CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 105/10
[2011] ZACC 30

In the matter between:

EVERFRESH MARKET VIRGINIA (PTY) LIMITED — Applicant

and

SHOPRITE CHECKERS (PTY) LIMITED — Respondent

Heard on : 10 May 2011

Decided on : 17 November 2011

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JUDGMENT

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YACOOB J (Froneman J, Mogoeng J and Mthiyane AJ concurring):

*Introduction*

[1] This application for leave to appeal requires us to consider the circumstances in which this Court should intervene to infuse the law of contract with constitutional values. The development of the common law of contract in the light of the spirit, purport and objects of the Bill of Rights in our Constitution[1] was not directly raised by the applicant either in the KwaZulu-Natal High Court, Pietermaritzburg (High Court) or in the Supreme Court of Appeal. It is directly raised for the first time in this Court

[1] Mandated by section 39(2) which provides:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

and we must decide the constitutionally appropriate way of managing the case before us. And we must do so by determining the requirements of the interests of justice.

[2] The genesis of the application is an ejectment claim by the respondent, Shoprite Checkers (Pty) Limited (Shoprite) against the applicant, Everfresh Market Virginia (Pty) Limited[2] (Everfresh). The ejectment application has its roots in an agreement of lease between Everfresh and Shoprite's predecessor in title[3] as lessor. Shoprite bought the property commonly known as the Virginia Shopping Centre,[4] a portion of which was the subject of the lease, from the original lessor during the currency of the lease. Shoprite therefore became bound by the lease. It effectively became Everfresh's lessor.[5]

[3] The lease was for five years from 1 April 2004 to 31 March 2009. Clause 3 provides:

> "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

[2] Previously named Wild Break 166 (Pty) Ltd.

[3] H.R. Geeringh C.C.

[4] Described as portions 506, 507, 508, 509, 510 and 542, all of Erf 3193 Durban North.

[5] On 30 May 2008.

no such notice being 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."

[4] Everfresh wrote to Shoprite on 14 July 2008:

"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 2014.

We propose that a reasonable escalation would be in line with the existing lease at 10,5% pa.

Accordingly we propose a commencing rental at R93,600 (Ninety three thousand, six hundred Rand) per month."

[5] Shoprite replied on 3 September 2008:

"We refer to the above matter and your letter dated 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 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 after on 31 March 2009 by which date you are required to vacate the lease 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 upon 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."

[6] Shoprite's response was markedly different from its predecessor in title when the precursor to the lease agreement with which we are here concerned was up for renewal. The original lease contained a similar clause as that set out in paragraph 3 of this judgment. The agreement of lease in this case is a product of the good faith negotiations entered into between Everfresh and Shoprite's predecessor in title in terms of a similar clause in the original lease at a time when that lease was almost at an end.

[7] Everfresh remained in occupation after 31 March 2009 and Shoprite began ejectment proceedings in the High Court.

[8] Shoprite contended, in line with its written response to Everfresh's written effort to secure a renewal, that it was not obliged to enter into any negotiations and that Everfresh was in unlawful occupation.

[9] Everfresh advanced two contentions based on its interpretation of clause 3 in its affidavit opposing the ejectment proceedings. The first was that the agreement gave it a right of renewal at a reasonable rental. The second, made in the alternative, was that Shoprite was and remains obliged, on a proper construction of the contract, to make a bona fide attempt to agree on the rent for the renewal period. It follows, so Everfresh

contends, that the right to evict does not accrue unless Shoprite negotiated bona fide. In argument before the High Court, however, Everfresh conceded that the agreement did not contain an option to renew and did not persist in its right to renew at a reasonable rental. It limited its argument to Shoprite's obligation to make a bona fide attempt to agree, contending that the terms of the agreement precluded Shoprite from frustrating Everfresh's qualified right to renew by refusing to negotiate in good faith and that its right to renewal would fall away only if the negotiations in good faith did not result in an agreement.

[10] The High Court emphasised that, according to our law, an option to renew a lease on terms to be agreed is unenforceable.[6] The Court accepted that it was a material requirement of the agreement "that the rental had to be agreed" and that this had to be done between 14 July 2008 (the date of receipt of the notice of the intention to renew) and 31 December 2008 (3 months before the expiry of the contract). Accepting that an agreement "inevitably" "presupposes an offer and then an acceptance corresponding to the terms of the offer", the Court concluded that clause 3 of the agreement did not go so far as to "impose a positive obligation or duty on the party who rejected the offer (or who might fail to accept the offer made within a reasonable time, at worst by the latest 31 December 2008) to make a counter-offer for consideration"[7] by Everfresh. Nor could the agreement be interpreted, so the Court held, to "carry the corollary of a duty in terms so wide that it required extensive offers

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[6] *Shoprite Checkers (Pty) Limited v Everfresh Market Virginia (Pty) Limited*, Case No. 6675/09, KwaZulu-Natal High Court, Pietermaritzburg, 25 May 2010 as yet unreported, at para 9.

[7] Id at para 19.

and counter-offers being exchanged, or even as little as a positive duty to actually respond to the respondent's proposed offer of rental."[8]

[11] The High Court went on to say that even if it were wrong and that the agreement conveyed some obligation to negotiate, "the legal requirement that [the] negotiation [should] be in good faith" would render the clause too vague to be enforced absent a "readily ascertainable objective standard" of good faith assessibility.[9] The Court referred to the decision of the Supreme Court of Appeal in *Southernport*[10] and concluded that the case was an instance where "a promise to negotiate in good faith [occurred] in the context of an arrangement which by its nature, purpose, contents, other provisions or otherwise makes it clear that the promise is too illusory or too vague and uncertain to be enforceable".[11] If Everfresh was required to make a counter-offer the Court said, it could never be determined whether that offer had been made in good faith absent a readily ascertainable external standard.[12]

[12] The application for leave to appeal was refused by the High Court and the Supreme Court of Appeal. Hence the application before us.

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[8] Id at para 21.

[9] Id at para 22.

[10] *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA).

[11] Above n 6 at para 26 read with para 25 where the High Court relied on a passage from the Australian case of *Coal Cliff Collieries Pty Ltd and Another v Sijehama Pty Ltd and Another* (1991) 24 NSWLR 1, quoted with apparent approval by the Supreme Court of Appeal in *Southernport* above n 10 at paras 15-6.

[12] Above n 6 at para 27.

*The contentions in this Court*

[13] In its launching affidavit Everfresh reiterates the argument made in the High Court and criticises its judgment on the basis that it "gives judicial approval to a party breaching a term of an agreement and in so doing [frustrates] what has been contractually agreed to". This is the context in which Everfresh makes reference to the Constitution for the first time. It contends that the approach of the High Court just described is contrary to the values enshrined in the Constitution and public policy and deprives the agreement of business efficacy. Shoprite should therefore have been obliged to negotiate. This approach, though not expressly resorted to in the High Court, is wholly consistent with the argument that had been proffered before and rejected by the High Court. And what is more, the reference to values of the Constitution is quite obviously a reference to section 39(2) of the Constitution.

[14] After affidavits had been filed, this Court accordingly issued directions[13] requiring written argument to include submissions on:

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

[13] Directions dated 1 February 2011.

(c) If there is no common law obligation like that described in paragraph 5(b) of these directions, 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.

(d) If so:

i. What constitutes fair and reasonable conduct or conduct in good faith in the circumstances of this case?

ii. Has the conduct of the respondent fallen below the requisite standard?

(e) If the conduct of the respondent has fallen below the required standard, what are the terms of an appropriate order that this Court should make to facilitate negotiations in compliance with the standard required by this Court."[14]

[15] Much of Everfresh's written argument in response to these directions attempted to resuscitate the argument, abandoned in the High Court, that the agreement should be interpreted to provide for a renewal of the contract at a reasonable rental. However, Everfresh conceded in oral argument that the circumstance that clause 3 contemplated the failure to reach an agreement excluded the possibility that the clause provided for agreement at a reasonable rental. That issue, and the development of the common law to recognise agreements at a reasonable rental that might arise need therefore not be considered further.

[16] Everfresh nevertheless continued to urge before this Court that clause 3 of the agreement obliges the parties to it to negotiate reasonably and in good faith. But this time the Constitution was invoked and the argument goes that the common law should

[14] Id at para 5.

be developed pursuant to section 39(2) of the Constitution so that parties to agreements are precluded from refusing to negotiate in good faith if an agreement, properly interpreted, requires them to do so. It was submitted that the sanctity of contract requires this. The argument is essentially the same as it was before the High Court but now buttressed and strengthened by reference to the Constitution and development of the common law.

*Should the application for leave to appeal be granted?*

[17] This Court will grant leave to appeal only if this application raises a constitutional matter and if it is in the interests of justice to grant leave.

*A constitutional matter?*

[18] Everfresh requires us to develop the law of contract in the light of section 39(2) of the Constitution so that the common law would require parties who undertake to negotiate a new rent for a renewed term of a lease to do so reasonably and in good faith. The High Court held that the contract does not require the parties to negotiate and that, even if it did, the obligation to negotiate in good faith would, in the circumstances of this case, be unenforceable.

[19] Everfresh contends that whether the High Court was correct in its construction of the agreement and in its finding that the obligation to negotiate in good faith would in any event be too vague to be enforceable indeed raise constitutional matters of some substance. It concedes that the approach of the High Court is consistent with

existing common law. Everfresh however argued that the High Court should have developed the common law in the light of the spirit, purport and objects of the Constitution as required by section 39(2). The question whether the common law should have been developed by the High Court according to the spirit, purport and objects of the Constitution to oblige parties who agree to negotiate rent for the renewal period of a lease to do so reasonably and/or in good faith does raise a constitutional matter.

*Interests of justice?*

[20] The crucial question is whether it is in the interests of justice to grant leave to appeal. Everfresh has not traversed the interests of justice issue either in its application for leave to appeal or in its written argument in this Court. We were urged in oral argument however that it was in the interests of justice to grant leave to appeal. Ordinarily the failure to canvass interests of justice in the application for leave to appeal might well be fatal to the application. In my view, we cannot achieve justice in the circumstances of this case if we do not consider whether the interests of justice requirement has been met. This despite the issue not having been canvassed in the application for leave to appeal. Applicants for leave to appeal to this Court are, however, well advised to canvass and establish in the course of the application for leave to appeal that it is in the interests of justice for the application to be granted. There is a real risk of their being non-suited altogether if this essential pre-requisite is not appropriately traversed.

[21] Factors that are important in determining whether it is in the interests of justice to grant leave to appeal include questions as to the importance of the issues raised, whether the issues are raised for the first time before this Court and the question of prospects of success.

[22] Everfresh contends that the common law should be developed in terms of the Constitution to oblige parties who undertake to negotiate with each other to do so reasonably and in good faith. The contention of Shoprite is that a provision of this kind should not be enforceable because the concept of good faith is too vague. Good faith is a matter of considerable importance in our contract law and the extent to which our courts enforce the good faith requirement in contract law is a matter of considerable public and constitutional importance. The question whether the spirit, purport and objects of the Constitution require courts to encourage good faith in contractual dealings and whether our Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Many people enter into contracts daily and every contract has the potential not to be performed in good faith. The issue of good faith in contract touches the lives of many ordinary people in our country.

[23] The values embraced by an appropriate appreciation of ubuntu are also relevant in the process of determining the spirit, purport and objects of the Constitution. The development of our economy and contract law has thus far predominantly been shaped by colonial legal tradition represented by English law, Roman law and Roman Dutch

law. The common law of contract regulates the environment within which trade and commerce take place. Its development should take cognisance of the values of the vast majority of people who are now able to take part without hindrance in trade and commerce. And it may well be that the approach of the majority of people in our country place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone.

[24] It may be said that a contract of lease between two business entities with limited liability does not implicate questions of ubuntu. This is, in my view, too narrow an approach. It is evident that contractual terms to negotiate are not entered into only between companies with limited liability. They are often entered into between individuals and often between poor, vulnerable people on one hand and powerful, well-resourced companies on the other. The idea that people or entities can undertake to negotiate and then not do so because this attitude becomes convenient for some or other commercial reason, certainly implicates ubuntu.

[25] The constitutional issue that arises is of sufficient moment to the lives of human beings in our society to require judicial consideration.

[26] The difficulty that stands in the way of a consideration of this important matter by this Court arises because of the way Everfresh conducted its case. I do not accept in this connection that Everfresh blew hot and cold and changed its case from time to time. While it is true that Everfresh abandoned the reasonable rental argument twice

and tried to reinstate it before this Court, its contention that the contract obliged Shoprite to negotiate in good faith has been consistently made. The only criticism that can be advanced against Everfresh is that the issue of the development of the common law was not raised directly either in the High Court or in the Supreme Court of Appeal. I say not directly because, in my view, the issue of whether a duty to negotiate in good faith is imposed by a contract and whether that obligation has been imposed by a particular contract is or should be enforceable does raise, by necessary implication, issues of public policy. And issues of public policy in turn cannot be considered without reference to section 39(2).

[27] The mere fact that the constitutional dimensions of the development point were not raised in the High Court or Supreme Court of Appeal is no bar to considering the legal point on appeal to this Court, provided that the pleaded and established facts allow this without prejudice to the opposing parties.[15] The crucial question is thus whether it will be unfair to determine the issue in this Court on the facts pleaded and accepted in the High Court. In my view there is no possible prejudice here.

[28] Those facts are all common cause: the original conclusion of the written contract; its terms; the subsequent renewal of the lease on a previous occasion with the original lessor; and the refusal of Shoprite, the successor in title as lessor, to negotiate the rental for a further renewal. This is thus not a case where Everfresh seeks to rely on facts not pleaded in the High Court and where the introduction of those new facts

[15] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (7) BCLR 691 (CC); 2007 (5) SA 323 (CC) at paras 37-42.

would prejudice Shoprite because it would not have had the opportunity to traverse them. This is, purely and simply, a case about the interpretation of a contract in terms of the applicable law. I have always understood that it is not only permissible for a court of appeal to decide on the correct legal interpretation of a contract where the facts on which the interpretation must be based are not disputed, but that it is obliged to do so, even if the legal argument on appeal is different to that advanced in the trial court. *Barkhuizen* is recognition in this Court of that general principle.[16]

[29] Be that as it may, this Court, if it considers the constitutional issue in this case, will do so as the court of first and last instance. This direction should not be taken lightly, more particularly since it is concerned with the development of the common law.[17]

[30] Another consideration is this. The fact that section 39(2) of the Constitution has been ignored by the High Court and possibly by the Supreme Court of Appeal when its relevance was by necessary implication brought into sharp relief does add considerable complexity to the equation. This Court said in *Carmichele*:[18]

> "It needs to be stressed that the obligation of courts to develop the common law, in the context of the section 39(2) objectives, is not purely discretionary. On the

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[16] Id.

[17] *Billiton Aluminium SA Ltd t/a Hillside Aluminium v Khanyile and Others* [2010] ZACC 3; 2010 (5) BCLR 422 (CC) at para 21; *Lane NO and Another v Dabelstein and Others* [2001] ZACC 14; 2001 (4) BCLR 312 (CC); 2001 (2) SA 1187 (CC) at para 5; *National Gambling Board v Premier of KwaZulu-Natal and Others* [2001] ZACC 8; 2002 (2) BCLR 156 (CC); 2002 (2) SA 715 (CC) at para 29; and *Bruce and Another v Fleecytex Johannesburg CC and Others* [1998] ZACC 3; 1998 (4) BCLR 415 (CC); 1998 (2) SA 1143 (CC) at paras 7-8.

[18] *Carmichele v Minister of Safety and Security and Another* [2001] ZACC 22; 2001 (10) BCLR 995 (CC); 2001 (4) SA 938 (CC).

> contrary, it is implicit in section 39(2) read with section 173 that where the common law as it stands is deficient in promoting the section 39(2) objectives, the courts are under a general obligation to develop it appropriately. We say a 'general obligation' because we do not mean to suggest that a court must, in each and every case where the common law is involved, embark on an independent exercise as to whether the common law is in need of development and, if so, how it is to be developed under section 39(2). At the same time there might be circumstances where a court is obliged to raise the matter on its own and require full argument from the parties.
>
> It was implicit in the applicant's case that the common law had to be developed beyond existing precedent. In such a situation there are two stages to the inquiry a court is obliged to undertake. They cannot be hermetically separated from one another. The first stage is to consider whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives. This inquiry requires a reconsideration of the common law in the light of section 39(2). If this inquiry leads to a positive answer, the second stage concerns itself with how such development is to take place in order to meet the section 39(2) objectives. Possibly because of the way the case was argued before them, neither the High Court nor the SCA embarked on either stage of the above inquiry."[19]

[31] This passage shows that, while the courts have a "general obligation" to develop the common law, courts need not conduct this exercise in each and every case that comes before them. However, there are indeed cases in which circumstances would oblige a court to raise the matter on its own. On the other hand, there are other cases in which a court would not be obliged to enter this terrain. The extract is also authority for the proposition, in my view, that where it is "implicit in the applicant's case that the common law had to be developed", the court must consider "whether the existing common law, having regard to the section 39(2) objectives, requires development in accordance with these objectives."

[19] Id at paras 39 and 40.

[32] Like in *Carmichele*, it is “implicit” in the case put up by Everfresh “that the common law had to be developed beyond existing precedent”. The High Court was accordingly obliged to follow the two-stage process described in *Carmichele* namely, whether the common law falls short of the spirit, purport and objects of the Constitution and, if so, how that “development is to take place”.[20] And in this case, like in *Carmichele*, “[p]ossibly because of the way the case was argued before them, neither the High Court nor the SCA embarked on either stage of the above inquiry.”[21]

[33] The importance of the duty of a court in relation to section 39(2) was emphasised in *K*:[22]

> “The normative influence of the Constitution must be felt throughout the common law. Courts making decisions which involve the incremental development of the rules of the common law in cases where the values of the Constitution are relevant are therefore also bound by the terms of section 39(2). The obligation imposed upon courts by section 39(2) of the Constitution is thus extensive, requiring courts to be alert to the normative framework of the Constitution not only when some startling new development of the common law is in issue, but in all cases where the incremental development of the rule is in issue.”[23]

[34] A court should always be alive to the possibility of the development of the common law in the light of the spirit, purport and objects of the Bill of Rights. The development of the common law would otherwise be no more than a distant dream. A

[20] Id at para 40.

[21] Id.

[22] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (9) BCLR 835 (CC); 2005 (6) SA 419 (CC).

[23] Id at para 17.

court should always be at pains to discover whether the development of the common law is implicit in a case. If, in the particular circumstances, it appears to a court that section 39(2) is implicitly raised and that the common law might have to be developed, that court has no choice but to embark upon that inquiry.

[35] There is a link between the way in which the High Court interpreted the clause and the finding that the renewal obligation was too vague to be enforced. If, for example, the High Court had found that the clause obliged Shoprite to make at least one counter-offer, the obligation would not have been too vague to be enforced. And it cannot be gainsaid that the spirit, purport and objects of the Bill of Rights as well as the related development of the common law is potentially relevant in both inquiries.

[36] The High Court's construction of the clause, without reference to public policy or to section 39(2), is not free from difficulty. It was necessary to consider whether to develop the common law and whether the detailed provisions of the clause carry the necessary implication that the renewal was not to be regarded as null and void in every respect. The proposition that a common law contract principle that provides meaningful parameters to render an agreement to negotiate in good faith enforceable is decidedly more consistent with section 39(2) than a regime that does not. A common law principle that renders an obligation to negotiate enforceable cannot be said to be inconsistent with the sanctity of contract and the important moral denominator of good faith. Indeed, the enforceability of a principle of this kind accords with and is an important component of the process of the development of a

new constitutional contractual order. It cannot be doubted that a requirement that allows a party to a contract to ignore detailed provisions of a contract as though they had never been written is less consistent with these contractual precepts: precepts that are in harmony with the spirit, purport and objects of the Constitution.

[37] Suffice it to say that Everfresh has reasonable prospects of success in its quest to develop the common law in terms of section 39(2) of the Constitution. And it should not be denied this opportunity because the High Court did not consider section 39(2) when it ought to have done so. The fact that the development of the common law was not expressly raised by Everfresh in its interpretation argument in the High Court cannot serve to deprive Everfresh of the opportunity to raise it here. I have already said that the Supreme Court of Appeal in *Southernport*[24] approved a principle laid down by an Australian court[25] that a promise to negotiate in good faith that occurs in a context of an arrangement which makes it clear that the promise is too illusory or too vague and uncertain to be enforceable is not enforceable.[26] This cannot be gainsaid. But the determination whether a promise is too illusory or too vague and uncertain must be made against the backdrop of an understanding that good faith should be encouraged in contracts and a party should be held to its bargain. The question to be answered is whether the common law as developed requires the enforcement of the bargain in this case.

[24] Above n 10.

[25] The Supreme Court of New South Wales. See above n 11.

[26] Above at [11].

[38] I conclude therefore that the High Court ought to have investigated the question whether the common law fell to be developed in accordance with the spirit, purport and objects of the Constitution. Its failure to do so was a misdirection. There is a reasonable prospect that the question whether the common law should be developed will be answered in the affirmative.

[39] In the circumstances, leave to appeal must be granted.

*Remedy*

[40] The fact that leave to appeal is granted does not mean that it is in the interests of justice for us to consider the merits of the appeal absent any consideration of the complex issues by the High Court or the Supreme Court of Appeal. Should we consider the case ourselves? Or is it more appropriate for us to set aside the judgment of the High Court and refer the case back to it to determine the question?

[41] The High Courts and the Supreme Court of Appeal are primary vehicles for developing the common law. Where it is found in this Court that those courts failed properly to consider a constitutional dimension of an issue, the general remedy will be to refer it back.

[42] After anxious consideration, I conclude that it is in the interests of justice for the matter to be referred back to the High Court to enable a consideration of the issue it should have considered in the first place. Ultimately, in the circumstances of this

case, and particularly in the light of the prospects of success it would be more just to allow a reconsideration of the case by the High Court than to confirm the eviction of Everfresh at this stage. The High Court must consider, in the light of this judgment, whether the common law needs to be developed and if so, the nature and extent of the development of the common law that is appropriate in the circumstances. The clause in issue must then be interpreted and, if appropriate, relief must be determined in the light of the common law as might be developed by the High Court.

[43] This decision will prejudice Shoprite. This prejudice cannot in our view be avoided without the immediate ejectment of Everfresh, a course that might well turn out to have been constitutionally unjustified. It is regrettably not in the interests of justice for us to go this route.

*Costs*

[44] Fundamental to an appropriate costs order is that Everfresh did not raise the issue in explicit constitutional terms in the High Court or in the Supreme Court of Appeal when it could and should have done so. I consider that fairness requires Everfresh to pay Shoprite's costs in the High Court, in the Supreme Court of Appeal (if any), and in this Court.

*Conclusion*

[45] I would accordingly grant leave to appeal, uphold the appeal, refer the matter to the High Court for reconsideration and in effect make the costs order considered appropriate by the Deputy Chief Justice.

MOSENEKE DCJ (Ncgobo CJ, Cameron J, Jafta J, Khampepe J, Nkabinde J and Van der Westhuizen J concurring):

*Introduction*

[46] I have had the privilege of reading the well-crafted judgment of my colleague Yacoob J. I am grateful for his narration of the background, with which I agree. He would grant leave to appeal, set aside the order of eviction granted against the applicant, Everfresh, and remit the case to the High Court for a fresh consideration whether the existing common law of contract that holds that a promise to negotiate is unenforceable should be developed in accordance with the requirements of section 39(2) of the Constitution and if so, the nature and extent of the development.

[47] I am in respectful disagreement with the outcome Yacoob J favours. In my view, it is not in the interests of justice to entertain the appeal. Accordingly, the application for leave to appeal falls to be dismissed with costs. This means that I will not set aside the order of eviction and remit the case to the High Court for re-hearing. What follows are my reasons for reaching this conclusion.

*Constitutional issue*

[48] I accept the contention that a given principle of the common law of contract ought to be infused with constitutional values does raise a constitutional issue. The refashioning of the common law in accordance with fundamental constitutional values is mandated by section 39(2) of the Constitution. The common law, like all other laws, must be viewed through the prism of the objective normative value system set by the Constitution and, where it is found to fall short, must be reshaped in order to conform to our supreme law. Clearly, before this Court Everfresh is raising a constitutional issue of some importance. This, however, does not mean that by Everfresh merely raising a constitutional issue this Court is without more obliged to hear it. Once we are past this initial jurisdictional hurdle that is not the end of the matter. We are still obliged to probe whether it is in the interests of justice to determine the dispute.

*Interests of justice*

[49] Where the interests of justice lie is a function of a careful balancing of several relevant considerations. In a claim for an adaptation of the common law, not least of these factors would be whether the High Court or the Supreme Court of Appeal has considered the issue and whether it bears a reasonable prospect of success. As Yacoob J correctly points out, neither in its application for leave to appeal nor in its written argument in this Court has Everfresh made submissions on why it is in the interests of justice for this Court to hear its appeal. Ordinarily an omission of this

kind would be fatal to an application for leave to appeal. Given the outcome I reach, I need not non-suit Everfresh solely on this slender ground.

[50] In deciding whether to grant leave to appeal we have to weigh carefully several relevant factors. I highlight four important considerations. First, whether Everfresh's defence to Shoprite's claim for eviction in the High Court, Supreme Court of Appeal and now in this Court has changed over time. Ordinarily, it would not be in the interests of justice for a litigant to adjust its case as it goes along to the prejudice of an opposing litigant. Second, whether the quest to develop the law of contract on a promise to agree or to negotiate, in line with constitutional values, is being raised for the first time in this Court. Third, whether the prospects of success of the claim that the common law should be developed should be decided. Fourth, whether the claim to develop the common law should be remitted to the High Court. I deal with each of these considerations in sequence.

*Has Everfresh's case changed over time to the prejudice of Shoprite?*

[51] This Court set out the test for proper pleading in *Prince v President of the Law Society of the Cape of Good Hope and Others*.[1] Ngcobo J wrote:

> "Parties who challenge the constitutionality of a provision in a statute must raise the constitutionality of the provisions sought to be challenged at the time they institute legal proceedings. In addition, a party must place before the court information relevant to the determination of the constitutionality of the impugned provisions. Similarly, a party seeking to justify a limitation of a constitutional right must place before the court information relevant to the issue of justification. I would emphasise

[1] [2000] ZACC 28; 2001 (2) SA 388 (CC); 2001 (2) BCLR 133 (CC).

> that all this information must be placed before the court of first instance. The placing of the relevant information is necessary to warn the other party of the case it will have to meet, so as allow it the opportunity to present factual material and legal argument to meet that case. It is not sufficient for a party to raise the constitutionality of a statute only in the heads of argument, without laying a proper foundation for such a challenge in the papers or the pleadings. The other party must be left in no doubt as to the nature of the case it has to meet and the relief that is sought. Nor can parties hope to supplement and make their case on appeal."[2] (Footnote omitted.)

[52] It is so that the test on proper pleading in *Prince* related to a challenge to the constitutional validity of a provision in a statute. That test however is of equal force where, as in the present case, a party seeks to invoke the Constitution in order to adapt or change an existing precedent or a rule of the common law or of customary law in order to promote the spirit, purport and objects of the Bill of Rights.[3] Litigants who seek to invoke provisions of section 39(2) must ordinarily plead their case in the court of first instance in order to warn the other party of the case it will have to meet and the relief sought against it. The other obvious benefit is that the High Court and the Supreme Court of Appeal will be afforded the opportunity to help shape the common law and customary law in line with the normative grid of the Constitution.

[53] Everfresh's case has indeed taken different forms in different forums, and sometimes in the same forum. In order to trace the mutation of Everfresh's contentions, it is convenient to recap the litigation history. On 5 August 2009 Shoprite instituted eviction proceedings in the High Court against Everfresh on the

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[2] Id at para 22.

[3] The test on pleading in *Prince* was extended to a case relating to breach of a constitutional right in *Singh v Commissioner, South African Revenue Service* 2003 (4) SA 520 (SCA) at para 24.

ground that it had no right to occupy the premises because the lease between them ended on 31 March 2009. Everfresh put up two defences. Its main defence was that it had the right to occupy because it had unilaterally but validly renewed the lease for a further period of four years and eleven months on the same terms as contained in the expired lease. Simply put, Everfresh contended that there was a new lease in place because clause 3[4] of the lease contained a valid right of renewal and that by notice to Shoprite it had renewed the lease at a rental that was effective when the lease ended (R93 600,00 per month) escalating annually at 10,5%.

[54] Everfresh's alternative defence was that Shoprite had no right to evict it from the premises because clause 3 of the lease obliged Shoprite to make an honest effort to reach an agreement with it on the rentals for the renewal period and that it may not frustrate the mechanism that clause 3 prescribes by refusing to participate in it. This is a dilatory defence and amounts to an assertion that an eviction is not competent until an honest attempt has been made to agree on a reasonable rental.

[55] What is evident is that both defences are rooted in an interpretation of clause 3 of the lease agreement. The High Court was called upon to interpret whether the clause provided first, for a valid right of renewal or, second, for a valid agreement to negotiate. In other words, the defences raised were restricted to and dependent on a proper interpretation of the renewal clause.

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[4] The full text of clause 3 is to be found in Yacoob J's judgment at [3] above.

[56] During the hearing in the High Court, Everfresh abandoned its main defence. It accepted that clause 3 does not contain an option which by its unilateral acceptance would give rise to a binding lease for the renewal period.[5] The High Court found that Everfresh's concession accords with the common law of contract because there cannot be a valid lease unless the amount of rental has been specified, fixed or is definitely ascertainable. This meant that an option to renew a lease on terms to be agreed is invalid and unenforceable.[6] The Court also rejected the implicit contention that clause 3 envisages that "reasonable rental" would be paid during the renewal period.[7]

[57] The High Court turned to the alternative defence and found that clause 3 does not create a positive duty to negotiate by exchanging offers and counter-offers or to respond to the offer of rental by Everfresh. It found that even if there was an agreement to negotiate in good faith, the obligation was too uncertain to enforce. Absent a readily ascertainable objective standard, the Court reasoned, it would be impossible to assess whether a party's conduct was in good faith or not. It concluded that clause 3 was no more than "a promise, assuming it to be one to negotiate in good faith which by its very nature, purpose and context is simply too vague and uncertain to be enforceable."[8]

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[5] *Shoprite Checkers (Pty) Limited v Everfresh Market Virginia (Pty) Limited*, Case No. 6675/09, KwaZulu-Natal High Court, Pietermaritzburg, 25 May 2010 as yet unreported at para 8.

[6] Id at para 9.

[7] Id at para 10.

[8] Id at para 29. See also id at para 23 referring to *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) and the Australian case *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1.

[58] Everfresh sought leave from the High Court to appeal its decision. Leave was refused.[9] It petitioned the Supreme Court of Appeal but leave to appeal was refused.[10] The two applications for leave to appeal reveal that Everfresh no longer contended that clause 3 contained an option to renew which could be exercised unilaterally. It rather relied on its alternative argument that properly construed, clause 3 obliged Shoprite to negotiate in good faith on renewal of rental and that it may not eject Everfresh until it had negotiated in good faith. Again, Everfresh did not invoke the Constitution or suggest that the common law ought to be adapted to create a duty on a party to negotiate in order to arrive at an agreement on rentals.

[59] In its application for leave to appeal to this Court Everfresh, for the first time, contended that the interpretation of clause 3 that placed no obligation on a party to negotiate in seeking to determine a reasonable rental, deprives it of its right to equal protection and benefit of the law as provided for in the Bill of Rights.

[60] In its written argument, however, Everfresh departed from its averments in the application for leave to appeal to this Court. It retracted its criticism of the manner in which the High Court interpreted clause 3 and went further to endorse its interpretation as correct under the common law. I can do no better than to cite the relevant part of the written argument:

[9] Leave to appeal was lodged on 8 July 2010 and refused on 10 August 2010.

[10] Leave was refused on 4 November 2010.

> "The Court a quo granted an eviction order in favour of the lessor on the basis that the clause imposed no obligation upon the lessor to negotiate with the lessee regarding rentals for the renewal period and on the basis that the lease had therefore terminated through effluxion of time.
>
> At common law, no obligation is created by such a clause. The decision of the Court *a quo* in this regard cannot be faulted from a common law perspective."[11]

[61] Having made the concession that the High Court was correct on the common law, Everfresh went on to submit that the common law must be developed to recognise (a) the validity of a lease at a reasonable rental and (b) that clause 3 contains an implied *ex lege* term that the rental is to be reasonable. To this contention it added two alternative arguments both of which were never raised in any of the preceding courts and not even in the application for leave to appeal in this Court. The first is that at common law, if a contractual discretion is granted to one contracting party, the discretion has to be exercised *arbitrio boni viri*.[12] This rule ought to be extended to recognise that where a clause grants both parties the discretion to negotiate, they are both obliged to negotiate reasonably. The second alternative advanced is that the

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[11] Everfresh's written argument further provides:

> "It is submitted that at common law no obligation is created by such a provision. The proposition which was accepted by KOEN J that an option to renew a lease upon terms to be agreed, is invalid and unenforceable, is with respect unobjectionable from a common law perspective. The proposition in question is certainly borne out by the authorities cited in paragraph [9] of the judgment of KOEN J.
>
> This approach is consistent with the approach which is more generally followed with regard to the enforceability of an agreement to negotiate. In Premier, Free State v Firechem Free State (Pty) Ltd SCHUTZ JA held as follows:
>
> > '*An agreement that the parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree*." (Footnotes omitted.)

[12] According to Hiemstra and Gonin *Drietalige Regs-Woordeboek* (Juta, Cape Town 1981) at 162 the phrase means a "decision . . . [or] discretionary power of a good man". For a general discussion of *abitrio boni viri* see *Blake and Another v Cassim and Another NNO* 2008 (5) SA 393 (SCA); *Dharumpal Transport (Pty) Ltd v Dharumpal* 1956 (1) SA 700 (A); and *Machanick v Simon* 1920 CPD 333.

constitutional values require that the common law must be adapted to impose a duty to negotiate in good faith on both parties. The constitutional values Everfresh now relies upon are "a framework within which the ability to contract enhances rather than diminishes our self-respect and dignity."[13] It adds that the concept of ubuntu and the necessity to do simple justice between individuals have been recognised as informing public policy in a contractual context.

[62] There can be no doubt that Everfresh adapted its defences to the eviction claim as and when the litigation progressed to the obvious detriment of Shoprite.

*Is the claim to develop the common law raised for the first time in this Court?*

[63] Everfresh has not only altered its defences as it went along, but has also failed to raise any of the constitutional points in the High Court and Supreme Court of Appeal. This Court has often warned that while there may be cases where the interests of justice require that a constitutional complaint be raised for the first time before this Court, these would be rare and exceptional.[14] In *Lane and Fey NNO*[15] this Court set out the proper approach in the following terms:

> "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

[13] *Brisley v Drotsky* 2002 (4) SA 1 (SCA) at 36A-B. See also *Napier v Barkhuizen* 2006 (4) SA 1 (SCA) at paras 12 and 23.

[14] *Phillips and Others v National Director of Public Prosecutions* [2005] ZACC 15; 2006 (1) SA 505 (CC); 2006 (2) BCLR 274 (CC) at para 44.

[15] *Lane and Fey NNO v Dabelstein and Others* [2001] ZACC 14; 2001 (2) SA 1187 (CC); 2001 (4) BCLR 312 (CC).

> Court of first instance. No relevant factors have been raised by the applicants that would constitute such special circumstances."[16] (Footnote omitted.)

[64] Everfresh has to establish special circumstances that would justify this Court being a court of first and last instance in a matter that implicates the development of the common law of contract. It has not done so. It will be recalled that Everfresh did not even advance any grounds why it is in the interests of justice to grant leave to appeal. If anything, several factors point against this Court tackling the wide ranging commercial intricacies related to renewal clauses in existing leases. The adaptation of the common law Everfresh urges upon us includes at least four possibilities: recognising the validity of a lease at a reasonable rental; recognising an implied (*ex lege*) term that rental is reasonable; requiring contracting parties who have a discretion to negotiate to do so reasonably (*arbitrio boni viri*); or imposing a duty on the parties to negotiate in good faith. All this we are urged to do without the benefit of the views of the High Court and of the Supreme Court of Appeal.

[65] If we were to accept Everfresh's invitation to adapt the common law, Shoprite would be obviously prejudiced. It would be confronted with a change of front at a very late stage in the proceedings. If these matters were raised in good time, Shoprite would have had the opportunity to meet them head on by perhaps tendering evidence or advancing new arguments or adapting its contentions.

[16] Id at para 5. See also *Carmichele v Minister of Safety and Security and Another (Centre For Applied Legal Studies intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (*Carmichele*) at paras 50-5.

[66] It would simply be unfair to require Shoprite to meet a brand new case at an appellate stage. Everfresh has not advanced any reason at all for its omission to plead its case fully and earlier than in this Court and for its ever changing defences to the eviction claim. This is a commercial dispute of considerable monetary value in which the parties were legally represented before and during litigation in all the courts including this one. Everfresh has not suggested that it lacked proper legal representation or that it was poorly advised or indeed that it suffered from any form of vulnerability springing from an unequal bargaining position. Moreover, Everfresh has not pleaded any dire consequences, commercial or otherwise, that might ensue if the lease were not renewed. If anything, it appears to have benefitted from the prolonged litigation in the sense that it has warded off the ejectment and continued with its commercial enterprise pending a final decision of this Court.

[67] Everfresh has not advanced nor can I find any special circumstances which would render it in the interests of justice for this Court to hear a claim for the development of the common law of contract relating to a renewal clause in a lease, as a court of first and final instance.

*Prospects of success*

[68] Ordinarily, in evaluating whether to grant leave to appeal, prospects of success are an important but not always a decisive factor. In its written argument in this Court, Everfresh concedes that without constitutional development the High Court properly interpreted clause 3 and that on existing judicial precedent its terms do not

give rise to an obligation to negotiate. Everfresh agrees with the High Court's finding that under the common law an option to renew a lease upon terms to be agreed is invalid and unenforceable. Well, if the renewal clause does not bring into being a duty to negotiate at all, there can be no need in this case to import the requirement that negotiation be done in good faith. This explains why Everfresh took refuge in the newly-crafted defence that the common law be constitutionally improved. To this end, it advanced at least four ways in which the common law ought to be developed.

[69] I am prepared to accept that there could be more than one plausible interpretation of the clause and that Everfresh's argument may therefore not be without some prospect of success. When two contracting parties conclude a bargain that a certain state of affairs will come into existence between them, provided only that the terms of a necessary condition "shall be agreed", a court called upon to interpret that provision may find itself required to develop the common law. It may find that "shall" imports a duty to negotiate and that parties would at least try to reach agreement on those terms. Counsel for the lessor sought to argue that "shall be agreed" in clause 3 implies no more than a conditional futurity – in other words, that a right of renewal would come into existence only if at some future point the parties were to reach agreement on rental. However, I accept in Everfresh's favour that there is at least a reasonable prospect that a court would find that "shall" imports the imperative and not merely the future tense.

[70] If that were so, then the parties' bargain was that they would try to agree, and the age-old contractual doctrine that agreements solemnly made should be honoured and enforced (*pacta sunt servanda*) would bolster Everfresh's case that the law should be developed to make an agreement of this kind enforceable.

[71] Had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law. Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of ubuntu, which inspire much of our constitutional compact. On a number of occasions in the past this Court has had regard to the meaning and content of the concept of ubuntu. It emphasises the communal nature of society and "carries in it the ideas of humaneness, social justice and fairness"[17] and envelopes "the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity".[18]

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[17] *S v Makwanyane and Another* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) (*Makwanyane*) at para 237.

[18] Id at para 308. See also id at 223-5, 227, 237, 262-3, 307-8 and 374; *The Citizen 1978 (Pty) Ltd and Others v McBride (Johnstone and Others, Amici Curiae)* [2011] ZACC 11; 2011 (4) SA 191 (CC); 2011 (8) BCLR 816 (CC) at paras 164-5, 168, 210 and 216-8; *Le Roux and Others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* [2011] ZACC 4; 2011 (3) SA 274 (CC); 2011 (6) BCLR 577 (CC) at para 200; *Van Vuren v Minister for Correctional Services and Others* [2010] ZACC 17; 2010 (12) BCLR 1233 (CC) at para 51; *Joseph and Others v City of Johannesburg and Others* [2009] ZACC 30; 2010 (4) SA 55 (CC) at para 46; 2010 (3) BCLR 212 (CC) at para 45; *Koyabe and Others v Minister for Home Affairs and Others (Lawyers for Human Rights as Amicus Curiae)* [2009] ZACC 23; 2010 (4) SA 327 (CC); 2009 (12) BCLR 1192 (CC) at para 62; *Bertie Van Zyl (Pty) Ltd and Another v Minister for Safety and Security and Others* [2009] ZACC 11; 2010 (2) SA 181 (CC); 2009 (10) BCLR 978 (CC) at para 78; *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) at para 51; *Dikoko v Mokhatla* [2006] ZACC 10; 2006 (6) SA 235 (CC); 2007 (1) BCLR 1 (CC) at paras 68-9, 86, 112-8 and 121; *Bhe and Others v Magistrate, Khayelitsha, and Others (Commission for Gender Equality as Amicus Curiae); Shibi v Sithole and Others; South African Human Rights Commission and Another v President of the Republic of South Africa and Another* [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC) at paras 45 and 163; *Port Elizabeth Municipality v Various Occupiers* [2004] ZACC 7; 2005 (1) SA 217 (CC); 2004 (12) BCLR 1268 (CC) at para 37; *Christian Education South Africa v Minister of Education* [2000] ZACC 11; 2000 (4) SA 757 (CC); 2000 (10) BCLR 1051 (CC) at para 50; and *Azanian Peoples Organisation (AZAPO) and Others v President of the Republic of South Africa and Others* [1996] ZACC 16; 1996 (4) SA 671 (CC); 1996 (8) BCLR 1015 (CC) at paras 3, 19 and 48. For academic articles see Bennett "Ubuntu: An African Equity" (2011) 14 (4)

[72] Were a court to entertain Everfresh's argument, the underlying notion of good faith in contract law, the maxim of contractual doctrine that agreements seriously entered into should be enforced, and the value of ubuntu, which inspires much of our constitutional compact, may tilt the argument in its favour. Contracting parties certainly need to relate to each other in good faith. Where there is a contractual obligation to negotiate, it would be hardly imaginable that our constitutional values would not require that the negotiation must be done reasonably, with a view to reaching an agreement and in good faith.

[73] I however conclude that it is unnecessary to decide the merits of any of these difficult questions now. We have not had the benefit of full argument, Shoprite has not had a proper opportunity to meet it, we are deprived of the views of the High Court and the Supreme Court of Appeal in matters where their expertise would be helpful, and there are no exceptional circumstances that incline us to be a court of first and final instance.

[74] On the contrary, for all the reasons I have earlier outlined, the interests of justice point away from allowing Everfresh to raise its argument for the first time. In particular, Everfresh cites no element of disparate bargaining power or contractual oppression, and claims no unfairness in the bargain it made with the lessor. Its dispute

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*Potchefstroom Electronic Law Journal* 29; Gade "The Historical Development of the Written Discourses on *Ubuntu*" (2011) 30 *South African Journal of Philosophy* 303; and Mokgoro "Ubuntu and the Law in South Africa" (1998) 4 *Buffalo Human Rights Law Review* 15.

is purely about commercial premises, and it makes no case that if it loses these, it will be unable to find any other, or that these particular premises are of any special value or importance to it. Against this background, and the powerful factors pointing away from allowing Everfresh to raise its constitutional argument at this very late stage, the mere possibility that its belated quest to have the common law developed may have some prospect of prevailing cannot sway the day in its favour.

*Should the matter be remitted to the High Court?*

[75] Yacoob J has taken the view that there is a reasonable prospect that the question whether the common law should be developed would have been answered in the affirmative. He concludes that the High Court ought to have investigated the question of whether the common law falls to be developed in accordance with the spirit, purport and objects of the Constitution. I am unable to agree.

[76] I can find nothing that justifies requiring the High Court to embark on an adaptation of the common law of its own volition. Unlike in *Carmichele*,[19] here the High Court was not confronted with an egregious invasion of a collection of vital fundamental rights which could not be vindicated when the High Court felt bound by existing precedent to grant absolution from the instance.[20] Moreover, unlike here, in *Carmichele* there was no doubt that had the High Court developed the common law of delict and heard evidence on trial, the claimant had clear prospects of success in her claim.

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[19] Above n 16.

[20] *Carmichele* above n 16 at para 80.

[77] It follows that it would not be in the interests of justice to remit this matter to the High Court on the narrow ground that it ought to have investigated the possible adaptation of the common law of its own volition.

[78] There are other pressing considerations. If the matter is remitted, the respondent would have to litigate afresh whilst Everfresh remains in occupation of Shoprite's premises for possibly a few more years as the matter winds its way up to this Court again. This delay would occur in circumstances where in the end, the renewal of the lease would take place only if, after the negotiation, Shoprite were to agree a rental. We know that whatever negotiations in good faith the "developed" common law would impose, it would not compel the respondent to agree to a renewal of the lease. After negotiating in good faith, the parties may not reach an agreement and the lease would not be extended. Another consideration is that the renewal period in issue expires in February 2014. If remittal is ordered the period may expire before the litigation is finalised.

[79] The second reason is that at the very least this Court, as an appellate court, must before remitting be satisfied that the common law, like in *Carmichele*, needs to be developed. In other words, the appellate court has to pronounce itself on the merits of the need to develop the common law in the course of determining prospects of success of the application for leave to appeal. It is not good enough to ask the court a quo whether the common law needs to be developed. That hypothetical question arises in

every single case involving the common law. The judgment of Yacoob J eschews the merits and requires the High Court to do that preliminary enquiry. I thus hold that it is not in the interests of justice to remit unless there is a reasonable prospect that the court to which the matter is remitted is likely to hold that the common law needs to be adapted. Otherwise the remittal may be said to be speculative.

[80] For all these reasons the application for leave to appeal has to fail.

*Order*

The application for leave to appeal is dismissed with costs.

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| For the Applicant: | Advocate JP Vorster SC instructed by Van der Merwe Du Toit Inc. |
| For the Respondent: | Advocate AM Breitenbach SC and Advocate MW Janisch instructed by Werksmans Attorneys. |