

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

NOTE BY COUNSEL FOR THE APPLICANT

1. **Nature of the proceedings**

Application for leave to appeal.

2. **Issues that will be argued**

2.1 At common law no obligation is created by a provision in a lease that the rentals for the renewal period shall be agreed upon between the lessor and the lessee.

2.2 There is a constitutional obligation on this Court and other Courts to develop the common law in the following respects:

- (a) To recognise the validity of a lease at a reasonable rental;
- (b) 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.
- (c) In the alternative, to recognise that the requirement that a contractual discretion is to be exercised *arbitrio boni viri* ought to be extended to oblige contracting parties to negotiate reasonably where a clause grants both parties the discretion to negotiate.
- (d) Further alternatively, that common law ought to be developed in order to impose a duty to negotiate in good faith in appropriate circumstances.
- (e) The Respondent has not, on the facts acted reasonably or in good faith.

3. **Portions of the record that are necessary for the determination of the matter**

It is submitted that the whole of the record, save for pp. 98 - 102 is relevant. Pages 12 - 25 are also not directly relevant, save to the extent that clause 3 on p. 11 is to be interpreted in the context of the lease as a whole.

4. **Estimate of the duration of oral argument**

2 - 3 hours.

5. **Summary of the argument**

The case concerns a clause in a lease which give the lessee the right to renew the lease on the same terms and conditions, save that the rentals for the renewal period shall be agreed upon between the lessor and the lessee.

The Court *a quo* granted an eviction order in favour of the lessor on the basis that the clause imposed no obligation upon the lessor to negotiate with the lessee regarding rentals for the renewal period and on the basis that the lease had therefore terminated through effluxion of time.

At common law, no obligation is created by such a clause. The decision of the Court *a quo* in this regard cannot be faulted from a common law perspective.

However, the proposition that an option to renew a lease upon a rental to be agreed, is invalid and unenforceable, postulates that the option contains no implied criterion which is to be applied in order to give content to the matters to be agreed upon. In this regard it is submitted that it is appropriate to develop the common law, having regard to the provisions of Section 39(2) of the Constitution, in the following respects:

- (i) To recognise the validity of a lease at a reasonable rental; and
- (ii) 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. Reliance is placed in this regard on the requirement of the Constitution that its values are to be employed to secure a framework within which the ability to contract enhances, rather than diminishes, our self respect and dignity, as well as the concept of Ubuntu and the necessity to do simple justice between individuals.

The parties to the lease clearly inserted the clause in question with the serious intention of bestowing on themselves and each other enforceable rights and obligations. In applying constitutional values to the clause at hand, the point of departure of the Court ought to be to strike a balance, so that without violation of essential principles, the dealings of contracting parties may as far as possible be treated as effective, and the law may not incur the reproach of being a destroyer of bargains.

An alternative way of reaching a similar result would be to use to the concept of *arbitrium boni viri* as a point of departure. The common law approach that a contractual discretion granted to one contracting party has to be exercised *arbitrio boni viri* may be extended to recognise that where a clause grants both parties the discretion to negotiate, they are both obliged to negotiate reasonably.

The further alternative submission is that constitutional values at least require the development of the common law in order to impose a duty to

negotiate in good faith on the part of the parties.

Whether the applicable standard be reasonableness or subjective good faith, the Respondent has clearly failed to meet the standard, by adopting the stance that it was unable to negotiate the extension of the lease agreement.

An appropriate order in the circumstances could either be an open ended one requiring the parties to conduct 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 a more detailed order such as the one granted by WRIGHT J in the unreported case of **Brink v The Premier of the Free State Province** (case no. 3167/07 in the Free State High Court). An order based on this judgment is annexed to the heads of argument as Annexure "B".

6. **Authorities on which particular reliance will be placed**

Southernport Developments (Pty) Ltd v Transnet Ltd 2005(2) SA 202 (SCA)

Genac Properties JHB (Pty) Ltd v NBC Administrators CC 1992(1) SA 566 (A)

Brisley v Drotsky 2002(4) SA 1 (SCA)

Napier v Barkhuizen 2006(4) SA 1 (SCA)

Barkhuizen v Napier 2007(5) SA 323 (CC)

Soteriou v Recto Poyntons (Pty) Ltd 1985(2) SA 922 (A)

NBS Boland Bank Ltd v One Berg River Drive CC 1999(4) SA 928 (SCA).

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

**J P VORSTER S.C.
COUNSEL FOR APPLICANT**