IN THE CONSTITUTIONAL COURT OF SOUTH AFRICA

CASE NO: CCT 105/10

In the matter between:

EVERFRESH MARKET VIRGINIA (PTY) LIMITED Applicant

and

SHOPRITE CHECKERS (PTY) LIMITED Respondent

RESPONDENT'S WRITTEN SUBMISSIONS

A M BREITENBACH SC

M W JANISCH

Respondent's Counsel

Chambers
Cape Town
24 March 2011

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INTRODUCTION

1. This is an application for leave to appeal to this Court against the judgment and order of the KwaZulu-Natal High Court *per* Koen J in case number 6675/09 dated 23 May 2010,[1] in which the court *a quo* ordered the eviction of the Applicant from commercial premises in a shopping centre owned by the Respondent and directed the Applicant to pay the costs of the application.

2. An application to the court *a quo* for leave to appeal was dismissed, as was a petition to the Supreme Court of Appeal.[2]

3. The Respondent submits that it would not be in the interests of justice for leave to appeal to this Court to be granted because the Applicant is raising constitutional points for the first time in this Court and because the intended appeal does not have reasonable prospects of success.

THE RELEVANT FACTS

4. The relevant facts are common cause. Most are set out in the judgment of the court *a quo.*[3] Briefly stated, they are as follows. For ease of reference in which follows the Applicant will be referred to as 'Everfresh' and the Respondent will referred to as 'Shoprite'.

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[1] Record pp. 52 to 68.

[2] Record p. 81 paras 20 and 21. The order of the SCA is at record p. 69.

[3] Paras [1] to [7], record pp. 52 to 55. Note however that the recordal in para [4] of the judgment of the court of *a quo* the last sentence of clause 3 of the lease is not entirely accurate.

5. On 15 July 2003 H R Geering CC and Everfresh (then known as Wild Break 166 (Pty) Ltd[4]) concluded a written agreement of lease[5] of premises known as Postal 25 Hinton Place within the Virginia Shopping Centre, Durban, for a period of five years starting on 1 April 2004 and ending on 31 March 2009. The lease provided for a basic rental of R55 088 per month, escalating at 10.5% per annum on each anniversary of the commencement date.

6. Clause 3 of the lease agreement reads as follows:

> '*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) 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 the notice being 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.*' (Emphasis added.)

[4] Record p. 37 para 2.

[5] Record pp. 10 to 25.

7. On 30 May 2008 Shoprite took transfer of the Virginia Shopping Centre from H R Geering CC, subject to all lease agreements in force including the one with Everfresh.[6]

8. On 14 July 2008, before the commencement on 30 September 2008 of the six-month period referred to in clause 3 of the lease agreement, Everfresh wrote to Shoprite as follows:[7]

> '*In terms of Clause 3 of the lease over "25 Hinton Place", dated 15 July 2003, we hereby exercise our option to renew the lease for a further period of 4 years and 11 months from 1 April 2009 to 28 February 2010.*
>
> *We propose that a reasonable escalation would be in line with the existing least at 10.5% pa.*
>
> *Accordingly we propose a commencing rental of R93,600 (Ninety three thousand, six hundred Rand) per month*'.

9. In a letter dated 3 September 2008 Shoprite responded to Everfresh's letter of 14 July 2008 as follows:[8]

> '*We refer to the above matter and your letter of 14 July 2008 purporting to exercise a right of renewal in terms of the lease agreement dated 15 July 2003.*
>
> *We wish to inform you that, according to our interpretation of the lease agreement and understanding of the law, clause 3 does not constitute a legally binding and enforceable right of renewal which*

[6] Founding affidavit in eviction proceedings, record p. 5 paras 3 to 5; see answering affidavit, record p. 37 paras 4 to 5(a).

[7] Record p. 26.

[8] Record pp. 27 to 28. As this letter was initially sent to Everfresh's *domicilium* address and returned undelivered, it was hand-delivered to Everfresh on 24 October 2008: see record p. 7 para 9.

is capable of being exercised by Wild Break 166 (Pty) Ltd. We are therefore of the opinion that your letter dated 14 July 2008 does not impose any contractual obligation to renew and/or have the effect of extending the lease agreement beyond the term referred to in clause 1 thereof. The lease agreement will accordingly terminate on 31 March 2009 by which date you are required to vacate the premises.

Apart from the fact that you are not legally entitled to renew the lease, we are in any event desirous to redevelop the Virginia Shopping Centre that will also impact on the lease premises. 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.

We trust that you will find the above in order and that you will arrange your affairs accordingly.'

10. A correspondence between the parties' attorneys ensued, which included the following:

10.1. On 30 October 2008 Everfresh's attorney requested Shoprite to explain why it held the view that clause 3 of the lease agreement did not constitute a legally valid and binding right of renewal capable of being exercised by Everfresh.[9]

[9] Record p. 29.

10.2. On 9 December 2008 Shoprite's attorney responded as follows:[10]

> '*Our client remains of the opinion that clause 3 of the agreement of lease does not constitute a legally binding and enforceable right of renewal. This contention is inter alia based on the fact that the aforementioned clause lacks all essential elements as required by law to be valid, especially that relating to rent specification. It is our client's view understanding that an "option" entitling a lessee to renew upon terms to be agreed upon will not result in a lease if exercised by the lessee.*'

10.3. On 22 December 2008 Everfresh's attorney replied, stating that Everfresh disagreed with Shoprite's interpretation of clause 3 and further asserted that it was incumbent on Shoprite to participate in attempts to agree the rental, that the rental Everfresh had proposed in its letter of 14 July 2008 was a reasonable rental and that by means of that letter Everfresh had exercised a valid right to renew the lease:[11]

> '… *[O]ur client is of the view that clause 3 of the agreement does constitute a legally binding and enforceable right of renewal, and that it is incumbent on your client to, at the very least, participate in attempts to agree a rental. Our client's view of the matter is that it is implicit in the agreement that the rental to be agreed upon must be a "reasonable rental", and for that reason our client has*

[10] Record p. 30 para 2.

[11] Record p. 45.

> *proposed the rental it did in its letter to your client, exercising its right of renewal.*
>
> *It would seem that your client has made absolutely no attempt whatsoever to participate in its contractual duty to agree rental and our client's rights in this regard are reserved. Our client's view is that it has exercised its option to renew the lease at a reasonable rental, as is set out in its letter dated the 14th of July 2008.*'

11. On 31 December 2008 and 1 January 2009 the three-month cut-off for agreement to be reached on the rental for the renewal period referred to in clause 3 of the lease agreement, came and went without the parties reaching any such agreement.

12. On 30 March 2009, the day before the expiry of the original lease, Everfresh's attorney wrote to Shoprite's attorney, reiterating Everfresh's view that it had exercised its option to renew the lease by means of its letter of 14 July 2008 and stating that Everfresh would therefore '*not vacate the premises and will pay to your client, in accordance with the provisions of the lease, the amount of R93 600,00 in respect of the first month of the renewal period.*'[12]

13. On 7 April 2009 Shoprite's attorney responded, saying since 1 April 2009 Everfresh had been occupying the property illegally, Shoprite would be instituting eviction proceedings against Everfresh and in the meantime Shoprite would accept the 'rental' of R93 600 and any other

[12] Record p. 33.

consideration Everfresh might pay, without prejudice and on account of damages suffered by Everfresh's unlawful holding over.[13]

14. On 5 August 2009 Shoprite instituted eviction proceedings against Everfresh,[14] on the basis that:[15]

> '*the lease expired on 31 March 2009, that there is currently no valid agreement between [Shoprite] and [Everfresh] and that [Everfresh] has no right to occupy. [Shoprite] is prejudiced by [Everfresh's] illegal occupation of the premises in that it cannot pursue the intended redevelopment of the property.*'

EVERFRESH'S CASE HAS CHANGED OVER TIME

15. Everfresh's case has changed over time as it has searched for a basis to remain in occupation of Shoprite's premises despite the absence of a valid lease. This has included the raising of constitutional points for the first time in this Court and resuscitating a point abandoned in the court *a quo* in its written submissions in this Court.

The eviction application: Everfresh's answering affidavit

16. Everfresh put up two main arguments in its affidavit in opposition to the eviction application in the court *a quo*:

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[13] Record p. 35.

[14] Record p. 1.

[15] Record p. 8 para 15.

16.1. Its '*main contention*'[16] was that it had '*validly renewed the lease for a further period of four years and eleven months at the rental set out in the notice of renewal and otherwise on the same terms and conditions as contained in the lease agreement dated 15 July 2003.*' In other words, Everfresh contended that it had already concluded a binding new lease at a rental of R93 600 per month escalating annually at 10.5%.

16.2. Its '*alternative contention*'[17] was that '*in terms of clause 3 of the lease agreement [Shoprite] is obliged to make a* bona fide *attempt to reach agreement with [Everfresh] with regard to the rentals for the renewal period, which have to be reasonable. [Everfresh] contends that [Shoprite] has no right to evict it from the premises until the mechanism provided for in clause 3 has failed. I submit that [Shoprite] cannot frustrate the mechanism provided for in clause 3 by refusing to participate therein and then seek to evict the [Everfresh] from the premises.*'

17. We point out that Everfresh's main defence was substantive (i.e. there was a new lease in place) while its alternative defence was dilatory (i.e. eviction is not competent until a *bona fide* effort has been made to agree a reasonable rental).

18. We submit that on a fair reading of Everfresh's affidavit, both defences were rooted in an interpretation of clause 3.

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[16] Record p. 43 para 18.

[17] Record pp. 44 to 45 para 19.

'*[Everfresh] has faithfully and timeously fulfilled and performed all its obligations in terms of the lease and contends that it has the right, in terms of clause 3 thereof, to renew the least for a further period of four years and eleven months.*'[18] (Emphasis added.)

and

'*[Everfresh] contends that clause 3 of the lease agreement contains a valid right of renewal, subject to the terms of that clause. [Everfresh] contends that in terms of clause 3 the parties were obliged to endeavour to agree the rentals for the renewal period in a bona fide manner and that the clause contemplated, at least impliedly, that a reasonable rental would be agreed upon.*'[19] (Emphasis added.)

19. There was no mention in Everfresh's affidavit of the Constitution, let alone of any need to develop the common law in terms of section 39(2) of the Constitution.

The eviction application: the hearing

20. As appears from the judgment of Koen J, at the hearing in the court *a quo* Everfresh abandoned its main defence. This appears from paragraph [8] of the judgment.[20] Koen J also said (correctly, we submit) that it was implicit in that concession that clause 3 does not imply that a

[18] Record pp. 39 to 40 para 8.

[19] Record p. 42 para 15.

[20] Record p. 55. Everfresh was held to have accepted that '*clause 3 does not contain an option which by its unilateral acceptance, would give rise to a binding and enforceable lease for the renewal period. That concession clearly is correct in law, as one of the essentialia for a valid lease, namely that the amount of the rental has to be specified, be fixed or be definitely ascertainable, has not been satisfied...*'

'*reasonable rental*' would be payable during the renewal period. This appears from paragraph [10] of the judgment.[21]

21. What was left in issue before the court *a quo* was therefore only the alternative defence, namely that clause 3 obliges Shoprite to negotiate in good faith on a renewal rental and it may not eject Everfresh until it has negotiated in good faith.[22]

The eviction application: judgment

22. Koen J rejected the alternative defence on two grounds:

22.1. First, he analysed clause 3 and concluded that the parties had not in fact agreed a positive duty to negotiate in the sense of exchanging offers and counter-offers, or in the sense that Shoprite had a duty to respond to Everfresh's proposed offer of rental.[23]

22.2. Second, he found that even if there was an agreed duty to negotiate in good faith, the obligation was too uncertain to enforce: there was no readily ascertainable objective standard according to which it could be assessed whether a party's

[21] Record p. 58. Koen J clearly understood that the only way in which there could notionally have been a binding lease at the rental proposed by Everfresh is if there was an enforceable term of the lease to the effect that, in the absence of agreement, the rental would be fixed at a reasonable amount. Hence Everfresh's abandonment of the argument that a new lease had been concluded had to include the concession that there was no right to a lease at a reasonable rental. We deal with this further below.

[22] Para [13] of the judgment.

[23] Record p. 63 paras [19] to [21].

conduct was in good faith or not.[24] Clause 3 was at best a promise (even if one to negotiate in good faith) '*which by its very nature, purpose and context is simply too vague and uncertain to be enforceable*'.[25]

Everfresh's applications for leave to appeal to the SCA

23. On 8 July 2010 Everfresh applied in the court *a quo* for leave to appeal to the SCA, alternatively a Full Bench of the KwaZulu-Natal High Court, against the decision of the court *a quo* and (such leave having been refused on 10 August 2010) on 31 August 2010 it made a similar application in the SCA (which refused the application on 4 November 2010[26]). As copies of these applications are not in the record, they are attached marked '**A**' and '**B**'. As appears therefrom those applications were made on essentially the same ground as the alternative defence Koen J had considered and rejected, i.e. an interpretation of clause 3. Once again, there was no mention of the Constitution, let alone of any need to develop the common law in terms of section 39(2) of the Constitution. In addition, in its application to the SCA, Everfresh made it clear that it was not its '*contention that clause 3 contains an option to renew which can be exercised unilaterally*'.[27]

[24] Record p. 64 para 22 and p. 65 paras [26] and [27].
[25] Record p. 66 para [29].
[26] Record p. 69.
[27] Annexure B, affidavit, p. 5 para 7(f).

Everfresh's application for leave to appeal to this Court

24. Everfresh's application for leave to appeal to this Court addressed only the issue of a duty to negotiate. It did not seek to resurrect the first (substantive) defence, i.e. that an enforceable new lease had been agreed upon. This is made clear by, amongst others, the first paragraph of its notice of motion: it is stated that Everfresh asks for leave to appeal '*against the decision by the Court a quo that a contractual provision permitting parties to a lease to reach agreement as to the rentals for a renewal period places no obligation on a party thereto to engage in negotiations aimed at arriving at such agreement regarding rentals*'.[28]

25. In regard to the alleged duty to negotiate, Everfresh made two main points.

25.1. First, Everfresh attacked the court *a quo*'s interpretation of clause 3, i.e. that the parties had not agreed to negotiate: it stated 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 period would be. In Everfresh's submission such decision deprives Everfresh of its right to equal protection and benefit of the law, as provided for in the Bill of Rights in that it leads to a failure to give effect to what*

[28] Record pp. 70 to 71 para (a). See also record p. 75 para 3 (founding affidavit).

has been agreed to between the parties and what is to govern their contractual relationship.'[29]

25.2. Second, Everfresh argued 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.'*[30] We point out this presupposes that the parties did agree to negotiate, but that the resulting duty to negotiate is not legally enforceable.

26. Nowhere in the founding papers is it suggested that an implied (*ex lege)* term of any kind needs to be imported into the contract.

27. The only reference to a constitutional right is the contention that the finding of the court *a quo* that there was no duty to negotiate deprives Everfresh of its right to '*equal protection or benefit of the law under the Bill of Rights*', and the only reference to constitutional values is the contention the finding of the court *a quo* that even if there was a duty to negotiate it would not be legally enforceable, is '*contrary to the values enshrined in the Constitution*'.

[29] Record pp. 75 to 76 para 4 (emphasis added). See also record p. 84 para 27: '*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*'. (Emphasis added.)

[30] Record pp. 81 to 82 para 22 (emphasis added). See also record p. 82 para 24.

Everfresh's written submissions in this Court

28. Everfresh's written submissions depart from the application for leave to appeal in a number of respects.

29. First, Everfresh appears to have abandoned the central contention that clause 3 should have been interpreted to the effect that the parties actually agreed a duty to negotiate in good faith. It makes no further arguments based on the interpretation of the contract and is generally uncritical of the reasoning in the judgment of Koen J. It appears to have accepted that the court *a quo* was correct in finding that the parties did not in fact agree upon a duty to negotiate. (In other words, Everfresh's current approach is that any duty to negotiate as between the present parties – whether enforceable or not – cannot be sourced in their actual consensus, but must come from outside it.)

30. Second, Everfresh's main case is now that the common law needs to be developed in terms of section 39(2) of the Constitution so as:

    30.1. to recognise the validity of a '*lease at a reasonable rental*'; and

    30.2. to recognise that a clause such as the one under consideration contains an implied (*ex lege*) term to the effect that the rental is to be reasonable.[31]

[31] Applicant's submissions paras 18 and 25.

31. This argument appears to be an attempt to resuscitate, through a 'development' of the common law under section 39(2) of the Constitution, what was abandoned in the court *a quo* and not even mentioned in the applications for leave to appeal to the SCA or this Court, namely that there is a contract for a lease at a '*reasonable rental*' that can be enforced in its own terms by the court.

32. Everfresh goes on to say that if the common law were to be developed in this manner, it would '*follow*' that the parties were under a duty to negotiate in good faith with a view to arriving at a reasonable rental.[32]

33. Third, Everfresh makes two new alternative submissions:

    33.1. The first alternative, not presaged in either the court *a quo* or the applications for leave to appeal, is based on the contention that a contractual discretion granted to one contracting party has to be exercised *arbitrio boni viri*. It is argued that this may be extended to recognise that where a clause grants both parties the '*discretion to negotiate*', they are both obliged to negotiate reasonably.[33]

    33.2. The second alternative, also not raised in the court *a quo*, 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 parties.[34]

[32] Applicant's submissions paras 18, 44 and 36.

[33] Applicant's submissions paras 37 and 38.

[34] Applicant's submissions paras 39 to 43.

34. Fourth, Everfresh has now abandoned reliance on the right to equal protection and benefit of the law (the only right in the Bill of Rights mentioned in the application for leave to appeal). Its current approach appears to be rooted in the right to human dignity. It contends that the Constitution's values must be employed to '*secure a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity*' and that the development of the common law to recognize contracts that would '*according to conventional dogma*' be void 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 human dignity.[35]

CONSTITUTIONAL POINTS ARGUED FOR THE FIRST TIME IN THIS COURT

35. We submit that this Court ought to decline to entertain the appeal on the basis that the constitutional points now argued were not raised in the court *a quo* or in the application in the SCA for leave to appeal to the SCA.

36. In *Phillips v National Director of Public Prosecutions* this Court said that while there could be circumstances where the interests of justice require that a constitutional complaint be raised for the first time before this Court, they would be rare and would have to be exceptional.[36]

[35] Applicant's submissions paras 28 and 33.

[36] *Phillips v National Director of Public Prosecutions* 2006 (1) SA 505 (CC) para [44].

However, this Court has said it will be particularly disinclined to allow this in cases involving the development of the common law.

37. In *Carmichele*[37] this Court emphasized the importance of judgments on constitutional issues by the High Courts and the SCA, particularly when the issue is developing the common law under section 39(2). Ackermann and Goldstone JJ stated:[38]

> '*The proper development of the common law under s 39(2) requires close and sensitive interaction between, on the one hand, the High Courts and the Supreme Court of Appeal which have particular expertise and experience in this area of the law and, on the other hand, this Court. Not only must the common law be developed in a way which meets the s 39(2) objectives, but it must be done in a way most appropriate for the development of the common law within its own paradigm.*'

38. The approach was expressed thus in *Lane and Fey*:[39]

> '*Where the development of the common law is the issue, the views and approach of the ordinary courts, and particularly the SCA, are of particular significance and value. Save in special circumstances, this Court should not consider this kind of matter as a Court of first instance. No relevant factors have been raised by the applicants that would constitute such special circumstances*.'[40]

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[37] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* 2001 (4) SA 938 (CC) at paras [50] to [55].

[38] 2001 (4) SA 938 (CC) at para [55].

[39] *Lane and Fey NNO v Dabelstein and Others* 2001 (2) SA 1187 (CC) at para [5].

[40] See also *S v Bierman* 2002(5) SA 243 (CC) at para [25]; *Swartbooi and Others v Brink and Another (1)* 2003 (5) BCLR 497 (CC) at para [5].

39. In *Dabelstein* this Court also mentioned the undesirability of its entertaining matters with wide-ranging commercial implications unless and until they have been thoroughly canvassed in the courts that are more directly concerned with such matters, and expressed the view that it is undesirable – and may well work injustice on the other side – to allow a fundamental change of front at this late stage of proceedings.[41]

40. What is more, the introduction of implied (*ex lege*) terms into contracts (which terms will apply to all such contracts in future, not just those in the instant case) is self-evidently a matter of considerable complexity and has wide-ranging commercial implications. As stated by the SCA in *York Timbers*:[42]

> '*Our courts' approach in deciding whether a particular term should be implied provides an illustration of the creative and informative function performed by abstract values such as good faith and fairness in our law of contract. Indeed, our courts have recognised explicitly that their powers of complementing or restricting the obligations of parties to a contract by implying terms should be exercised in accordance with the requirements of justice, reasonableness, fairness and good faith (see, eg, Tuckers Land and Development Corporation (Pty) Ltd v Hovis 1980 (1) SA 645 (A) at 651C - 652G; A Becker & Co (Pty) Ltd v Becker and Others 1981 (3) SA 406 (A) at 417F - 420A; Ex Parte Sapan Trading (Pty) Ltd 1995 (1) SA 218 (W) at 226I - 227G). Once an implied term has been recognised, however, it is incorporated into all contracts, if it is of general application, or into contracts of a*

[41] *Lane and Fey NNO v Dabelstein* (*supra*) para [6].

[42] *South African Forestry Co Ltd v York Timbers Ltd* 2005 (3) SA 323 (SCA) at 339F-J.

specific class, unless it is specifically excluded by the parties (see, eg, Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration 1974 (3) SA 506 (A) at 531D - H). It follows, in my view, that a term cannot be implied merely because it is reasonable or to promote fairness and justice between the parties in a particular case. It can be implied only if it is considered to be good law in general. The particular parties and set of facts can serve only as catalysts in the process of legal development.' (Emphasis added.)

41. Everfresh is therefore asking this Court to make significant changes to the common law of contract while it is effectively sitting as a court of first and final instance and without the benefit of consideration having been given to these aspects by any lower court. It is doing so in circumstances where the parties had no opportunity to lead evidence or present argument pertaining to the constitutional issues in the High Court.

42. As was the case in *Fey and Lane NNO v Dabelstein* (*supra*), Everfresh has furnished no special circumstances why this Court should not follow its usual course of refusing to entertain the matters raised for the first time before it. That, we submit, should be dispositive of the matter.

NO REASONABLE PROSPECTS OF SUCCESS

The common law

43. If this Court is nonetheless prepared to entertain the application for leave to appeal on its merits, we make the following submissions.

44. Everfresh accepts that from the perspective of the common law, Koen J's judgment is unassailable.[43] As stated, it recognises that for it to succeed in this Court, the common law would have to be developed in one or more of the ways set out in the written submissions.

45. This means *inter alia* that Koen J's finding (based on ordinary contractual interpretation) that the parties did not in fact agree a duty to negotiate with one another is not challenged.[44] Any duty to negotiate must therefore be imposed '*from outside*' (i.e. it is not sourced in the parties' *consensus*).

46. At issue here is a clause in a lease which records that the parties may agree a rental for a new lease, but which does not compel them to negotiate with one another to achieve this. Clause 3 is therefore merely an '*agreement to agree*' without an associated '*agreement to negotiate*'.

47. At common law, both types of agreement are typically regarded as too vague to enforce. The reasons are as follows:

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[43] Applicant's submissions paras 16 and 17.

[44] Even if it were to be argued that the contract should be otherwise interpreted, this would not involve the development of the common law, would not raise a constitutional issue, and so could not be entertained by this Court (section 167(2)(b) of the Constitution).

47.1. An '*agreement to agree*' in the above sense is an incomplete agreement. The material terms must be fixed or determinable from the parties' agreement, and absent that the courts will not make a contract for the parties by imposing such a term.[45] Contractual autonomy remains at the heart of the law of contract, and in deference to this, the courts '*profess themselves unwilling and incapable of relieving the parties of the burden of determining the consequences of the transaction for themselves*'.[46] If (for example, by not agreeing on a material term) the parties fail to regulate their relationship with sufficient certainty to render their obligations practically enforceable, the courts will not rescue them.

47.2. An agreement to negotiate likewise lacks enforceable certainty because of the '*absolute discretion vested in the parties to agree or disagree*'.[47] This is also the accepted rationale in England. In *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd*[48] Lord Denning said: '*If the law does not recognize a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me it cannot*

[45] *Aris Enterprises (Finance) (Pty) Ltd v Waterberg Koelkamers (Pty) Ltd* 1977 (2) SA 425 (A) at 434E-F. Cf. *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A) at 776B-D. In *Walford and others v Miles and another* [1992] 1 All ER 453 (HL) at 460g-h the House of Lords stated that an agreement to agree is unenforceable because it is too uncertain to have any binding force. The position is the same in Australia: in *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* [1982] HCA 53; (1982) CLR 600 (22 September 1982) the majority held (at para [7]): *'It is established by authority, both ancient and modern, that the courts will not lend their aid to the enforcement of an incomplete agreement, being no more than an agreement of the parties to agree at some time in the future. Consequently, if the lease provided for a renewal at a 'rental to be agreed' there would clearly be no enforceable agreement.'*

[46] Van der Merwe *et al* Contract: General Principles (2nd edition) p. 204.

[47] *Premier, Free State and Others v Firechem Free State (Pty) Limited* 2000 (4) SA 413 (SCA) at 431H.

[48] *Courtney and Fairbairn Ltd v Tolaini Brothers (Hotels) Ltd and another* [1975] 1 ALL ER 716 (CA) at 720c-e.

> *recognise a contract to negotiate. The reason is because it is too uncertain to have binding force… It seems to me that a contract to negotiate, like a contract to enter into a contract, is not a contract known to the law… I think we must apply the general principle that when there is a fundamental matter left undecided and to be the subject of negotiation, there is no contract.'.*[49]

48. The above having been said, courts applying the common law generally adopt a liberal approach which attempts to save from invalidity terms seriously entered into.[50] Such efforts have been made in the context of agreements to agree or negotiate. In *Southernport*[51] Ponnan JA held that the principles enunciated in the Australian case *Coal Cliff*[52] accord with our law.

49. In *Coal Cliff*, Kirby P (for the majority) stated that he did not share the view that no promise to negotiate in good faith would ever be enforced by a court. Although the agreement before him was held not to be binding because, in the context of the overall arrangement, it was too vague and uncertain to be enforceable, the judge expressed the view that the enforceability of a promise to negotiate will depend on the precise terms as construed from the particular contract.[53] Examples of where a promise to negotiate may be enforceable would be (1) where a third

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[49] See also the South African cases referred to by Koen J at record pp. 56-58 para [9].

[50] These usually involve the admission of extrinsic evidence where the unspecified details of the contract are questions of fact: see *Levenstein v Levenstein* 1955 (3) SA 615 (SR) at 619 and the discussion of Quénet J's '*fourth class*' of void for vagueness cases in Christie The Law of Contract in South Africa (5th edition) pp. 96-98.

[51] *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) at 211A-B.

[52] *Coal Cliff Collieries (Pty) Ltd and Another v Sijehama (Pty) Ltd and Another* (1991) 24 NSWLR 1.

[53] At 26E-F.

party has been given the power to settle ambiguities and uncertainties[54] and (2) in a small number of cases, where '*by reference to a readily ascertainable external standard the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory*'.[55] However, (3) '*[i]n many cases, the promise to negotiate in good faith will occur in the context of an "arrangement" (to use a neutral term) which, by its nature, purpose, context, other provisions or otherwise, makes it clear that 'the promise is too illusory or too vague and uncertain to be enforceable'…*'[56]

50. Ponnan JA referred to South African cases where (1) and (3) were applied:

50.1. As to *Coal Cliff* category (1), *Letaba Sawmills*[57] was cited as a case where the agreement was saved from voidness by a mechanism allowing a third party to establish outstanding issues if there was disagreement (a tie-breaker provision). This was also the basis for the decision in *Southernport*: '*what elevates this agreement to a legally enforceable one and distinguishes it from an agreement to agree is the dispute resolution mechanism to which the parties have bound themselves. The express undertaking to negotiate in good faith in this case is not an isolated edifice. It is linked to a provision*

[54] At 26G, although Kirby P went on to say that even in such cases, the court may regard the failure to reach agreement on a particular term as such that the agreement should be classed as illusory or unacceptably uncertain.

[55] At 27A.

[56] At 27B. This will usually be the case where the parties have not provided for any criteria on the basis of which a third party can adjudicate or assess the matter in the event of a dispute.

[57] *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1993 (1) SA 768 (A).

that the parties, in the event of their failing to reach agreement, will refer such dispute to an arbitrator whose decision will be final and binding. The final and binding nature of the arbitrator's decision renders certain and enforceable, what would otherwise have been an unenforceable preliminary agreement.'[58]

50.2. As to *Coal Cliff* category (3), Ponnan JA cited *Firechem*,[59] where the agreement to negotiate was not supported by a tie-breaking provision and where the parties retained their discretion to agree or disagree. That provision was unenforceable.[60]

51. Although Ponnan JA gave no example of the application in South Africa of *Coal Cliff* category (2), Christie[61] suggests that this category is covered by those cases where external evidence of facts can be used to give certainty to otherwise vague clauses. In this regard Christie refers to the cases he discusses elsewhere where the unspecified details of a contract were held to be matters of fact capable of determination by evidence.[62] We submit, however, that this category is confined to the evidence of an identificatory nature referred to by Hoexter JA in his discussion in *Delmas Milling* of the first broad class of evidence usable to interpret a contract.[63]

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[58] 2005 (2) SA 202 (SCA) at 211E-G. See also *Schwartz NO v Pike and Others* 2008 (3) SA 431 (SCA) at para [17].

[59] *Premier, Free State v Firechem Free State (Pty) Limited* 2000 (4) SA 413 (SCA).

[60] 2005 (2) SA 202 (SCA) at 208B-D and 211A.

[61] Christie The Law of Contract in South Africa (5th edition) p. 38.

[62] Christie *op cit* pp. 96 to 98.

[63] *Delmas Milling Co Ltd v Du Plessis* 1955 (3) SA 447 (A) at 545F-G.

52. In summary, it is submitted that the common law's response to '*agreements to agree*' and '*agreements to negotiate*' is well-developed. It seeks to establish a balance between (on the one hand) giving effect to such agreements where this is practicable and by reference to established principles of interpretation, and (on the other) deferring to the fundamental principle of party autonomy by not making contracts for parties who fail to delineate their obligations with sufficient clarity. Thus, although in the majority of cases (as recognised in *Coal Cliff* and *Southernport* (*supra*)) agreements to agree or negotiate will be too vague to enforce, there are exceptions which are based in the parties' own conduct and contractual freedom (e.g. by agreeing a tie-breaking or dispute-resolution method by which certainty can be imported, or by agreeing criteria for performance that are objectively ascertainable).

53. Returning to the present case, Everfresh plainly accepts that on established common law principles, clause 3 is not enforceable. We submit that this is correct: as a pure '*agreement to agree*' on rental it omits to establish an essential term of a lease. Furthermore, as Koen J found, there is no agreement to negotiate in clause 3 (which should put paid to any further consideration of that aspect), but even if there were such an agreement, the clause would not be enforceable because it lacks objective criteria against which the duty to negotiate may be tested (hence it would fall into the third *Coal Cliff* category).

Everfresh's main argument

54. Against this common law backdrop, we consider Everfresh's main argument which seeks to overcome the following material difficulties:

54.1. that clause 3 by itself contains no duty to negotiate; and

54.2. that even if such a duty had been agreed, clause 3 contains no objective criteria that could give content and enforceability to the duty to negotiate.

55. Everfresh's argument in this regard is complex and, with respect, vague, circuitous and beset with logical difficulties. We analyse it below to demonstrate its material failings.

Lease at a reasonable rental

56. The argument proceeds in two main steps. The first of these is set out in paragraphs 22 to 35 and 44 of Everfresh's submissions, and envisages two developments of the common law: the recognition of the validity of a '*lease at a reasonable rental*', and the recognition 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*'.[64] The precise form of the implied term is however not set out in the submissions.

[64] Applicant's submissions para 25.

57. What Everfresh has in mind is a contract of lease that provides that the rental will be '*reasonable*'. The suggestion is that this would be sufficiently clear to enforce: if the parties dispute what a reasonable rental is, the court can be approached to decide the point. Thus Everfresh argues that under such a clause, 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*'.[65] Everfresh therefore proposes a term which it would view as similar in effect to the '*tie-breaker*' mechanism recognised in *Southernport* (*supra*). Such a term would stand apart from any agreed process of negotiation, because the failure to reach agreement would be immaterial: the court could always be called upon to give content to the agreement and save it from vagueness.

58. A term of that type (if enforceable, a matter to be addressed below) is therefore of a far-reaching nature. It would remove the possibility that no lease may result because of a failure to reach agreement on rental. There will always be a lease, either because the parties themselves agree on the rental or because the court decides it on the basis of evidence presented to it.

59. Whether an agreement on a lease at a '*reasonable rental*' would be enforceable *per se* is, we accept, open to debate (see the authorities discussed in paragraph 24 of Everfresh's submissions). It is, however, unnecessary to decide that point in the present case for the reasons which follow.

[65] Applicant's submissions para 44.

60. Not only do courts not lightly import implied terms *ex lege* – as explained, they have to be satisfied that the importation amounts to good law for all contracts of that type, not merely the one before the court – but there is no room to import an implied term where, as here, this would be contrary to the express terms of the contract between the parties.[66]

61. In this regard we rely on *H Merks & Co*, where the SCA said:[67]

> '*On behalf of Merks an alternative argument (not foreshadowed in the pleadings and not raised in the Court below) was relied on. It was that, either on a proper interpretation of the agreement or on the basis of an implied term, the increase had to be a reasonable one; there was accordingly an objective yardstick by which it could be measured; in this way the price for the years following 1989 was ascertainable and the agreement was enforceable. Even assuming that a sale at a reasonable price is valid (as to which see Genac Properties Jhb (Pty) Ltd v NBC Administrators CC (previously NBC Administrators (Pty) Ltd) 1992 (1) SA 566 (A) at 577G-578D), I am unable to agree with the argument. The express terms of clause 4 negate it. That clause defines the method by which price adjustments are to be determined, namely by the parties agreeing thereto. Where in a given case that fails, a Court will not usually substitute its own machinery in the form of a reasonable price. This is what was said in Sudbrook Trading*

[66] *Group Five Building Ltd v Minister of Community Development* 1993 (3) SA 629 (A) at 653F-G; *A Becker & Co (Pty) Ltd v Becker and Others* 1981 (3) SA 406 (A) at 419F-H, describing a *naturalium* as a term of a contract '*wat vanaf regsweë geld tensy die werking daarvan uitgesluit is deur ooreenkoms (hetsy uitdruklik of stilswyend) van die partye*.'

[67] *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another* 1996 (2) SA 225 (A) at 235B-E.

Estate Ltd v Eggleton and Others [1981] 3 All ER 105 (CA), especially at 114f-116d. According to Templeton LJ, the principle stems from 'one central proposition, that where the agreement on the face of it is incomplete until something else has been done . . . by further agreement between the parties . . . the Court is powerless, because there is no complete agreement to enforce'.'

62. Clause 3 provides that unless agreement is reached three months before termination of the lease, the right of renewal is null and void. Hence the parties expressly provided that even if they negotiated, and if they then failed to reach agreement within three months, there would be no right of renewal. They thereby expressly excluded the possibility that a third party or a court could impose a lease on them at a rental that they had not actually agreed (which would be the effect of the proposed term).

63. It follows that even if there were grounds to import an implied term of a '*reasonable rental*', no such term could be imported into this particular lease because it would be inconsistent with the express terms. That should be the end of Everfresh's main argument.

64. We nonetheless turn to consider whether Everfresh has made a case for the constitutional development of the common law by importing its suggested implied term in every purported agreement of lease which contains an '*agreement to agree*' on the essential term of the rental.

65. After contending (as is uncontroversial) that the values of the Constitution have had an impact on the law of contract through the

doctrinal gateway of public policy, and after mentioning the concept of Ubuntu, Everfresh makes the following point:[68]

> '*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. This assumption would apply equally to other parties concluding agreements of lease at a reasonable rental. There are certainly no 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.*'

66. The submission comes down to this: because the parties intended to create a binding obligation in clause 3, constitutional values demand that a binding agreement for a lease at a reasonable rental should be recognised; and further that where parties have agreed a lease at a reasonable rental, the same values demand that it should be enforceable. The argument thus conflates the issues of importing an implied term where the parties did not agree it, and of enforcing that term where they did agree it.[69]

67. Everfresh goes on to contend (in paragraph 35) that a policy reason in favour of importing such an implied term *ex lege* is that the courts are reluctant to hold void for uncertainty a provision intended to have legal effect. As stated above, that is indeed the courts' approach under the common law. However, it manifests itself in contractual interpretation and the determination (by reference to extrinsic evidence) of details not

[68] Applicant's submissions para 32.

[69] Everfresh and Respondent clearly do not fall into the latter category.

specified by parties, rather than by the importation of implied terms. The *Soteriou*[70] case relied upon by Everfresh for this proposition has nothing to do with *ex lege* terms, but involved the interpretation of a contractual term.[71]

68. As shown above, the refusal of the courts to give effect to vague or incomplete contacts is indeed based on valid public policy considerations fundamental to the law of contract: the need to give effect to contractual freedom and autonomy and the concomitant idea that the courts do not make contracts for parties. It is therefore quite wrong to say, as a general proposition, that there are no policy considerations in favour of a refusal to enforce an agreement that lacks the necessary certainty.

69. It is submitted that there is very little scope (if any) for constitutional values to influence the law regarding contracts that are void for vagueness. As Everfresh acknowledges, the main influence that the Constitution has had on the law of contract has been in striking down or declining to enforce contracts concluded *animo contrahendi* that are held, by reference to constitutional values, to be contrary to public policy. There is no reported case in which constitutional values have been invoked to do the opposite, namely to breathe life into a contract which is otherwise void for vagueness.

[70] *Soteriou v Retco Poyntons (Pty) Limited* 1985 (2) SA 922 (A).

[71] It was held that if the clause in question was intended to be an option, it would be invalid because there was no agreement as to rentals. But it was also capable of being interpreted as a right of first refusal which was not subject to the same difficulties of enforceability, and the court interpreted it as such (at 931F-932A).

70. The invocation of Ubuntu and dignity are also out of place in this context. Contracts that are too vague to enforce are the product of a failure by both parties to record their obligations adequately. This has nothing to do with unequal bargaining power or the inherent dignity of parties (in any event, there is no evidence in this case that one party imposed the lease terms on the other). Simple justice between contracting parties cannot extend to saving them when they have both failed to meet the minimum standard imposed by the courts to give effect to a bargain. The fact that one party may regard the other as having evaded its responsibilities by not complying with what it considers to have been required by a vague and hence unenforceable contract, is therefore of no relevance: the invalidity of the agreement affects them equally.[72]

71. Indeed, the common law on '*agreements to agree*' and '*agreements to negotiate*' is itself rooted in constitutional values. As stated, at the heart of the common law approach is respect for individual autonomy, i.e. the idea that the courts do not make contracts for parties. In *Brisley*[73] Cameron JA (as he then was) emphasized that contractual autonomy is part of freedom and that it also informs the constitutional value of dignity. Hence the constitutional values of dignity, equality and freedom require the courts to approach their task of striking down or declining to enforce contracts with perceptive restraint. In *Afrox Health Care*[74] Brand JA referred with approval to Cameron AJ's characterization in *Brisley* of the constitutional values which are given

[72] For example, Shoprite may just as well (and with similar lack of success) have complained about Everfresh's conduct if Everfresh had eventually decided not to agree a rental and Shoprite had no other prospective tenants to turn to.

[73] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at paras [94] to [95].

[74] *Afrox Healthcare Bpk v Strydom* 2002 (6) SA 21 (SCA) at paras [22] and [23].

effect to by contractual autonomy, and referred to freedom of contract as a constitutional value.

72. In the SCA judgment in *Barkhuizen*[75] Cameron JA reiterated the above principles in *Brisley* and stated that the fact that a term is unfair or may operate harshly does not by itself mean that it offends against constitutional principles. By the same token, we submit that the fact that a contractual term is rendered unenforceable for vagueness, and that this may impact negatively on one or both of the parties, does not mean that a constitutional principle has been infringed.

73. On further appeal in *Barkhuizen*[76] this Court specifically held that '*[s]elf-autonomy, or the ability to regulate one's own affairs, even to one's own detriment, is the very essence of freedom and a vital part of dignity*'.[77] It also endorsed the approach of the SCA that courts employ the Constitution and its values to achieve a balance that strikes down the unacceptable excesses of freedom of contract while seeking to permit individuals the dignity and autonomy of regulating their own lives.[78]

74. We submit that Everfresh has not established any constitutionally-based public policy consideration in support of the introduction, *ex lege*, in purported rental agreements that do not specify any rental, of a term that the rental is a reasonable rental. It has only said that the parties intended their vague contract to be valid. That is a matter to which courts applying the common law are always alive; it is not a true constitutional

[75] *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at para [12].
[76] *Barkhuizen v Napier* 2007 (5) SA 323 (CC).
[77] At para [57].
[78] At para [70].

consideration necessitating a change to the already sophisticated common law approach towards such contracts.

75. We further submit that the forced introduction of such a term into an '*agreement to agree*' would infringe the values of freedom of contract and party autonomy. The most that can be said of the parties' intentions under an agreement to agree is that they envisaged the possibility of reaching a new agreement, but were not bound to agree. To hold that such persons are automatically bound to an agreement at a reasonable price or rental even if they fail to reach agreement would be a radical step: this term would not only deprive the parties of the right not to agree, but would also place the power to fix the price or rental in the hands of a third party (the court). There is no justification for such a radical departure from autonomy.

76. For the reason given in paragraphs 60 to 63 above, however, it is unnecessary to decide whether such a term should be imported *ex lege* into the present contract: the parties decided that a failure to reach agreement would be the end of the matter, and did not envisage terms being imposed on them from without.

Duty to negotiate in good faith towards a reasonable rental

77. The second step of the main argument comes as something of a surprise. Having argued for the inclusion and enforcement of a term that would give rise, in the absence of agreement, to a binding lease at a reasonable rental, Everfresh at the last moment takes a substantial step backwards

by stating in paragraph 36 of its submissions that it would '*follow*' that the parties were '*under a duty to negotiate in good faith with a view to arriving at a reasonable rental*'. In paragraph 44 of its submissions Everfresh is more tentative, saying that '*ought to follow*'.

78. There is no logic in requiring, in all cases where a lease stipulates a reasonable rental (whether by consensus or through a term implied *ex lege*), that the parties negotiate in good faith towards a reasonable rental. The two are irreconcilable. If there is an enforceable lease at a reasonable rental, the rental will be a reasonable rental not what the parties have agreed is a reasonable rental. It is irrelevant to the quantum of the rental whether or not the parties have negotiated in good faith in an attempt to agree on the rental. Hence we submit that it is not an automatic or logical consequence of a term that there will be a reasonable rental that the parties are then obliged to negotiate towards a reasonable rental. There would have to be some other basis to import such an obligation (presumably another implied term, or a tacit term). Everfresh has however not addressed this issue.

79. Even if an obligation to negotiate towards a reasonable rental were found to exist, the further difficulty of enforcement would have to be addressed. On the approach in *Coal Cliff* as endorsed in *Southernport*, certainty is the touchstone for this. Principles must be found against which the court can assess and decide whether the parties negotiated reasonably. We submit that Everfresh's proposed '*negotiation in good faith*' to attempt to agree a '*reasonable rental*' does not provide the necessary certainty.

80. In this regard, in *Walford v Miles* it was stated that a duty to negotiate in good faith is inherently inconsistent with the position of a negotiating party to advance his own interests:[79]

> '*How can a court be expected to decide whether, subjectively, a proper reason existed for the termination of negotiations? The answer suggested depends upon whether the negotiations have been determined 'in good faith'. However, the concept of a duty to carry on negotiations in good faith is inherently repugnant to the adversarial position of the parties when involved in negotiations.*'

81. Likewise, what is '*reasonable*' differs depending on each party's perspective. The present case provides a good example of this. Here Everfresh's only interest is remaining in the premises to continue operating its supermarket business as before. A reasonable rental to it will therefore be determined by reference to its own business. On the other hand, Shoprite's interest as a landlord is in making a suitable return on its property. As it has said from the outset, it intends to redevelop the premises,[80] either with a view to earning enhanced rentals or to utilising all the space itself. If it were to be precluded from doing so to allow Everfresh to remain in the premises for a further four years and eleven months, the rental that it would regard as reasonable is that which would compensate it for the inability to earn enhanced rental in the lease period. Koen J expressly recognised this.[81] Because of the parties' fundamentally different perspectives and business imperatives,

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[79] *Walford and others v Miles and another* [1992] 1 All ER 453 (HL) at 460g-j.

[80] Record p. 27 (last para); p. 31 para 3.

[81] Record p. 65 to 66 para [28].

it cannot be said that either would be unreasonable in refusing to accept the other party's rental demands.[82]

82. In this context too, however, sight should not be lost of the fact that the '*reasonable rental*' term is not in fact to be found in the actual agreement of the instant parties. To say that the parties' negotiating conduct can be objectively assessed by reference to a '*reasonable rental*' presupposes that both parties are, by agreement, committed to negotiating towards a rental that a third party, not holding the sectarian interests of either party, would regard as reasonable. That is far removed from the normal situation (which we submit is the case here) where one is entitled to pursue the best bargain that one's negotiating position allows, retaining the ultimate freedom rather not to contract at all if acceptable terms cannot be agreed.

83. Everfresh does not deal with the above difficulty, not does it address through what contractual portal or mechanism a duty to negotiate in good faith could arise at all where this was never part of their agreement.

[82] This difficulty was expressed as follows by Potter LJ in *Phillips Petroleum Co UK Ltd v Enron Europe Limited* [1996] EWCA Civ 693, [1997] CLC 329 at 343, in relation to a clause requiring parties to use '*reasonable endeavours*' to agree: '*The unwillingness of courts to give binding force to [such an obligation] seems to me to be sensibly based on the difficulty of policing such an obligation, in the sense of drawing the line between what is regarded as reasonable or unreasonable in an area where the parties may legitimately have differing views or interests, but have not provided for any criteria on the basis of which a third party can assess or adjudicate the matter in the event of dispute. In the face of such difficulty, the Court does not give a remedy to a party who may with justification assert, "well, whatever the criteria are, there must have been a breach in this case". It denies the remedy altogether on the basis of the unenforceability in principle of an obligation which may fall to be applied across a wide spectrum of arguable circumstances.*'

The appropriate remedy

84. Finally, the question arises (and is not addressed by Everfresh) whether a court could ever in the present circumstances make an order of specific performance of a duty to negotiate.[83] In *Coal Cliff* Kirby P mentioned, as an argument against enforcing a contract to negotiate, the difficulty of fashioning an appropriate remedy. His answer was that the remedy '*may be nominal damages only*'.[84] He does not suggest that an order could be made to negotiate.

85. In any event, we submit that any attempt at this stage to cause negotiations to occur would come too late. The parties expressly agreed in clause 3 that if no rental was agreed upon by three months before the end of the lease, the option would be of no force and effect. Any duty to negotiate must have expired when that deadline was reached. Hence the lease itself precludes any order directing the parties to negotiate now. Everfresh's only possible remedy for a breach is therefore a damages claim, a remedy which it does not seek. (We deal with this further in paragraph 104 below in response to the last question posed by this Court in its directions.)

Conclusion on the main argument

86. We stated above that Everfresh's main argument requires the performance of major contractual surgery. Each one of the steps

[83] Although this is what Everfresh seeks on appeal, it did not ask for an order to this effect in the court *a quo*.

[84] (1991) 24 NSWLR 1 at 25E; the damages would be nominal because of the need to recognise that no agreement may have come into existence.

contended for brings with it difficulties. One of those steps (the recognition of a duty to bargain where none has been agreed) does not flow logically from what precedes it, and the steps on which it is supposed to build are themselves not competent in the present contractual context. Everfresh's invocation of general constitutional values, dignity and Ubuntu is vague and unfocused, and ignores the fact that the common law already contains sophisticated methods to save contracts from invalidity, only declining to do so where this would amount to making a contract for parties.

87. In all the circumstances, this is not a case where this Court should or must develop the common law as applied by Koen J.

Everfresh's first alternative argument

88. Everfresh's first alternative argument, not raised in either the court *a quo* or the application for leave to appeal, is based on the contention that a contractual discretion granted to one contracting party is saved from invalidity by the common-law requirement that it be exercised *arbitrio boni viri*. It argues that this principle may be extended to recognise that where a clause grants both parties '*the discretion to negotiate, both parties are to negotiate reasonably*'.[85]

89. In the first instance, for the reasons given earlier, in the present case there is no contractual duty to negotiate. There is obviously always a discretion to negotiate, and this includes a discretion not to negotiate

[85] Applicant's submissions paras 37 and 38.

too. Quite how such a discretion can carry with it a duty to negotiate in good faith is not explained.

90. Second, Everfresh plucks the *arbitrium boni viri* from a very different context. It is a method adopted by courts to save a contract from invalidity where the parties have agreed that one of them may fix the required performance.[86] Like a contractual '*tie-breaker*', it is sourced in the actual consensus of the parties and gives rise to contractual certainty. It has nothing whatsoever to do with pre-contractual negotiation. It therefore has no role to play, by analogy or otherwise, in the present debate.

91. Finally, no constitutional arguments are raised in support of this submission and it therefore does not give rise to a constitutional issue.

Everfresh's second alternative argument

92. Everfresh's second alternative argument, also not raised in the court *a quo*, is that '*at the very least the common law ought to be developed in order to impose a duty to negotiate in good faith on the part of the lessee and the lessor*'.[87] The only constitutional basis mentioned is a vague reference to '*the considerations discussed in paragraphs 26 and further above*',[88] i.e. '*the values enshrined in the Constitution*', '*Ubuntu and the necessity to do simple justice between individuals*' and '*human dignity*'.

[86] *NBS Boland Bank Ltd v One Berg River Drive CC and Others; Deeb and Another v Absa Bank Ltd; Friedman v Standard Bank of SA Ltd* 1999 (4) SA 928 (SCA) at paras [16] to [28]; *Nedcor Bank Ltd v SDR Investment Holdings Co (Pty) Ltd* and Others 2008 (3) SA 544 (SCA) para [17].

[87] Applicant's submissions para 39.

[88] Applicant's submissions para 41.

93. Everfresh does not say through what contractual '*portal*' the duty to negotiate in good faith should be imposed. There is no suggestion that the term is implied *ex lege* or as a tacit term. In paragraph 40 of Everfresh's submissions it seems to be contended that on a proper interpretation of clause 3 the parties agreed to negotiate about the rentals; but as stated, this is not what Koen J found, and his judgment has been conceded to be correct at common law. The interpretation of clause 3 is in any event not a constitutional issue (nor does Everfresh make this contention). For these reasons alone, we submit, the second alternative submission must fail.

94. We nonetheless deal briefly with the remaining arguments made under this heading.

95. It is first argued that the obligation to negotiate in good faith is well recognised in labour law. That was indeed the case under the previous Labour Relations Act 28 of 1956 where a refusal to bargain was recognised as an '*unfair labour practice*'. However, the duty to bargain in good faith has not been expressly incorporated in the new Labour Relations Act 66 of 1995. As was recognised in the Explanatory Memorandum to the new LRA, the previous regime gave rise to '*a confused jurisprudence in which neither party is certain of its rights and in which economic outcomes are imposed on parties which bear little, if any, relation to the needs of the parties and the power they are capable of exercising*.'[89] Under the new LRA, the elimination of bad faith

[89] Explanatory Memorandum to the Draft Labour Relations Bill, 1995 (GN 97, GG 16259, 10 February 1995) p. 122 ((1995) 16 *ILJ* 278 at p. 292).

bargaining is now principally left to the exercise of power.[90] The reasoning in the Explanatory Memorandum demonstrates the dangers inherent in imposing enforceable rights in an activity that is fundamentally based in party autonomy.

96. Everfresh's tentative reference to *Biloden Properties*[91] also does not assist it. The *dictum* of Hathorn JP in the court *a quo* (also relied upon in paragraph 26(a) of the application for leave to appeal this Court) must be viewed in the context of the Full Bench judgments that followed. In the leading judgment Broome J stated that the nature and extent of the duty to act in good faith in negotiations, if it exists at all, are impossible to define.[92] As set out in paragraph 47.2 above, the SCA has subsequently confirmed that an agreement to negotiate is not enforceable.

97. Even if there were a duty to negotiate in good faith, it would suffer from the same deficiencies as pointed out in the main argument, because of the lack of any adequate objective criteria against which to measure the parties' conduct and to fashion an appropriate order.

98. It is therefore submitted that there are no reasonable prospects of this Court importing into the present contract an enforceable duty to negotiate the rental in good faith.

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[90] Du Toit *et al* Labour Relations Law: A Comprehensive Guide (5th edition) p. 250.

[91] *Biloden Properties (Pty) Ltd v Wilson* 1946 NPD 736 at 739.

[92] At 744.

ANSWERS TO THIS COURT'S QUESTIONS

99. Finally and in summary, we deal with the questions posed in this Court's directions dated 1 February 2011.

(a) The precise nature of the obligation (if any) created by a provision in a lease that the rentals shall be agreed upon between the lessor and the lessee.

100. Such a provision (as found in clause 3) is a plain '*agreement to agree*'. Everfresh and Shoprite are *ad idem* that at common law it creates no obligations because it is invalid and unenforceable.[93]

(b) 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.

101. Clause 3 does not contain any such obligation, so the question falls away. Everfresh and Shoprite are in any event *ad idem* that at common law clause 3 would not impose an obligation to negotiate.[94]

(c) If there is no common law obligation like that described in paragraph (b), 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.

[93] Applicant's submissions para 16.

[94] Applicant's submissions para 21.

102. There is no such constitutional obligation. The reason why the clause is unenforceable at common law is that the parties have failed to import sufficient certainty in their agreement. The common law is already well-developed and sensitive to the need to give effect to bargains deliberately concluded, but properly will not intrude on the fundamental principle (and constitutional value) of autonomy by making contracts for the parties. Everfresh's complex and circuitous route to amend the common law is also not based on compelling constitutional values. A court cannot create the necessary objective criteria that the parties failed to include in their contract.

(d) <u>If so, what constitutes fair and reasonable conduct or conduct in good faith in the circumstances of this case, and has Shoprite's conduct fallen below the required standard.</u>

103. Shoprite's conduct has not been unfair, unreasonable or in bad faith. From the outset (i.e. in its initial response to Everfresh's renewal letter and thereafter) Shoprite has explained its decision not to agree. It relied not only on its understanding of the legal inefficacy of the right of renewal for which Everfresh contended, but also on its desire to redevelop the Virginia Shopping Centre including the premises leased by Everfresh. Shoprite added that it would reconsider its position once the redevelopment of the shopping centre had been completed.[95]

(e) <u>If the conduct of Shoprite has fallen below the required standard, what are the terms of an appropriate order that this Court should make to</u>

[95] <u>Record</u> p. 27.

facilitate negotiations in compliance with the standard required by this Court.

104. Even if a duty to negotiate existed, it would not be appropriate to make an order directing the parties to negotiate because the contractually-stipulated period for that ended on 31 December 2008. Everfresh has now remained in occupation for two years since the lease terminated on 31 March 2009. As Everfresh has no contractual right to remain in occupation, it should be evicted if it does not vacate the premises at the end of the month following the month in which this Court confirms the eviction order made by the court *a quo* (such constituting a reasonable period within which Everfresh should vacate of its own volition or face eviction). If Everfresh were to contend it has suffered damage because of Shoprite's failure to negotiate about the rental for the period by which the lease could have been extended and its consequent vacation of or eviction from the premises, it may seek to recover damages from Shoprite.

CONCLUSION

105. For the above reasons, we submit that the application for leave to appeal should be dismissed with costs, including the costs of two counsel.

A M BREITENBACH SC

M W JANISCH

Counsel for Shoprite

Chambers
Cape Town
24 March 2011

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