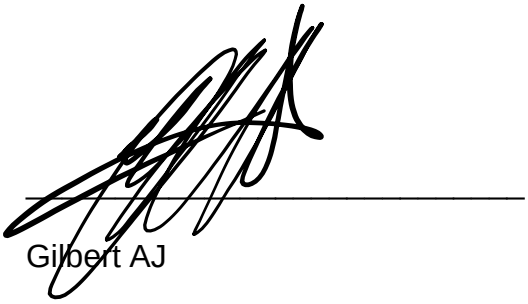
64. The focus of the argument as well as this judgment has been on the interdictory relief sought by the applicant in prayer 2.1 of its notice of motion preventing the respondent from effecting renovations to the premises. The applicant does seek further interdictory relief in prayer 2.2 of its notice of motion interdicting the respondent from interfering, directly or indirectly through third parties, with its use and enjoyment and conducting of its business on the leased premises. This appears to be little other than an adjunct to the balance of the relief. The facts set out in the applicant's affidavits to justify this relief is sparse and goes little further than the presence of a security guard having been placed upon the premises at the instance of the respondent. In my view, insufficient averments are made out in an affidavit to sustain this relief, which in any event suffers from the same disconnect when it comes to the duration of the interdictory relief sought.

65. There is no reason why costs should not follow the result and why they should not be on the ordinary scale.

66. The following order is made:

66.1. The application is dismissed.

66.2. The applicant is to pay the costs.



Gilbert AJ

Date of hearing:	8 October 2021
Date of judgment:	12 October 2021
Counsel for the applicant:	Mr Meijers
Instructed by:	Alhadeff Attorneys
Counsel for the respondent:	Ms I Goodman
Instructed by:	Nortons Inc.