IN THE SUPREME COURT OF ESWATINI

JUDGMENT

HELD AT MBABANE **Case No. 44 / 2020**

In the matter between

Edmund Mazibuko NO	**1st Appellant**
Nellie Ndzimandze NO	**2nd Appellant**
Daniel Dumisani Ntshalintshali NO	**3rd Appellant**
Velebandla Hezron Dlamini NO	**4th Appellant**
Carlos Maphandzeni NO	**5th Appellant**
KaFolishi Service Station (Pty) Ltd And	**6th Appellant**
Total Swaziland (Pty) Ltd	**Respondent**

Neutral Citation: Edmund Mazibuko NO And 5 Others vs Total Swaziland (Pty) Ltd (44/2020) {2021] SZSC ...08 (22 June,2021.)

Coram **SP Dlamini JA; MJ Dlamini JA; NJ Hlophe JA**

Heard 21 April, 2021

Delivered: 22 June, 2021

Contract: *The parties entered into a Filling Station and Service lease agreement. After an initial period of a year, the agreement was allowed to endure for an indefinite period to be terminated by either party on three months' notice. The respondent gave due notice for termination. Appellant challenged the notice alleging that the agreement cannot be terminated without compensation for goodwill being paid. The High Court dismissed the challenge. Appeal dismissed with costs.*

JUDGMENT

MJ Dlamini JA

[I) This appeal arises from the judgment of Justice JS Magagula JA dated 15 July 2020. The learned Judge dismissed the application of the appellants in terms of which they sought a number of orders, inter alia, declaring invalid the purported termination of a lease agreement between the appellants and the respondent. The respondent had in terms of the lease agreement by letter of23 March 2020 given a three months' formal notice of termination of the lease by 30 June 2020. The appellants had challenged the termination as being an unlawful deprivation of property without compensation. Magagula J had dismissed the application with costs at attorney and client scale, including certified costs of counsel.

[2] The appellants appealed against the judgment of Magagula J and listed some 28 grounds of appeal. This is unrealistic since many of these grounds will not be argued at the hearing;· it only makes the Court work for nothing with its limited resources. This could be construed as an abuse of Court process. Litigants should learn to limit their grounds of appeal to only those grounds which if successful would overturn the judgment appealed against. Also, counsel .should learn to inform the Court at the beginning of the hearing - even though prior to such time would be preferable - which of their grounds of appeal they will pursue or abandon. Otherwise presenting such a litany of grounds is more like a fishing expedition. And could be counter-productive.

[3] Although not entirely satisfactory the application for condonation (Case No. 44/2020B) for the late filing of heads and bundle of authorities by the appellants, which was not opposed, was dispatched with a stem warning to appellants' attorney. This was done in the interest of justice and progress. In the result, the Court dealt with both Case No 44/2020B and this case, being Case No 44/2020. But the case numbering in some of the Court papers was confused. For instance, the heads of arguments for both the appellants and the respondent bear Case No 44/2020B instead of Case No.44/2020. Such confusion could have serious consequences if not managed.

[4] The first to fifth appellants are executors in the Estate of the Late Charles Mafika Ndzimandze, who was the 'Total Dealer', for a Filling and Service Station operating by the name KaFolishi Service Station (Pty) Ltd, the 6th Appellant in this appeal. In short, Total Swaziland (Pty) Ltd, the respondent herein had entered into a Filling Station lease agreement operated from Lot 367, Nkoseluhlaza Street, Manzini City with effect from January 2001. Initially, the lease was to run for a period of one year. If not terminated at the end of that initial period, the lease would go on indefinitely until terminated by either party on three months' notice.

[5] By letter dated 23 March 2020, the respondent gave the 6th appellant a three months' notice of termination of the dealership. The three months ended on June 30. The notice of termination was in terms of clause 3 of the annexure to the Operating Lease. Clause 3 .2 stated, *inter alia,* that the lease, after the initial period, would be *"terminable by either party giving to the other at least 3 (three) calendar months written notice of termination".* It would appear that the Agreement did not require reasons for termination, at least after the initial period. Clause 14 of the Agreement deals with "Goodwill", and, *inter alia,* states: *"The fact that the Dealer paid or may receive goodwill in respect of the Business shall not prejudice any of Total's rights under this agreement or in law. ....Upon termination or cancellation or expiration of this agreement for any reason whatsoever Total shall not be liable to pay any compensation for goodwill to the Dealer or its successors in title".*

[6] After a meeting between the representatives of the parties earlier in June failed to produce an "amicable solution", the respondent by letter of 23 June gave a final confirmation of its notice of termination of the lease by June 30. That was the letter which, in particular paragraph 7 thereof, precipitated the urgent application to the High Court for an order essentially interdicting the termination of the lease and challenging the validity of the notice of termination of the lease without prior payment of compensation for goodwill. Apparently, the appellants had escalated the issue of the termination of the lease to a constitutional issue, that is, deprivation of property without compensation, section 19 of Constitution.

[7] The respondents opposed the application on a variety of grounds, *inter alia:"6.3 The entire premise of the applica nts' are flawed, and has not merit at all. The bulk of the applicants' founding affidavit relates to complaints about clause 14 of the lease agreement, but no relief is sought in respect of those complaints in the notice of motion.*
6.4. The applicants have not set out what, on their version, happens after the relief sought in prayers 3 and 4 is granted. What the applicants in effect want is for the lease agreement to exist in perpetuity, so that they can use it as a bargaining tool in negotiations for goodwill compensation. This is *abuse of process of this Court".*

[8] The respondent further averred denying that by the termination they mean to deprive appellants any "proprietary rights protected by the Constitution". That on the contrary they have invited the applicants to prove the goodwill alleged to have payable to them; but he appellants "have failed to do so", as they only submitted "2017 estimates of goodwill", nor has the purported assessor/ valuer qualified himself for the purpose. That the attack on Clause 14 of lease agreement is misguided since the notice of motion does not pray for its invalidation. That there is therefore nothing constitutional about the matter, that is, the matter of the termination of the lease does not affect any provision of the Constitution, including secti_on 19. And that, in any case, the respondent has not refused to consider payment of goodwill. In this regard, appellants have not submitted updated information as required by the respondent. Clause 14 is by no means *"prima*

facie inimical to the Constitutional values ... " or public policy. This is not an issue calling for determination having regard to the Notice of Motion.

[9] In the Court *a quo,* Magagula J observed that *"Total is willing to engage on goodwill and that this position was communicated to the [appellants] way before the institution of the current proceedings. It is therefore not clear why the present proceedings were instituted in view of this offer",* and further wondered *"why the issue of goodwill payment should be linked to the termination of the lease".* The learned Judge *a quo* further pertinently observed as to why the value of the goodwill was not determined properly by a competent expert prior to the 30th June 2020. These observations made by Justice Magagula are some of the contentions by the respondent that the applicants are essentially not concerned with the payment of goodwill but interested in a non termination of the lease, that is, that the lease should endure in perpetuity. That is why the appellants challenged the validity of the notice of termination even though the agreement was clear on the issue of termination without giving reason for it. In this respect I entirely agree with the views expressed by Magagula J.

[1O] Indeed, in its answering affidavit, the respondent's deponent had stated:

> *"91 I admit. that a meeting took place on 2 June 2020, between the applicants' lawyers and Total representatives.....*
>
> *"92 At that meeting, Total again invited the applicants to present their financial statements. This was required in order to assess any claim of goodwill, as well as for purposes of considering the sixth [appellant] in the new business strategy sought to be implemented by Total".*

[11] In the appellants' argument before this Court, Mr. Magagula insisted that the termination of the lease was unlawful and said according to him goodwill was evaluated on a going concern; thus, terminating the lease would deprive the appellants the goodwill they had worked long and hard to create. And that, accordingly, the termination had to be effected with due regard to section 19 of the Constitution. That due to the lockdown

- as a result of the Covid-19, the three months' notice was not sufficient to work out the goodwill as it took about two months to do the evaluation.

[12] If payment for goodwill was the main concern of the appellants, and not continuation of the leasehold, as respondent alleged, the appellants ought to have seized on paragraph 7 of the letter, accepted the termination and prepared the necessary information for the determination of the value of the goodwill, instead of going to Court. In paragraphs 14, 15 and 16 of their founding affidavit, the appellants had averred:

> *"14. The basis for seeking to declare the purported termination of the operating lease by the Respondent invalid is that the contract contains a clause (Clause 14) which provides that* ***'upon termination or cancellation or expiration of this agreement for any reason whatsoever TOTAL shall not be liable to pay any compensation for gootfwill to the dealer or its successors in title'.*** *The Applicants respectfully contend that this c{ause is prima facie inimical to the Constitutional values enshrined in the fundamental rights and freedoms of individuals contained in Chapter 3 of the Constitution which protects a person from compulsory deprivation of property or an interest or right over property.*
>
> *15. The effect of this Clause is to deprive the Applicants, by a mere contract, of proprietary rights protected by the Constztution. The Applicants contend that the Clause is grossly exploitative and offends against the public* ***mores,*** *The Clause is unconscionable and incompatible with the public interest and therefore contrary to public and unenforceable.*
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> *16. The Applicants further contend that the eriforcement of the cancellation by TOTAL in the particular circumstances of this case would be contrary to public policy and this Honourable Court should decline to eriforce the cancellation by declaring the cancellation i,:ivalid".*

[13] The respondent has described the attempt to impugn the termination based on the reading of paragraph 7 and Clause 14 as mutually destructive contentions of law. After summarizing what it called the 'high watermark of appellants' case' the respondent, referring to clause 3.2 and Clause 14 of the agreement, concluded *"27 On the facts of this case and the law, the appellants' case is both flawed, confused and stillborn".* It would be hard to disagree with this statement. *"The appellants cannot contend that the termination* is *unlawful and yet contend for relief flowing from such termination",* assert the respondent. That is, if appellants are to obtain compensation for goodwill they must allow termination to occur. In other words, the position of the appellants is like that of legatees: The appellants will not benefit or inherit from the will until the testator is dead. Instead, the appellants undermine their own cause by demanding to inherit before the testator dies. That is how I understand the contention of the respondent.

[14] The respondent tactfully d nied any intention on its part to enforce an agreement or provision in a contract which was otherwise "contrary to public mores", such as to "appropriate someone's business without compensation". The respondent denied any intention to enforce Clause 14 *"irrespective of what that clause may or may not mean".* In my understanding, clause 14 permitted the payment of goodwill except where the Dealer had alienated the business and failed to submit to the Total certain certified documents prior to the alienation. That was not the situation in the present case. *In casu,* the termination of the lease had not been prompted by the appellants and was not in terms of clause 14. The appellants evidently misunderstood the contract and their recourse in case of a termination as purported by the respondent. The termination could not be unlawful just because compensation for goodwill had not been paid before the terminal date.

[15] The opening phrase of clause 14 says that notwithstanding the issue of goodwill, the other clauses of the Agreement shall not be compromised to the prejudice of Total and this is exactly what is contained in paragraph 7 of the letter of 23June. That is, that the issue of goodwill ought not to stop the termination of the lease agreement. It would

seem that this meaning of paragraph 7 and clause 14 was not accepted by the appellants. This is reflected in the appellants' heads of argument paragraphs 14 - 20. In paragraphs 14 and 16, paragraph 7 of the letter and clause 14 of the Agreement are respectively reproduced. Appellants submit that the wording of paragraph 7 is *"clearly not an offer to pay goodwill for the business"* as *"the Respondent's offer is premised on the provisions of Clause 14"*. The appellants' understanding of clause 14 is set out as follows in their heads of argument:

> *"17. Clause 14 clearly envisage paying goodwill where there is a sale, alienation or disposal in any way of the business or any interest in the business. The Clause clearly specifies that upon termination, cancellation or expiration of the Agreement for any reason whatsoever, the Respondent shall not be liable to pay any compensation for goodwill.*
>
> *"18. It is clear from a reading of paragraph 7 and Clause 14 that the Appellant will not qualify for compensation because the Agreement says no compensation is payable by the Respondent where the Agreement terminates or is cancelled or expires. In casu the Agreement was purportedly cancelled by the Respondent. This means that no compensation is payable; i[l terms of Clause 14* ".

[16] With respect, I fail to understand how the appellants interpreted Clause 14 with or without paragraph 7 of the letter. What the appellants assert in paragraph 17 supra is the very opposite of what clause 14 provides. That is, the goodwill is not payable if respondent has terminated the lease as a result of appellants' default. Clause I4 does not say that appellants will not qualify for goodwill just because the lease has been terminated or cancelled. In the manner the lease had been terminated in no way disqualified appellant_s from goodwill as might be proved. There is absolutely no merit in the appeal and the alleged constitutional issue does not arise.

[I 7] If fear that the respondent will not pay for the goodwill once the lease is terminated is what motivated the appellants to go to Court - however not so well-founded

that thinking may be, in my opinion - the appellants are urged to prepare and afford respondent with the information necessary to begin talks on the goodwill within a month from date hereof. The *onus* in this regard is on the appellants, to set the ball rolling. We trust this to be in line with the Respondent's commitment to seek resolution of the issue of goodwill and ensure a happy parting. Goodwill could, of course, be pursued even after termination of the lease agreement.

[18] As did the Court *a quo* and in light of the submissions by the respondent that it is amicable to payment of goodwill, the apparent purpose for the application to Court *a quo,* I make the following order -

1. The appeal is dismissed with costs including certified costs of Counsel.
2. The Appellants must vacate the premises of the Respondent within one (1) month from the date of this judgment.
3. Paragraph 17.2 of the order *a quo* is substituted as follows: "The applicants are to pay the costs of this application on the ordinary scale including the certified costs of counsel".

I **Agree**

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MINORITY JUDGMENT

HLOPHEJA.

[19] I have read the judgement of my brother Justice Dlamini and I respectfully hold a different view on the conclusion reached. Herein below I have tried to give a detailed account on how and why I see the matter differently.

[20] This Appeal is against a judgement of the High Court per Magagula J dismissing an application brought by Appellant under a certificate of urgency for an order *inter alia* interdicting the then intended termination of the lease agreement between the parties whilst calling upon the Respondent to show cause why the notice of termination of the said lease agreement could ,n9t be declared a nullity and set aside and why the Respondent should not be ordered to pay costs of the proceedings.

[21] The lease in question was concluded in January 2001 betvveen one Charles Mefika Ndzimadze, who is now late, and the Respondent. It was about the said Mr Ndzimadze operating a filing station business by means of an operating lease at one of the Respondent's filing stations knowns as Lot 367, Nkoseluhlaza Street, Manzini, KaFolishi Filing Station.

[22] The said Charles Mefika Ndzimadze passed away sometime in 2016 having appointed the first five, appellants as testamentary executors and executrix for his estate which included the business of the filing station referred to above as having been leased from the Respondent. It is in that capacity that the first five Appellants feature in this matter.

[23] The lease agreement in question was concluded in January 2001 and was to endure for a one year period. The lease provided that if neither party had given at least three months' notice of termination before the expiry of the initial period, then the said agreement was to remain indefinitely in force until it would be terminated by either party giving the other a three calendar months' notice. The lease in question operated on an indefinite basis after the initial period and that remained in force until the Respondent gave a three calendar months' notice of termination of the said lease which was by means of a letter dated the 23rd March 2020. The lease was thus to be terminated on the 30th June 2020.

[24] According to the Appellant, their receipt on the 26th March 2020, of the notice of termination of the lease agreement by the Respondent coincided with the announcement of a lockdown imposed the Government on the 27th March 2020, which was in an attempt to curb the spread of the corona virus pandemic which hit the world including this country at about that time. The Appellants contend that because of that situation they could not be able to meet their attorneys to brief them and take advice on the propriety of the notice of termination. I must say that neither from the papers filed of record

nor during the submissions did I get the impression that there was any dispute about the lockdown and its effect on curbing movement and meetings by members of the public during the said lockdown before it was relaxed by the Government. The Appellants further claimed that it was only after the terms of the lockdown were relaxed that they managed to brief their attorneys which obviously afforded them a limited opportunity when considering the natural period that remained before the termination date set as the 30th of June 2020.

[25] On the 12th May 2020 one of the executors of the estate of the late Mr. Ndzimandze, the deponent to the founding affidavit, wrote a brief letter advising the Respondent that the termination of the lease was being taken for advice and asked for the reasons behind the termination. The response thereto was by means of a letter dated the 2s1 t May 2020. It advised the Appellants that their lease agreement allowed the Respondent to terminate it on a three 3 months' notice and that it had no obligation to give reasons. It then sought a confirmation of receipt of the notice of termination and the Appellants' attitude thereto explaining it needed to plan for the vacation of the premises by the estate of the late (Mr Nzimandze).

[26] Apparently, the advice the Appellants got from their attorneys was to the effect that the notice of termination, in so far as it did not say anything about compensating the lessee by paying it for the goodwill of the business hitherto conducted on the said premises, when it was going to take it over, was invalid and of no force or effect and that the Respondent's conduct in

those circumstances would amount to compulsory deprivation of the estate of its property in contravention of clause 19 (2) of the Constitution which protects an owner of property against such deprivation. Letters were exchanged between the Appellants' attorneys and the Respondent in that regard.

[27] In a letter reacting to the contention by the Appellant that the intended termination of the lease agreement amounted to deprivation of the estate's property (that is the goodwill or business) without compensation, the Respondent said the following at paragraph 7 of its letter dated the 23rd June 2020, which was some 7 days before the termination date notified.

> "7. *To the extent that your client is entitled to any goodwill payment as per clause 14 of the Agreement Total is amicable to engage with your client as per the obligations of the parties therein, however, it should be noted that this matter shall be treated as a separate issue from the termination and the vacation of your client from our premises".* (Underlining has been added.)

[28] Upon a close scrutiny of the foregoing excerpt from _the Respondent's letter of the 23rd June 2020, two issues arise which merit an immediate comment. Firstly, the Respondent's offer to engage on the payment of goodwill to the appellants is there made conditional to clause 14 of the lease agreement.

Clause 14, it is common cause, with regards the payment of goodwill, makes it clear same will not be payable where the termination is made by the Respondent. There is no .explanation on which other context that alleged offer to engage was made conditional to other than the above cited one. In that case it would be difficult to fault the Appellants if they formed the view that the alleged offer was not genuine because it was surreptitiously bringing back clause 14.

[29] The second issue with regards the excerpt of the above-cited letter is the fact that it unilaterally sought to dictate on how the goodwill and the termination of the lease agreement were to be treated. As I understand it, this is not how appellants saw it. They obviously saw the two issues as inseparable, which was apparently their view of the provisions of Section 19 of the Constitution to the effect that if the Respondent was terminating the lease with the result that it was taking over the business hitherto operated by the 6th Appellant it

. ..was only fair and proper that it should compensate the Appellants for the goodwill, which was property of the estate they were looking after.

[30] I can only add that what the Appellants contend sounds prima facie logical, particularly if one looks at the deprivation and meaning of goodwill this court was referred to at paragraph 12 of its replying affidavit as having been sourced from The Oxford Dictionary of Economics, 4th Edition which reads as follows when defining goodwill: -

> *"An intangible asset, representing a business as a going concern* is *worth more than its tangible assets. This* is *usually*

- *due to the accumulated know-how and trade contracts of its staff Goodwill is not normally included as an asset in balance sheets, but it is listed if a company has taken over another business for more than the value of its tangible assets. It is then required to be written off over a period.* "

[31] The 5th Edition of the Oxford Dictionary of Business and Management on the other hand is quoted as defining goodwill in the following terms: -

> *"An intangible asset reflecting a business 's customer connections, reputation and similar factors. It can be valued as the difference between the value of the separate net assets of a business and the total value of the business. Purchased goodwill is the difference between the fair value of the price . paid for the business and the aggregate of the fair values of its. separable net assets ...* "

[32] The Appellants submitted that in so far as the termination of the lease agreement was done so as to result in a transfer of the business hitherto operated by the appellants to someone else without the question of the payment of its goodwill having been settled in advance, such would amount to deprivation of its aforesaid intangible asset as its property, which would be contrary to Section 19(2) of the Constitution. I shall revert to this aspect

'

of the matter later on in this judgment, given that in my view it forms the gravamen of the appellants' case.

[33) Otherwise the Appellants reacted to the Respondent's letter of the 23rd June 2020 and the clause therefrom cited in paragraph 9 herein above by instituting an urgent application with a hearing date of the 29th June 2020 at 1700 hours which was a few hours before the termination date. It there sought the reliefs referred to which in a nutshell were an interim interdict against the termination of the agreement together with the Respondent in the interim being called upon to show cause why the notice of termination should not be declared invalid; null and void as well as why it could not be set aside with costs. The Judgment confirms that the application was set down for hearing at about 1700 hours that day, prompting it not to grant the interim order sought out of its concerns about the filing of it that late and the fact that the Respondent's counsel had not had time to read it. This led to the postponement of the matter to some future date with the parties being given time limits to file their papers.

[34) In its judgment, particularly on clauses 10,11,12, and 13 the court a quo had the following to say: -

> "10. *Mr. Flynn who appeared for the respondents summed up that the above statement simply means that Total is willing to pay goodwill as long as the value thereof can be properly proved. Mr. Flynn further submitted that the willingness of Total to pay goodwill if proved was*

- *communicated to the Applicant's way before they instituted the current proceedings. He therefore maintained that there was no need to institute the present proceedings and maintained that they were an abuse of the court process".*

11. On prior notification by Total that it is willing to engage on goodwill there is annexure "E" to the founding affidavit which is a letter written by Total and addressed to Applicants' Attorneys. The letter is dated 23rd June 2020. Paragraph 7 of this letter reads;

> *"To the extent that your client is entitled to any goodwill payment as per clause 14 of the agreement, Total is amicable to engage with your client as per the obligations of the parties therein, however, it should be noted that this matter shall be treated as a· separate issue from termination and the vacation of your client from our premi·ses".*

This statement supports the contention that Total is willing to engage on goodwill and that this position was communicated to the Applicant's way before the institution of the current proceedings. It is therefore not clear why the present proceedings were instituted in view of this offer.

12. *In any event, as the letter stated one wonders why the issue of goodwill payment should be linked to the termination of the lease. Mr Magagula who appeared for the Applicants maintained that the value of goodwill cannot be determined after the applicants have vacated the premises. Assuming that contention to be correct, and I am not finding that it is correct, one wonders why the value of goodwill was not determined properly by a relevant expert, prior to the 30th June 2020.*

Conclusion

13. *The Applicant's grievance lay in clause 14 of the agreement which provides that Applicant shall not claim goodwill from Total upon termination of the lease. They maintain that this clause violates their constitutional rights and it is contra-bonos mores. The respondent indicated prior to the institution of proceedings that it did not intend to enforce clause 14 of the agreement and this stance was maintained in the respondent's papers in these proceedings and in submissions by respondent's counsel. There is therefore no need for this court to make a finding on the constitutionality or otherwise of clause 14 of the agreement. "*

[35] If one confined himself to the papers filed of record, one would not be faulted for thinking that it is a matter that was very easy to resolve between the parties. Whereas it is clear that the Appellants today remain in the said premises because they say they have not been paid the worth of their business, which they were obviously expected to surrender upon termination of the lease agreement, but they resisted; the Respondent claimed on the other hand to be committi:;d to paying the goodwill, which put differently is the value of the business being run there. In this sense it is clear that what the parties need to do is to sit down between themselves and if need be, through the help of experts in the field, and determine the value of the goodwill to be paid. There can be no doubt that once such goodwill is determined including an agreement on how it is to be paid if it found to be there, th.e matter would be instantly resolved such. that there would be no reason whatsoever for any dispute between the parties.

[36] It is,.a, mere look at the time it has taken to have this very shnple issue resolved that one can see there is no honesty behind the said words and that what is being said is sheer lip service, which unfortunately has had to involve the court and unnecessarily take valuable time.

[37] During the hearing of the matter I specifically made this observation from counsel if the quickest and fairest way to conclude their dispute did not lie in both parties sitting down determining the goodwill and then paying each other what was due, if there was anything including agreeing on how to handle the issues going forward. Whereas counsel for the Appellants was

amenable to the idea that was not the position with Respondent's counsel whose clients were allegedly always willing to pay for the goodwill which became a contradiction in terms.

[38] The court a quo seems to have taken it at face value, and from the words expressed in the papers and in Court, that there was willingness by the Respondent to pay for the goodwill of the business with the hold back being only the alleged failure by the Appellants to avail them with the proof of same. This cannot be entirely correct on the part of the court a quo if one considers that it acknowledged that certain figures, which it termed as estimates of goodwill, yet on the part of the Appellants those figures represented the alleged goodwill, and had had been filed as part of the latter's case. All this suggests is that there is only a dispute between the parties on the accurate figures for goodwill which must have required the referral of the matter to oral evidence so that the true value of the goodwill was determined once and for all to avoid keeping live a dispute that the parties themselves acknowledged needed to be resolved, if not by agreement, then through the help of expert witnesses. I therefore cannot agree that with the uncertainty there was on the meaning and effect of paragraph 7 of the letter of the 23rd June 2020, there was no need to institute the proceedings resulting in this appeal.

[39] As proof that the Respondent was willing to engage on goodwill, the court a quo made reference to the said paragraph 7 of the letter aforesaid. As indicated above my reading of the said paragraph does not express an

unequivocal willingness to pay for goodwill. Given the Respondent's latest stance as expressed in the papers with regards clause 14 of the agreement - that it was not being enforced at all - the said paragraph threw the whole issue of the payment of goodwill into total ambiguity. This is because it said that in so far as the Appellants were entitled to "any goodwill payment as per clause 14 of the agreement", Total was amicable to engage. It shall be remembered that clause 14 of the lease agreement was completely against the payment of goodwill in instances of termination by the Respondent.

[40] It does not seem correct for the court a quo to have concluded, in light of the foregoing that there was any willingness by the Respondents to pay the goodwill to the point of finding that the application was an abuse of the court process. Besides, one cannot say that if he has had recourse to the definition of goodwill as a going concern as referred to in the Oxford Dictionary of Economics 4th Edition, referred to by the Appellants in their papers as cited above. ',, ,

[41] Having said that it also seems to me that the court a quo confined the appellants' case to clause 14 and thus inevitably took a narrow view of it. As I understand it, their case is simply that the termination of the lease agreement in the manner done, which was without paying them for the goodwill of the business or for the business the respondent was to take over, that such amounted to a compulsory deprivation of their business (their property) contrary to clause 19 (2) of the Constitution and that in those circumstances the clause that allowed same, (whether clause 3.2 or clause

14 of the lease agreement) was against public policy and was in law not enforceable by the courts.

[42] Clause 19 of the Constitution reads as follows: -

Protection from deprivation of property

"19 (J) a person has a right to own property either alone or in association with others.

(2) A person shall not be compulsorily deprived of property or any interest in or right over property of any description except where the following conditions are satisfied-

(a) the taking of possession or acquisition is necessary for public use or in the interest of defence, public safety, public ordf?r, public morality or public health;

(b) the compulsory taking of possession or acquisition of the property is made under a law which makes provision for-

(i) prompt payment of fair and adequate compensation; and

(ii) and a right of access to a court of law by any person who has an interest in or right over the property

- *(c) The taking of possession or the acquisition is made under a court order.* "

[43] Section 19 (2) (b) prohibits the compulsory taking of possession of a person's property without prompt payment of fair and adequate compensation. A simple effect of this clause is that in so far as the Respondent seeks to take possession of the business of the Appellants (their property) without paying them the said compensation or without them agreeing thereto, that taking is conduct against public policy and is prohibited. In terms of section 19 (2) (b) (1) of the Constitution, for such possession to be taken, it should be preceded by prompt payment of a fair and adequate compensation. In this sense and in my view, such deprivation of possession, does not have to be only under clause 14 of the agreement for it to be in contravention of the Constitution but any deprivation of possession of property including one that comes about as a result of applying clause 3.2 of the agreement. I bring in this distinction because Respondent's counsel made it clear during the hearing of the matter that in terminating the agreement in question, they did not rely on clause 14 which prohibited the payment of goodwill in a case where the employer was terminating the lease.

[44] I note that responding to a contention by the Appellant at paragraph 68 of the founding affidavit namely that they feared that if the business were to shut down as a result of the termination of the lease, it would lose being a going conce1n and could lead to loss of employment of the 34 employees,

the Respondent responded as follows at paragraph 123 of its answering affidavit:

> *"Total has every serious intention to continue operating the Filling Station and whoever runs it will try to accommodate the employees. This is not a situation where the business is shutting down, it is merely a transfer of operations from one individual to another.* "

[45] It is clear that what will be transferred from the 6th Appellant or the estate of the late to whoever the new individual operator is, is the business hitherto operated by the Appellants with the goodwill attaching to it. According to the appellant's contention such transfer cannot occur without Section 19 of the Constitution being contravened. This it was argued would be offending against public policy which is against the deprivation of property unless it is pursuant to compensation which as stated has to be prompt and adequate. I agree with the appellants' contention in this regard.

[46] Both parties' counsel agreed through their submissions and heads of argument that in appropriate instances, courts will not enforce a contractual provision whose enforcement would offend public policy. Whereas the appellants refer us to the case of **Beadica 231 CC and Others vs Trustees For The Time Being of Oregon Trust and Others (2020) ZACC,** the

Respondent referred us to **Barkhuizen v Napier 2007 (5) SA 323 (CC) at para 29"**

[47] On what public policy is and how it relates to the constitution, the following was stated in **Barkhuizen v Napier 2007 (5) SA 323 (CC) at paragraph 28, 29 and 30.**

> *"28. Ordinarily, constitutional challenges to contractual terms will give rise to the question of whether the disputed provision is contrary to public policy. Public policy represents the legal convictions of the community, it represents those values that are held most dear by the society. Determining the content of public policy was once fraught with difficulties. That is no longer the case. Since the advent of our constitutional democracy, public policy is now deeply rooted in our constitution and the values which underline it. Indeed, the · founding provisions of our constitution make it plain: Our constitutional democracy is founded on, among other values, the values of human dignity, the achievement of equality and the advancement of human rights and freedoms, and the rule of law. And the Bill of Rights, as the constitution proclaims, "is a cornerstone" of that democracy, "it enshrines the rights of people in our country and affirms the democratic [founding! values of human dignity, equality and freedom."*

29. *What public policy is and whether a term in a contract is contrary to public must now be determined by the reference to the values that underlie our constitutional democracy as given expression by the provisions of the Bill of Rights. Thus, a term in a contract that is inimical to the values enshrined in our constitutional is contrary to public policy and is therefore, unenforceable.*

30. *In my view, the proper approach to constitutional challenges to contractual terms is to determine whether the terms challenged is contrary to public policy as evidenced by the constitutional values, **in** particular, those found in the Bill of Rights. This approach leaves space/or the doctrine **ofpacta sunt servanda** to operate, but at the same time allows courts to decline to enforce contractual terms that are in conflict with the constitutional values even though the parties may have consented to them. It follows therefore that the approach by the High Court is not the proper approached to adjudicating the constitutionality of contractual terms.* " (Underlining has been added)

[48] The majority judgement of Theron **J in <u>Beadica 231 CC and Others v Trustees For The Time Being of Oregon Trust and Others</u> [2002] ZACC 13** confirms the position advanced in the **<u>Barkhuizen case</u>** cited above and it said the following in its paragraph 16: -

> " *Whether the enforcement of a contractual clause would be contrary to public policy, in that it is inimical to constitutional values, is a constitutional issue. As this court states in Barkhuizen, public policy is deeply rooted in our constitution and the values which underlie it".*

[49] Both the **<u>Barkhuizen v Napier</u>** and **<u>Beadica 231 And Others</u>** judgments, confirm that although the principle of ***pacta sunt sevanda*** (Which means that agreements freely and voluntarily concluded must be honoured), is important and central to contracts, the tenns of the said contract must accord with the constitution particularly the Bill of Rights otherwise it would be contrary to public policy which finds e;pression in the said Bill. **In Beadica 231 CC and Others** (supra) this position was captured in the following words at paragraph 34, whilst repeating the position expressed in **Barkhuizen v Napier** (supra):-

> *"The proper approach to the constitutional challenges to contractual terms is to determine whether the term is contrary to public policy as evidenced by the constitutional values, in particular, those found in the Bill of rights".*

[50] There can be no denying that if the termination of the agreement between the parties did not address the prompt payment of the goodwill attaching to the Appellant's business the Respondent intends to operate (by prompt I understand it to mean prior to the taking over of same by another operator), such amounts to a violation of Section 19 of the Constitution which means that the said clause infringes on public policy as informed by the Bill of Rights.

[51] I therefore cannot agree that there was no need to bring this application but would rather say there was no need for the matter to get to where it did because in so far as both parties seem to be alive to the fact that if goodwill is there it then has to be paid, it was then irresponsible to fail to settle the question of what the goodwill entailed in the business in question was in9lµding paying it if it was there. It seems logical that if the Respondent genuinely believed that it had to pay goodwill, its very notice of terminating the lease should have unequivocally made it clear that the other side had to determine goodwill within the three months period.

[52] I do not agree with the court a quo's failure to accept that because of the Covid - 19 Pandemic things could not have been as they would normally be, hence the failure to conclude the issue of the goodwill within the three months period, particularly when taking into account the fact that no finding had been made against the submission it had delayed having things done as they should have been. In any event the Appellants did produce what they

considered to be proof of goodwill, which if it was not enough, reality hardly called for the dismissal of the application than it did for a referral of that aspect of the matter to oral evidence for determination by the High Court, so as avoid being unduly technical with an issue that required a prompt decision.

[53] In view of the fact that the clause allowing the determination of the contract in the manner it did had the effect of compulsorily depriving the Appellants of their business (goodwill) without prompt compensation, it is contrary to Section 19 of the Constitution which is under the Bill of Rights. If it so, it is against public policy as stated in the above excerpt from the **Barkhuizen v Napier 2007 (5) SA 323** judgment, which stresses that public policy is to be determined by reference to the values that underlie constitutional democracy as given expression to by the Bill of Rights of which the right to protection from deprivation of property without prompt and adequate compensation is one.

[54] Given the settled position of our law that a term that is contrary to public policy in a contract is, in deserving circumstances, not enforceable by the Courts, I am of the view the circumstances of this matter are such and therefore the clause in question is not to be enforced.

[55] I have therefore come to conclusion that the Appellants appeal succeeds with the result that: -

1. The order dismissing the application is altered to read that: -

   1.1 The Applicants' application succeeds.

   1.2 The term of the lease agreement that allowed its termination without prompt and adequate payment of the business's goodwill is declared null and void on account of its being contrary to public policy.

   1.3 The termination of the lease agreement be and is hereby set aside.

   1.4 Costs are to follow the event.

2. In order to have the matter decided in its merits once and for all so as to resolve the issut1 of goodwill, the matter is reverted to the High Court, differently constituted, for it to hear and determine the said issue by referring that question to oral testimony, with the parties thereat leading such expert witnesses as they shall consider appropriate for the purpose.

3. The Respondent is to pay the costs of this appeal.

For Appellants M. Magagula.

For Respondent Adv. P. Flynn.