



## CONSTITUTIONAL COURT OF SOUTH AFRICA

### Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd

Case No.: CCT 105/10

Date of Hearing: 10 May 2011

Date Decided: 17 November 2011

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#### MEDIA SUMMARY

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*The following explanatory note is provided to assist the media in reporting this case and is not binding on the Constitutional Court or any member of the Court.*

On Thursday 17 November 2011 the Constitutional Court delivered judgment in the application for leave to appeal lodged by Everfresh Market Virginia (Pty) Ltd (Everfresh). This application originates from a lease dispute between Everfresh and Shoprite Checkers (Pty) Ltd (Shoprite). Shoprite bought the premises from its predecessor in title during the currency of the lease, a portion of which is the subject of the lease between the parties. Clause 3 gave Everfresh an option to renew the lease on its expiry on the same terms and conditions, subject to agreement being reached between the parties on the rental.

Seeing that Shoprite was opposed to the renewal of the lease on its expiry, Everfresh remained in occupation of the premises. It alleged that it had unilaterally but validly renewed the lease in terms of clause 3. Everfresh alternatively alleged that Shoprite had no right to evict it, because clause 3 obliged Shoprite to make efforts in good faith to reach an agreement on rental. Subsequently, Shoprite sought and obtained an eviction order against Everfresh in the Kwa-Zulu Natal High Court, Pietermaritzburg (High Court). The High Court held that an option to renew a lease on terms to be agreed is unenforceable. The Supreme Court of Appeal (SCA) agreed with the High Court and dismissed Everfresh's application for leave to appeal.

Before the Constitutional Court Everfresh argued that the common law of contract must be infused with constitutional values, to provide for greater recognition of the concept of good faith. The question was whether this can be done in circumstances where this issue was directly raised in neither the High Court nor the SCA, but for the first time before the Court.

Moseneke DCJ in a majority judgment acknowledged the importance of infusing constitutional values into contract law. He however concluded that it was not in the interests of justice to entertain the appeal and that Everfresh had not advanced any grounds why it would be in the interests of justice for the Court to decide the appeal as the court of first instance. He held that Shoprite was not warned of the case it had to meet and the relief sought against it, nor was the Court afforded the benefit of the views of the High Court and

the SCA which would help shape the common law and customary law in line with the normative grid of the Constitution.

Accordingly, the Constitutional Court dismissed the application for leave to appeal with costs. The Court refused to set aside the order of eviction and to remit the matter back to the High Court for re-hearing.

Yacoob J in a minority judgment held that the infusion of the values of the Bill of Rights into contract law is of considerable significance, that the High Court was obliged to develop the common law in the light of the factual dispute before it, and that it is appropriate to refer the matter back to the High Court to consider whether to develop the common law.