



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA
JUDGMENT

Not Reportable

Case no: 1263/2022

In the matter between:

**68 WOLMARANS STREET JOHANNESBURG
(PTY) LTD
10 FIFE AVENUE BEREA (PTY) LTD
MARK MORRIS FARBER**

**FIRST APPLICANT
SECOND APPLICANT
THIRD APPLICANT**

and

TUFH LIMITED

RESPONDENT

In re:

TUFH LIMITED

APPLICANT

and

**68 WOLMARANS STREET JOHANNESBURG
(PTY) LTD
10 FIFE AVENUE BEREA (PTY) LTD
MARK MORRIS FARBER**

**FIRST RESPONDENT
SECOND RESPONDENT
THIRD RESPONDENT**

Neutral citation: *68 Wolmarans Street Johannesburg (Pty) Ltd and Others v Tufh Limited* (1263/2022) [2024] ZASCA 48 (15 April 2024)

Coram: GORVEN, WEINER and KGOELE JJA and BAARTMAN and SEEGOBIN AJJA

Heard: 12 March 2024

Delivered: This judgment was handed down electronically by circulation to the parties' representatives by email, publication on the Supreme Court of Appeal website and release to SAFLII. The date and time for hand-down of the judgment is deemed to be 11h00 on 15 April 2024.

Summary: Special leave to appeal – law of contract – enforcement of provision in loan agreement – failure to pay all rates, taxes, water and electricity charges (municipal charges) in respect of the immovable property constituting an event of default – whether the enforcement of provision in loan agreement between first applicant and respondent to accelerate payment and to execute against first applicant's immovable property based upon its failure to pay municipal charges would be unconscionable and contrary to public policy.

ORDER

On appeal from: Gauteng Division High Court, Johannesburg (Matojane J Molahlehi J and Strydom J sitting as a full court):

The application for special leave is dismissed with costs on an attorney and client scale, such costs to include the costs of two counsel.

JUDGMENT

Seegobin AJA (Gorven, Weiner and Kgoele JJA and Baartman AJA concurring):

Introduction

[1] On 5 March 2020 the respondent, Tufh Limited (Tufh), brought an application against the applicants in the Gauteng Division of the High Court, Johannesburg, in which it sought, as its primary relief, payment of the sum of R4 897 004.22 together with interest and costs as well as the foreclosure of a mortgage bond executed by the first applicant, 68 Wolmarans Street Johannesburg (Pty) Ltd (Wolmarans), in favour of Tufh.

[2] The application served before Senyatsi J (the court of first instance) who dismissed the application with costs on 17 September 2021. Tufh applied for and was granted leave to appeal the judgment of the court of first instance to the full court of the Gauteng Division of the High Court, Johannesburg. The full court (Matojane, Molahlehi and Strydom JJ) upheld the appeal, set aside the judgment

and order of the court of first instance and essentially substituted it with an order sought by Tufh.

[3] On 5 December 2022, the applicants applied for special leave to this Court in terms of s 16(1)(b) of the Superior Courts Act 10 of 2013 (the Superior Courts Act) to appeal the judgment and order of the full court. On 5 April 2023, this Court referred the application for special leave for oral argument in terms of s 17(2)(d) of the Superior Courts Act. The parties were further advised that they should be prepared to argue the merits of the appeal should they be called upon to do so.

Relevant background

[4] Tufh is a public company with limited liability. It is engaged in the business of providing its clients with, amongst other things, single loan facilities that would afford them access to finance which in turn would allow them to purchase and subsequently convert or refurbish buildings in the inner cities of South Africa to affordable residential units that would be available for rental.

[5] Wolmarans is the registered owner of an immovable property situated at 68 Wolmarans Street, Hillbrow, Johannesburg (the property), which consists of a large apartment building known as Wolbane Mansions. Wolbane Mansions comprises over 51 residential units which are occupied by about 200 tenants. The second applicant is 10 Fife Avenue Berea (Pty) Ltd (Fife) whilst the third applicant is Mr Mark Morris Farber (Mr Farber). Mr Farber is the sole director and shareholder of Wolmarans and Fife.

[6] Sometime in 2013 Mr Farber approached Tufh for a loan facility to be granted in favour of Wolmarans in order to assist it with the purchase and

refurbishment of Wolbane Mansions. A written loan agreement was concluded in the period 8 August 2013 to 23 August 2013 between Tufh and Wolmarans.

[7] In terms of the loan agreement it was agreed, *inter alia*, that Tufh would advance to Wolmarans a facility amount in the sum of R5 771 166.00 (the facility amount) for drawdown by Wolmarans.

[8] At the heart of the dispute between the parties lie clauses 17 and 18 of the loan agreement. Clause 17 specifically records the following:

‘17 RATES AND TAXES AND MUNICIPAL SERVICE CHARGES

The Borrower shall –

17.1 pay promptly on due date for payment, all rates, taxes, water and electricity charges (whether levied as basic charges or in respect of actual consumption), sanitation charges (in respect of refuse removal and sewerage) and other like imposts that may be payable in respect of the Property to any governmental, provisional, divisional council, municipal or other like authority;

17.2 provide proof of the aforesaid payments to the Lender whenever requested to do so, and the Lender have the right, but not the obligation, to make all such payments on behalf of the Borrower and any moneys so disbursed shall be immediately refundable by the Borrower to the Lender; and

17.3 provide the Lender on a monthly basis certified copies of all statements for the amounts payable in terms of 17.1.’

[9] Clause 18 specifies a number of ‘events of default’ which, when triggered, would entitle Tufh to accelerate and declare the entire principal amount outstanding, immediately due and payable. Given the nature of the dispute between the parties it is necessary to set out only those aspects of the clause that are relevant. They are the following:

‘18 EVENTS OF DEFAULT

18.1 Each of the following events shall constitute an Event of Default under the Loan Facility

18.1.1 the Borrower fails to pay any amount(s) due by it in terms of this Agreement on the due date for payment thereof or breaches any other provision of this Agreement and fails to remedy any such breach within any applicable cure period;

...

18.1.20 the Borrower fails to comply with all and any municipal by-laws;

...

18.2 Forthwith upon the occurrence of an Event of Default and at any time thereafter, if such event continues, the Lender shall in his sole and absolute discretion be entitled (but not obliged), without prejudice to any other rights which the Lender may have, by notice issued by the Lender to the Borrower to –

...

18.2.3 accelerate and declare all amounts owing in terms of this Agreement immediately due and payable, notwithstanding that such amounts may not otherwise have been due and payable, whereupon the same shall become immediately due and payable, including any fees, penalties, costs and charges’

[10] On 8 August 2013 and as security for the facility amount, Fife and Mr Farber concluded written unlimited suretyship agreements in favour of Tufh. As backing security for the facility amount, Wolmarans registered a mortgage bond over the property for an amount of R8 656 749.00 together with an additional 30% provision for contingent costs.

[11] Clause 3 of the mortgage bond deals with rates and taxes and provides as follows:

‘3 RATES AND TAXES

The Mortgagor shall –

3.1 pay promptly on due date for payment all rates, taxes and other like imposts that may be payable in respect of the property to any Governmental, Provisional, Divisional Council, Municipal or other like authority; and

3.2 exhibit proof of such payments to the Mortgagee or its assigns whenever requested to do so, and the Mortgagee may in its own discretion make all such payments on behalf of the Mortgagor and recover the relative amounts from the Mortgagor.’

[12] In terms of clause 4 of the mortgage bond, and as further collateral security in the event of a default, Wolmarans ceded its rights to rental income and Tufh was entitled to recover and receive all rent, income and fruits from the immovable property.

[13] Pursuant to the granting of the facility amount in March 2014, Wolmarans drew down on the amount for payment of the purchase price and for refurbishment. As the landlord of Wolbane Mansions, Wolmarans and its agent duly collected all rental from its tenants on the property.

[14] Whilst Wolmarans paid its monthly instalments towards the facility amount in terms of the loan agreement, it breached the specific terms of the loan agreement and the mortgage bond referred to above by failing to: (a) pay the City of Johannesburg (CoJ) promptly, or at all, its account in respect of municipal service charges (rates, water, sanitation, refuse and electricity) provided to the property;¹ (b) provide Tufh with proof of such payments following Tufh’s demand for same;² and (c) provide Tufh with certified copies of the municipal statements.³

¹ This failure was in breach of clause 17.1.

² This failure was in breach of clause 17.2.

³ This failure was in breach of clause 17.3.

[15] The last payment to the CoJ for municipal services consumed at the property by Wolmarans' tenants was the amount of R25 000. This payment was made on 30 October 2015. No further payments were made. Four years later and as at 12 November 2019 Wolmarans' municipal account in respect of rates, water, electricity, sanitation and refuse stood at R3 288 156.08.

[16] On 20 December 2019 Tufh's attorneys sent a letter of demand to the applicants placing them on terms to comply with their obligations in terms of the loan agreement and mortgage bond. The letter of demand, *inter alia*, informed the applicants that should they fail to remedy their breaches immediately, Tufh would institute legal proceedings to enforce its rights.

[17] The applicants' attorneys responded on 13 January 2020. They recorded that there was an ongoing dispute between Wolmarans and the CoJ with regard to the manner in which the CoJ was billing Wolmarans for the municipal services rendered. They indicated that the accounts received from the CoJ contained patent errors which despite demand and continuing negotiations, were not rectified.

[18] The essence of Wolmarans' complaint was that the CoJ had incorrectly debited its account utilising incorrect readings from a different electricity meter which was not on the property. The CoJ resorted to disconnecting the electricity supply to the property in about April 2016. This resulted in Wolmarans obtaining an order from the Johannesburg High Court on 5 May 2016 (the 2016 court order) interdicting the disconnection of electricity to the property and compelling the CoJ to provide it with a proper statement of account and for a debatement thereof. The CoJ was further ordered to credit Wolmarans' account with charges that had been incorrectly levied.

[19] In responding to the above letter on 17 January 2020, Tufh's attorneys pointed out that it was evident from the court order of 5 May 2016 that the dispute between Wolmarans and the CoJ had to do with a billing query relating to water and electricity supplied to the property. There appeared to be no dispute about the rates, refuse, sanitation and other charges being levied by the CoJ to the property. Tufh's attorneys emphasized that notwithstanding Wolmarans' billing query, it was obliged to pay on the due date all other current charges levied subsequent to the 2016 court order. Wolmarans was informed that it remained in breach of the loan agreement and that as at 13 January 2020 the municipal account in respect of rates, water, electricity, sanitation and refuse was in arrears in the sum of R3 462 722.01.

[20] On 14 February 2020, a letter was received from Wolmarans' attorneys informing Tufh that the relevant CoJ account was being investigated by Mr Hugo Venter of Municipal Account Rectifiers (MAR) and that Mr Venter had advised Wolmarans not to make any payments to the CoJ whilst the dispute continued.

[21] On 24 February 2020, Tufh's attorneys sent a response which recorded, *inter alia*, that no explanation was provided as to why, for almost 5 years since the 2016 court order, Wolmarans had simply failed to pay any amount whatsoever for services provided to the property. They further recorded that MAR's advice that no payments be made whilst the dispute existed was clearly in conflict with the express terms of the loan agreement and in contravention of the CoJ's by-laws, which in itself amounted to a breach of the loan agreement. Wolmarans was informed that its conduct was placing Tufh's security in and to the property at risk and it was for this reason that Tufh was entitled in terms of the loan agreement, to

accelerate and declare all amounts due owing and payable. The total debt outstanding as at 21 February 2020 stood at R4 897 004.22.

Proceedings in the courts below

The court of first instance

[22] Tufh's founding affidavit drew attention to the fact that a vital component of its business model was its right to protect the immovable property for which it had provided a loan facility and to ensure that the value of the property does not deteriorate. Tufh pointed to typical examples of events that could have a material impact on the value of the immovable property. One such event was the failure on the part of the borrower to pay the municipal accounts rendered in respect of the property and these could and did run into millions of rands.

[23] In opposing the application Wolmarans persisted with its denial that it was in breach of the loan agreement. It denied that there were any municipal charges due and payable to the CoJ at the time that Tufh had placed it on terms to remedy any breaches. It blamed the CoJ for its failure to render proper statements of account. It averred that the CoJ was experiencing a billing crisis. It further averred that there was an ongoing dispute between it and the CoJ regarding its accounts. It maintained, however, that there was no obligation on it to make payment to the CoJ of undisputed amounts, even under protest, given the billing dispute as the CoJ itself had not called upon it to pay.

[24] The court of first instance found that since there was a historical dispute between Wolmarans and the CoJ which resulted in the 2016 court order for a statement and debatement, and since the CoJ had itself not asserted any rights to

payment since then, it would be unconscionable for Tufh to claim that Wolmarans was in breach of the loan agreement and to foreclose on the mortgage bond.

[25] In dismissing the application the court of first instance ultimately found that: ‘. . . In my respectful view, allowing the applicant to rely on non-payment of such services, electricity, rates and taxes as a ground to allege a breach of the loan agreement entitling it to the cancellation, accelerated payment, and cession of rental revenue generated by the first respondent would be prejudicial to the first respondent. Allowing the applicant to take such draconian steps when the first respondent is in fact up to date with its loan repayments will be an injustice of great proportion.’

The full court

[26] The central issue identified by the full court for determination was whether, despite Wolmarans keeping up with its monthly instalment in terms of the loan agreement, Tufh was entitled to accelerate payment and claim the full amount outstanding in circumstances where Wolmarans had failed to pay the CoJ for municipal services rendered.

[27] The full court considered that Wolmarans had admitted that since 6 March 2014 it was charged for water and electricity and that such services continued to be supplied to the property. It also admitted that it had been levied for property rates and taxes and that save for the sum of R25 000 which it paid in respect of water and electricity on 30 October 2015, no other payments were made. The full court considered that Wolmarans had fallen into significant arrears as evidenced by the amounts referred to above.

[28] Placing reliance on the principle of *pacta sunt servanda*, the full court found that ‘generally, contracting parties have considerable freedom in choosing how they structure their agreements, and it is not the function of the court to protect consenting adults from bad bargains. Legal certainty and the notion of *pacta sunt servanda* are central values of the law of contract, which must be honoured and enforced by the courts’.

[29] It found that Wolmarans had failed to explain why it failed to pay its undisputed indebtedness to the CoJ on the due date. In line with the legal principles set out by the Constitutional Court in *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*,⁴ the full court reasoned that the harsh consequences of Wolmarans’ failure to comply with the terms of the loan agreement could not by itself constitute a sufficient basis for the conclusion that enforcement of the strict terms of the contract would be unconscionable.

[30] In upholding the appeal, the full court held that:

‘The failure by the first respondent to perform its contractual obligations has destroyed the commercial purpose of the contract as the significant municipal arrears impair the appellant’s security it required in order to advance the loan facility as a charge in favour of the municipality imposed by s 118(3) of the Systems Act enjoys preference over any mortgage bond registered against the applicable immovable property.’

Application for special leave

[31] For the applicants to succeed in their application for special leave to appeal the judgment of the full court, they are required to show something more than the

⁴ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) para 14.

existence of reasonable prospects of success on appeal.⁵ In *Cook v Morrison and Another*⁶ this Court held:

‘The existence of reasonable prospects of success is a necessary but insufficient precondition for the granting of special leave. Something more, by way of special circumstances, is needed. These may include that the appeal raises a substantial point of law; or that the prospects of success are so strong that a refusal of leave would result in a manifest denial of justice; or that the matter is of very great importance to the parties or to the public. This is not a closed list . . . ’

[32] The test of what constitutes a reasonable prospect of success is well established. The applicants are required to demonstrate that ‘there is a sound rational basis to conclude that there is a reasonable prospect of success on appeal’.⁷ They are further required to show that ‘something more by way of special circumstances, is needed’.⁸

Grounds for special leave

[33] It must be pointed out that the applicants’ application for special leave is not a model of clarity. However, in summary, the grounds advanced appear to be the following. The applicants aver that there may well be other loan agreements which contain similar clauses such as Clauses 17 and 18 as in the present case. Borrowers in such cases may face a similar situation such as Wolmarans herein where they notionally breach the loan agreement by not paying any rates, taxes and other municipal charges thus entitling the lender to declare all amounts immediately due and payable and to seek execution against the borrower’s immovable property.

⁵ *P A F v S C F* [2022] ZASCA 101; 2022 (6) SA 162 (SCA) para 24.

⁶ *Cook v Morrison* [2019] ZASCA 8; [2019] 3 All SA 673 (SCA); 2019 (5) SA 51 (SCA) para 8.

⁷ *MEC for Health, Eastern Cape v Mkhitha and Another* [2016] ZASCA 176 paras 16-17.

⁸ *Cook v Morrison* op cit, para 8.

[34] They further aver that the judgment of the full court has far-reaching consequences ‘beyond the immediate impact on the applicants and Tufh. The judgment potentially impacts upon many other borrowers facing the same circumstances’. They contend that while this Court as well as the Constitutional Court have dealt on a number of occasions with contracts that should not be enforced on grounds of public policy, the unique circumstances faced by the applicants herein have not been dealt with by this court. They assert that not only are there reasonable prospects of success but that the appeal also raises substantial legal issues of public importance and the interests of justice warrant that leave be granted.

In this Court

[35] At the outset of the hearing in this Court Mr Hollander for the applicants conceded that there was a breach of the loan agreement by Wolmarans. He submitted, however, that there were reasonable prospects of success in the appeal and that leave should be granted. On the issue of ‘special circumstances’ which embodies the test for special leave as set out in para 31 above, Mr Hollander indicated that he intended addressing three aspects only which also went to the merits of the matter. The first was that Wolmarans was engaged in a *bona fide* dispute with the CoJ with regard to the municipal charges levied against the property. The second was that Tufh’s security was not in any way at risk as it still held suretyships by Mr Farber and Fife. The third was that any risk to Tufh’s security was caused by Tufh itself when it elected to accelerate and declare all amounts owing in terms of the loan agreement immediately due and payable. Mr Hollander’s further submission in this regard was that whilst Wolmarans was not attacking any of the relevant clauses in the loan agreement or the agreement *per se*

as being unconscionable and contrary to public policy, the implementation thereof certainly was.

Issues raised

(a) Did Wolmarans have a bona fide dispute with the CoJ in respect of municipal services rendered to the property?

[36] It is common cause on the papers that, although Wolmarans' dispute with the CoJ related only to water and electricity, it failed to make any payments for other municipal charges relating to property rates and taxes and wastewater services, since 30 October 2015. The dispute in question arose out of billing accounts rendered by the CoJ which, according to the applicants, contained certain patent errors.⁹

[37] Apart from the specific provisions of the loan agreement¹⁰ that impose an obligation on Wolmarans to pay for all municipal services rendered to the property, such obligations also flow from the provisions of the Local Government: Municipal Systems Act No 32 of 2000 (the Systems Act) and the CoJ's Credit Control and Debt Collection By-laws published on 23 May 2005¹¹ (the Collection By-laws).

[38] Whilst municipalities are obliged to provide water and electricity to the residents in their area as a matter of public duty, they are further required to ensure the provision of services to communities in a sustainable manner.

⁹ Clause 17 of the loan agreement.

¹⁰ Clause 17 of the loan agreement.

¹¹ Provincial Gazette Extraordinary, 23 May 2005, Notice 1857 of 2005.

[39] Section 96(a) of the Systems Act obliges municipalities like the CoJ to collect all money that is due and payable to it. In *Mkontwana v Nelson Mandela Metropolitan Municipality*¹² the Constitutional Court recognised that ‘it was therefore important that the possibility that municipal debt remains unpaid be reduced by all legitimate means’¹³ and that ‘the municipality must comply with its duty and take reasonable steps to collect amounts that are due’.¹⁴

[40] The applicants’ argument that it had a *bona fide* dispute with CoJ over the outstanding municipal charges is clearly not sustainable especially in light of CoJ’s Collection by-laws. In terms of s 1, ‘account’ means a notification by means of a statement of account to a person liable for payment of any amount for which he or she is liable to pay the Council in respect of the following:

- ‘(a) electricity consumption based on a meter reading or estimated consumption or availability fees;
- (b) water consumption based on a meter reading or estimated consumption or availability fees;
- (c) refuse removal and disposal;
- (d) sewerage services and sewer availability fees;
- (e) rates;
- (f) interest; and
- (g) miscellaneous and sundry fees and collection charges.’

[41] The following further sections of the Collection By-laws are relevant insofar as they have some bearing on Wolmarans’ conduct herein:

- (a) Section 5 provides that the CoJ may estimate the consumption of water and electricity for any relevant period in the absence of a meter reading;

¹² *Mkontwana v Nelson Mandela Metropolitan Municipality* [2004] ZACC 9; 2005 (1) SA 530 (CC); 2005 (2) BCLR 150 (CC).

¹³ *Ibid* para 38.

¹⁴ *Ibid* para 49.

(b) In terms of section 8(2) the CoJ may in accordance with the provisions of s 102 of the Systems Act consolidate any separate accounts of a customer liable for payment, credit any payment by such customer, and implement any of the debt collection measures provided for in the Collection By-laws;

(c) Section 8(3) provides that the amount due and payable by a customer constitutes a consolidated debt and any payment made by a customer less than the total amount due will be allocated in reduction of the consolidated debt in the order prescribed; and

(d) Section 11(3) provides that before or after the due date for payment specified in the CoJ account, notwithstanding its dispute with the CoJ, the customer must pay the full amount of any account insofar as it relates to amounts for rates, or the municipal services concerned, and which are not in dispute.

[42] On a reasonable and proper interpretation of s 11(3) of the Collection By-laws, it would seem that it is aimed at stopping unscrupulous property owners from declaring a dispute with the municipality and then withholding payment for years. The purpose of the By-laws is therefore to avoid an alleged billing dispute from persisting for years on end while the property owner continues to consume services it does not pay for.

[43] Section 102 of the Systems Act deals with ‘accounts’. In relevant part it provides as follows:

‘102 Accounts

(1) A municipality may -

(a) consolidate any separate accounts of persons liable for payments to the municipality;

(b) credit a payment by such a person against any account of that person; and

- (c) implement any of the debt collection and credit control measures provided for in this chapter in relation to any arrears on any of the accounts of such a person.
- (2) Subsection (1) does not apply where there is a dispute between the municipality and a person referred to in that subsection *concerning any specific amount* claimed by the municipality from that person.
- (3)’ (Emphasis added.)

[44] In *Body Corporate Croftdene Mall v Ethekwini Municipality*,¹⁵ this Court held that:

‘It is, in my view, of importance that subsec 102(2) of the Systems Act requires that the dispute must relate to a ‘specific amount’ claimed by the municipality. Quite obviously, its objective must be to prevent a ratepayer from delaying payment of an account by raising a dispute in general terms. The ratepayer is required to furnish facts that would adequately enable the municipality to ascertain or identify the disputed item or items and the basis for the ratepayer’s objection thereto. If an item is properly identified and a dispute properly raised, debt collection and credit control measures could not be implemented in regard to that item because of the provisions of the subsection. *But the measures could be implemented in regard to the balance in arrears; and they could be implemented in respect of the entire amount if an item is not properly identified and a dispute in relation thereto is not properly raised.*

Whether a dispute has been properly raised must be a factual enquiry requiring determination on a case-by-case basis. It is clear from clause 22.3 of the Policy referred to above that the dispute must be raised before the municipality has implemented the enforcement measures at its disposal.’ (Emphasis added.)

[45] While Wolmarans admits that its dispute with the CoJ is limited to electricity and water charges it nonetheless unreasonably, unlawfully and inexplicably withholds payments for all municipal services and charges, namely, electricity, water, sanitation (sewer), property rates and taxes and refuse. This it

¹⁵ *Body Corporate Croftdene Mall v Ethekwini Municipality* [2011] ZASCA 188; [2012] 1 All SA 1 (SCA); 2012 (4) SA 169 (SCA) paras 22 and 23.

has been ongoing since 30 October 2015. The billing crisis which plagued the CoJ at the time has clearly afforded Wolmarans with an ideal opportunity to exploit the situation by withholding all payments. In the result it cannot be found that Wolmarans' dispute with the CoJ is *bona fide*. The full court correctly found that there was no merit in the submission that no amounts were due to the CoJ.

(b) Was Tufh's security in the property at risk given that it held suretyships from the second and third respondents?

[46] The validity of Fife's suretyship was challenged by it in 2020 in previous proceedings as alluded to already. Tufh's request for other security from Fife was refused. This refusal constituted a further breach of the loan agreement which prompted Tufh to institute a further application in the Johannesburg High Court. The only existing suretyship is that of Mr Farber. In the circumstances, Wolmarans' contention that Tufh has sufficient security in the form of the two suretyships is without merit.

(c) Was Tufh's security put to any risk by its own conduct when it accelerated and declared all amounts owing in terms of the loan agreement due and payable thereby making the implementation of the loan agreement unconscionable and contrary to public policy?

[47] Before addressing this issue pertinently it is necessary to set out the legal principles that are generally applied by our courts in order to determine whether a contract is inimical to a constitutional value or principle or is otherwise contrary to public policy and should be invalidated. In *A B and Another v Pridwin Preparatory School and Others*¹⁶ this Court set out what it viewed as the ‘most important principles’ governing the judicial control of contracts through the instrument of public policy. The following principles were outlined:

- ‘(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;
- (vi) A court will decline to use this power where a party relies directly on abstract values of fairness and reasonableness to escape the consequences of a contract because they are not substantive rules that may be used for this purpose.’¹⁷

¹⁶ *A B and Another v Pridwin Preparatory School and Others* [2018] ZASCA 150; [2019] 1 All SA 1 (SCA); 2019 (1) SA 327 (SCA); 2019 (8) BCLR 1006 (SCA).

¹⁷ *Ibid* para 27; See also *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) at 9A-C.

[48] In *Barkhuizen v Napier*,¹⁸ the Constitutional Court rejected notions of good faith, fairness and reasonableness as independent grounds for refusing to enforce contractual terms. It did, however, hold that public policy as informed by the Constitution imports ‘notions of fairness, justice and reasonableness’; it takes account of the need to do ‘simple justice between individuals’; and is informed by the concept of *Ubuntu*.¹⁹ It also recognised that public policy requires parties to honour their contractual obligations undertaken freely and voluntarily as encapsulated in the Latin *maxim pactum sunt servanda*, because this is a ‘profoundly moral principle, on which the coherence of any society relies’;²⁰ and it ‘gives effect to the central constitutional values of freedom and dignity’.²¹

[49] In *Bredenkamp and Others v Standard Bank of SA Ltd*,²² this Court rejected an argument that the Constitutional Court in *Barkhuizen* had established fairness as a free-standing requirement for enforcement of contractual provisions. It held that it was only if a public policy consideration, either in the Constitution or elsewhere that militated against enforcement of the terms, that such enforcement would be refused. This Court went on to hold that it was only if a constitutional value was limited by a contractual term or its enforcement that a court would have to determine whether that limitation was fair and reasonable.

¹⁸ *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) para 82.

¹⁹ *Ibid* para 51.

²⁰ *Ibid* para 87. See also R H Christie and G B Bradfield *Christie’s The Law of Contract in South Africa* 8 ed (2022) at 25 (Christie).

²¹ *Ibid* para 57.

²² *Bredenkamp and Others v Standard Bank of SA Ltd* [2010] ZASCA 75; 2010 (4) SA 468 (SCA); 2010 (9) BCLR 892 (SCA); [2010] 4 All SA 113 (SCA) para 1.

[50] In *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others*,²³ the Constitutional Court reaffirmed its position that *Barkhuizen* remained the leading authority in our law on the role of equity in contract, as part of public policy considerations. It recognised that good faith was ‘not a self-standing rule but an underlying value that was given expression through existing rules of law’.²⁴

[51] The court went on to say the following in para 72:

‘It is clear that public policy imports values of fairness, reasonableness and justice. Ubuntu, which encompasses these values, is now also recognised as a constitutional value, inspiring our constitutional compact, which in turn informs public policy. These values form important considerations in the balancing exercise required to determine whether a contractual term, or its enforcement, is contrary to public policy.’

[52] The court found it necessary to provide clarity with regard to two principles derived from the case law. The first was *pacta sunt servanda* and the second was ‘perceptive restraint’. It held that the former was not a relic of our pre-constitutional past and that in general public policy required contracting parties to honour obligations that have been freely and voluntarily undertaken. As for the second, it held that while ‘perceptive restraint’ was a sound approach, courts should not rely on it to shrink from their constitutional duty to infuse public policy with contractual values, nor may it be used to shear public policy of the complexity of the value system created by the Constitution. Furthermore, the notion that there must be substantial and incontestable harm to the public before a court may decline to enforce a contract on public policy grounds, was alien to our law of contract.²⁵

²³ *Beadica 231 CC and Others v Trustees for the time being of the Oregon Trust and Others* [2020] ZACC 13; 2020 (5) SA 247 (CC); 2020 (9) BCLR 1098 (CC) para 58.

²⁴ *Ibid* para 38. See also Christie 8 ed (2022) at 428.

²⁵ *Ibid* paras 83-85, 87, 89 and 90.

[53] Applying the above principles to the facts of this case, the question is whether the applicants have discharged the onus of demonstrating that the enforcement, or implementation as Mr Hollander put it, of the loan agreement would be contrary to public policy in the particular circumstances of this case. As *Barkhuizen* decided, a party seeking to avoid the enforcement of a contractual term is required to demonstrate good reason for failing to comply with the term. In the present matter the applicants were unable to show how the implementation of the loan agreement would be unconscionable and contrary to public policy. After all, this was an agreement that was freely and voluntarily entered into. There was no suggestion whatsoever that clauses 17 and 18 were anything out of the ordinary or that they imposed any undue hardship on the applicants. It was correctly pointed out by Tufh's counsel that this was not an issue that was raised properly by the applicants in their papers in the courts below. The issue was raised rather opportunistically and that too only in heads of argument leaving no option for Tufh or the court to address the issue fully.

[54] Wolmarans' contention that it is Tufh's own conduct that has put its security at risk is fallacious. After all, Tufh was merely implementing the terms of the loan agreement so as to ensure that its security in and to the property was not jeopardised in any way.

[55] As the facts show, the last payment made by Wolmarans to the CoJ was on 30 October 2015. Wolmarans asserts that it was advised by its forensic investigator not to effect any further payments until its dispute with the CoJ was resolved. What this ignores is that the dispute is related only to charges for water and electricity.

Municipal charges for all other services rendered remained due, owing and payable.

[56] The fact that the CoJ, for whatever reason, has adopted a supine approach in the collection of all outstanding amounts from Wolmarans, is irrelevant. The CoJ is no doubt aware that it is preferentially secured for the recovery of its debt in terms of s 118(3) of the Systems Act. In *BOE Bank Ltd v Tshwane Metropolitan Municipality and Others*,²⁶ this Court confirmed that a charge in favour of the municipality imposed by s 118(3) of the Systems Act enjoyed preference over any mortgage bond registered against the applicable immovable property. In the circumstances, the provisions of s 118(3) of the Systems Act jeopardises, prejudices and impairs Tufh's mortgage bond which is the security it bargained for with Wolmarans at the outset.

[57] While the applicants' are quick to now blame the CoJ for the position in which Wolmarans finds itself, the latter's conduct is particularly egregious and unconscionable in that it has for more than eight years enjoyed the benefit of all municipal services at Wolbane Mansions, collected all rental from its tenants and still fails to pay for such services. It cannot therefore, be said that the full court was incorrect when it found that Wolmarans failed to discharge the onus to show that the enforcement of the relevant clauses would be unconscionable and contrary to public policy.

[58] In the circumstances, I find that there are no reasonable prospects in any appeal challenging the findings of the full court. Still less, are there special

²⁶ *BOE Bank Ltd v City of Tshwane Metropolitan Municipality* [2005] ZASCA 21; 2005 (4) SA 336 (SCA) para 5.

circumstances that would justify granting special leave to appeal herein. It follows that the application for special leave must fail.

[59] As to costs, there was no issue that costs should follow the result and that such costs should include the costs of two counsel. That such costs should be paid on an attorney and client scale is provided for by the loan agreement itself.

Order

[60] The following order is made:

The application for special leave is dismissed with costs on an attorney and client scale, such costs to include the costs of two counsel.

R SEEOBIN
ACTING JUDGE OF APPEAL

Appearances

For the applicants: L Hollander
Instructed by: Swartz Weil Van Der Merwe Greenberg Inc.
Attorneys, Parkview
Bezuidenhout Inc., Bloemfontein

For the respondent: A C Botha SC (with him E Eksteen)
Instructed by: Schindlers Attorneys, Johannesburg
Webbers Attorneys, Bloemfontein.