

15 MAY 2019

# CORPORATE & COMMERCIAL ALERT

## IN THIS ISSUE >

### The pursuit of certainty, in good faith

In *Trustees for the time being of the Oregon Trust (Oregon Trust) v BEADICA 231 CC and Others* (74/2018) [2019] ZASCA 29 (28 March 2019) (*Oregon Trust Case*), the Supreme Court of Appeal (SCA) again grappled with the competing concepts of fairness, reasonableness and good faith (Good Faith) on the one hand and legal certainty on the other. Good Faith as a value playing a role in our law is well established, however, the interpretation and limitation of the application of Good Faith has a somewhat inconsistent history.

FOR MORE INSIGHT INTO OUR  
EXPERTISE AND SERVICES

CLICK HERE 

## The pursuit of certainty, in good faith

The SCA ... once again cautioned that “the parties [must] know what their contract means and that they are entitled to rely on its terms, unless they are against public policy or their enforcement would be unconscionable”.

*In Trustees for the time being of the Oregon Trust (Oregon Trust) v BEADICA 231 CC and Others (74/2018) [2019] ZASCA 29 (28 March 2019) (Oregon Trust Case), the Supreme Court of Appeal (SCA) again grappled with the competing concepts of fairness, reasonableness and good faith (Good Faith) on the one hand and legal certainty on the other. Good Faith as a value playing a role in our law is well established, however, the interpretation and limitation of the application of Good Faith has a somewhat inconsistent history.*

One such example is the *Oregon Trust Case*. As part of a black empowerment initiative by the National Empowerment Fund (NEF), a number of franchise arrangements were established between Sales Hire CC (Sales Hire) and four close corporations, the members of which were former employees of Sales Hire (Lessees) and which arrangements were for a period of 10 years. Connected to the franchise arrangement, the Oregon Trust (one of the trustees of which was also the only member of Sales Hire), entered into leases with the Lessees for a period of five years (Initial Period). In addition, a co-operation agreement was entered into between Sales Hire and the NEF, in terms of which, amongst others, Sales Hire undertook to assist and support the Lessees in their franchise operations.

The leases contained options for the Lessees to extend the Initial Period by another five years, provided that the option was exercised by providing notice within

a particular time period and that the new rental was agreed to per the mechanism in the leases. The Lessees purported to exercise their option to renew but did not do so in accordance with the requirements set out in the leases and as such the Oregon Trust sought to evict the Lessees on the basis that the leases had expired.

When brought before the Western Cape Division of the High Court (HC), the HC ordered that the option was validly exercised and that the rentals were to be determined in accordance with the agreed upon mechanism. The argument before the HC was that despite the strict terms of the leases, considerations of Good Faith should be taken into account as well as the context of all the agreements as read together, which indicates that the intention was clear that the leases should endure for 10 years.

As for the arguments regarding Good Faith, the *Oregon Trust Case* records that the HC based its decision on (a) that terminating the leases was disproportionate to the breach and (b) that arguments regarding legal certainty should not, on their own, be a restraint on a finding that the clear intention of the parties was to advance historically disadvantaged persons (without requisite business knowledge to comply strictly with the renewal terms).

The SCA, however, once again cautioned that “the parties [must] know what their contract means and that they are entitled to rely on its terms, unless they are against public policy or their enforcement would be unconscionable”.

## The pursuit of certainty, in good faith...continued

The *Oregon Trust Case* confirms that the abstract values of Good Faith, while important values tempering the law of contract, are not standalone rules. It further acknowledges the need for commercial certainty and ensuring that disproportionality and adverse consequences (however extreme) for one party alone, are not necessarily violations of public policy.

The SCA further found that while “fairness and reasonableness, inform policy they are not self-standing principles...and the need for certainty in commerce” is also of importance. However, the HC did not rule on the basis of public policy but rather on the basis of public policy but rather on the apparent rule of “disproportionality” of sanction versus breach, which is a principle, according to the SCA, that is not in itself a policy consideration.

On a review of the leases the SCA held that, amongst others, the renewal clause was not inherently offensive, the notice period was reasonable, if agreement was not reached on the renewal the Oregon Trust would need to find new tenants and while the Lessees may not be “sophisticated business people” they “were not ignorant individuals”. In addition to this, no reason for the failure to comply with the renewal requirements were advanced by the Lessees and therefore the SCA had no ability to assess whether its enforcement was unconscionable.

An argument was raised by the Lessees that the termination of the lease was against public policy as the result, with apparently no benefit to the Oregon Trust, would cause the franchise business of the Lessees to fall apart and thus “derail an empowerment initiative”. It was also alleged that the Oregon Trust (or its trustee) had an improper motive in enforcing the leases.

The SCA, however, did not uphold these arguments. Firstly, it was stated that the franchise business was put at risk by the actions of the Lessees themselves, without explanation. Secondly, there was no facts to support that the Oregon Trust (or its trustee) had an improper motive and that, in any event, the motive was irrelevant. Based on its interpretation of the law of contract regarding Good Faith values, the SCA upheld the enforcement of the leases.

The *Oregon Trust Case* confirms that the abstract values of Good Faith, while important values tempering the law of contract, are not standalone rules. It further acknowledges the need for commercial certainty and ensuring that disproportionality and adverse consequences (however extreme) for one party alone, are not necessarily violations of public policy.

Contracting parties, wishing to avoid unfavourable results, shall still need to consider public policy when not only agreeing to terms but also enforcing same. However, the *Oregon Trust Case* will hopefully provide comfort that without violations of public policy a claim of Good Faith should not be sufficient to overrule consensus.

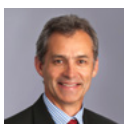
*Deepa Vallabh and Maud Hill*

## OUR TEAM

For more information about our Corporate & Commercial practice and services, please contact:



**Willem Jacobs**  
National Practice Head  
Director  
Corporate & Commercial  
T +27 (0)11 562 1555  
M +27 (0)83 326 8971  
E willem.jacobs@cdhlegal.com



**David Thompson**  
Regional Practice Head  
Director  
Corporate & Commercial  
T +27 (0)21 481 6335  
M +27 (0)82 882 5655  
E david.thompson@cdhlegal.com

**Mmatiki Aphiri**  
Director  
T +27 (0)11 562 1087  
M +27 (0)83 497 3718  
E mmatiki.aphiri@cdhlegal.com

**Roelof Bonnet**  
Director  
T +27 (0)11 562 1226  
M +27 (0)83 325 2185  
E roelof.bonnet@cdhlegal.com

**Tessa Brewis**  
Director  
T +27 (0)21 481 6324  
M +27 (0)83 717 9360  
E tessa.brewis@cdhlegal.com

**Etta Chang**  
Director  
T +27 (0)11 562 1432  
M +27 (0)72 879 1281  
E etta.chang@cdhlegal.com

**Clem Daniel**  
Director  
T +27 (0)11 562 1073  
M +27 (0)82 418 5924  
E clem.daniel@cdhlegal.com

**Jenni Darling**  
Director  
T +27 (0)11 562 1878  
M +27 (0)82 826 9055  
E jenni.darling@cdhlegal.com

**André de Lange**  
Director  
T +27 (0)21 405 6165  
M +27 (0)82 781 5858  
E andre.delange@cdhlegal.com

**Werner de Waal**  
Director  
T +27 (0)21 481 6435  
M +27 (0)82 466 4443  
E werner.dewaal@cdhlegal.com

**Emma Dempster**  
Projects & Energy  
Director  
T +27 (0)11 562 1194  
M +27 (0)79 491 7683  
E emma.dempster@cdhlegal.com

**Lilia Franca**  
Director  
T +27 (0)11 562 1148  
M +27 (0)82 564 1407  
E lilia.franca@cdhlegal.com

**John Gillmer**  
Director  
T +27 (0)21 405 6004  
M +27 (0)82 330 4902  
E john.gillmer@cdhlegal.com

**Sandra Gore**  
Director  
T +27 (0)11 562 1433  
M +27 (0)71 678 9990  
E sandra.gore@cdhlegal.com

**Jay Govender**  
Projects & Energy Sector Head  
Director  
T +27 (0)11 562 1387  
M +27 (0)82 467 7981  
E jay.govender@cdhlegal.com

**Johan Green**  
Director  
T +27 (0)21 405 6200  
M +27 (0)73 304 6663  
E johan.green@cdhlegal.com

**Allan Hannie**  
Director  
T +27 (0)21 405 6010  
M +27 (0)82 373 2895  
E allan.hannie@cdhlegal.com

**Peter Hesseling**  
Director  
T +27 (0)21 405 6009  
M +27 (0)82 883 3131  
E peter.hesseling@cdhlegal.com

**Quintin Honey**  
Director  
T +27 (0)11 562 1166  
M +27 (0)83 652 0151  
E quintin.honey@cdhlegal.com

**Roelf Horn**  
Director  
T +27 (0)21 405 6036  
M +27 (0)82 458 3293  
E roelf.horn@cdhlegal.com

**Kendall Keanly**  
Director  
T +27 (0)21 481 6411  
E kendall.keanly@cdhlegal.com

**Yaniv Kleitman**  
Director  
T +27 (0)11 562 1219  
M +27 (0)72 279 1260  
E yaniv.kleitman@cdhlegal.com

**Justine Krige**  
Director  
T +27 (0)21 481 6379  
M +27 (0)82 479 8552  
E justine.krige@cdhlegal.com

**Johan Latsky**  
Executive Consultant  
T +27 (0)11 562 1149  
M +27 (0)82 554 1003  
E johan.latsky@cdhlegal.com

**Giada Masina**  
Director  
T +27 (0)11 562 1221  
M +27 (0)72 573 1909  
E giada.masina@cdhlegal.com

**Nkcubeko Mbambisa**  
Director  
T +27 (0)21 481 6352  
M +27 (0)82 058 4268  
E nkcubeko.mbambisa@cdhlegal.com

**Nonhla Mchunu**  
Director  
T +27 (0)11 562 1228  
M +27 (0)82 314 4297  
E nonhla.mchunu@cdhlegal.com

**Ayanda Mhlongo**  
Director  
T +27 (0)21 481 6436  
M +27 (0)82 787 9543  
E ayanda.mhlongo@cdhlegal.com

**William Midgley**  
Director  
T +27 (0)11 562 1390  
M +27 (0)82 904 1772  
E william.midgley@cdhlegal.com

**Tessmerica Moodley**  
Director  
T +27 (0)21 481 6397  
M +27 (0)73 401 2488  
E tessmerica.moodley@cdhlegal.com

**Anita Moolman**  
Director  
T +27 (0)11 562 1376  
M +27 (0)72 252 1079  
E anita.moolman@cdhlegal.com

**Jo Neser**  
Director  
T +27 (0)21 481 6329  
M +27 (0)82 577 3199  
E jo.neser@cdhlegal.com

**Francis Newham**  
Director  
T +27 (0)21 481 6326  
M +27 (0)82 458 7728  
E francis.newham@cdhlegal.com

**Gasant Orrie**  
Cape Managing Partner  
Director  
T +27 (0)21 405 6044  
M +27 (0)83 282 4550  
E gasant.orrie@cdhlegal.com

**Verushca Pillay**  
Director  
T +27 (0)11 562 1800  
M +27 (0)82 579 5678  
E verushca.pillay@cdhlegal.com

**David Pinnock**  
Director  
T +27 (0)11 562 1400  
M +27 (0)83 675 2110  
E david.pinnock@cdhlegal.com

**Allan Reid**  
Director  
T +27 (0)11 562 1222  
M +27 (0)82 854 9687  
E allan.reid@cdhlegal.com

**Megan Rodgers**  
Oil & Gas Sector Head  
Director  
T +27 (0)21 481 6429  
M +27 (0)79 877 8870  
E megan.rodgers@cdhlegal.com

**Ludwig Smith**  
Director  
T +27 (0)11 562 1500  
M +27 (0)79 877 2891  
E ludwig.smith@cdhlegal.com

**Ben Strauss**  
Director  
T +27 (0)21 405 6063  
M +27 (0)72 190 9071  
E ben.strauss@cdhlegal.com

**Tamarin Tosen**  
Director  
T +27 (0)11 562 1310  
M +27 (0)72 026 3806  
E tamarin.tosen@cdhlegal.com

**Roxanna Valayathum**  
Director  
T +27 (0)11 562 1122  
M +27 (0)72 464 0515  
E roxanna.valayathum@cdhlegal.com

**Deepa Vallabh**  
Head: Cross-border M&A,  
Africa and Asia  
Director  
T +27 (0)11 562 1188  
M +27 (0)82 571 0707  
E deepa.vallabh@cdhlegal.com

**Jurg van Dyk**  
Construction & Engineering Sector Head  
Director  
T +27 (0)11 562 1216  
M +27 (0)82 826 2808  
E jurg.vandyk@cdhlegal.com

**Roux van der Merwe**  
Director  
T +27 (0)11 562 1199  
M +27 (0)82 559 6406  
E roux.vandermerwe@cdhlegal.com

**Charl Williams**  
Director  
T +27 (0)21 405 6037  
M +27 (0)82 829 4175  
E charl.williams@cdhlegal.com

### BBBEE STATUS: LEVEL TWO CONTRIBUTOR

This information is published for general information purposes and is not intended to constitute legal advice. Specialist legal advice should always be sought in relation to any particular situation. Cliffe Dekker Hofmeyr will accept no responsibility for any actions taken or not taken on the basis of this publication.

### JOHANNESBURG

1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.  
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

### CAPE TOWN

11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.  
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

©2019 7843/MAY

