

IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO:

In the matter between:

**EVERFRESH MARKET VIRGINIA (PTY) LIMITED**  
**[Previously known as WILD BREAK 166 (PTY) LTD]**

Applicant

and

**SHOPRITE CHECKERS (PTY) LIMITED**

Respondent

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**AFFIDAVIT**

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I, the undersigned, **LEONEL ALEXANDRE LUIZINHO**, do hereby make oath and state:

1.

I am a major male, a director of the applicant. I am duly authorised to represent applicant in deposing to this affidavit and confirm that the applicant has duly authorised its attorneys of record to bring this application.

2.

This is an application for leave to appeal against a decision which resulted in an eviction order being granted against the applicant.

3.

Underlying this order for eviction is a decision by the Court *a quo* that a contractual provision which was to govern the renewal of an existing lease, and which permitted parties to a lease to reach agreement as to the rentals which are to apply in the renewal period, placed no obligation on one of the parties to engage in negotiations aimed at arriving at an agreed rental for the renewal period and, consequently, giving effect to the agreement that the lease is subject to a renewal period.

4.

The applicant is of the view that the continued interpretation of such a clause as has been done in the Court *a quo* places no obligation on a party to an agreement to act positively in seeking to determine what the reasonable rental for the renewal period would be. In applicant's submission such decision deprives applicant of its right to equal protection and benefit of the law, as provided for in the Bills of Rights in that it leads to a failure to give

effect to what has been agreed to between the parties and what is to govern their contractual relationship.

5.

The background to this application is as hereinafter set out.

6.

The respondent is the owner of premises commonly known as the Virginia Shopping Centre. This is a medium size shopping centre situate in Durban. Respondent purchased the premises from H R Geeringh CC during 2008.

7.

The applicant and its predecessor in title have been in occupation of the premises from 1 April 1999 and conducts a fresh produce supermarket business from those premises.

8.

The original lease for the premises operated from 1 April 1999 to 31 March 2004. That lease agreement contained a provision to renew the lease for a further period of five years (less one day) at a rental to be agreed. The right

of renewal was exercised and a new lease was concluded with the applicant for the period 1 April 2004 to 31 March 2009.

9.

The new lease agreement contained a right to renew the lease agreement for a further period of four years and eleven months and stated in clause 3 the following:

*“6.1 CLAUSE 3*

*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 1<sup>st</sup> April 2009, such renewal to be upon the same terms and conditions as in this lease contained 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) calendar 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 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) calendar months prior to the date*

*of termination of this lease, then in either event this right of renewal shall be null and void.”*

10.

In the interim respondent became the owner of the premises and substituted H R Geeringh CC as lessor.

11.

It is common cause between the parties that the applicant addressed a letter to respondent on 14 July 2008 seeking to exercise the right to renew the lease. This letter was responded to by respondent on 3 September 2008, by letter, stating that respondent considered the right of renewal as contained in the lease agreement to be defective and applicant's letter of renewal (the letter of 14 July 2008) did not impose any contractual obligations on respondent to renew the lease agreement and/or have the effect of extending the lease agreement.

12.

There is no dispute between the parties as to the receipt of the various letters nor that applicant had faithfully and timeously fulfilled and performed all its obligations in terms of the lease, being the precondition for renewal.

13.

Respondent maintained the position that the lease was to terminate on 31 March 2009 and that applicant did not have a binding right of renewal.

14.

The renewal notice contained a proposal on behalf of applicant that a reasonable escalation would be in line with the escalation of the existing lease which was 10.5% per annum. The respondent did not dispute that the rental proposed by applicant was reasonable and made no counter proposal in regard thereto.

15.

The situation accordingly is one where respondent made no attempt to agree the rental, contended that it had no obligation so to do and accordingly that the renewal clause conferred no rights on applicant.

16.

I pause to mention at this junction that both applicant and respondent are involved in the fresh produce retail business. Applicant owns a number of stores in the KwaZulu-Natal area and applicant throughout the Republic of

South Africa and elsewhere in Africa. It should therefore not be a difficult matter between applicant and respondent to determine what a reasonable rental would be for premises such as those in question.

17.

Respondent then instituted proceedings under case number 6675/09 for the eviction of applicant from the premises, which were decided in favour of respondent.

18.

In those proceedings applicant maintained the stance that:

- (a) a reasonable rental is not difficult to determine;
- (b) respondent is simply frustrating applicant's right of renewal by refusing to participate in endeavours to agree the rental for the renewal period; and
- (c) the respondent is obliged to make at least a *bona fide* attempt to reach agreement with applicant in regard to the rental for the

renewal period and until such time as the mechanism provided for in clause 3 has failed no right of eviction accrues.

19.

A copy of the order granted in the KwaZulu-Natal High Court, Pietermaritzburg under case number 6675/09 is annexed hereto, marked “A” and the reasons of judgment underpinning that order as “B”.

20.

Applicant sought leave from the Court *a quo* to appeal the order, which leave was refused on 10 August 2010.

21.

Subsequent to that applicant instituted an application to the Supreme Court of Appeal of South Africa for leave to appeal the whole of the judgment in the Court *a quo*, which application was refused.

22.

Applicant contends that the position as evidenced in the judgment of the Court *a quo* which gives judicial approval to a party breaching a term of an agreement and in so doing frustrating what has been contractually agreed to

is contrary to the values enshrined in the Constitution, contrary to public policy and not correct.

23.

There are various considerations which lead to the position adopted by applicant. Those are hereinafter dealt with.

24.

The Courts should endeavour to give content and business efficacy to clauses appearing in agreements. By allowing respondent to frustrate the clause by merely not attempting to negotiate, the clause in question is deprived of business efficacy.

25.

It is accepted in our legal system that certain situations create an obligation to negotiate in good faith. The sphere of labour law is one where an obligation so to do has been imposed. Although not defined, such an obligation is imposed.

26.

The contentions of applicant are supported in the following matters:

- (a) In Biloden Properties (Pty) Ltd v Wilson, 1946 (NPD) 736 the following is stated at 739:

*“In my opinion it is clear that unless terms are arranged there is no renewal. This does not mean that the right of renewal is valueless. On the contrary it has great value, for it obliges the lessor to negotiate and it prevents him for refusing point blank to let to the lessee, and it also prevents him from letting to third person upon terms which the lessee is willing to accept.”*

In the same judgment at 744 the following is said:

*“The parties are then in the position of negotiators, but neither has obliged to agree anything. It may be that some duty to act in good faith is cast upon the lessor, but the exact nature and extent of that duty, if it exists at all, are impossible to define.”*

- (b) In Southern Port Developments (Pty) Ltd v Transnet Ltd, 2005 (2) SA 202 (SCA) the following is stated in paragraph 17:

*“In that sense, it is the very exercise of the right to contract which has bound the parties to the negotiation in good faith which they*

*promised. Thus, to enforce that undertaking is not to interfere in the parties' freedom to contract but to uphold it."*

27.

Applicant therefore contends that public policy requires that effect be given to the provision and that respondents should not be permitted to deprive the contract of legal efficacy by interpreting it in a manner which placed no duty to negotiate in good faith on respondent.

28.

It is therefore respectfully submitted that the application should be granted.

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**DEPONENT**

The terms and conditions of regulation R.1258, published in Government Gazette No. 3619 of the 21st July 1972, having been complied with, I hereby certify that the deponent has acknowledged that he/she knows and understands the contents of this affidavit, which was signed and sworn to before me at DURBAN this                      day of                      , 2010.

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**COMMISSIONER OF OATHS**