IN THE HIGH COURT OF SOUTH AFRICA,

KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

CASE NO: 14399/17P

In the matter between:

RIVER ROCK INVESTMENTS (PTY) LTD **APPLICANT**

and

UMHLATHUZE MUNICIPALITY **RESPONDENT**

ORDER

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1. The application is dismissed with costs, such costs to include that of two counsel where so employed.

JUDGMENT

Chetty J:

1. The applicant, a company with its place of business in Meerensee, Richards Bay, entered into a notarial lease agreement with the then Richards Bay Transitional Local Council on or about 5 August 1998 in respect of a property described as Rem of the Farm Richards Bay 14217, and Rem of Erf 2627 Richards Bay, Province of KwaZulu-Natal ('the property'). Over the years during the lifetime of the lease, the applicant spent a considerable amount of money in developing the property from which it carried out business letting out holiday accommodation to the public. It constructed log cabins on site, as well as a swimming pool, ablution blocks, a conference centre, a miniature golf course and a host of other infrastructural developments. None of these improvements to the property is disputed by the respondent. Clause 14.4 of the agreement provides that upon the termination of the agreement all buildings and other improvements on the property would become the sole property of the respondent without any compensation whatsoever to the applicant. Alternatively, at the option of the respondent, the applicant could, at its own cost, remove all the improvements elected on the property and restore the property to the same condition in which it was at the time of the commencement of the agreement.

2. The issue which has given rise to the application relates to the application by the applicant to renew the lease agreement, which was declined by the respondent.

3. It is common cause between the parties that the date of commencement of the lease agreement was in October 1997, with the lease to endure for a period of 19 years and eight months, terminating on 31 May 2017. In terms of clause 4.2 of the agreement the applicant would have an option to renew the lease for two further consecutive periods of ten years each, except that there would be no renewal upon the expiry of the second ten-year period, and that the rental in respect of the renewal periods would be market related and agreed upon between the parties. However, in order for the applicant to have secured a renewal lease, it was required in terms of clause 4.3 of the agreement to give written notification to the respondent of its intention to do so, before the commencement of the 19th anniversary of the agreement.

4. It is common cause on the papers that the 19th anniversary would have occurred on 31 May 2016. In an apparent attempt to renew the lease in accordance with the provisions of clause 4.3, the applicant dispatched a letter to the respondent on 6 May 2016 exercising its option to renew the lease for a period of 10 years. The problem for the applicant is that the municipality had no record of such email or letter having been received. Not having heard from the respondent for several months, the applicant on 20 January 2017 addressed a letter to the respondent referring to its earlier letter in which it contended contained the exercise of the renewal option.

5. On 14 March 2017 the respondent replied that the application to renew the lease had been declined as the municipality had no record of receipt of the letter sent in May 2016. As the applicant failed to apply to renew the lease before 31 May 2016, the respondent declined the application to renew the lease. It pointed out that if the applicant wished to remain on the premises beyond 31 May 2017, this would be on the basis of a month-to-month lease.

6. In light of the applicant being unable to prove that it delivered its written communication of the exercise of the option to extend the lease before 31 May 2016, its attorneys wrote to the respondent on 7 April 2017 essentially contending that on the applicant's interpretation of the lease, prior to 31 May 2016 it had enjoyed an unconditional and irrevocable right to exercise the option to renew the lease. It was further contended that during the period between 31 May 2016 and 31 May 2017 (when the agreement terminated), provided that the applicant gave notice to the respondent that it was exercising the option to renew, and before the respondent exercised its election as to what it wished to do with the property, the applicant was still entitled to exercise the option to renew.

7. It is common cause that prior to 16 March 2017 the respondent did not communicate to the applicant that it had decided to dispose of the property in some or other manner nor did it record that the applicant's option to renew had lapsed. On this basis, the applicant submits that its notification in January 2017 constituted a valid enforcement of its option to renew in terms of clauses 4.2 and 4.3 of the agreement. It is perhaps prudent to set out the full text of the provisions of clause 4

of the agreement, the interpretation of which is dispositive of the application before me. Clause 4 provides for the following :

'4. PERIOD

4.1 The Lease shall be for an initial period of 19 (Nineteen) years and 8 (Eight) months, which period, notwithstanding the date of signing hereof, will commence in the EFFECTIVE DATE and terminate on the 31st day of May 2017.

4.2 The LESSEE, having faithfully complied with the terms and conditions of the AGREEMENT, will upon termination of the AGREEMENT, have an option to renew the Lease for 2 (Two) further consecutive periods of 10 (Ten) years each, subject, *mutatis mutandis,* to the same terms and conditions as contained in the AGREEMENT, except that there shall be no further right of renewal upon the expiry of the second period of 10 (Ten) years and the rental in respect of each renewal period being an amount to be agreed upon between the parties as market related but subject to the proviso that such rental shall not be less than the rental paid in respect of the month immediately preceding the relevant renewal period plus 12 % (Twelve Percent). In the event of the parties failing to reach agreement in respect of rental for any renewal period, the matter shall be referred to arbitration as provided for in Clause 33 hereof. Until the matter has been resolved by arbitration, the LESSEE shall be obliged to pay the rental at the minimum rate as aforesaid.

4.3 The LESSEE shall be obliged to exercise its option to renew the Lease in writing, at least 12(Twelve) calendar months prior to the termination date of the previous term of the AGREEMENT, failing which such option, in the sole discretion of the LESSOR, shall lapse and be of no further force or effect.' (my emphasis)

8. The applicant relies on the dictum in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) for its contention that its interpretation is the only reasonable, sensible and business like interpretation. In paragraph 18 Wallis JA said the following regarding the approach to interpretation :

'. . .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 unbusinesslike results or undermines the apparent purpose of the document. . .'

See also *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) at para 39 where the Court stated:

'. . .interpretation is a matter of law and not of fact. . . to the extent that evidence may be admissible to contextualise the document (since "context is everything") to establish its factual matrix or purpose or for purposes of identification, "one must use it as conservatively as possible". . . .'. (References omitted).

In *Roazar CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA) the matter was put thus at paragraph 9:

'These clauses must be interpreted by having regard to the language used, in the light of the ordinary rules of grammar and syntax, in the context of each other and the agreement as a whole, and their apparent purpose, so as to give them a commercially sensible meaning. If more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective.'

9. In support of the interpretation that it was still open to the applicant to renew the lease after 31 May 2016, the applicant submits that if the option to renew only existed until 31 May 2016 and would have lapsed beyond that date, there would be no rationale for the agreement to include the words in clause 4.3 '*failing which such option, in the sole discretion of the LESSOR, shall lapse and be of no further force or effect*.' As I understood this argument, Ms Nel who appeared for the applicant, submitted that if the option to renew lapsed on 31 May 2016, the remainder of the words in clause 4.3 after 'shall lapse' would be superfluous and meaningless, unless one interpreted the clause in the manner contended for by the applicant, in other words, that the option of renewal would endure beyond 31 May 2016 and would only be extinguished if the respondent (without having heard from the applicant) had communicated its decision that it had other plans for the property than a renewal of the lease with the applicant. As stated in *African Products (Pty) Ltd v AIG South Africa Ltd* 2009 (3) SA 473 (SCA), para 13, where words in a contract, depending on the context, may have the same meaning, 'they must each be given a meaning that will avoid tautology or superfluity'.

10. In support of this conclusion, the court in *African Products* para 13 referred to the decision in *Wellworths Bazaars Ltd v Chandler's Ltd & another* 1947 (2) SA 37 (A) at 43, in which the Appellate Division made reference to the decision of the Privy Council in *Ditcher v Denison* 11 Moor PC 325 at 357, holding that:

'It is a good general rule in jurisprudence that one who reads a legal document whether public or private, should not be prompt to ascribe - should not, without necessity or some

sound reason, impute - to its language tautology or superfluity, and should be rather at the outset inclined to suppose every word intended to have some effect or be of some use.'

11. Mpati J concluded in *African Products* para 13 that a 'court should thus be slow to conclude that words in a single document are tautologous and superfluous'. The applicant contends that the interpretation contended for by the respondent causes the remainder of clause 4.3 after the word 'Agreement' to be disregarded. This is not entirely correct as the respondent contends that in the event of the applicant not exercising its option within the first 18 years of the lease, within the last year of the lease it (the respondent) has the sole discretion as to whether it may want to extend the lease, or do whatever it may wish with the property. I will deal more this aspect below, suffice to say that this is the nub of the application.

12. In light of the applicant having communicated its intention to renew the lease agreement on 20 January 2017 (the initial communication on 6 May 2016 being disputed), it contends that it properly exercised the option to renew as contemplated in clause 4.2 and 4.3, and that this communication was made prior to the respondent communicating that it had elected to use the property for some other purpose. Accordingly, the applicant contends that its election of the option on 20 January 2017 is valid and binding on the respondent and that the latter's communication on 30 May 2017 that the agreement was terminated by effluxion of time, and relegating the applicant to a monthly tenancy terminable at the will of the respondent, is unlawful. Put differently, and as stated in the letter of the applicant's attorney to the respondent dated 7 April 2017:

'. . .it is not the agreement of lease that lapses, but the option agreement in clauses 4.2 and 4.3 of the lease agreement that can lapse, at the discretion of the municipality – not automatically. The clear meaning of clause 4.2 read together with clause 4.3 is that prior to 31 May 2016, [the applicant] is entitled to exercise the option in terms of the option agreement (contained in the lease agreement) which [the respondent] cannot withdraw from or vary other than in terms of the express provisions provided in the lease agreement.'

13. In the alternative, and in the event of the interpretation argument not succeeding, the applicant contends (at least in the letter from its attorney dated 7 April 2017) that the discretion which vested in the respondent in terms of clause 4.3

had to be fairly exercised inasmuch as the respondent, being as organ of state, was obliged to act in accordance with fair procedure. To this end, the applicant contends that despite there being no proof that its letter of 6 May 2016 was received by the respondent, it has substantially complied with its obligations to notify the respondent that it intended to exercise its option to renew prior to 31 May 2017.

14. In its replying affidavit, and in answer to the respondent's argument that the principles of fair dealing underpin the object of clause 4.3, the applicant relies on the concept of Ubuntu and good faith which underpins the manner in which contracts are to be interpreted. In developing this argument, the applicant points to its expenditure of over R20 million over the duration of the lease in developing the property, with no prospect of recovering this money in the event of it being found that it failed to exercise its option of renewal. The infusion of constitutional values into the law of contract can be found in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) where Yacoob J noted at para 24 that to exclude the concept of ubuntu from a contract of lease between two business entities was 'too narrow an approach.' Moseneke DCJ in para 72 added:

'Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith'.

This theme was continued in *Botha v Rich NO and Others* 2014 (4) SA 124 (CC) para 46 the Constitutional Court went further and infused the value of fairness into the law of contract holding that where parties to a contract deal with each other 'good faith is the lens through which we come to understand contracts. . . .'

15. In substantiation of the point that fairness should favour the interpretation contended for by the applicant, it points out that although the respondent's Council took a decision on 20 June 2017 that the leased property was not needed by the respondent for the provision of basic municipal services and therefore could be disposed of by public tender, the respondent in December 2017 rescinded its earlier decision and entered into a lease with the applicant until the end of December 2018. At the time of the hearing of this application in February 2019, I understood that the applicant was still in occupation of the leased premises.

16. The applicant also contends that a business which it runs from a caravan park on the adjoining property is reliant on the continuance of the lease being renewed, as both businesses operate in tandem. This is disputed by the respondent which contends that the caravan park is a stand-alone business and does not form any part of the legal enquiry as to whether the applicant has validly exercised its right to renew option. I agree with that submission.

17. The respondent's stance is that the applicant did not exercise its option to renew the lease any time prior to 31 May 2016, which the parties accept to be the 19th anniversary of the lease agreement. To the extent that the applicant contends that the above date was not the cut-off point for it to exercise its option to renew, the respondent points out that even on the applicant's own version, it regarded the 31st May 2016 as being of critical importance. Why then, the respondent contends, would the applicant have initially placed reliance on its letter of 3 May 2016 which makes reference to the 'stipulations set out in the agreement' and requests the renewal of the lease for a further ten (10) year period? The respondent contends that this in itself points to the applicant's acceptance that it had until 31 May 2016 within which to exercise its option to renew. Only after discovering that it was unable to prove that the letter of 3 May 2016 reached the respondent, did it adopt a fall-back position of what I consider to be a '*residua*l' basis for the option to renew.

18. The respondent, relying on the rule of interpretation set out in *Endumeni* contends that the text of clause 4.2 is clear – the option to renew is expressly provided for in this section. Clause 4.3 provides the mechanism for the option to be validly exercised – it had to be communicated in writing, at least (or not less than) 12 months prior to the termination date of the agreement. It is common cause that clause 4.1 stipulates the termination date of the agreement as 31 May 2017. What remains is the interpretation accorded to the following words: '. . . *failing such option, in the sole discretion of the Lessor, shall lapse and be of no further force and effect'*. Mr *Madonsela* SC, who appeared with Ms *Mbonane*, for the respondent submitted that that if regard is had to the arrangement of the words in clause 4.3, this militates against the interpretation contended for by the applicant that the option to renew existed up to 31 May 2017. I am in agreement with the respondent in this regard, as

any interpretation to the contrary would render superfluous the words '. . .at least 12(Twelve) calendar months prior to the termination date'.

19. Mr *Madonsela's* argument was founded on an analysis of the 'text, context and purpose' of clause 4.2 and 4.3 of the agreement, when considered as a whole. It was submitted that the scheme of the arrangement of clauses 4.2 and 4.3 must take cognisance of the long lease entered into between the parties where the applicant was accorded an option, freely exercisable without any interference from the respondent, within the first 19 years of the life of the agreement. This option was to be exercised at the will of the applicant on or before 31 May 2016. In contrast, the latter part of clause 4.3 recognises an unfettered discretion accorded to the respondent, without any inference or input from the applicant, to decide what it elects to do with the property, where the applicant has not exercised its option to renew prior to 31 May 2016. That would accord with a sensible interpretation of the wording.

20. The respondent contends that the interpretation sought by the applicant fails to give any recognition to the statutory and legislative constraints within which the respondent carries out its functions, for example, whether it is to elects to sell the property or lease it to another party. Mr *Madonsela* pointed to the respondent's obligations in dealing with an asset, such as the leased property, in terms of the Local Government: Municipal Finance Management Act, 56 of 2003 which prescribes the circumstances under which a municipality may deal with a capital asset either by the sale or some other transaction, without determining beforehand whether the asset is required for basic municipal services. Added to this, is the obligation to ensure that any transaction that disposes of the property would have to be by open tender and based on a fair market value.

21. In addition, I was referred to the provisions of the Municipal Asset Transfer Regulations, GN R878, GG 31346, 22 August 2008, which regulate the process in terms of which a municipal asset, like the leased property, may be disposed. Taking into account the legislative constraints that bind the municipality in any of its decision making processes, Mr *Madonsela* submitted, and correctly so in my view, that the unfettered period of one (1) year which is accorded to the municipality was inserted

in clause 4.3 to ensure that the respondent is able to comply with the various statutory requirements which it is obliged to follow. In counsel's submission, anything to the contrary would lead to what Wallis JA in *Endumeni* referred to as 'unbusinesslike results', which would undermine 'the apparent purpose of the document'.

22. The next ground relied on by Mr *Madonsela* was that the principles of fair dealing underpin the object of clause 4.3 in that it affords sufficient time to both parties to decide the fate of the property. In the case of the applicant, it is allowed 19 years from the effective date (being the commencement of the lease agreement) to decide whether it wishes to extend the lease for a further ten years. If the option to renew is not exercised by the applicant, the pendulum swings to the respondent, in its sole discretion, to determine how it wishes to deal with the property. During the period accorded to each contracting party, they are permitted to exercise their choice free of interference from the other. In the case of the applicant, all that would have been necessary to cement the option to renew was to have proof of the letter it says was sent to the municipality. That would have been the end of the matter, and the applicant would have been ensconced as a lessee for a further ten year period. If on the other hand the applicant took no steps to exercise the option to renew by the stipulated date, the agreement is clearly worded to give to the respondent discretion to deal with the property in a manner it deems fit, obviously in accordance with statutory prescripts.

23. If the interpretation called for by the applicant were to prevail, a lessee of a municipal owned property could simply ignore a time stipulation within which it had to exercise an option to renew a lease, and keep the municipality guessing until the very last day of the agreement as to whether it wishes to renew the lease or not. If it chooses not to, the municipality, in such circumstances, would be severely prejudiced as it would have to lease the property at short notice, if at all possible, or dispose of the property in accordance with fair procedure. Either of these processes would involve considerable delay, to the prejudice the municipality. The municipality's conduct would be placed under scrutiny, and rightly so, where the property in question is located in a sought after area or one which attracts high market values. The municipality cannot contract with the first party who shows an

interest in either leasing or buying the property. To do so would render its decision unlawful. Accordingly, it contends that the right accorded to the applicant to renew the lease had to be exercised on or before 31 May 2016. That right did not extend into the last anniversary of the contract, during which time the respondent had the sole discretion to deal with the property as it chose.

24. The respondent's assertion of fair dealing afforded the platform for the applicant in reply to contend that the principles of Ubuntu must inform the interpretation of any contract, and such application must favour the interpretation sought for by the applicant. The applicant relies on *Beadica 231 CC & others v Trustees, Oregan Unit Trust & others* 2018 (1) SA 549 (WCC) to support its alternative argument that it has substantially complied with its obligations in respect of the exercise of the option to renew the lease. In *Beadica*, Davis J applied considerations of fairness to the enforcement of a contractual clause in a lease agreement. The facts in *Beadica* are briefly that the lessees were franchisees and beneficiaries of a black economic empowerment transaction who concluded a lease for certain premises, for an initial period of 5 years, subject to a right to renew. The franchise agreements contemplated that the business would operate from the leased premises. The lessees purported to exercise their right to renew the lease agreements, but did so out of time. They argued that if the lease was not extended their businesses would close, and their franchise agreements would be terminated.

25. The clause under consideration in *Beadica* was very similar in effect to clause 4.2 and 4.3 presently under consideration in that it gave the lessees the option to renew the lease agreements provided that this was exercised by a certain specified date. The relevant provision was quoted in *Beadica* as follows:

'The lessee shall have the right to extend the lease period by a further period as set out in section 13 of the Schedule [a further period of five years] on the same terms and conditions as set out herein, save as to rental, provided that the lessee gives the lessor written notice of its [sic] exercising of the option of renewal at least six months prior to the termination date.'

26. Notwithstanding that it was clear from the clause in question that the option to renew had to be timeously exercised by the lessees, Davis J found that the lessees

had validly exercised their options to renew the lease, despite being out of time. The court reasoned at paragraph 42 that:

'In this case I find that the sanction was disproportionate because the contracts signed maximised the interests of both parties and this meant that they intended ensuring that the franchise agreements be underpinned by the lease agreements'

And at paragraph 43:

'. . .the sanction which might follow a strict application of a formal rule is in and of itself insufficient to justify the relief sought when the key intention of parties can be clearly divined from, as in this case, the substance of the two agreements read together'.

27. Subsequent to hearing this matter, Davis J's judgment in *Beadica* was set aside by the Supreme Court of Appeal in *Trustees for the Time Being of the Oregon Trust v BEADICA 231 CC & others* (74/2018) [2019] ZASCA 23 (28 March 2019). In doing so, Lewis ADP, writing for the court, endorsed the views of Brand JA in *Potgieter v Potgieter NO* 2012 (1) SA 637 (SCA) where he sounded a caution of judges venturing to introduce the principle of fairness as the basis for adjudicating contract disputes. Brand JA stated at paragraph 34:

'[T]he reason why our law cannot endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair, is essentially that it will give rise to intolerable legal uncertainty. That much has been illustrated by past experience. Reasonable people, including judges, may often differ on what is equitable and fair. The outcome in any particular case will thus depend on the personal idiosyncrasies of the individual judge. Or, as Van den Heever JA put it in *Preller & others v Jordaan* 1956 (1) SA 483 (A) at 500, if judges are allowed to decide cases on the basis of what they regard as reasonable and fair, the criterion will no longer be the law but the judge'.

28. Lewis ADP criticised the basis on which Davis J relied to find that the lessees were entitled to relief, by stating at paragraph 38 that:

'The notion that a sanction for breach, or failure to comply with the terms of a contract, agreed on by the parties is disproportionate and therefore unenforceable, is entirely alien to South African contract law. And to recognize it would be to undermine the principle of legality.'

Lewis ADP proceeded in paragraph 38 to clarify that:

'That does not mean that a sanction that is contrary to public policy, or that is unconscionable in the circumstances, is to be enforced. The question is really one that centres on policy – the legal convictions of the community, rooted now in the Constitution.'

29. Having found that the proper basis for deciding whether to allow the enforcement of sanction was the consideration of public policy issues and not the notion of the sanction being disproportionate, and, having proceeded to consider the policy issues that arose in the matter before her, Lewis ADP concluded in paragraph 46 that:

'. . .there are no considerations of public policy that render the renewal clause of the leases unenforceable. The demand for compliance with their terms was not unconscionable. The leases terminated on 31 July 2016 through the effluxion of time. When the lessees brought their urgent application on 1 August 2016 the leases had expired. There was no basis on which to resuscitate them.'

30. Is conclusion that the option to renew the lease only existed until 31 May 2015 contrary to public policy or unconscionable in the circumstances of this case?. If it is, it cannot be enforced. The respondent submits that the rationale for it being granted an unfettered discretion for a year, in the event of the lessee not exercising the option to renew, was due to its public law duties as an organ of state. Apart from that however, even if this were a contract between two private parties who entered into the agreement freely and honestly and with mutual respect for each other's obligations under the contract, the principle which has evolved is that contracts should be honoured - *pacta sunt servanda*. Brand JA in *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) para 27 rejected the contention that all contracts should be subject to an implied term that parties' obligations should be exercised in accordance with the dictates of fairness and reasonableness and found that although these values are fundamental to our law of contract, they cannot be 'acted upon by the courts directly'. Brand JA added that:

'Acceptance of the notion that judges can refuse to enforce a contractual provision merely because it offends their personal sense of fairness and equity will give rise to legal and commercial uncertainty".

In *Fourway Haulage SA (Pty) Ltd v SA National Roads Agency Ltd* 2009 (2) SA 150 (SCA) similar views were expressed. In his article, 'Commercial certainty and

constitutionalism: Are they compatible' (2016) SALJ 545 at 559, Malcolm Wallis expresses himself on the issue thus:

'Encouraging good faith in contracts and enforcing good faith commitments does not involve overthrowing the entire edifice of our law of contract.'

31. Even accepting that there will be negative financial consequences for the applicant and that it is unable to recoup its investment in the leased property, this does not mean that the operation of the 'option clause' has inequitable or unconscionable results, or that the sanction of the lapsing of the option is unduly harsh or inappropriate. The decision of the respondent not to validate an out of time renewal will have the result that the applicant will be unable to recoup the money spent on the development of the property. Apart from the respondent's contention that the applicant benefitted from operating for 20 years at a very reasonable rental, the applicant was well aware of the implications of clause 14.4 of the agreement which provided an reasonable time for it to consider and act on its option to renew in the knowledge that if it did not, on termination, the buildings and improvements become the property of the municipality, unless these could be removed by the applicant.

32. Importantly, there is nothing on the papers to suggest that the municipality was using the option period in clause 14.4 for a purpose not intended. The municipality states that when it recorded on 14 March 2017 that it would not concede to the out of time renewal, plans were already being made for the leased property in light of the applicant not having timeously elected to renew the lease. In this regard, the Deputy Municipal Manager states that the municipality was already in the process of 're-imagining the Alkantstrand beach and surrounding properties', including the leased property and that the future of the property was being considered by its Planning Department for a renewed urban development.

33. Lastly, I can find no basis to interpret clause 4.2 and 4.3 as requiring the respondent, where the applicant had not exercised its renewal option before 31 May 2016, to communicate its decision to the applicant as to what it wished to do with the property, and that a failure to do so would entitle the applicant to renew the lease in the last year of its duration. I agree with Mr *Madonsela* that there is nothing in the

text of clause 4.2 and 4.3 that imposes such an obligation on the respondent nor is there any basis to imply such a duty from the language of the contract. This argument falls to be rejected.

34. Accordingly, the interpretation contended for by the applicant in relation to the purported exercise of the renewal in January 2017 cannot be sustained. Despite the hardship that it may suffer from the termination of the lease agreement, I am unable to find any basis that warrants a rejection of the contextual interpretation of the agreement. *Mohamed's Leisure Holdings (Pty) Ltd v Southern Sun Hotel Interests (Pty) ltd* 2018 (2) SA 314 (SCA) made it clear that when interpreting contracts:

'The fact that a term in a contract is unfair or may operate harshly does not by itself lead to the conclusion that it offends the values of the Constitution or is against public policy. In some instances the constitutional values of equality and dignity may prove to be decisive where the issue of the party's relative power is an issue. There is no evidence that the respondent's constitutional rights to dignity and equality were infringed. It was impermissible for the high court to develop the common law of contract by infusing the spirit of ubuntu and good faith so as to invalidate the term or clause in question'.

35. The decisions in *Mohamed's Leisure* and *Roazar CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA), cited with approval by Lewis ADP in *Oregon Trust,* illustrate the importance of the principle of *pacta sunt servanda* and the importance of contracting parties to order their affairs with legal certainty arising from the terms of a contract freely entered into. I find that there are no public policy issues which render clause 4 of the agreement unenforceable.

36. In the result, I make the following order :

> The application is dismissed with costs, such costs to include that of two counsel where so employed.

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M R CHETTY

Appearances

For the Applicant:	C A Nel
Instructed by:	Macgregor Erasums Attorneys
	Bond Square, First Floor
	Durban
c/o	Macgregor Emasums Attoneys
	12 Gough Road
	Pietermaritzburg
Ref:	(Callum Smythe/Cathy)
Tel:	031 389 0433
Email:	callum@meattorneys.co.za
	cathy@meattorneys.co.za

For the Respondent:	T G Madonsela SC
Instructed by:	Mgwenya & Zwane Inc
c/o	Yashika Chetty Attorney
	365 Langalibalele Street
	Pietermaritzburg
Tel:	033 394 9818
Ref:	(Ms Y Chetty/N7159)
Tel:	033 394 9818

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Date delivered:	30 April 2019