



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1191/2018

In the matter between:

BEADICA 231 CC

APPLICANT

and

SALE'S HIRE CC

RESPONDENT

Neutral citation: *Beadica 231 CC v Sale's Hire CC* (1191/2018) [2020]
ZASCA 76 (30 June 2020)

Coram: PETSE DP, MBHA, MOKGOHLOA and NICHOLLS
JJA and GORVEN AJA

Heard: This appeal was, by consent between the parties, disposed of without an oral hearing in terms of s 19(a) of the Superior Courts Act 10 of 2013.

Delivered: This judgment was handed down electronically by circulation to the parties' legal representatives by email, publication on the Supreme

Court of Appeal website and release to SAFLII. The date and time for hand-down is deemed to be 09H45 on 30 June 2020

Summary: Practice and procedure – special leave to appeal – refusal by two judges of the Supreme Court of Appeal (SCA) – s 17(2)(f) of the Superior Courts Act 10 of 2013 – referral of order refusing special leave to court for reconsideration and, if necessary, variation.

Appeal – application for special leave to appeal to the SCA – requirements for grant thereof – test not satisfied by establishing existence of only reasonable prospects of success but existence of special circumstances also required.

Contract – enforcement of – general rule that contracts enforceable unless enforcement unconscionable or contrary to public policy.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Ndita J, Baartman and Sher JJ concurring sitting as court of appeal):

The application for the reconsideration and, if necessary, variation of the order of this Court, granted on 15 August 2018, dismissing applicant's application for special leave to appeal, is dismissed with costs.

JUDGMENT

Petse DP (Mbha, Mokgohloa and Nicholls JJA and Gorven AJA concurring)

[1] This is a hybrid application that raises two discrete issues of narrow compass. It is brought pursuant to an order of this Court granted by Navsa AP on 13 February 2019¹ under s 17(2)(d) and (f) of the Superior Courts Act, 10 of 2013 (the Act). The first application is for reconsideration and, if necessary, variation of the decision of this Court in terms of which the

¹ The order is couched in these terms:

- '1. The decision of the court dated 15/08/2018 dismissing the applicant's application for leave to appeal with costs is referred to the court for reconsideration and, if necessary, variation.
2. The application for special leave to appeal is referred for oral argument in terms of s 17(2)(d) of the Superior Courts Act 10 of 2013.
3. The parties must be prepared, if called upon to do so, to address the court on the merits.
4. For this purpose the applicant is to file 6 copies of the initial application for leave to appeal and six copies of the application in terms of s 17(2)(f) of the Superior Courts Act 10 of 2013, within one month of the date of this order and thereafter, to comply with the rules of this Court relating to the conduct of appeals by filing the record in terms of rule 8 within three months of this order and both parties are to comply with all the remaining rules relating to the prosecution of an appeal.
5. If the applicant does not proceed with the application, the applicant is to pay the costs relating to the application for leave to appeal.'

applicant's application for special leave² to appeal was dismissed with costs. The second part of the application is for special leave to appeal in terms of s 17(2)(d) of the Act.

[2] As is usual in these types of applications, their consideration generally requires for their determination, full argument as if the envisaged appeal itself were being considered. To this end, the applicant was directed to file six copies of its application and the record in terms of rule 8 of this Court's Rules. And the parties were forewarned that they must be prepared, if called upon to do so, to address the court on the merits. Hence, in due course, six copies of the application and record were filed as were the parties' comprehensive heads of argument in which the merits of the envisaged appeal were addressed.

[3] The substantive issues sought to be raised in the envisaged appeal are two-fold. First, the principal issue is whether a party to a contract freely and voluntarily entered into, can deny the other party to that contract its entitlement to enforce contractual obligations freely and seriously undertaken by the former on the ground that the latter, in asserting its contractual rights, in truth seeks to achieve an illegitimate purpose. The subsidiary issue is whether the well-entrenched *Plascon-Evans*³ principle was properly applied by the Full Court of the Western Cape Division of the High Court (the Full Court) in determining factual disputes in motion proceedings where final relief is sought without recourse to the hearing of oral evidence in order to decide where the probabilities lie.

² This court's order erroneously makes reference to 'leave to appeal' when what the applicant had applied for was 'special leave to appeal'.

³ *Plascon-Evans Paints Ltd v Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); [1984] 2 All SA 366 (A).

[4] As to the first issue, the applicant, Beadica 231 CC (Beadica), asserts that in the context of the facts of this case the answer must be in the affirmative. On this score, Beadica accepts that the terms of the contract upon which the respondent, Sale's Hire CC (Sales' Hire), relies are, on the face thereof, objectively reasonable and unobjectionable. Nevertheless, Beadica contends that Sale's Hire ought to have been denied relief by the Full Court because what it sought to do was to compete unlawfully with it by surreptitiously gaining access to Beadica's 'sensitive confidential information' under the guise of exercising the inspection rights that are explicitly provided for in the parties' agreement. This, says Beadica, is contrary to public policy and inimical to the constitutional objective of accomplishing economic transformation and empowerment of the previously disadvantaged persons as a consequence of the racially discriminatory practices of the past. Consequently, Beadica seeks special leave to appeal to this Court so that this issue can be ventilated.

[5] The factual matrix against which these issues fall to be determined now follows. Beadica is a close corporation that sells and lets tools and building equipment. It conducts its business in Durbanville, Western Cape. Sale's Hire is similarly a close corporation whose sole member is Mr Shaun Sale. As the name suggests, Sale's Hire hires out building tools and equipment to builders in Cape Town and its environs. Previously, Sale's Hire operated some 20 outlets in various areas of Cape Town and environs. Apart from general staff, it also employed managers at its stores. Mr Alistair Fisher, who at all times material to this litigation, was Beadica's sole

member, was one of its employees who rose through the ranks to become a manager at one of the stores.

[6] In the course of time, Sale's Hire decided to divest its interests in ten of its stores which were thereafter operated by franchisees. The various franchisees were part of a black empowerment scheme funded by the National Empowerment Fund Trust⁴ (NEFT) which is a government initiative aimed at economically empowering previously disadvantaged persons. The NEFT receives its funding from the government. Mr Fisher is one of the beneficiaries of the NEFT funding through Beadica.

[7] On 12 October 2011 the parties concluded a written franchise agreement (the franchise agreement) in terms of which Beadica, as franchisee, was granted by Sale's Hire, as franchisor, a right to acquire and operate the franchisor's former store in Durbanville, Western Cape, subject to certain terms and conditions that were fully spelt out in the franchise agreement. Of particular relevance for present purposes were clauses 11, 14 and 15 of the franchise agreement.

[8] Clause 11, in material parts, reads:

'11. SUPPLY OF GOODS AND/OR SERVICES, BUSINESS IMAGE AND OPERATING STANDARDS

11.1 Whilst it is not possible to provide an exhaustive list of the goods and/or services the Franchisee is entitled to provide, the Franchisee acknowledges that the goods and services it is entitled to provide, pursuant to this Agreement, are only those goods and services ordinarily provided in the course of operating a ***SALE'S HIRE*** Business and which are approved by the Franchisor.

...

⁴ The NEFT is registered with the Master of the High Court, Pretoria under the Trust Property Act 57 of 1988 and was established in terms of the National Empowerment Fund Act 105 of 1998.

11.2.3 to maintain the condition and appearance of the Business and the Location in accordance with the standards of the Franchisor and consistent with the image of a ***SALE'S HIRE*** Business as a clean, sanitary, attractive and efficiently operated Business offering high quality tools and equipment for hire and sale and courteous and helpful service;

11.2.4 to effect such maintenance of the Business and the Location as is required by the Franchisor from time to time to maintain such condition, appearance and efficient operation, including without limitation:-

11.2.4.1 continuous and thorough cleaning of the interior and exterior of the Business including the parking bays and yards;

11.2.4.2 interior and exterior repair of the Business;

11.2.4.3 maintenance of equipment; tools and vehicles at peak performance;

11.2.4.4 replacement of worn out or obsolete fixtures, furnishings, equipment, tools and signs with approved fixtures, furnishings, equipment, tools and signs, and;

11.2.4.5 periodic refurbishing, painting and decorating.

11.2.5 to upgrade the Business at reasonable intervals determined by the Franchisor to reflect changes in the image, signage, design, format or operation of ***SALE'S HIRE*** introduced by the Franchisor and required of ***SALE'S HIRE*** Franchisees subject to approval of all construction, signage, repair or re-fixturing in connection with such upgrading or remodelling, and;

11.2.6 to place or display at the Business (interior and exterior) only such signs, emblems, lettering, logos, colour schemes and display only such advertising materials that are from time to time approved in writing by the Franchisor.

...

11.7 The Franchisee shall offer all products approved by the Franchisor. If the Franchisee desires to add items to be sold or hired at or by the Business, the prior written approval of the Franchisor must first be obtained. The Franchisor requires such approval of new items to assure itself that such items are of the type and quality approved for ***SALE'S HIRE*** Businesses and are consistent with the image and format of ***SALE'S HIRE*** Businesses. The Franchisee agrees not to, without prior written approval by the Franchisor, offer any equipment, tools or other services or products that are not authorised by the Franchisor for ***SALE'S HIRE*** Businesses. The Franchisee shall apply for any licences as required by law to enable it to sell and hire the products from the Approved Location.

- 11.8 The Franchisee shall at all times maintain its stock at such levels as the Franchisor may from time to time require.
- 11.9 All Products, except those contained on the Approved Supplier's Schedule as described in clause 11.10, must be purchased directly from the Franchisor at a price determined by the franchisor from time to time in accordance with market-related indicators. The Franchisor shall endeavour to provide the Franchisee with the Products requested however the Franchisor does not warrant that it shall be able to supply the Franchisee with the products as requested, nor that it shall be able to do so within a reasonable time period. In the event that the Franchisor is unable to provide the Franchisee with the requested products within a reasonable time period, the Franchisor shall attempt to facilitate the supply of such product from an alternative supplier. The Franchisor shall not under any circumstances become liable for the cost of any orders placed by the Franchisor on behalf of the Franchisee and at the Franchisee's instance and request and the Franchisee hereby assumes liability to pay for any such Product purchases ordered on the Franchisee's behalf and indemnifies the Franchisor in this regard.
- 11.10 The Franchisor shall provide the Franchisee with an Approved Supplier Schedule which Schedule shall contain a directory of Products together with the name and contact details of the designated supplier from whom such Product must be purchased. The Franchisee shall be obliged to purchase such Products from such designated supplier as recorded on the Approved Supplier Schedule. In the event the designated supplier is unable to provide the Product to the Franchisee on any occasion, the Franchisee shall be obliged to request the Franchisor to source the supply of the Product from an alternate supplier. The Franchisor is entitled to amend such Schedule at any time in the Franchisor's discretion.
- ...
- 11.14 The Franchisor shall provide training to the Franchisee and its personnel which training shall enable the Franchisee to maintain and effect minor repairs to the Franchisee's tools and equipment. The training provided by the Franchisor to the Franchisee shall not, in any manner, constitute a warranty that the Franchisee's personnel shall be competent to properly and effectively carry out the required repairs and maintenance as such ability is dependent on the individual skills of the Franchisee's personnel. In the event the Franchisee is unable to carry out the repairs and/or maintenance of its tools and equipment, the Franchisee is obliged to request the Franchisor to assist with repair and maintenance. Provided that the Franchisor is in a position to carry out the repair or maintenance required by the Franchisee, the Franchisor is not obliged to effect any

repairs or maintenance as requested by the Franchisee. The Franchisee is prohibited from mandating or contracting any third party to carry out the repairs or maintenance of the Franchisee's tools or equipment without the Franchisor's prior written approval.

...

- 11.16 At the Franchisor's sole discretion, and without prior warning, the Franchisee shall undergo regular customer service evaluations and shall be required to pass such evaluation.
- 11.17 Mandatory specifications, standards and operating procedures may be prescribed from time to time by the Franchisor in the Operating Manuals, or otherwise communicated to the Franchisee verbally or in writing. All reference thereto in this Agreement shall include all such mandatory specifications, standards and operating procedures.
- 11.18 The Franchisee shall purchase, install and use such telephone equipment electronic communications and computer equipment, including hunting facilities for at least 4 (four) hunting telephone lines, 1 (one) line for a facsimile machine, modems and computerised cash registers, as the Franchisor may from time to time require. The Franchisee shall purchase and use such computer software, including "mail order" software as the Franchisor may from time to time require.
- 11.19 The Franchisee shall be liable for the cost of all computer software including licensing and any technical support as may from time to time be supplied by the Franchisor which software shall remain the Franchisor's property, as shall the mailing lists and other data recorded thereby, whether on CD, hard disks, tapes or in printed, photocopied or facsimile or in any other format, which the Franchisee agrees to treat as confidential. The cost of such software as payable by the Franchisee is not included in the royalty and service fees payable under clause 9 above and the Franchisor shall invoice the Franchisee separately for these amounts. The Franchisor shall, in its sole and unfettered discretion, determine what software must be purchased by the Franchisee. The Franchisor and/or its authorised agents shall be given access to all such data and shall be permitted to make copies thereof for its own purposes. The Franchisee shall not use any such software for any other purpose, nor shall Franchisee make or use copies thereof for any purpose except as backup copies for security purposes. Copies of the Franchisee's backup disks shall be delivered to the Franchisor each month, by no later than the 7th (seventh) day of the following month.

...

- 11.21 The Franchisee shall secure and maintain in force in its name all required licences, permits and certificates relating to the operation of the Business and shall, if so required by the Franchisor, transmit copies of all such licences, certificates and permits to the Franchisor within 10 (ten) days of their receipt by the Franchisee. The Franchisee shall operate the Business in full compliance with all applicable laws, occupational hazards and health, workmen's compensation insurance, unemployment insurance and payment of taxes. All marketing by the Franchisee shall be factual, ethical and in good taste in the judgment of the Franchisor and shall be subject to the Franchisor's prior written approval.

...'

[9] Clause 14, in turn, provides:

'14. ACCOUNTING REPORTS AND FINANCIAL STATEMENTS

- 14.1 The Franchisee shall at its own expense obtain and properly maintain a computer based point-of-sale register approved by the Franchisor and will use the software specified and/or provided by the Franchisor, to record all sales and provide accounting and such other information as may be required by the Franchisor. The Franchisee shall establish and maintain at its own expense a record-keeping system prescribed by the Franchisor from time to time. The Franchisor shall provide the Franchisee with the prescribed software and shall invoice the Franchisee for *inter alia*; the cost of the software; the licensing fees; any installation services; technical support or guidance and training which may be provided by the Franchisor, at the Franchisor's discretion in order to ensure that the Business continually complies with the mandatory accounting; reporting and operating standards and procedures. With respect to the operation and financial situation of the Business, the Franchisee shall, on a daily basis, facilitate, allow and ensure that the Franchisor is accessed to upload all relevant trading information from the Franchisee's computer system and facilitate the Franchisor ascertaining stock levels and such financial and other information as is required by the Franchisor from time to time, including but not limited to:
- 14.1.1 the Gross and Net Sales of the Business for the preceding calendar month and such other information and supporting records as the Franchisor may from time to time require in its sole discretion;
 - 14.1.2 financial statements consisting of a balance sheet and a profit and loss statement for the preceding calendar month and a year-to-date balance sheet and profit and loss statement for the Business;

- 14.1.3 a balance sheet and an annual profit and loss statement reflecting all year-end adjustments for the Business.
- 14.1.4 exact copies of all VAT returns and income tax returns that reflect the operation of the Business;
- 14.1.5 access to any information on any computer system utilised in the operation of the Business. In this regard the Franchisee undertakes to ensure that the Franchisor has access to a data line which will allow the Franchisor access to the Franchisee's computer's system at any time.
- 14.2 Each such report and financial statement shall be verified as a true and correct reflection of the Franchisee's trading activities and signed by the Franchisee (or the Franchisee's auditor, if so required by the Franchisor) in the manner prescribed by the Franchisor.
- 14.3 The Franchisee shall take physical stock on the last day of each month and a copy of each stock sheet shall be transmitted to the Franchisor by e-mail. The final monthly stock figures shall be used in preparing the financial statements referred to above.
- 14.4 In addition to the foregoing financial reporting requirements the Franchisee shall be obliged to properly, diligently and timeously complete in all respects, a Financial Report in the form prescribed by the Franchisor, which form may be amended from time to time in the Franchisor's sole discretion. The financial Report, which must be delivered to the Franchisor in the manner prescribed from time to time by no later than the 5th day of each consecutive month, shall include the following minimum financial information:-
 - 14.4.1 a calculated and itemised breakdown of the Business's turnover for the immediately preceding month;
 - 14.4.2 a calculated and itemised breakdown of all the purchases of the Business for the immediately preceding month and how such purchases were made, for example cash or on credit and whether payment has been settled or remains outstanding;
 - 14.4.3 copies of the Business's bank statements for the immediately preceding month;
 - 14.4.4 copies of the Business's VAT returns.'

[10] Finally, clause 15 in material parts reads:

5. REVIEWS, INSPECTIONS AND AUDITS

- 15.1 To determine whether the Franchisee is complying with the specifications, standards and operating procedures prescribed the Franchisor for the operation of a ***SALE'S HIRE*** Franchised Business, the Franchisor or its designated agents shall have the right at any reasonable time and without prior notice to the Franchisee to:

- 15.1.1 inspect the Business and the stock to ensure that *inter alia*:-
 - 15.1.1.1 all hire equipment and consumables are accounted for and there are no losses due to theft or breakage;
 - 15.1.1.2 ensure that all hire equipment is complete with all necessary accessories and consumables;
 - 15.1.1.3 ensure the technical soundness and quality of the hire equipment is maintained;
 - 15.1.1.4 ensure the Business is correctly stocked with hire equipment and that such stock is correctly displayed;
 - 15.1.1.5 ensure the signage is correctly displayed and maintained.
- 15.1.2 observe the Franchisee and any ***SALE'S HIRE*** managers and other employees of the Franchisee;
- 15.1.3 interview ***SALE'S HIRE*** managers and other employees of the Business;
- 15.1.4 interview customers of the ***SALE'S HIRE*** Business; and
- 15.1.5 gain access to all records including those maintained by the computerised point-of-sale or any other communications equipment.

The Franchisee shall present to its customers such Customer Evaluation forms as are periodically prescribed by the Franchisor and shall participate in and/or request that its customers participate in any marketing surveys performed by anyone on behalf of the Franchisor.

- 15.2 The Franchisor shall have the right at any time during business hours, and without prior notice to the Franchisee to inspect or cause to be inspected and audited, the stock of the Business, the business records, bookkeeping and accounting records, sales and income tax records of any company, close corporation, partnership or any other juristic or natural person which holds any interest in or owns the Franchisee. The Franchisee shall fully co-operate with representatives of the Franchisor and independent accountants hired by the Franchisor to conduct any such inspection or audit. In the event that any such inspection or audit shall disclose an understatement of the Sales of the Business, the Franchisee shall immediately after receipt of the inspection or audit report, pay to the Franchisor any royalties, marketing contributions or other fees due on the account of such understatement, plus interest (at the rate and on the terms provided herein) from the date originally due until the date of payment.
- 15.3 The stock audit carried out by the Franchisor will involve regular assessments of *inter alia*:-

15.3.1 recorded stock balance;

15.3.2 actual stock on hand;

15.3.3 the appearance, condition and quality of the stock

...

15.5 The Franchisor shall be entitled to carry out inspections any time during normal business hours and without prior warning to the Franchisee. No warnings will be issued or penalties incurred by the Franchisee during the first 3 (three) months after the Commencement Date.

15.6 In the event that such inspection or audit is made necessary by the failure of the Franchisee to furnish reports, supporting records or other information timeously or at all, as herein required, or if any understatement of Sales for the period of any audit is determined by any such audit or inspection, the Franchisee shall reimburse the Franchisor for the costs of such audit or inspection, including, but not limited to, any charges of any independent accountants, and the travel expenses and room and board and compensation for the expenses and costs (including salary) or any employee or agent of the Franchisor. The foregoing remedies shall be in addition to and not in lieu of all other remedies and rights of the Franchisor hereunder or under any applicable law.

...'

[11] I have, in the preceding three paragraphs, quoted clauses 11, 14 and 15 of the franchise agreement extensively, because they are particularly relevant to the issues which arise for determination in this application. In sum, clauses 11, 14 and 15 of the franchise agreement, amongst other things, provide that: (a) the franchisor shall have the sole right to determine the software that must be purchased by the franchisee at the latter's cost and used by the franchisee, and allowing the franchisor free access to all data recorded therein; (b) the franchisee, at own expense, must obtain and properly maintain a computer based point-of-sales register approved by the franchisor to record all sales, and provide the franchisor with accounting and related information as the latter may require from time to time; (c) the franchisee, on a daily basis, must facilitate, allow and ensure that the

franchisor has access to upload all relevant trading information from the franchisee's computer system and facilitate the franchisor ascertaining stock levels and such financial and other information as required by it from time to time; (d) the franchisor has the right, at any reasonable time and without prior notice to the franchisee, to: (i) inspect the franchisee's business and its stock to ensure, amongst others, that all hire equipment and consumables are accounted for, complete and technically sound, the business is correctly stocked with hire equipment that is correctly displayed and signage is correctly displayed and maintained; (ii) observe and interview the franchisee's managers and employees and interview customers of the franchisee's business; (iii) gain access to all records, including those maintained by the computerised point-of-sales or any other communications equipment; (e) the franchisor has the right, at any time during business hours, and without prior notice to the franchisee, to inspect or cause to be inspected or audited, the stock of the business, business records, bookkeeping and accounting records, sales and income tax records and returns, and other records of the business; and (f) the franchisee must fully cooperate with the franchisor's representatives conducting inspections or audits. In short, the purport of these clauses is that the franchisor has a right to exercise a close control over important business related activities of the franchisee.

[12] As already indicated, Beadica's acquisition of Sale's Hire's Durbanville store was funded by the NEFT. In consequence, it presumably became necessary for Sale's Hire to enter into what the parties to that agreement have described as a 'co-operation agreement' with the NEFT. In essence, the co-operation agreement required of Sale's Hire to: (a) 'source,

screen and approve prospective BEE franchisees; (b) provide ongoing business support and mentorship to selected franchisees; and (c) provide training to the BEE franchisees on aspects of corporate governance'. In short, it required Sale's Hire, once funding had been approved by the NEFT, to ensure that the business operations of the franchisees were run successfully and in keeping with best practices of corporate governance.

[13] The services rendered by Sale's Hire to its franchisees, and in particular Beadica, were not out of charity. The franchise agreement explicitly provided for ways and means whereby Sale's Hire would be recompensed by way of royalties and fees payable by the franchisees. Thus, the extensive inspection rights accorded to Sale's Hire in terms of the franchise agreement were intended to ensure that: (a) the franchisees adhered to the business standards and practices agreed upon; (b) they purchased their tools and equipment from approved suppliers; and (c) importantly, the revenue generated from sales and hire of tools and equipment was reasonably accurate for it was from these figures that the amount of royalties and fees payable to Sale's Hire would be determined. Therefore, the accuracy of the revenue figures generated by the franchisees was critical to the success of the ventures and the determination of the amount representing royalties and fees payable to Sale's Hire.

[14] Some two years later, and consistently thereafter until 2016, intractable problems began to emerge as a result of what Sale's Hire asserted were persistent and unwarranted refusals by Beadica to allow it to exercise its inspection rights and Beadica's failure to comply with its obligations as explicitly set out in clauses 11, 14 and 15 of the franchise agreement. Consequently, a letter was addressed to Beadica on behalf of Sale's Hire in

which it was pointed out, amongst other things, that Beadica was committing several breaches of the terms of the franchise agreement. However, despite Sale's Hire's appeal to Beadica to desist from the conduct of which it complained, the breaches persisted.

[15] On 5 December 2014, a firm of attorneys acting on behalf of the NEFT addressed a letter to Sale's Hire at the instance of Beadica and other franchisees, in which they raised various issues about what they alleged were several respects in which Sale's Hire had failed to comply with the terms of both the co-operation agreement and the franchise agreement.

[16] As there appeared to be no prospect of the amicable resolution of the ensuing impasse, Sale's Hire wasted no time in instituting urgent motion proceedings in the Western Cape Division of the High Court (the High Court). The relief claimed against Beadica was for an order that:

'1 ...

2.1 That Applicant and/or its designated agent(s) shall have the right at any reasonable time during business hours, and at 12 Marais Street, Durbanville ("the approved location") and without prior notice to Respondent to:

2.1.1 inspect the business of Respondent;

2.1.2 observe Respondent and any of its managers and/or employees;

2.1.3 interview Respondent's managers and other employees;

2.1.4 interview customers of Respondent;

2.1.5 gain access to all records of Respondent including those maintained by the computerised point-of-sale or any other communications equipment;

2.1.6 inspect or cause to be inspected and audited at the approved location its business records, bookkeeping and accounting records, sale and income tax records and returns, and other records of Respondent and the books

and records of any company, close corporation, partnership or any other juristic or natural person which holds any interest in or owns Respondent.

- 2.2 That Respondent be ordered not to in any way refuse or obstruct such inspections, observations, interviews, access and/or audits during such reasonable times in any way whatsoever.
- 2.3 That Respondent be ordered to fully co-operate with applicant and/or its designated agent(s) to conduct such inspections, observations, interviews, access and/or audits.
- 2.4 That Respondent be ordered to immediately re-establish and maintain at its own expense the record-keeping system prescribed by the Applicant and to use Applicant's prescribed software;
- 2.5 That Respondent be ordered to immediately allow and ensure, on a daily basis, facilitate, that Applicant has access to upload all relevant trading information from the Respondent's computer system and facilitate the Applicant ascertaining stock levels and such financial and other information as required by the Applicant from time to time;

...'

[17] Affidavits in support of the application and in opposition to it were filed. Mr Sale deposed both to the founding and replying affidavits on behalf of Sale's Hire. After making reference to clauses 11, 14 and 15 of the franchise agreement, Mr Sale asserted that:

'6. Despite demand, Respondent refuses to comply with the aforementioned terms of the contract in that:

6.1 Respondent frustrated and continues to frustrate Applicant's rights in terms of clauses 15.1 and 15.2 of the agreement, by refusing and/or failing to enable Applicant to conduct proper (if any) inspections, observations and audits, including on the following dates:

26 August 2013; 30 June 2014; 18 March 2015; 5 June 2015; 15 June 2015;
13 May 2016.

6.2 Respondent was found to be in default of its obligations in terms of the agreement upon inspections and audits held on 28 June and 13 September 2014, *inter alia* in that Respondent failed to:

- 6.2.1 correctly record the hire stock of the franchise;
- 6.2.2 keep updated records of deposits by customers;
- 6.2.3 separate hire stock machine parts from “ready-for-hire” machines on the display floor;
- 6.2.4 separate defective machines from “ready-for-hire” machines on the display floor;
- 6.2.5 record repairs effected to machines in the books of the franchise;
- 6.2.6 record missing equipment;
- 6.2.7 adequately address safety concerns of equipment;
- 6.2.8 display new products on offer;
- 6.2.9 keep stock on an adequate standard of appearance and

maintenance.’

[18] On 20 July 2016, Mr Fisher deposed to Beadica’s answering affidavit. Apart from contesting the issue of urgency and Sale’s Hire’s entitlement to the relief sought, he pertinently asserted the following in regard to the merits of the claim:

‘15. In broad terms, the Respondent opposes this application on the basis that the Applicant improperly seeks an order of court that would authorise the Applicant’s exercise of the inspection, observation, interview, access and audit rights conferred by the Franchise Agreement (the “inspection rights”) for a purpose not authorised by the Franchise Agreement. In this regard, the inspection rights are conferred for the purposes of enabling the Applicant to determine whether the Respondent is (a) complying with the specifications, standards and operating procedures relating to the franchised business; and (b) paying the correct royalties and fees payable under the Franchise Agreement. This much is clear from clause 15.1 and the final sentence of clause 15.2 of the Franchise Agreement. These provisions are discussed in greater detail below.

16. The Applicant has, however, routinely abused the inspection rights conferred by the Franchise Agreement for the purpose of obtaining access to the Respondent's sensitive confidential business information (for example, client information, sales figures and prices) in order to undercut the Respondent and to lure clients away from the Respondent to the detriment of the Respondent's business.'

[19] In addition, Mr Fisher accused Sale's Hire of having committed material breaches of the terms of the co-operation agreement. And that Sale's Hire had poached some of Beadica's major clients in order to entice them away as well as 'inappropriately and unlawfully [using] confidential and sensitive client information' thereby making itself guilty of 'anti-competitive conduct designed to deliberately restrict or prevent the commercial viability of [Beadica's] business'.

[20] In due course, the matter was heard by Le Grange J (the High Court) who dismissed the application with costs. In its judgment, the High Court dealt with the facts and the defences raised by Beadica. Ultimately it came to the conclusion that, first, there were material disputes of fact on the papers and that absent a referral to oral evidence, Beadica's 'version that [Sale's Hire] is using its inspection and audit rights in the franchise agreement for entirely different purposes as contemplated, cannot be rejected as false or far-fetched'.

[21] As to the nature of the relief sought, which the High Court described as one for an interdict, it restated the requirements that must be established by an applicant before a court would grant an interdict. It spelled them out

as: (a) a clear right; (b) an injury committed or reasonably apprehended; and (c) the absence of an alternative remedy.⁵ It then went on to conclude that:

‘On a conspectus of all the evidence, I am not convinced that it will be in the interest of justice to grant the relief sought by the Applicant. The dispute resolution [mechanism] as provided [for] by the co-operation agreement still exists and may equally benefit the applicant’.

Nevertheless, the High Court rightly observed that Beadica, ‘in the present instance, does not take issue with [Sale’s Hire’s] inspection and auditing rights as stipulated in the franchise agreement.’ And that ‘[A]t the heart of the respondent’s case, is that in exercising these rights the applicant is utilising it contrary to the principles and ethos that underpin the co-operation agreement between the NEF Trust and the applicant. More importantly . . . , the applicant had used its inspection and auditing rights in terms of the franchise agreement to obtain confidential pricing structure and other client data to unlawfully compete with the respondent.’ I fully endorse these observations. But more about them later.

[22] Dissatisfied with the outcome in the High Court, Sale’s Hire sought and was granted leave to appeal against the dismissal of its application to the Full Court.

[23] Following upon its analysis of the facts presented before it, the Full Court dealt first with the question whether there was an irresolvable dispute of fact on the papers. After citing passages from judgments of this Court in *Plascon-Evans*,⁶ *National Director of Public Prosecutions*⁷ and

⁵ See in this regard: *Setlogelo v Setlogelo* 1914 AD 221 at 227.

⁶ *Plascon-Evans Paints Ltd v Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A); [1984] 2 All SA 366 (A) at 634E-635C.

⁷ *National Director of Public Prosecutions v Zuma* 2009 [2009] ZASCA 1; (1) SACR 361 (SCA) para 26.

*Wright t/a J W Construction*⁸ as authority for the proposition that notwithstanding that there are disputes of fact on the papers before it, if a court is satisfied that on the facts averred by the applicant and admitted by the respondent, together with the facts alleged in the respondent's affidavits, the applicant is entitled to relief, whether in whole or part, it will grant relief consistent with such finding.⁹ The *Plascon-Evans* rule was endorsed by the Constitutional Court in *Thint (Pty) Ltd v National Director of Public Prosecution and Others*; *Zuma and Another v National Director of Public Prosecution and Others* [2008] ZACC 13; 2009 (1) SA 1 (CC); 2008 (12) BCLR 1197 (CC) para 8. I do not find it necessary to elaborate on these enduring legal principles, for sometimes, an over-elaboration upon an abiding and well-entrenched principle tends to obscure rather than clarify matters. Ultimately, the Full Court concluded that it was satisfied that 'there was no serious real dispute of fact' and that 'the version proffered by [Beadica] was unsubstantiated and as such untenable'.¹⁰

[24] This then paved the way for the Full Court to delve into the merits of the application. On this score, it proceeded to mention four issues that, in its view, merited attention. These were: (a) whether Sale's Hire had established the requisites for an interdict; (b) the status of the co-operation agreement as between Sale's Hire and Beadica; (c) whether the enforcement of the franchise agreement so far as Sale's Hire's inspection rights were concerned, and which Beadica had admitted was objectively reasonable and unobjectionable, would nevertheless be unconscionable or against public policy; and (d) whether the decision of the Constitutional Court in

⁸ *Wright t/a J W Construction v Headgear (Pty) Ltd and Another* 2008 (3) SA 371 (SCA) para 13.

⁹ Compare: *Burnkloof Caterers (Pty) Ltd v Horseshoe Caterers (Green Point) (Pty) Ltd* 1976 (2) SA 930 (A) at 938A-B.

¹⁰ See para 48 of the Full Court judgment.

Barkhuizen v Napier [2007] ZACC 5; 2007 (5) SA 323 (CC) availed Beadica.

[25] As to the requisites for an interdict, the Full Court held that these had clearly been established. Apropos the status of the co-operation agreement, it stated that it was a matter entirely between the NEFT and Sale's Hire and that it was not open to Beadica to enforce its terms as it had sought to do. In relation to the contention that the franchise agreement was unconscionable and contrary to public policy, the Full Court concluded that Beadica's reliance on the decision of the Constitutional Court in *Bakhuizen*¹¹ was misplaced.

[26] In the result, the Full Court upheld the appeal with costs. In substitution of the order of the High Court, the Full Court ordered that: '(a) the applicant's application for an interdict succeeds; (b) an interdict is . . . granted against the respondent in the terms set out in paragraph 2 of the notice of motion . . . '.

[27] It bears emphasising that the courts below rightly noted that Beadica did not take issue with the inspection and auditing rights accorded to Sale's Hire by the franchise agreement. Indeed, in its answering affidavit Beadica tellingly said the following:

'I admit that I have frustrated . . . [Sale's Hire] . . . from carrying out inspections, and have switched [Beadica's] IT systems to prevent [Sale's Hire] from accessing [Beadica's] client information and sales data. . .[and] that I have done so lawfully, to prevent [Sale's Hire] from obtaining sensitive confidential information.'¹²

¹¹ See para 24 above.

¹² See para 62 of A/A, Vol 1:119.

Moreover, Mr Fisher's answering affidavit, filed on behalf of Beadica, is replete with averments admitting that the franchise agreement accorded Sale's Hire certain inspection and auditing rights and that the latter 'is permitted to exercise its inspection rights'.¹³

[28] Disgruntled with the outcome of the appeal, Beadica applied to this Court for special leave to appeal against the decision of the Full Court. That application was dismissed with costs 'on the grounds that the requirements for special leave are not satisfied'. But it appears that Beadica was not deterred by this setback in its determination to restore its initial success. It applied to the President of this Court in terms of the proviso to s 17(2)(f) of the Act¹⁴ for reconsideration of the order refusing it special leave and, if necessary, for its variation. Pursuant thereto, the order referred to in para 1 above was granted.

[29] The application for reconsideration now confronting us therefore pertinently raises the question whether special leave to this Court should have been granted. Almost four decades ago, in *Westinghouse Brake and Equipment (Pty) Ltd v Bilger Engineering (Pty) Ltd* 1986 (2) SA 555 (A), this Court stated that 'an applicant for special leave to appeal must show, in addition to the ordinary requirement of reasonable prospects of success, that there are special circumstances which merit a further appeal. . .'. And that it alone is the final '. . . arbiter as to whether such special circumstances exist'.

¹³ See para 17 of A/A, Vol 1:105.

¹⁴ Section 17(2)(f) reads:

'The decision of the majority of the judges considering an application referred to in paragraph (b), or the decision of the court, as the case may be, to grant or refuse the application shall be final: Provided that the President of the Supreme Court of Appeal may in exceptional circumstances, whether of his or her own accord or on application filed within one month of the decision, refer the decision to the court for reconsideration and, if necessary, variation.'

It went on to give examples of what would constitute special circumstance. These were: (a) the appeal raises a substantial point of law; (b) the matter is of very great importance to the parties or of great public importance; and (c) where the refusal of leave to appeal would probably result in a manifest denial of justice.¹⁵ It must be stressed, however, that the list is by no means exhaustive. The requirement for special leave now finds expression in s 16(b) of the Act, which provides that ‘an appeal against any decision of a Division on appeal to it, lies to the Supreme Court of Appeal *upon special leave having been granted by the Supreme Court of Appeal*’. (Emphasis added.)

[30] It is now timely to determine the fate of the application for reconsideration. To this end an assessment of the merits of the envisaged appeal is necessary.

[31] At the outset I deem it necessary to state what Sale’s Hire’s application in the High Court was and still is all about. As is manifest from the factual narrative recounted above, the essence of the relief sought by Sale’s Hire in the High Court as encapsulated in prayer 2 of its notice of motion was that it should be allowed to exercise its inspection and auditing rights without let or hindrance. The genesis of prayer 2 is clauses 11, 14 and 15 of the franchise agreement. In effect it sought an order of specific performance of the terms of the franchise agreement that are encapsulated in these clauses. It was therefore a misconception to characterise the nature of its prayers as one for an interdict. Once this is appreciated, the crux of the

¹⁵ At 564H-565A-E.

dispute between the antagonists will be discerned. This is the topic to which I now turn.

[32] What emerges from Beadica's answering affidavit is that its discontent with Sale's Hire in large measure stems from its core complaint that the latter is asserting its inspection and auditing rights as a ruse to inappropriately obtain access to its sensitive confidential information in order to gain an edge over Beadica as a business competitor. The edifice of its case that allowing Sale's Hire to enforce its rights for this purpose would be unconscionable and contrary to public policy is built solely on this foundation.

[33] But before dealing with this complaint it is necessary to address two matters that are central to this application. The first relates to the application of the *Plascon-Evans* rule. The heads of argument filed on behalf of Beadica advance propositions that fail to take proper account of Sale's Hire's version. Such an approach is not consonant with that expressed in *Plascon-Evans* that, in a case of the kind with which we are concerned, the court's decision must have due regard to the facts averred by the applicant which are admitted by the respondent, together with the facts averred by the respondent.¹⁶

[34] The second aspect relates to the co-operation agreement upon which Beadica heavily relies. It is this. As the Full Court rightly noted, the co-operation agreement is between Sale's Hire and the NEFT. Beadica is not a party thereto. Accordingly, simple logic dictates that it cannot lie in

¹⁶ *Plascon-Evans* at 634H-I.

Beadica's mouth to complain about breaches of the co-operation agreement, if any, by Sale's Hire, still less to seek to enforce its terms. Any contractual rights and obligations flowing from the co-operation agreement are matters between Sale's Hire and the NEFT. In relation to Beadica, those rights and obligations are *res inter alios acta*.¹⁷

[35] That the co-operation agreement may have been entered into in the furtherance of the interests of the franchisees of which Beadica was one, as some of its terms suggest, matters not. Even if it were to be accepted that Sale's Hire breached the co-operation agreement in a material way, it was only the NEFT, and not third parties without a contractual nexus, like Beadica, that would have had legal standing to enforce its terms.

[36] Reverting to the crux of the matter, I think that I would not be doing an injustice to Beadica's case by saying that when it is reduced to its bare essentials it boils down to the following. It is accepted, for example, that: (a) the franchise agreement accords Sale's Hire extensive inspection rights as detailed in paras 8-10 above; and (b) the terms embodying those rights are objectively reasonable and not objectionable. Curiously, in the face of the clear and unequivocal terms of clauses 11, 14 and 15, Beadica still obdurately resisted every endeavour by Sale's Hire to do precisely what Beadica accepts it has a right to do.

[37] Beadica justifies its conduct on two bases. First, it relies on the co-operation agreement to which, as already indicated, it is not a party.

¹⁷ *Res inter alios acta* is a common law doctrine which, inter alia, is to the effect that someone who is not a party to a contract between others is not supposed to concern themselves with that contract. A free translation thereof means: a matter between others is not our business.

Second, it contends that Sale's Hire is abusing its inspection and auditing rights in order to inappropriately and unlawfully undermine its business operations. And therefore, asserts Beadica, Sale's Hire's objectionable conduct is what renders the enforcement of the terms of the agreement against it unconscionable and contrary to public policy.

[38] In pursuit of its application for reconsideration of the earlier order refusing it special leave to appeal, Beadica submits that there are special circumstances that justify a further appeal to this Court. In support of this submission, it is contended that the envisaged appeal implicates a black economic empowerment initiative which is an important policy objective whose bedrock is the Constitution¹⁸ itself. And that the 'effect of the Full Court's decision is to allow Sale's Hire to enforce its contractual rights in a manner which undermines the effective implementation of a BEE initiative financed with public funds' through the NEFT.

[39] As I see it, the logical point of departure must be the universally accepted legal principle expressed in the maxim *pactum sunt servanda*. But this is not to say that all obligations freely and seriously undertaken must be given effect to no matter what. In *Bredenkamp and Others v Standard Bank of South Africa Ltd* [2010] ZASCA 75; 2010 (4) SA 468 (SCA), Harms DP, writing for a unanimous court, whilst acknowledging that the *pactum sunt servanda* principle was not a holy cow, nevertheless stated that 'it is a self-evident principle' of our law that contracts concluded contrary to laws or public policy are of no force or effect. Before *Bredenkamp*, the Constitutional Court had occasion to express itself emphatically on this,

¹⁸ The Constitution of the Republic of South Africa Act 108 of 1996.

where the *pactum sunt servanda* principle was described as ‘a profoundly moral principle, on which the coherence of any society relies’.¹⁹ The Constitutional Court went further and held that:

‘. . . Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity. The extent to which the contract was freely and voluntarily concluded is clearly a vital factor as it will determine the weight that should be afforded to the values of freedom and dignity. . . .’²⁰

[40] But as already indicated, our courts will decline to enforce contracts that are contrary to the law or public policy. And this is a power that courts have exercised for more than a century. Thus, in *Eastwood v Shepsthone* 1902 TS 294, Innes CJ stated in his usual inimitable style that (at 302):

‘Now this Court has the power to treat as void and to refuse in any way to recognise contracts and transactions, which are against public-policy or contrary to good morals. It is a power not to be hastily or rashly exercised; but when once it is clear that any arrangement is against public policy, the Court would be wanting in its duty if it hesitated to declare such an arrangement void.’

[41] In *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (AD); [1989] 1 All SA 347 (A) Smallberger JA, writing for the majority, embraced the legal proposition propounded by Innes CJ and said the following (at 9A-E):

‘No court should therefore shrink from the duty of declaring a contract contrary to public policy when the occasion so demands. The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* (1938)

¹⁹ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC) para 87.

²⁰ *Barkhuizen* para 57.

AC 1 at 12, “the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds.”

...

In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restriction on that freedom.’

[42] The remarks of the Constitutional Court in *Barkhuizen* where it endorsed the principle that everyone has a right to freely enter into contracts bears repeating. There, Ngcobo J said (para 57):

‘Self-autonomy, or the ability to regulate one’s own affairs, even to one’s own detriment, is the very essence of freedom and a vital part of dignity.’

Since the advent of our new constitutional order, public policy considerations are now infused with the values underlying the Constitution.

[43] In *A B and Another v Pridwin Preparatory School and Others* [2018] ZASCA 150; 2019 (1) SA 327 (SCA) para 27, upon which Beadica heavily relies, this Court extracted six principles from various decision of our courts in which the subject of private contracts and public policy was broached. Only five of these principles bear relevance to this case. These are:

‘(i) Public policy demands that contracts freely and consciously entered into must be honoured;

(ii) A court will declare invalid a contract that is prima facie inimical to a constitutional value or principle, or otherwise contrary to public policy;

(iii) Where a contract is not prima facie contrary to public policy, but its enforcement in particular circumstances is, a court will not enforce it;

(iv) The party who attacks the contract or its enforcement bears the onus to establish the facts;

(v) A court will use the power to invalidate a contract or not to enforce it, sparingly, and only in the clearest of cases in which harm to the public is substantially incontestable and does not depend on the idiosyncratic inferences of a few judicial minds.’

[44] Although this Court’s judgment in *Pridwin Preparatory School* has recently been overturned by the Constitutional Court,²¹ that Court nevertheless endorsed the principles referred to in the preceding paragraph in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* CCT109/19 [2020] ZACC 13 (17 June 2020) and said that these ‘principles are derived from a long line of cases and find support in the decisions of this Court’.²² The Constitutional Court went on to state that two of the principles enumerated in *Pridwin Preparatory School* required further elucidation. First, the Constitutional Court recognised that the principle of *pactum sunt servanda* ‘continues to play a crucial role in the judicial control of contracts through the instrument of public policy, as it gives expression to central constitutional values’.²³ What is important, the Constitutional Court emphasised, is that the *pactum sunt servanda* principle ought not be elevated above all else but has to be looked at through the prism of ‘a wide range of constitutional values’.²⁴ Thus, in short, the Constitutional Court has reiterated that public policy considerations must be infused with constitutional values.

[45] The other principle qualified by the Constitutional Court is that of ‘perceptive restraint’ which proceeds from the premise that contracts freely and voluntarily entered into should be honoured. Whilst acknowledging that

²¹ See in this regard: *A B and Another v Pridwin Preparatory School and Others* CCT294/18 [2020] ZACC 12 (17 June 2020).

²² Paragraph 82.

²³ Para 83.

²⁴ Paras 86-87.

this is a sound approach to adopt, the Constitutional Court cautioned that courts should be careful not to take this principle beyond its natural limits. And that the principle of ‘perceptive restraint’ should not be invoked in a manner that permits the enforcement of contracts ‘that undermine the very goals that our Constitution is designed to achieve’.²⁵

[46] There has been no suggestion in the papers that the franchise agreement does not accord Sale’s Hire the rights it asserted in this litigation. On the contrary, Sale’s Hire’s assertions have been unequivocally admitted. What the thrust of Beadica’s case amounts to is that, in exercising its rights, Sale’s Hire ventured into unlawful activities that are at variance with its rights under the franchise agreement. Thus, the complaint here is that the relevant clauses cannot be enforced because they are being used for unlawful purposes. The issue before us is twofold: (a) is the unlawfulness established (in which event the *Plascon-Evans* rule would apply); and, (b) if so, what should the result be? Would it mean that Sale’s Hire is left without a crucial mechanism by which it can determine royalties and fees, a mechanism which Beadica has not impugned, or does it mean that Sale’s Hire is entitled to invoke its inspection rights for as long as it does so lawfully? Significantly, Beadica has not contended that there is an overriding constitutional obligation that must first be fulfilled. It was submitted in Beadica’s heads of argument that ‘Sale’s Hire seeks to enforce contractual rights for a purpose other than the purpose expressly prescribed by the agreement and that is unlawful, namely, to gain confidential information and to use it in its unlawful competition with Beadica’. In the premises, Beadica

²⁵ Paras 88-90.

submits that ‘enforcing Sale’s Hire’s rights would be contrary to public policy’.

[47] But as this Court made plain in *Pridwin Preparatory School*, a party who impugns a contract or its enforcement bears the onus to establish the facts. This requirement accords with the trite legal principle that a party who alleges must prove. (See in this regard: *Pillay v Krishna and Another* 1946 AD 946 at 952-953.) This must be all the more so, particularly in circumstances where, as a general rule, courts are enjoined to exercise their power to refuse to enforce contracts if to do so would be contrary to public policy, sparingly and, even then, in the clearest of cases. In *Barkhuizen*, too, the Constitutional Court endorsed the principle that a party seeking to avoid the enforcement of a contract bears the onus to ‘demonstrate why its enforcement would be unfair and unreasonable in the given circumstances’.²⁶

[48] It bears emphasising that in this case the grant of an order of specific performance in favour of Sale’s Hire will not result in a failure of a black economic empowerment initiative as Beadica would have it. On the contrary, Sale’s Hire’s election to uphold the franchise agreement would have the effect of sustaining the empowerment initiative. Moreover, I fail to see how, in the context of the facts of this case, the enforcement of the clauses invoked by Sale’s Hire would be unreasonable or unjust to a degree that would render it contrary to public policy for a court to enforce the clauses in question. On this score it is as well to remember that Beadica does not in any way impugn the terms of the clauses in issue. Its case is, in essence, that these clauses ought not to be enforced because Sale’s Hire

²⁶ Para 69.

seeks to invoke them for an unlawful purpose. Accordingly, it was incumbent upon Beadica to establish the unlawfulness alleged. As I see it, even if Sale's Hire's alleged unlawful conduct were established, nothing would preclude Sale's Hire from enforcing the franchise agreement for the lawful purpose – about which there is no dispute between the parties – that it was meant to achieve. It is also not without significance to note that the order granted by the Full Court cannot on any stretch of the imagination be construed to be a licence to Sale's Hire to unlawfully gain confidential information of or otherwise compete unlawfully with Beadica.

[49] Whatever justification there might be for thinking that in certain respects the franchise agreement operated harshly as against Beadica in that its terms favoured Sale's Hire is neither here nor there. On a reading of the franchise agreement one gains the impression that Sale's Hire sought to protect its interests to the fullest. But unfortunately for Beadica, courts are not empowered to modify the terms of a contract or afford the complaining party equitable relief. (See in this regard: *South African Warehousing Services (Pty) Ltd and Others v South British Insurance Co Ltd* 1971 (3) SA 10 (A); [1971] 3 All SA 186 (A) at 18F-19A.)

[50] I have also considered Beadica's argument based on cases like *Pridwin Preparatory School (SCA)*; *Barkhuizen (CC)* and *Brisley v Drotsky* 2002 (4) SA 1 (SCA) and the principles set out in those decisions with reference to the power of a court to refuse to enforce a contract if to do so would be unconscionable or contrary to public policy. I do not propose to analyse those cases in this judgment. Suffice it to say that having regard to

the circumstances disclosed in the papers, I consider Beadica's argument that is predicated on those decisions to be untenable.

[51] Moreover, I do not think that Beadica had a lawful basis to deny Sale's Hire its contractual rights of inspection purely because the latter's representatives or agents supposedly went beyond the parameters of the inspection rights for which the franchise agreement provides. If Beadica believed that Sale's Hire was abusing its rights in order to gain access to its sensitive confidential information and trade secrets, it should and could have applied, by way of a counter-application in this instance, for an order restraining Sale's Hire from abusing its inspection rights. It also goes without saying that if Beadica established the unlawful conduct of which it complains it could just as well have elected to cancel the franchise agreement. In both of these instances, the onus would squarely rest on Beadica to establish its case. One thing though is beyond question, which is this. It was not open to Beadica to undermine Sale's Hire's election to exercise its contractual rights. Beadica's tactic of adopting a 'tit for tat' stratagem to stymie the exercise by Sale's Hire of its rights was ill-conceived.

[52] As to the existence of special circumstances that merit a further appeal in this Court, it was contended that the BEE initiative serves important policy objectives that are underpinned by the Constitution to redress the legacy of the past. Thus, Beadica submits, if the judgment of the Full Court were allowed to stand, it would have the effect of 'permitting Sale's Hire to enforce its contractual rights in a manner that undermines the effective implementation of a BEE initiative financed with public funds' through the

NEFT. For the reasons already stated, this submission is plainly unsustainable. Significantly, the envisaged appeal does not raise a substantial point of law. Whilst it might be of importance to Beadica, its importance does not transcend the natural interests of the parties to this litigation. Nor am I convinced that the refusal of special leave to appeal would, in the context of the facts of this case, result in a manifest denial of justice. And, as already indicated, Beadica has effective legal remedies that it could have invoked to address Sale's Hire's alleged unlawful conduct. In these circumstances, I am not persuaded that Beadica, who is after all seeking special leave, has come anywhere near to establishing the existence of special circumstances to warrant special leave being granted.

[53] Accordingly, the substance of the reasoning underpinning the judgment of the Full Court can hardly be faulted. The inevitable consequence of this conclusion is that the order of this Court granted on 15 August 2018, in terms of which the applicant's application for special leave to appeal against that judgment was refused, was correct. In the result the following order is made:

The application for the reconsideration and, if necessary, variation of the order of this Court, granted on 15 August 2018, dismissing applicant's application for special leave to appeal, is dismissed with costs.

X M PETSE
DEPUTY PRESIDENT

Appearances

For appellant: G Quixley

Instructed by: M E Mohammed Attorney-at-Law, Cape Town
Honey Attorneys, Bloemfontein

For Respondent: S Rapaport

Instructed by: De Klerk & Van Gend Inc., Cape Town
McIntyre van der Post, Bloemfontein.