

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 NOTE IN TERMS OF THE PRACTICE DIRECTIONS

1. Names of the parties and case number:

See above.

2. The nature of the proceedings:

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, 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.

3. The issues that will be argued:

- 3.1 Whether in this case this Court should decide constitutional issues relating to the development of the common law under section 39(2) of the Constitution, argued for the first time in this Court.
- 3.2 Whether the common law must be developed under section 39(2) of the Constitution to recognise the validity of a lease at a reasonable rental.
- 3.3 Whether the common law must be so developed to import into every agreement to conclude a new lease at a rental still to be agreed (i.e. an ‘*agreement to agree*’), an implied term that there shall be a lease at a reasonable rental.
- 3.4 Whether the common law must be so developed to require, 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.
- 3.5 The remedy in the present case.

4. The portions of the record that are necessary for the determination of the appeal:

The whole of the record plus annexures 'A' and 'B' to the Respondent's written submissions, being the Applicant's applications in the High Court and the SCA for leave to appeal to the SCA or a Full Bench of the High Court.

5. An estimate of the duration of the argument:

A day.

6. A summary of the argument:

6.1 It would not be in the interests of justice for leave to appeal to this Court to be granted because the Applicant did not raise any constitutional issues in the High Court or even in its applications for leave to appeal in the High Court and the SCA; the development of the common law the Applicant is seeking will have profound implications for the law of lease; the issues argued by the Applicant in this Court are *res nova*, i.e. have not been considered by the SCA or any High Court in any reported case.

6.2 The common law should in any event not be developed under section 39(2) of the Constitution to recognise the validity of a lease at a reasonable rental because the common law strikes an adequate

balance between agreements that can practically be enforced and those that are void for vagueness. A lease at a reasonable rental falls into the latter category.

- 6.3 The common law should not be so developed to import into every agreement to conclude a new lease at a rental still to be agreed (i.e. an ‘*agreement to agree*’) an implied term that there shall be a lease at a reasonable rental. Like the agreement at issue in this case, such an agreement does not and cannot accommodate an implied term that the rental shall be a reasonable rental. Such a term would be inconsistent with the express stipulation that the rental shall be an agreed rental.
- 6.4 The common law should not be so developed to require, 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. The common law is in any event sufficiently developed to determine whether such a duty

(even if agreed) is capable of practical enforcement. That would not be the case with a term that the parties negotiate in good faith towards a reasonable rental.

6.5 Even if the common law is developed in the manner the Applicant seeks, then the remedy it seeks in the present case, namely an order directing the Respondent to negotiate in good faith towards a reasonable rental, should not be granted because under the preceding lease agreement the time period within which the parties had to reach agreement on any extension ended on 31 December 2008. Instead, the order of the High Court evicting the Applicant should be confirmed and the Applicant ordered to vacate the premises at the end of the month following the month in which this Court's order is made. If the Applicant then believes it has suffered damage because of its being compelled to leave, it may seek to recover damages from the Respondent.

7. The authorities to which particular reference will be made during the course of argument:

Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening) 2001 (4) SA 938 (CC)

Lane and Fey NNO v Dabelstein and Others 2001 (2) SA 1187 (CC)

South African Forestry Co Ltd v York Timbers Ltd 2005 (3) SA 323 (SCA)

Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk 1993 (1) SA 768 (A)

Walford and others v Miles and another [1992] 1 All ER 453 (HL)

Premier, Free State and Others v Firechem Free State (Pty) Limited 2000 (4) SA 413 (SCA)

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

Coal Cliff Collieries (Pty) Ltd and Another v Sijehama (Pty) Ltd and Another (1991) 24 NSWLR 1

H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd and Another 1996 (2) SA 225 (A)

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

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

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)

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)

Biloden Properties (Pty) Ltd v Wilson 1946 NPD 736

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24 March 2011**