IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT105/10

In the matter between:

EVERFRESH MARKET VIRGINIA (PTY) LTD
(Registration No. 2002/01763/07 - previously known as
WILD BREAK 166 (PTY) LTD) **Applicant**

and

SHOPRITE CHECKERS (PTY) LTD **Respondent**

APPLICANT'S HEADS OF ARGUMENT

A. THE FACTS

1. On 15 July 2003 the Applicant ("EVERFRESH"), then known as WILD BREAK 166 (PTY) LTD, concluded, as lessee, a written lease with HR GEERINGH CC in respect of a store in the Virginia Shopping Centre in Durban North. The term of the lease was for a period of 5 years from 1 April 2004[1].

2. Clause 3 of the lease provides as follows:

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[1] **Annexure "FF4" pp. 10 - 25**.

> *"Provided that the Lessee has faithfully and timeously fulfilled and performed all its obligations under and in terms of this Lease, the Lessee shall have the* ***right to renew*** *same for a further period of Four Years and Eleven months commencing on 1st April 2009, such renewal to be upon the same terms and conditions as in this Lease contained save that there shall be no further right of renewal,* ***and save that the rentals for the renewal period shall be agreed upon between the Lessor and the Lessee at the time****. The said right of renewal is subject to the Lessee giving written notice to the Lessor of its intention so to renew, which notice shall reach the Lessor not less than six (6) calender months prior to the date of termination of this Lease. In the event of no such notice being received by the Lessor,* ***or in the event of notice being duly received but the Parties failing to reach agreement in regard to the rentals for the renewal period at least Three (3) calender months prior to the date of termination of this Lease, then in either event this right of renewal shall be null and void****."* (My emphasis.)

3. The Respondent ("SHOPRITE") became the registered owner of the shopping centre on 30 May 2008 (and thus succeeded HR GEERINGH CC as lessor[2]).

4. On 14 July 2008, being more than six calender months prior to the date of

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[2] ***Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd 1995(2) SA 926 (A) at 936 A - C***.

the termination of the lease, EVERFRESH gave written notice to SHOPRITE of its intention to renew the lease. In this notice EVERFRESH proposed that a reasonable escalation would be in line with the existing lease at 10,5% per annum, resulting in a commencing rental of R93 600,00 per month[3].

5. SHOPRITE replied in a letter dated 3 September 2008[4]. In this letter SHOPRITE stated, *inter alia*, that clause 3 did not constitute a legally binding and enforceable right of renewal and, that the lease will accordingly terminate on 31 March 2009, by which date EVERFRESH is required to vacate the leased premises. SHOPRITE further stated that, apart from the fact that EVERFRESH was not legally entitled to renew the lease, SHOPRITE was in any event desirous to redevelop the shopping centre which would impact on the leased premises. SHOPRITE continued:

> *"We are thus unable to negotiate the extension of the lease agreement beyond the current termination date (31 March 2009). We may, however, reconsider our position once the redevelopment of the shopping centre has been completed."*

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3 **Annexure "FF5" p. 26**.

4 **Annexure "FF6" p. 17**.

6. In a letter dated 30 October 2008 EVERFRESH's attorneys stated that the commencing rental proposed by EVERFRESH of R93 600,00 is reasonable and in line with the existing lease[5]. SHOPRITE's attorneys did not contest the correctness of this statement in reply[6].

7. In a letter dated 22 December 2008 EVERFRESH's attorneys informed SHOPRITE's attorneys that it was incumbent on SHOPRITE to, at the very least, participate in attempts to agree a rental and that it is implicit in the agreement of lease that the rental to be agreed upon must be a reasonable rental. It was further recorded that SHOPRITE had made absolutely no attempt to participate in its contractual duty to agree rental[7].

8. It is not in dispute that it is not difficult to determine what a reasonable rental would be in respect of the renewal period[8].

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5 **Annexure "FF8" p. 29 lines 15 - 17. See also p. 41par 12 read with p. 49 par 8** from which it appears that SHOPRITE did not dispute that the rental which EVERFRESH proposed for the renewed lease was reasonable and did not make any counter-proposal with regard to the rental.

6 **Annexure "FF9" p. 31**.

7 **p. 45 Annexure "B" lines 17 - 23**.

8 **pp. 42 - 43 par 16; p. 50 par 10**.

9. It is also not in dispute that EVERFRESH did faithfully and timeously fulfil and perform all its obligations under and in terms of the lease[9].

10. By way of background it may be pointed out that the family business conducted under the name of EVERFRESH had started occupying the store on 1 April 1999 in terms of an earlier lease with the lessor. The earlier lease which expired on 31 March 2004 contained a similar provision relating to renewal thereof for a further period of 5 years (less one day), at a rental to be agreed. The lessor and lessee did reach agreement on the rental and a new lease was concluded. This new lease is the lease referred to in paragraph 1 above[10].

B. PROCEEDINGS IN THE COURT *A QUO*

11. SHOPRITE adopted the stance that EVERFRESH's continued occupation of the store after 31 March 2009 was unlawful and launched an application to the Court *a quo* for the eviction of EVERFRESH.

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9 **p. 39 par 8 read with p. 49 par 6; p. 78 par 12.**

10 **p. 38 par (b) - p. 39 par (e)**.

12. KOEN J ordered the eviction of EVERFRESH on 25 May 2010[11]. The reasons for judgment appear on ***pp. 52 - 66***.

13. It is submitted that the reasoning of the Court *a quo* is based on the acceptance of the following propositions of law:

13.1 An option to renew a lease upon terms (such as rental) to be agreed, is invalid and unenforceable[12].

13.2 South African law does not recognise that the obligation to pay a reasonable rental gives rise to sufficient certainty to result in a valid and enforceable agreement of lease[13].

13.3 An agreement to negotiate a rental is valid only if the agreement

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11 **Court order p. 68**.

12 **See** the authorities cited and discussed on **pp. 56 - 58 par [9]**.

13 **p. 58 par [10]**. While the Applicant had made it clear in its answering papers that it was implicit in the lease agreement that the rental to be agreed upon must be a reasonable rental (***p. 41 par 13 and p. 42 par 15***), KOEN J held that the Applicant had made the implied concession that clause 3 does not imply that a reasonable rental would be payable during the renewal period. It is submitted that, if such an implied concession had been made, the Applicant would not be bound by it: **see *Paddock Motors (Pty) Ltd v***

contains a dispute resolution mechanism to which the parties have bound themselves, such as the decision of an arbitrator[14].

14. The Applicants' applications for leave to appeal to the Court *a quo* and to the Supreme Court of Appeal were both dismissed[15].

15. The issues raised in paragraph 5 of the Directions dated 1 February 2011[16] are dealt with against the aforegoing background.

C. THE PRECISE NATURE OF THE OBLIGATION (IF ANY) CREATED BY A PROVISION IN A LEASE THAT THE RENTALS FOR THE RENEWAL PERIOD SHALL BE AGREED UPON BETWEEN THE LESSOR AND THE LESSEE

16. It is submitted that at common law no obligation is created by such a provision. The proposition which was accepted by KOEN J that an option to renew a lease upon terms to be agreed, is invalid and unenforceable, is

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***Igesund** 1976(3) SA 16 (A) at 23 B - 24 G; **Kevin and Lasia Property Investments CC v Roos N.O.** 2004(4) SA 103 (SCA) at 108 B - C.*

14 **p. 58 par [11].**

15 **p. 81 par 20;** Court order **p. 69**.

with respect unobjectionable from a common law perspective. The proposition in question is certainly borne out by the authorities cited in paragraph [9] of the judgment of KOEN J[17].

17. This approach is consistent with the approach which is more generally followed with regard to the enforceability of an agreement to negotiate. In ***Premier, Free State v Firechem Free State (Pty) Ltd***[18] SCHUTZ JA held as follows:

> *"An agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree"*.[19]

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16 **Constitutional Court Directions p. 95 - 96**.

17 **See** in particular the judgment in ***Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk 1993(1) SA 768 (A) at 773 I - J*** which is quoted on **p. 57 lines 16 - 21**. **See also** ***Southernport Developments (Pty) Ltd v Transnet Ltd 2005(2) SA 202 (SCA) at 211 F*** where it was held that, an undertaking to negotiate in good faith is unenforceable where the undertaking is *"an isolated edifice"* (e.g. because there is no dispute resolution mechanism involving a third party).

18 ***2000(4) SA 413 (SCA) at 431 G - H***.

19 **See also** ***Du Plessis N.O. v Goldco Motor and Cycle Supplies (Pty) Ltd 2009(6) SA 617 (SCA) at par [39]*** (dissenting); ***South African Reserve Bank v Photocraft (Pty) Ltd 1969(1) SA 610 (C) at 613 G*** where it was held that an agreement to negotiate is so vague as to its import, significance or consequence as to be unenforceable.

18. However, the proposition accepted by KOEN J postulates that the option contains no implied criterion which is to be applied in order to give content to the obligations agreed upon. For the reasons set out below, it is submitted that the common law ought to be developed to recognise that an option such as the present contains an implied (*ex lege*) term to the effect that the rental is to be reasonable[20]. The concept of a reasonable rental would import sufficient certainty in order to render the obligation to negotiate in good faith, enforceable[21].

19. In paragraph [10] of the judgment of KOEN J it was held that a term implying that a reasonable rental would be payable during the renewal period would not be of assistance as *"it seems clear that South African law does not recognise that the obligation to pay a reasonable rental gives rise to sufficient certainty to result in a valid and enforceable agreement of lease"*[22].

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20 **See paragraph 25 below**.

21 In the ***Southernport Development*** case *supra* ***at par [15] and [16]*** it was held that certainty is the touchstone of the enforceability of agreements to negotiate in good faith.

22 With reference to ***Trook t/a Trook's Tearoom v Shaik 1983(3) SA 935 (N) at 937 B - C and 939 A - B*** and ***Amavuba (Pty) Ltd v Pro Nobis Landgoed (Edms) Bpk 1984(3) SA***

20. It is argued below that the common law ought to be developed to recognise the validity of a lease at a reasonable rental[23].

D. IF THERE IS AN OBLIGATION TO NEGOTIATE IN AN EFFORT TO ARRIVE AT AN AGREEMENT, ARE THE PARTIES REQUIRED, AT COMMON LAW, TO NEGOTIATE
(i) REASONABLY AND/OR
(ii) IN GOOD FAITH?

21. In view thereof that there is (in the absence of an objective criterion against which the negotiations can be *"measured"* or a dispute breaking mechanism) no obligation to negotiate at common law, this question falls away.

E. IF THERE IS NO COMMON LAW OBLIGATION LIKE THAT PRESCRIBED IN PARAGRAPH 5(b) OF THE DIRECTIONS, IS THERE A CONSTITUTIONAL OBLIGATION ON THIS COURT AND OTHER COURTS TO DEVELOP THE COMMON LAW TO REQUIRE FAIR AND/OR REASONABLE CONDUCT OR GOOD FAITH ON THE PART OF THE LESSEE AND THE LESSOR?

22. Before dealing with this question it is necessary to revisit the position at

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760 (N) at 765 H.

[23] **See par 25 below**.

common law and in particular the proposition accepted by KOEN J[24] that South African law does not recognise that the obligation to pay a reasonable rental gives rise to sufficient certainty to result in a valid and enforceable agreement of lease.

23. In accepting this proposition, KOEN J was bound by the Full Bench decision in ***Trook t/a Trook's Tea Room v Shaik***[25].

24. At the time when KOEN J gave his judgment the state of the law, from a common law perspective, with regard to the enforceability of a lease at a reasonable rental (and by analogy a sale at a reasonable price) could be summarised as follows:

24.1 There were Provincial Division decisions to the effect that an agreement to lease for a reasonable rent or to sell for a reasonable

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24 **See par 13.2 above**.

25 **See footnote 22** ***supra;*** as was LAW J in ***Amavuba (Pty) Ltd v Pro Nobis Landgoed (Edms) Bpk*** ***(see footnote 22 supra) at 765 G - I***. **See also** in this regard ***Afrox Healthcare Bpk v Strydom*** ***2002(6) SA 21 (SCA) at par [28]***.

price is void for vagueness[26].

24.2 There was the (with respect well reasoned*) obiter dictum* of NICHOLAS AJA in ***Genac Properties JHB (Pty) Ltd v NBC Administrators CC***[27] that it is difficult to see on what principle a sale for a reasonable price, or a lease for a reasonable rent, should be regarded as invalid.

24.3 Respected academics (except PROF ZEFFERT[28] who argued that a sale at a reasonable price would be valid if the Court was able to determine what is reasonable in the circumstances) considered the point to be debatable[29].

25. Having regard to the provisions of Section 39(2) of the Constitution, it is

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26 **See footnote 22 above** and ***Erasmus v Arcade Electric 1962(3) SA 418 (T) at 419 G - 420 B; Adcorp Spares PE (Pty) Ltd v Hydromulch (Pty) Ltd 1972(3) SA 663 (T) at 668 F - G***.

27 ***1992(1) SA 566 (A) at 577 G***.

28 *"Sales at a Reasonable Price"* ***1973 SALJ 113***.

29 **See** the authors referred in ***Genac Properties*** *supra* ***at 577 D - G***.

submitted that it would be appropriate for this Court to develop the common law:

25.1 To recognise the validity of a lease at a reasonable rental; and

25.2 To recognise that an option such as the one under consideration contains an implied (*ex lege*) term to the effect that the rental is to be reasonable[30].

26. The Bill of Rights in the Constitution has already had a considerable impact on the law of contract, and will continue to do so[31]. However, thus far the disputes raised before the Courts have generally focussed on the question whether the values enshrined in the Constitution ought, in particular instances, to be used to strike down or not enforce agreements or clauses in agreements for being contrary to public policy[32].

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30 It is not surprising that there is no reported case recognising such an implied (*ex lege*) term, as the Courts would obviously not imply a term which would render the agreement void (on the basis that an agreement to pay a reasonable rental is void).

31 **Christie The Law of Contract in South Africa 5th Edition p. 18**

32 **See e.g. *Brisley v Drotsky 2002(4) SA 1 (SCA)*** (non-variation clause); ***Afrox Health Care Bpk v Strydom 2002(6) SA 21 (SCA)*** (exemption clause);

27. I have been unable to find any reported case in which the question was raised whether the values enshrined in the Constitution could be used to enforce an agreement or a clause of an agreement concluded *animo contrahendi*, but which may otherwise be void for vagueness.

28. However, the Constitution requires that its values be employed to secure a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity[33]. It is submitted that the recognition of the validity of contracts or clauses therein which would, according to conventional dogma be void, would be entirely consistent with the fulfilment of this requirement.

29. Mr Justice F D J BRAND[34] summarises the present state of South African Law as follows:

***PriceWaterHouseCoopers Inc v National Potato Co-operative Ltd* 2004(6) SA 66 (SCA)** (champertous agreement); ***Barkhuizen v Napier* 2007(5) SA 323 (CC)** (time bar clause); ***Bredenkamp v Standard Bank of SA Ltd* 2010(4) SA 468 (SCA)**; ***Nyandani Local Municipality v Hlazo* 2010(4) SA 281 (EDM)** (non-variation clause).

33 ***Brisley v Drostky*** *supra* ***at 36 A - B*** (concurring judgment of CAMERON JA); **see also *Napier v Barkhuizen* 2006(4) SA 1 (SCA) par [12] and [13]**.

34 *"The role of good faith, equity and fairness in the South African Law of Contract: The Influence of the Common Law and the Constitution"* ***2009 South African Law Journal p. 71 at 83,*** relying on Prof Hector MacQueen (Hector MacQueen & Reinhardt Zimmermann (eds) *Good faith in European Contract Law,* **Edinburgh Studies in Law Vol 2 (2006) 43**

> *"In neither Scots nor South African contract law is there an active general principle of good faith .... [and] in both systems the role of good faith is to inform and explain the rules of contract* ***and, when necessary, to provide the basis for amending these rules ....".*** (My emphasis.)

The learned author proceeds to explain that the South African Courts have employed the concept of public policy as the doctrinal gateway for the importation of constitutional values into the law of contract (and that the same gateway appears to have been used for the introduction of constitutional values into the law of contract in other jurisdictions[35]).

30. The concept of Ubuntu and the necessity to do simple justice between individuals have been recognised as informing public policy in a contractual context[36].

31. Our Courts have gone to great lengths to explain the concept of Ubuntu[37].

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at 49.

35 **At 84 and see footnote 65** on that page.

36 ***Barkhuizen v Napier* (CC) at 339 D - E par [51]**.

37 **See e.g. *S v Makwanyane* 1995(3) SA 391 (CC) at par [237]:** the concept permeates the Constitution generally and carries with it the ideas of humaneness, social justice and

32. One must assume that the parties inserted clause 3 into the agreement of lease with the serious intention of bestowing on themselves and each other enforceable rights and obligations[38]. This assumption would apply equally to other parties concluding agreements of lease at a reasonable rental. There are certainly no compelling policy considerations which would be served by allowing a party to evade the responsibilities willingly undertaken on the basis that a reasonable rental is unenforceable.

33. It is submitted that the development of the common law in the manner contended for would give expression to the necessity to do simple justice between individuals and the concept of Ubuntu which embraces, *inter alia*, respect towards each other and for human dignity.

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fairness; ***[263]***: the ethos of an instinctive capacity for and enjoyment of love towards our fellow men and women; ***[308]***: it envelopes the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity; ***Pharmaceutical Society of South Africa v Tshabalala-Msimang 2005(3) SA 238 (SCA)***; ***At 260 G - H:*** the respect required of citizens towards each other; ***Dikoko v Mokhatla 2006(6) SA 235 (CC) par [68] - [69] and [113] - [121]***: the knitting together of shattered relationships in the community and encouragement of across-the-board respect for the basic norms of human and social interdependence; ***Masethla v President of the Republic of South Africa 2008(1) SA 566 (CC) [238]***: civility and tolerance for those with whom one disagrees and respect for the dignity of those with whom one is in dispute; ***Tshabalala-Msimang v Makhanya 2008(6) SA 182 (W) par [2]***: the capacity to express compassion, justice, reciprocity, dignity, harmony and humanity in the interests of building, maintaining and strengthening the community; ***Law Society, Northern Provinces v Mogame 2010(1) SA 186 (SCA) par [22]***: a concept which may place ethical duties upon us.

38 The clause unequivocally grants EVERFRESH **the right** to renew the lease.

34. With regard to the recognition of the as yet unrecognised implied (*ex lege*) term to the effect that the rental is to be reasonable, it is generally accepted that the Courts have the power to recognise as yet unrecognised *ex lege* terms, should the principles of fairness and good faith so require[39].

35. An important policy consideration which dictates that such an *ex lege* term be recognised is that the Courts are reluctant to hold void for uncertainty any provision that was intended by the parties to a contract to have legal effect[40]. The point of departure of a Court ought to be "*so to balance matters that, without violation of essential principles, the dealings of men may as far as possible be treated as effective, and that the law may not incur the reproach of being a destroyer of bargains*"[41].

36. If the aforegoing submissions are accepted, it would, with respect, follow

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39 **See e.g. *A Becker & Co (Pty) Ltd v Becker* 1981(3) SA 406 (A) at 419 F - G; *Schoeman v Constantia Insurance Co Ltd* 2002(3) SA 417 (W) at 425 F - 426 E**; ***South African Forestry Co Ltd v York Timbers Ltd* 2005(3) SA 323 (SCA) par [28].**

40 ***Soteriou v Retco Poyntons (Pty) Ltd* 1985(2) SA 922 (A) at 931 G - H**.

41 ***Hillas & Co Ltd v Arcos* [1932] All ER 491 (HL) at 499 H - I** referred to with approval in, *inter alia*, ***Genac Properties JHB (Pty) Ltd v NBC Administrators CC* 1992(1) SA 566 (A) at 579 G**. **See also *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997(2) SA 548 (A) at 561 H** where the importance of the parties decision to have entered into a binding legal relationship was emphasised.

that SHOPRITE and EVERFRESH were under a duty to negotiate in good faith with a view to arriving at a reasonable rental.

F. ALTERNATIVE SUBMISSIONS

37. The matter may also be approached somewhat differently by using the concept of the *arbitrium boni viri* as a point of departure. The Courts have accepted, from a common law perspective, that where a clause in a contract grants the one contracting party a discretion, that clause may be saved from being void for vagueness, by imposing an obligation on the contracting party to exercise the discretion *arbitrio boni viri*[42].

38. It is submitted that it would be but one small step further to accept that where a clause grants both parties the discretion to negotiate, both parties are to negotiate reasonably.

39. In the **further alternative** that It is submitted that, at very least the common law ought to be developed in order to impose a duty to negotiate

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42 **See e.g. *Boland Bank Bpk v Steele* *1994(1) SA 259 (T) at 273 F - 276 I***, especially***276***

in good faith on the part of the lessee and the lessor.

40. In this regard it is instructive that the last portion of clause 3 which has been emphasised in paragraph 2 above envisages that at least three calender months will pass from the time upon which the notice of renewal is received by the lessor, until the right of renewal shall become null and void (in the event of the parties failing to reach agreement in regard to rentals). It is submitted that the only plausible explanation for casting the clause in this form is that the parties were to be afforded at least three months within which to engage each other and negotiate about the rentals.

41. It is submitted that the considerations discussed in paragraphs 26 and further above would at least justify recognition of the requirement that the parties are to negotiate in good faith.

42. The obligation to negotiate in good faith is by no means foreign to our law. In the context of labour law this obligation is well recognised[43]. While the

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F - I; NBS Boland Bank Ltd v One Berg River Drive CC 1999(4) SA 928 (SCA) at [24] - [28].

43 **See *Southernport Developments*** *supra* ***par [12]***.

analogy between ordinary contract negotiations and collective bargaining in labour law is less than perfect[44], there is some support for a duty to negotiate in good faith in an ordinary contractual setting[45].

43. European courts have, in certain instances, recognised an obligation on contracting parties to bargain in good faith[46].

G. WHAT CONSTITUTES FAIR AND REASONABLE CONDUCT OR CONDUCT IN GOOD FAITH IN THE CIRCUMSTANCES OF THIS CASE?

44. Should it be held that the common law is to be developed to recognise an *ex lege* term that the rental for the renewal period shall be reasonable, it

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44 ***Southernport Developmtents* at 208 F - G**.

45 ***Biloden Properties (Pty) Ltd v Wilson* 1946 NPD 736. At 739** HATHORN JP (in the Court of first instance) held that a clause granting a lessee a right of renewal *"upon terms to be arranged"* obliges the lessor to negotiate and prevents the lessor from refusing point-blank to let to the lessee. In an appeal to the Full Bench, BROOME J said the following of such a clause: *"... the true effect of [the] clause .... is that the due exercise by the lessee of the so-called option is nothing more than a notice to the lessor that he wishes to renew and desires to negotiate. The parties are then in the position of negotiators, but neither is obliged to agree to anything. It may be that some duty to act in good faith is cast upon the lessor, but the exact nature and extent of the duty, if it exists at all, are impossible to define" **(744)***. At ***751*** CARLISLE J held a reciprocal promise of good faith in an endeavour to reach a mutual agreement was implicit in the clause.

46 **See** the authorities cited in ***Southernport Developments*** *supra* ***p. 209 footnote 6***.

ought to follow that the parties were obliged to negotiate in good faith to attempt to agree reasonable rental. Where the parties fail to reach agreement, a Court will be in a position to determine a reasonable rental in the circumstances on the basis of such (expert and other) evidence as the parties may elect to place before it.

45. Should it be held that the parties are obliged to negotiate reasonably with regard to the rental, the Court will also be in a position to resolve any difference which may arise between the parties[47]. It is submitted that it would not be necessary to attempt to formulate a more precise criterion with which the parties' conduct is to comply. The Courts have over many years and in numerous scenarios demonstrated that they are well equipped to apply the criterion of reasonableness.

46. If it should be held that the parties are to negotiate in good faith, the appropriate criterion ought to be that the parties negotiate honestly and without ulterior motives. KOEN J held[48] that in the absence of a readily

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47 **See e.g.** the observation in ***NBS Boland Bank Ltd*** *supra* ***at 937 A - B*** that the exercise of a contractual discretion *arbitrio boni viri* is not unassailable (by the Court).

48 **p. 65 par [27]**.

ascertainable external standard being specified, it could never be judged whether a counter-offer (or negotiations) accorded with good faith or not. It is submitted that the Courts have also over many years developed techniques, especially relating to the drawing of inferences from circumstantial evidence, to ascertain the intent, knowledge and motives of litigants. Possible evidential problems ought not to stand in the way of recognising appropriate legal principles. In any event, the application of the onus can in doubtful cases be used to determine whether the applicable criterion has been met or not.

H. HAS THE CONDUCT OF THE RESPONDENT FALLEN BELOW THE REQUISITE STANDARD?

47. It is submitted that, whether the applicable standard be reasonableness or subjective good faith, the Respondent has failed to meet the standard. By adopting the stance that clause 3 did not constitute a legally binding or enforceable right of renewal and by informing the Applicant that it was unable to negotiate the extension of the lease agreement, the Respondent effectively ruled out any further engagement or negotiations between the parties.

I. THE TERMS OF AN APPROPRIATE ORDER TO FACILITATE NEGOTIATIONS IN COMPLIANCE WITH THE STANDARD REQUIRED

48. Depending on the standard which may be adopted the order could be either:

48.1 That EVERFRESH and SHOPRITE are ordered to negotiate in good faith with each other for a period of 3 months from the date of the order, with a view to attempting to agree on a reasonable rental for the renewal period; or

48.2 That EVERFRESH and SHOPRITE are ordered to act reasonably in conducting negotiations with each other for a period of 3 months from the date of the order, with a view to attempting to agree on the rental for the renewal period; or

48.3 That EVERFRESH and SHOPRITE are ordered to negotiate in good faith for a period of 3 months with effect from the date of the order, with a view to reaching agreement on the rental for the renewal period.

49. A different approach was adopted by WRIGHT J in the unreported case of ***Brink v The Premier of the Free State Province*** in the Free State High Court, Bloemfontein (case no. 3167/07), a copy of which is annexed hereto as Annexure "A". WRIGHT J[49] granted a detailed order to facilitate negotiations between the parties. It is respectfully to be doubted whether, on the common law as it stands, such an order was competent[50]. It is submitted that the order cannot be reconciled with the authorities referred to in paragraphs 16 and 17 above.

50. The whole of the order granted by WRIGHT J is quoted in the ***Brink*** case[51].

51. An order which is based on the order by WRIGHT J but which has been adapted to suit the facts of this is annexed hereto as Annexure "B" for the Court's consideration.

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49 Relying on the judgment of HATHORN JP in ***Biloden Properties*** (**see** footnote 45 above).

50 In the appeal, (*sub nom* ***Brink v Premier, Free State 2009(4) SA 420 (SCA) at 425 B***) it was observed that it was unnecessary to consider whether the order of WRIGHT J was a competent one in the absence of a counter-appeal

51 **At *par [9].***

J. COSTS

52. In view thereof that the litigation between the parties arose from a commercial dispute, it is submitted that it be appropriate for costs to follow the result[52].

DATED AT PRETORIA ON THIS 7th DAY OF MARCH 2011.

J P VORSTER S.C.
COUNSEL FOR APPLICANT

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52 **See *Twee Jonge Gezellen (Pty) Ltd v Land and Agricultural Development Bank of South Africa t/a The Landbank* Case CCT 68/10 [2011] ZA CC 2 at par [77]**.

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