

# **Yet another Missed Opportunity to Develop the Common Law of Contract? An Analysis of *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30**

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Courts are under a general obligation to develop common law by applying constitutional values as mandated by sections 8(3), 39(2) and 173 of the Constitution. There have been attempts by part of the judiciary and calls from legal commentators to develop the common law contractual doctrine of good faith. In particular, the question that has occupied judicial decision making and academic writing for some time now is whether the spirit, purport, and objects of our Constitution require courts to encourage good faith in contractual dealings or whether the Constitution insists that good faith requirements are enforceable. The Constitutional Court had an opportunity to settle this question in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*<sup>1</sup>. This article argues that the Court wrongly decided that it was not in the interests of justice to grant leave to appeal. Consequently, the Court's misdirection and its refusal to refer the matter to the High Court to develop common law to require parties who undertake to negotiate a new term in a lease agreement to do so reasonably and in good faith resulted in the loss of a great opportunity to develop the common law.

## **1 INTRODUCTION**

The role of the courts in developing the common law of contract in South Africa has assumed great importance and has of late become a subject that has occupied academic writing<sup>2</sup> and judicial decision making.<sup>3</sup> South African "superior courts have always had an inherent power

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<sup>2</sup> Many writers have recently expressed views on the role of courts in developing the common law of contract. See for example, Brand "The role of good faith, equity and fairness in the South African Law of Contract: The influence of the common law and the Constitution" 2009 *SALJ* 71-90; Fagan "The secondary role of the spirit, purport and objects of the Bill of Rights in the common law's development" 2010 *SALJ* 611-627; Campbell *The cost of credit in the micro-finance industry in South Africa* (LLM-thesis, Rhodes University, 2006) 6. See chapter two on "Fairness in the South African law of Contract" 6-44.

<sup>3</sup> See the following cases where the role of the courts in developing common law in order to deal with contractual justice was an issue: *Carmichele v Minister of Safety and Security (Centre for Applied Legal*

to develop the common law in order to reflect the changing social, moral and economic make of the society”.<sup>4</sup> What appears to have become contentious of late<sup>5</sup> is whether this role to develop the common law (which common law has since been subsumed by the Constitution) is an obligation or merely discretionary when viewed in the light of relevant constitutional provisions.<sup>6</sup>

This article critically analyses the decision of the majority in *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd*<sup>7</sup> (hereafter *Everfresh*) in refusing the applicant leave to appeal and concluding that the case did not warrant remittal to the High Court and Supreme Court of Appeal to allow these courts to consider the question of the development of the common law of contract in accordance with section 39(2) of the Constitution. The critique will be presented in the light of the minority judgement of Yacoob J, minority views in relevant recent case law, the normative values of the Constitution and public policy<sup>8</sup> considerations. The thesis of this article is that the majority of the Constitutional Court in *Everfresh* incorrectly concluded that there was no need to develop common law, and in the process missed a good opportunity to play its obligatory role of developing the common law (particularly the principle of good faith which has been in dire need of development for more than a decade now).<sup>9</sup>

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*Studies Intervening*) 2001 4 SA 938 (CC) paras 54-6; *Napier v Barkhuizen* 2006 4 SA 1 (SCA); *Barkhuizen v Napier* 2007 5 SA 323 (CC) paras 28-9; *Brisley v Drotosky* 2002 4 SA 1 (SCA).

<sup>4</sup> See *S v Theus* 2003 6 SA 505 (CC) para 31.

<sup>5</sup> See part 2.1.2 below for a brief consideration of the debate on whether the courts’ role to develop the common law is an obligation or simply discretionary, when viewed in the light of the Constitution.

<sup>6</sup> The relevant constitutional provisions being sections 39(2) and 173 of the Constitution of South Africa, 1996. See part 2.1.2 in chapter two below for a more extensive discussion of these specific constitutional provisions.

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<sup>8</sup> See the definition of the concept “public policy” in 2.2 below

<sup>9</sup> A gap has existed in the South African law of contract with respect to contractual equity, for example in situations where questions arise as to whether a contract can be enforced in circumstances which were not envisaged at the time it was made. Since the demise of the *exceptio doli generalis* in *Bank of Lisbon and South Africa Ltd v De Ornelas* 1988 3 SA (A), there has been a call for the development of the common law doctrine of *bona fides* (good faith) to fill the gap in cases of contractual justice. See Lewis “The demise of the *exceptio doli generalis*: is there another route to contractual equity?” 1990 *SALJ* 26. One judge of the Supreme Court of Appeal, Olivier JA, has fought a lone battle in the SCA to develop the common law concept of good faith. In *Eerste Nasionale Bank van Suidelike Africa Bpk v Saayman* 1997 4 SA 302 (A) his attempt failed. According to Christie *The Law of Contract in South Africa* 5 ed (2006) 16, the little gains his dissenting judgement in *Saayman* had made in some High Court decisions, were all eroded when in *Brisley v Drotosky* 2002 4 SA 1 (SCA) “the majority dismissed his views as those of a single judge and good faith could not be accepted as an independent basis for setting aside or enforcing contractual provisions”.

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Common law can simply be defined to mean the law of the courts, or in other words the law made by the courts as opposed to the law made by the legislature.<sup>10</sup> Courts or judges make law through interpreting already existing rules of law when settling disputes. Common law is an uncodified body of law<sup>11</sup> from precedents of the courts that bind those courts or lower courts within the courts' hierarchy system, a doctrine known as *stare decisis*. Brand J of the Supreme Court of Appeal (hereafter SCA) opines that the system of developing common law through precedents has over the years provided the South African judiciary with a "medium to develop our system of uncodified common law".<sup>12</sup> By modifying, extending, or supplementing the common law principles, the courts seek to keep the law "in tune with changing social needs and values",<sup>13</sup> Brand J argues further. It is within this context that courts are expected to develop common law using the "objective normative value system" provided by the Constitution as per the Constitutional Court *dicta* in *Carmichele v Minister of Safety and Security*.<sup>14</sup>

The article has basically five parts. The first part introduces the thesis of the article. The second part locates the analysis or discussion within the context of relevant legal framework and interrogates the question as to whether the role of courts in developing the common law of contract is obligatory or discretionary. In the third part, the background to the *Everfresh* case will be given (that is, the factual and legal issues in the case). The fourth part will analyse the judgement and provide a critique thereof in the light of the dissenting judgement in *Everfresh*, recent case law developments and public policy considerations. The fifth part is a conclusion.

## 2 RELEVANT LEGISLATIVE AND LEGAL FRAMEWORK

This discussion is located within the context of the constitutional framework. The supremacy of the Constitution,<sup>15</sup> a celebrated development in South Africa, means that all laws enforced in South Africa and applied by the courts, including the common law of contract, now derives its force from the Constitution.<sup>16</sup> Christie makes a valid point when stating that "the Bill of

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<sup>10</sup> Currie and De Waal *The Bill of Rights Handbook* 5 ed (2005) 67.

<sup>11</sup> Brand *SALJ* 72.

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> 2001 4 SA 938 (CC) para 56.

<sup>15</sup> S 2 of the Constitution clearly provides thus, "The Constitution is the supreme law of the Republic; law or conduct that is inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".

<sup>16</sup> See the important *dicta* of Cameron JA in *Brisley v Drotsky* (fn 7 above). The judge confirms the position of s 2 of the Constitution in 33F-G.

Rights in the 1996 Constitution has already had a considerable impact on the law of contract, and will continue to do so”.<sup>17</sup>

The Constitution has impacted on the law of contract in some critical ways, two of which we will shortly turn to. Firstly, the Constitution has provided for horizontal application of the Bill of Rights and secondly, it provides for the constitutional mandate on courts to develop the common law in some of the provisions that will be discussed in 2.1.1 and 2.1.2 below. The link between public policy and the Constitution and its role thereof in the development of the common law will also be considered.

## **2 1 Constitutional framework for developing common law of contract**

### *2 1 1 Horizontal application of the Bill of Rights*

The confusion that prevailed during the days of the Interim Constitution,<sup>18</sup> as to whether the Bill of Rights has direct or indirect horizontal application to a contractual dispute between private parties, does not appear to have been completely resolved by the 1996 Constitution.<sup>19</sup> Dale Hutchison is one such author who expresses serious reservations regarding clarity of the position under the present Constitution.<sup>20</sup> Giving a treatise on the debate around direct and indirect horizontal application of the Bill of Rights is beyond the scope of this article.<sup>21</sup> Suffice it to say though that it is now axiomatic from case law<sup>22</sup> and the constitutional text that horizontal application with regard to private parties involved in a contractual dispute, for example, is now possible, but only to the extent that such horizontal application is permitted or qualified by the Bill of Rights itself.<sup>23</sup> It is nonetheless clear from section 8(2) that not all fundamental rights bind persons in the private sphere. Application of certain classes of rights, like socio-economic rights for instance, can be invoked against the state as opposed to private individuals.

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<sup>17</sup> Christie *Contract* 18.

<sup>18</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>19</sup> Constitution of the Republic of South Africa Act 108 of 1996.

<sup>20</sup> Hutchison *et al The Law of Contract in South Africa* (2009) 35-36.

<sup>21</sup> For a more in-depth discussion on the subject, see Cockrell “Private Law and the Bill of Rights: A Threshold Issue of Horizontality” in Y Mokgoro & P Tlakula (eds) *Bill of Rights Compendium* (1998) 3A9. Also refer to Hutchison *Law of Contract* 35-38.

<sup>22</sup> In *Du Plessis v De Klerk* 1996 3 SA 850 (CC) the Constitutional Court ruled that even the interim constitution did apply to relations between private persons on the horizontal plane, but that in general it did so only indirectly, and not directly. See Hutchison *Law of Contract* 35.

<sup>23</sup> S 8(2) provides for qualified horizontal application of the Bill of Rights in this way: “A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right.”

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*Barkhuizen v Napier*<sup>24</sup> is authority for the assertion that the Constitutional Court seems to prefer an interpretation of section 8(2) that points towards indirect application of the Bill of Rights when testing the constitutionality of a contractual term, since direct application, according to the judgement delivered on behalf of the majority by Ngcobo J, is fraught with difficulties.<sup>25</sup> It can be discerned from Ngcobo's judgement that the best approach to constitutional challenges to contractual terms is to determine whether the term challenged is contrary to public policy and for now, indirect application is best achieved via the development of the common law, first provided for within the context of section 8 (section 8 (3) to be precise) of the Bill of Rights to which we will shortly turn<sup>26</sup>.

### 2.1.2 Constitutional mandate to develop common law of contract

The Constitutional Court holds the view that the Constitution gives a general mandate to courts to develop the common law. This position was strongly conveyed in *Carmichele* as follows:

“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 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.”<sup>27</sup>

It is important at this stage to point out that the courts' “obligation” to develop the common law in order to promote the objectives of sections 39(2)<sup>28</sup> and 173<sup>29</sup> of the Constitution is to be found from within the Bill of Rights in sections that come earlier than sections 39(2) and

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<sup>24</sup> See fn 2 above.

<sup>25</sup> See Ngcobo J's judgement in *Barkhuizen v Napier* paras 23-30.

<sup>26</sup> While for now courts may be more comfortable with indirect horizontal application of the Bill of Rights to contractual disputes which implicate constitutional rights, the door is left open for courts to directly intervene if a party to a contract exercised a contractual power in a manner that failed to respect the constitutional rights of the other party. The Southern Gauteng High Court recently did that in *Breedenkamp v Standard Bank of South Africa Ltd* 2009/7907 when Jajbhay J granted an interdict against the bank, restraining it from unfairly cancelling the applicant's bank account, going against a provision in the contract that gave the bank the power to cancel “for any reason”. Also see Cockrell “Second-guessing the exercise of contractual power on rationality grounds” 1997 *Acta Juridica* 26.

<sup>27</sup> *Carmichele v Minister of Safety and Security* (see fn 2 above) para 39.

<sup>28</sup> S 39(2) provides thus, “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.”

<sup>29</sup> S 173 provides as follows: “The Constitutional Court, Supreme Court of Appeal and High Courts have the inherent power to protect and regulate their own process, and to develop the common law, taking into account the interests of justice.”

173. The clearest of the mandate on courts to develop the common law when applying the Bill of Rights to a practical situation where violation of a right is alleged, comes from section 8(3).<sup>30</sup> This provision is of the essence that when a court of law applies a right in the Bill of Rights in a private sphere (horizontal application), it must do so through the medium of the common law, and must develop common law by adapting, modifying or supplementing its rules where necessary to fill a gap in the law (the law of contract in this instance). It has been argued that common law of contract in particular is “shot through with open-ended concepts such as good faith, public policy, and reasonableness ... malleable standards [*which*] afford [*courts of law*] ready and convenient means of infusing the law of contract with the spirit and values of the Constitution”.<sup>31</sup>

According to the Constitutional Court, when fulfilling the mandate or obligation to develop the common law, courts of law do not have to wait for a perfect opportunity or a moment where “some startling development of the common law is in issue, but in all cases where the incremental development of a common law rule is in issue”.<sup>32</sup> In addition, where a court realises the need to develop the common law in a particular case in order to fill a gap in law, such a court does not always have to rely on litigants to make a relevant allegation regarding the need to develop a common law rule in the interests of justice, but can under certain circumstances intervene of its own accord.<sup>33</sup> What is expected of the courts in keeping with their constitutional mandate to develop the common law is to be at all times “alert to the normative framework of the Constitution”.<sup>34</sup>

The author recognises that there is an alternative view to the increasingly general understanding that courts in South Africa are enjoined by the Constitution to develop the common law whenever it falls short of the spirit, purport, and objects of the Constitution. While the Constitutional Court<sup>35</sup> may consider the position regarding courts’ mandate to

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<sup>30</sup> S 8(3)(a) states that “When applying a provision of the Bill of Rights to a natural or juristic person in terms of the subsection (2), a court –

- (a) in order to give effect to a right in the Bill of Rights, must apply, or if necessary develop, the common law to the extent that legislation does not give effect to that right;
- (b) may develop rules of the common law to limit the right, provided that the limitation is in accordance with section 36(1)”.

<sup>31</sup> *Hutchison Law of Contract* 36. My emphasis.

<sup>32</sup> *K v Minister of Safety and Security* 2005 6 SA 419 (CC) para 17.

<sup>33</sup> *Carmichele v Minister of Safety and Security* (see fn 26 above) is authority for this assertion.

<sup>34</sup> See *K v Minister of Safety and Security*, fn 31 above, para 17.

<sup>35</sup> Including other stakeholders who are converted to the conviction that there exists a constitutional mandate on courts to develop the common law within the context of s 8(3), s 39(2), and s 173 of the Constitution.

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develop common law as trite, the question is not without difficulty or even controversy for other academics and legal commentators. Professor Antony Fagan argues that contrary to the Constitutional Court's assertion in *Carmichele*,<sup>36</sup> "the Constitution does not oblige courts to develop the common law whenever it falls short of the spirit, purport, and objects of the Bill of Rights".<sup>37</sup>

Fagan further contends that the Constitution does not even regard the spirit, purport, and objects of the Bill of Rights as reasons for the development of the common law, but only as reasons for choosing between several alternative ways of developing the common law.<sup>38</sup>

Another professor and seasoned legal practitioner, Halton Cheadle, supports Fagan's view, and adds that the wording of sections 39(2) and 173 of the Constitution cannot be read to imply an obligation to develop common law, since in Cheadle's view "both logic and the rules of statutory interpretation set their face against deriving an obligation from a power".<sup>39</sup> I am prepared to agree with Fagan only on the point that section 39(2) requires a court to promote the objects of the Bill of Rights not only when developing the common law but also when interpreting any legislation. Indeed the focus of section 39 is the interpretation of the Bill of Rights.<sup>40</sup>

I am, however, unable to agree with the argument by Professor Fagan that there is no discernible obligation on courts to develop common law from the reading of sections 8(3), 39(2) and 173 of the Constitution. A proper construction and understanding of section 8(3)(a) of the Constitution should lead to a conclusion that courts are mandated to develop the common law of contract in a situation where a constitutional right is implicated in a contractual dispute, for example.<sup>41</sup> Section 39(2), flowing from the above construction, can be understood to be a directive on courts to ensure that the common law is infused with the values of the Constitution, and can be interpreted to be therefore giving the courts an indirect obligation to develop the common law. It is important to note that the said constitutional

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<sup>36</sup> See *Carmichele v Minister of Safety and Security* para 39

<sup>37</sup> Fagan 2010 *SALJ* 612

<sup>38</sup> See fn 36 above. According to Fagan, the Constitution only recognises the following as possible reasons for developing common law: (1) the rights in the Bill of Rights; (2) justice; and (3) the rules of the common law itself. See Fagan 2010 *SALJ* 612

<sup>39</sup> Cheadle "Application" in Cheadle, Davis, and Haysom *South African Constitutional Law: The Bill of Rights* 2 ed (2005) 3-11.

<sup>40</sup> Fagan 2010 *SALJ* 620.

<sup>41</sup> See 2.1.2 above for details of and a commentary on sections 8(3)(a), 39(2) and 173.

mandate on courts to develop the common law whenever the courts find it necessary to do so in applying a provision of the Bill of Rights to a set of facts, is couched in a peremptory word “must” and not optional words like “may” or even “should”.<sup>42</sup>

It is further contended that, from the premise that the Constitution is supreme law and all law now derives its force from it,<sup>43</sup> it should be more logical to conclude that the relevant Bill of Rights sections give courts an obligation to develop the common law than believing that such obligation emanates from anywhere else but the Constitution. In other words, despite the contrary views of authors like Fagan, this author firmly agrees with the view of the Constitutional Court that the duty of courts to develop the common law whenever it falls short of the spirit and purport of the Bill of Rights is obligatory and not discretionary as demonstrated above.

## 2 2 Relevance of public policy considerations

Doctrine of public policy, while difficult to comprehensively define, can be understood to refer to courts’ considerations of what is in the interests of the society or community<sup>44</sup> when interpreting contracts.

*Sasfin (Pty) Ltd v Beukes*<sup>45</sup> is one of the leading cases on contracts that are contrary to public policy and is also considered the starting point of the modern law of illegality or unenforceability of contracts by common law. According to Christie, since *Drotsky*<sup>46</sup> and *Afrox Healthcare Bpk v Strydom*<sup>47</sup> [unfortunately] “rejected good faith in favour of public policy,<sup>48</sup> *Sasfin* has become the leading authority for testing the enforceability of contracts which in other jurisdictions<sup>49</sup> would raise questions of good faith. Smalberger JA in his judgement in *Sasfin* stated the importance of interests of the community to public policy. His remark that “no court should ... shrink from the duty of declaring a contract contrary to

<sup>42</sup> See s 8(3)(a) in fn 29 above.

<sup>43</sup> *Brisley v Drotsky* para 33F-G

<sup>44</sup> Something akin to the concept “public interest”, a term that is sometimes used interchangeably with the phrase “interests of the community”.

<sup>45</sup> *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).

<sup>46</sup> *Brisley v Drotsky* 2002 4 SA 1 (SCA).

<sup>47</sup> *Afrox Healthcare Bpk v Strydom* 2002 6 SA 21 (SCA).

<sup>48</sup> Christie *Contract* 347.

<sup>49</sup> A good example is the Germany jurisdiction where a contract can be struck down if it is contrary to the notion of good faith, while in South Africa a contract has to be repugnant to public policy to suffer similar consequences. See Braun *Policing Standard Form Contracts in Germany and South Africa: A Comparison* (LLM-thesis University of Cape Town, 2005) 64.



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public policy when the occasion so demands”, has become celebrated in South Africa’s superior courts.

Interests of the society are dynamic and never static.<sup>50</sup> As society progresses, its needs and value system change in sync with changing times. To this extent, public policy assumes new scope and content at every milestone stage of the development of a society. Since the Bill of Rights in the South African Constitution “is the most recent expression of the values upheld in our society”,<sup>51</sup> it can be correctly regarded, in the words of Christie, as an “exceptionally reliable statement of seriously considered public opinion”.<sup>52</sup> Today, public policy, which “in its modern guise ... is rooted in our Constitution and the fundamental values it enshrines”,<sup>53</sup> has the following content and objectives to achieve: human dignity, achievement of equality, advancement of human rights and freedoms, non-racialism and non-sexism.

The value and relevance of public policy to this article is to be seen in the light of the reality that courts in South Africa appear to favour public policy as an instrument for handling cases of contractual unfairness that cannot satisfactorily be handled by existing rules.<sup>54</sup> Some commentators who see an important role for good faith in contract law have been left disappointed by the fact that for many years the courts have shown a preference for public policy, itself an abstract concept, and have refused to see the need to develop the common law concept of good faith.<sup>55</sup>

### **2 3 Enforceability of a duty to negotiate in good faith – the lacuna**

The enforceability of a general duty to negotiate in good faith in the context of an agreement to agree at a future date remains a grey area in South African law of contract. It has led writers to search for answers through some scholarly publications.<sup>56</sup> Cases discussed below show the different classes of agreements to agree present in South African law. Courts of law have adopted different approaches when dealing with such agreements, especially when

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<sup>50</sup> Christie *Contract* 348.

<sup>51</sup> Van der Merwe *et al Contract General Principles* 3 ed (2007) 18.

<sup>52</sup> Christie “The Law of Contract and the Bill of Rights” in Mokgoro and Tlakula (eds) *Bill of Rights Compendium* (2006) 3H8.

<sup>53</sup> See statement of Cameron JA in *Brisley v Drotosky* fn 7 above para 34H-35B.

<sup>54</sup> Christie *Contract* 16.

<sup>55</sup> See Bhana and Pieterse “Towards a Reconciliation of Contract Law and Constitutional Values: *Brisley* and *Afrox* Revisited” 2006 *SALJ* 894; Cockrell “Substance in the South African Law of Contract” 1992 *SALJ* 109; Kerr *The Principles of the Law of Contract* 6 ed (2002).

<sup>56</sup> Andrew Hutchison in his article “Agreements to agree: Can there ever be an enforceable duty to negotiate in good faith?” 2011 *SALJ* 273-296 asks a very pertinent question in this regard.

attempting to answer the question as to whether a duty to negotiate in good faith is enforceable in our law.

The different approaches are clear when courts are faced with agreements to agree where preliminary agreements or arrangements in the existing contract contain some deadlock-breaking mechanisms and in cases where such mechanisms are absent. For example, in *Southernport Developments (Pty) Ltd v Transnet*<sup>57</sup> a binding preliminary agreement which contained open terms as to the conditions of a future lease of a defined property was held by the court to be valid and enforceable. In *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk*<sup>58</sup> an option to renew a lease agreement at a rental to be negotiated in future was considered enforceable by the court. It appears that the courts found it easier to enforce the duty to negotiate in good faith in these two cases due to the presence of an arbitration clause which required parties to approach an arbitrator for resolution in case of a dispute. As per Ponnar AJA's *dicta* in *Southernport*, the work of the courts was made easier by the fact that the arbitrator had the task of simply "... putting the flesh onto the bones of a contract already concluded by the parties".<sup>59</sup> In light of these recent cases, it can be concluded that there is authority in South Africa that the presence of an arbitration clause in an agreement imposing on the parties a duty to negotiate in good faith makes the agreement enforceable.<sup>60</sup>

Difficulties appear to arise when there is no "deadlock-breaking mechanism" in a preliminary agreement or an arrangement like the one found in *Lethaba* (an "arrangement" or agreement to renew a lease at a rental to be negotiated). Despite clear intentions of parties to be bound by a duty to negotiate in good faith present or implied in their agreement, courts have been hesitant to enforce such agreements in the absence of an arbitration clause or any other form of a deadlock-breaking mechanism.<sup>61</sup> This is the present state of South African law regarding this category of agreements to agree. There is reluctance by courts to intervene, even where there is a strong call for intervention to prevent contractual injustice. Such a state of affairs

<sup>57</sup> *Southernport Developments (Pty) Ltd v Transnet* 2005 92 SA 202 (SCA). Also see Hutchison (2011) *SALJ* 275.

<sup>58</sup> *Letaba Sawmills (Edms) Bpk v Majovi (Edms) Bpk* 1996 2 SA 225 (A) in Hutchison (2011) *SALJ* 275.

<sup>59</sup> *Southernport* para 17.

<sup>60</sup> Hutchison (2011) *SALJ* 274.

<sup>61</sup> In *Premier Free State v Firechem Free State (Pty) Ltd* 2000 4 SA 413 (SCA) an agreement without an arbitration clause was held to be an unenforceable "agreement to agree". See Hutchison (2011) *SALJ* 275 where another case of *H Merks & Co (Pty) Ltd v The B-M Group (Pty) Ltd* is discussed. In this case, an agreement to increase the sale price from time to time was held to be unenforceable because no deadlock-breaking mechanism existed to break the stalemate between the parties. In its absence, the court refused to interfere with the parties' freedom to contract.

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appears to work in favour of a recalcitrant party who can always find it easy to argue that a promise to negotiate in good faith is too illusory or too vague and uncertain to be enforceable.<sup>62</sup> What is therefore the remedy for a party who is affected by the other party's refusal to negotiate in good faith? Is a court of law obliged to develop the common law of good faith beyond precedent to impose a duty on a recalcitrant party to negotiate in good faith even in the absence of an arbitration clause? These are the critical questions that faced the Constitutional Court in *Everfresh*.

### **3 Background to *Everfresh* (Factual and Legal issues)**

#### **3.1 Factual Issues**

The case is a result of an ejectment application in the High Court<sup>63</sup> by the respondent Shoprite Checkers (Pty) Ltd (hereafter Shoprite) against applicant, Everfresh Market Virginia (Pty) Ltd<sup>64</sup> (hereafter Everfresh). The business relationship between the two was established by means of good faith negotiations between Everfresh and Shoprite's predecessor in title that resulted in a lease agreement for the rental of a portion of the Virginia Shopping Centre by Everfresh. Shoprite bought this property from the original lessor<sup>65</sup> during the currency of the lease, and Shoprite therefore became bound by the lease, effectively becoming Everfresh's lessor.

The lease was for five years between 1 April 2004 and 31 March 2009. The lease gave the lessee a right to renew the lease for a similar duration under similar conditions, subject to the lessee giving the lessor written notice of such intention to renew at least 6 calendar months prior to termination of the lease. The agreement had a clause that provided for the parties to negotiate and agree on a rental fee at renewal. In due course Everfresh elected to exercise the right to renew the lease agreement, and duly notified Shoprite of its intentions to do so on 14 July 2008, and further proposed a reasonable rental fee escalation of 10.5% per annum in line with the existing lease.

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<sup>62</sup> This is the position adopted by Shoprite in *Shoprite Checkers (Pty) Limited v Everfresh Market Virginia (Pty) Limited* Case No 6675/09, KwaZulu-Natal High Court, Pietermaritzburg (25-05-2010), unreported. When Everfresh argued that Shoprite had a duty to negotiate with it in good faith and renew a lease in line with an agreement to agree, Shoprite refused and sought ejectment of Everfresh from the property after denying that it had an obligation to negotiate in good faith.

<sup>63</sup> *Shoprite Checkers (Pty) Ltd v Everfresh Market Virginia (Pty) Limited* Case No 6675/09, KwaZulu-Natal High Court, Pietermaritzburg (25-05-2010), unreported.

<sup>64</sup> Previously called Wild Break 166 (Pty) Ltd. See *Everfresh* para 2.

<sup>65</sup> H.R Geering C.C.

Shoprite, however, rejected Everfresh's proposal for lease renewal, and on 3 September 2008 wrote back to Everfresh advising it that according to its understanding, the lease agreement did not impose any contractual obligation on the lessor to extend the lease agreement. Shoprite further advised Everfresh that the lease agreement would accordingly terminate on 31 March 2009. When that date arrived, Everfresh did not vacate the premises. Shoprite then instituted ejectment proceedings in the High Court, arguing that it was not obliged to enter into negotiations and that Everfresh was in unlawful occupation. Everfresh in its affidavit opposing ejectment, contended that the terms of the agreement precluded Shoprite from frustrating its qualified right to renew by refusing to negotiate in good faith.

The High Court rejected Everfresh's argument as bad in law and Shoprite succeeded in its ejectment claim.<sup>66</sup> Both the High Court and the SCA refused Everfresh's application for leave to appeal, hence the Constitutional Court challenge.

### 3.2 The Legal Issues

The Constitutional Court (hereafter the Court)<sup>67</sup> in *Everfresh* had to deal with three central legal issues, with a few questions connected to the main legal issues also requiring the decision of the Court. The first legal question which the Court had to decide on is whether a constitutional matter was being raised when Everfresh requested the Court to develop the common law in the light of section 39(2) of the Constitution in order for the common law to require parties who undertake to negotiate a new term in a lease agreement to do so reasonably and in good faith.<sup>68</sup> The Court was unanimous that a constitutional matter was thus being raised.

Secondly, the Court had to decide whether it was in the interests of justice to grant Everfresh leave to appeal.<sup>69</sup> Though the Court was divided on whether it was in the interests of justice to grant leave to appeal against the decision of the High Court and the SCA, it was unanimous on the fact that Everfresh had not made a very relevant allegation that it was in the interests of justice for the court to grant leave to appeal. In the end, the majority decided

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<sup>66</sup> See fn 62 above.

<sup>67</sup> Where reference hereafter is made to a court other than the Constitutional Court, it will be clearly specified which court is referred to.

<sup>68</sup> See *Everfresh* paras 18 and 48. The minority and majority decisions agree in paras 19 and 48 that a constitutional matter of substance was raised by the applicant.

<sup>69</sup> Para 49. Also see para 20 for the minority decision.

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that everything militated against granting leave to appeal,<sup>70</sup> while the minority held that despite Everfresh's failure to properly canvass the issue, it was generally in the interests of justice to grant leave to appeal, given the importance of developing the common law of contract.<sup>71</sup>

Thirdly, the Court had to decide on whether an obligation existed for the Court to remit the matter to the High Court for the purpose of developing the common law in light of the "spirit, purport, and objects of the Bill of Rights".<sup>72</sup> In relation to this point, the Constitutional Court had to consider the prospects of success if Everfresh's challenge was to be remitted to the High Court to reconsider the question of the development of common law. The majority sharply differed with the minority on this point and decided that it was not in the interests of justice and fairness to remit the matter back to the High Court. In coming to the above decision, the majority had to consider whether the claim to develop the common law had been raised for the first time in the Court,<sup>73</sup> and ruled that not only had Everfresh altered its defences as it went along, but also failed to raise any of the constitutional points in the High Court and SCA.

#### **4 Analysis of the *Everfresh* judgement**

##### **4.1 The *Everfresh* judgement**

The Constitutional Court majority judgement in *Everfresh* was delivered by Moseneke DCJ, with Ngcobo CJ, Cameron J, Jafta J, Khampepe J, Nkabinde J, and Van der Westhuizen J concurring. Yacoob J led the dissenting (minority) judgement, with Froneman J, Mogoeng J, and Mthiyane AJ concurring. In an eight-to-four decision, the Court refused to grant leave to appeal and accordingly the matter was not remitted to the High Court to consider the question of the development of the common law.<sup>74</sup> This decision was obviously not unanimous. What follows below is a discussion of the *ratio decidendi* and how the Court arrived at its decision.

In the main, the Court's decision to refuse the applicant leave to appeal was for the reason that it was not in the interests of justice to do so. According to the judgement delivered by Moseneke DCJ for the majority, a careful balancing of various factors had to be done in order

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<sup>70</sup> Including the fact that it was not in the interests of justice to grant leave to appeal.

<sup>71</sup> *Everfresh* para 29.

<sup>72</sup> That is, in line with the s 39(2) objectives. Para 75.

<sup>73</sup> Constitutional Court.

<sup>74</sup> *Everfresh* para 47.

to determine the exact content of interests of justice in this case.<sup>75</sup> Thus, in Moseneke DCJ's view, it was fatal to the application brought by Everfresh, that the applicant failed to allege, either in its application for leave to appeal in the High Court and SCA or in its written argument before the Constitutional Court, that it was in the interests of justice for the Court to hear its appeal.<sup>76</sup> It was further found not to be in the interests of justice for the Court to grant Everfresh leave to appeal because the applicant's defence to Shoprite's claim for eviction, according to the majority, had changed over time to the prejudice of the respondent (Shoprite). Moseneke DCJ argued that "Everfresh's case had ... taken different forms in different forums, and sometimes in the same forum."<sup>77</sup> It is interesting that Moseneke DCJ, in making the above comment, inadvertently referred to the defences that Everfresh had put up in the High Court against Shoprite's eviction claim. The defences presented by Everfresh in the High Court, as Moseneke DCJ acknowledges, were rooted in the proper interpretation of clause 3<sup>78</sup> of the contract.<sup>79</sup> Everfresh's alternative defence was that clause 3 of the lease at least created a positive duty on Shoprite to negotiate with Everfresh for the renewal of the lease in good faith.<sup>80</sup>

While Everfresh was forced to abandon its main defence presented in the High Court, it continued with its alternative defence, which argument was now buttressed by the request to the Constitutional Court to develop the contractual common law principle of good faith in line with the "spirit, purport, and objects of the Bill of Rights".<sup>81</sup> The Court, per Moseneke DCJ, concluded that good faith was too illusory to be ascertainable or enforceable even if it was to be concluded that the lease contained a promise from the lessor to the lessee to negotiate in good faith, "such a promise, assuming it to be one to negotiate in good faith,

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<sup>75</sup> Para 49.

<sup>76</sup> Para 49.

<sup>77</sup> Para 53.

<sup>78</sup> Clause 3 of the lease partly read, "Provided that the Lessee has faithfully and timeously fulfilled and performed all its obligations under and in terms of this Lease, the Lessee shall have the right to renew same for a further period of four years and eleven months commencing on 1<sup>st</sup> April 2009, such renewal to be upon the same terms and conditions ... and save that the rentals for the renewal period shall be agreed upon ... at the time. The said right of renewal is subject to the Lessee giving written notice to the Lessor of its intention to so renew ... not less than six (6) Calendar months prior to the date of termination of this Lease ... "

<sup>79</sup> In the High Court, Everfresh, in its first defence to Shoprite's eviction claim, contended that it had the right to occupy the premises flowing from a valid right of renewal of the lease by virtue of clause 3 of the agreement.

<sup>80</sup> Para 57.

<sup>81</sup> See section 39(2) of the Constitution.

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which by its very nature, purpose and context is simply too vague and uncertain to be enforceable”.<sup>82</sup>

The Court also reasoned that because, in its view, the claim to develop the common law was raised by the applicant Everfresh for the first time in the Constitutional Court, the interests of justice point towards the application falling to fail. Using case law,<sup>83</sup> Moseneke DCJ ruled that it was not desirable to grant leave to appeal where an applicant failed to raise the development of the common law in the High Court, and only does so in the Constitutional Court.<sup>84</sup> Though the Court held unanimously that Everfresh’s claim to have common law of contract developed presented a constitutional case of substance,<sup>85</sup> the majority ruled that without the benefit of the views of the High Court and SCA, it was not in the interests of justice for the Court to hear the claim as a court of first and last instance. The reason advanced for this finding being that no special circumstances existed for the Court to hear the matter as a court of first instance.<sup>86</sup> The correctness of the position adopted by the majority in this regard is debatable, as will be demonstrated in 4.2 below.

The final reason advanced by the Court for refusing to grant leave to appeal was that there were no prospects of success in the case argued before it by Everfresh, and the Court accordingly declined to refer the matter to the High Court or SCA to consider the question of the development of common law as requested by Everfresh.<sup>87</sup> It is surprising that Moseneke DCJ arrived at this finding notwithstanding a concession that there exists a possibility of “... more than one plausible interpretation of the clause and that Everfresh’s argument may therefore not be without some prospect of success”.<sup>88</sup> The Court established an interlink of key contractual principles relevant to Everfresh’s argument. These include the underlying notion of good faith in contract law (*bona fides*), the maxim of the contractual doctrine *pacta sunt servanda*<sup>89</sup> and the value of *ubuntu*, which as Moseneke DCJ acknowledged, “... inspire

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<sup>82</sup> In arriving at such a conclusion, Moseneke DCJ agreed with and even employed the quotation of this *dicta* from *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 2 SA 202 (SCA). See also the Australian case of *Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd* 1991 24 NSWLR 1.

<sup>83</sup> Moseneke DCJ quoted with approval *Lane and Fey NNO v Dabelstein* [2001] ZACC 14; 2001 2 SA 1187 (CC); 2001 4 BCLR 312 (CC).

<sup>84</sup> Para 63-64.

<sup>85</sup> See paras 18 and 48.

<sup>86</sup> Para 64.

<sup>87</sup> See paras 69-75.

<sup>88</sup> See para 69.

<sup>89</sup> Doctrine which means that agreements solemnly made should be honoured and enforced (by courts of law).

much of our constitutional compact ... ”<sup>90</sup> The Deputy Chief Justice further remarked that such contractual principles had the potential to tilt the argument in Everfresh’s favour, and that “where there is a contractual obligation to negotiate ... our constitutional values would ... require that the negotiation be done reasonably, with a view to reaching an agreement and in good faith”.<sup>91</sup> Despite all these comments from Moseneke DCJ, which appeared to favour Everfresh’s case, the majority reached a conclusion that the applicant had failed to convince the Court that prospects of success existed.

Having gleaned over the judgement presented by Moseneke DCJ and the important admissions he made as highlighted above, it is difficult for one not to wonder why the Court arrived at the decision that it reached regarding refusing to grant leave to appeal and refusing to remit the case to the High Court and SCA to consider developing common law. Despite conceding that the case presented by Everfresh is not without prospects of success, that the case bears a constitutional issue of importance and that the Constitution requires negotiations to be done in good faith, Moseneke still ruled against Everfresh’s claim to have common law developed in light of section 39(2) requirements in order to require parties who undertake to negotiate a new term in a lease agreement to do so reasonably and in good faith.

It is important to also note that no attempt was made by the Court to reflect on the current trend in South African law to make a promise to negotiate in good faith enforceable where there is the presence of a deadlock mechanism like an arbitration clause. Little attempt was also made by the Court to explain why a conclusion was reached to say that the promise to negotiate in good faith in *Everfresh* was too illusory and uncertain to be enforced by the Court. It needs to be noted that Everfresh and Shoprite had a contract in place, which contract was negotiated on the basis of good faith, and became the vehicle for an “agreement to agree” or to negotiate a rental fee in future at renewal. It is difficult to understand why the Court only referred to cases (*Southernport* and foreign case law in this regard)<sup>92</sup> which supported the conclusion which the majority favoured, to the effect that the promise to negotiate was too illusory and uncertain to be enforceable. The omission by the majority to clearly show that there is case law that suggests that it is possible in South African law to enforce a duty to negotiate in good faith in certain circumstances, does raise eyebrows. As discussed in 2.3

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<sup>90</sup> Para 72.

<sup>91</sup> See para 72.

<sup>92</sup> See how Moseneke DCJ quoted with approval, *Southernport* as well as the Australian case of *Coal Cliff Colliers (Pty) Ltd v Sijehama (Pty) Ltd* 1991 24 NSWLR 1 in *Everfresh* para 57.



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above, the case of *Southernport* employed by Moseneke DCJ in his judgement, as well as *Litaba* (which was disappointingly never referred to), demonstrate the potential which exists in South African law to develop a duty to negotiate in good faith into an independent rule to ensure contractual justice in line with the section 39(2) objectives.

Another rationale for the Court's decision to refuse Everfresh's request for the development of common law was that the applicant (Everfresh) failed to properly argue its case before the Court, and in Moseneke DCJ's own words, "had the case been properly pleaded, a number of inter-linking constitutional values would inform a development of the common law".<sup>93</sup>

#### **4.2 A Critique of *Everfresh* in light of Yacoob J's dissenting judgment**

From the analysis of the outcome, which the majority favoured in *Everfresh* given in 4.1 above, it can be deciphered that there was potential for a different outcome. A different outcome was possible if, firstly, the Court had been more alert to its constitutional mandate to develop the common law in light of the section 39(2) objectives. Secondly, it can be argued that a different result could have been achieved if the Court had not misdirected itself when making decisions on key legal issues. It therefore comes as no surprise that there is an alternative view and a different outcome favoured by part of the same Court, in the form of the minority's dissenting judgement presented by Yacoob J.<sup>94</sup> I will briefly consider the points at which the Court misdirected itself and demonstrate how a different approach to the key legal issues could have resulted in a different outcome in *Everfresh*. The minority judgement of Yacoob J is critical in this regard and shall be referred to from time to time in this critique.

The rationale for the Court's ruling that despite the applicant in *Everfresh* raising a constitutional matter of substance, it was not in the interests of justice for the Court to hear the matter as a Court of first instance,<sup>95</sup> is highly contestable. As argued by Yacoob J, the fact that Everfresh failed to argue the need for development of the common law before the High Court should not bar it from arguing the matter before the Constitutional Court as Court of first instance, provided that there was no prejudice to be suffered by Shoprite.<sup>96</sup> Could it be gainsaid that there was a possibility of prejudice to Shoprite in a situation where the facts

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<sup>93</sup> Para 71.

<sup>94</sup> See the conclusion reached by Yacoob J in *Everfresh* paras 38-42.

<sup>95</sup> See the outcome that Moseneke DCJ reached in this regard in para 73.

<sup>96</sup> See para 27.

argued before the High Court and the Constitutional Court were basically the same facts, save that Everfresh's argument was now buttressed by a request to the Constitutional Court to develop the duty to negotiate in good faith beyond precedent? As argued by Yacoob J, there is no possibility of prejudice since the matters raised were not matters that Shoprite could not traverse since they were all common cause.<sup>97</sup>

Again, the majority's argument that it could not hear the argument to develop common law as court of first instance because Everfresh failed to raise the constitutional matter before the High Court and SCA, is difficult to reconcile with the reality of Everfresh's argument before the Court. Despite Everfresh's failure to mention by name the need to develop common law before the High Court, Everfresh raised a matter laced with constitutional implications before the High Court when it argued that Shoprite had an obligation to negotiate in good faith. Yacoob J correctly states that raising the argument of a duty to negotiate in good faith does "by necessary implication raise issues of public policy ... which issues ... in turn cannot be considered without reference to section 39(2)"<sup>98</sup> of the Constitution. The Court's conclusion that no special circumstances existed to justify remitting the matter to the High Court to consider the question of developing common law<sup>99</sup> was, in line with this construction, also very surprising.<sup>100</sup> This outcome was favoured by the Court despite its earlier acknowledgement that the Constitution requires parties to an agreement to conduct their relationship, including negotiations, reasonably and in good faith.<sup>101</sup> Yet before the Court, Everfresh brought a request for the Court to adapt the common law in line with the "spirit, purport, and objects of the Bill of Rights"<sup>102</sup> to ensure that an agreement to negotiate made in good faith is rendered enforceable. At common law, the current position appears to be that an agreement or promise to negotiate and agree on an element of a contract in future is unenforceable in the absence of a deadlock-breaking mechanism, despite the parties' intentions to be bound by such an agreement.<sup>103</sup>

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<sup>97</sup> See paras 27 and 28.

<sup>98</sup> Para 26.

<sup>99</sup> See paras 73-79.

<sup>100</sup> Moseneke DCJ attempted to distinguish *Everfresh* from *Carmichele* in para 76, as he sought to establish that there were no prospects of success in the case under review to require the High Court to embark on an adaptation of the common law of its own volition.

<sup>101</sup> Para 72.

<sup>102</sup> In other words to infuse the common law rules of contract, particularly the undeveloped concept of good faith, with the values as per the s 39(2) objectives.

<sup>103</sup> See 2.3 above.

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Considering that contractual fairness and justice are values that the Constitution, supreme law of the land, holds dearly, it cannot be gainsaid that refusal to allow for the development of common law to infuse it with the values of the Bill of Rights is consistent with public policy considerations and the Constitution. Not even the reasons proffered by the Court, namely, firstly, that it was deprived of the views of the High Court and SCA; secondly, because of the reason that the matter was being raised for the first time in the Constitutional Court; and thirdly, that granting the appeal would prejudice Shoprite, are good enough grounds to have prevented the Court from considering the crucial matter that Everfresh brought before it.<sup>104</sup>

Contrary to Moseneke DCJ's assertion that no exceptional circumstances existed to allow the Court to intervene or require the High Court to intervene of its own accord and develop the common law as requested by the applicant, it was arguably implicit in *Everfresh* that the common law concept of good faith required development in order to align it with the emerging new contractual constitutional order.<sup>105</sup> In contrast to Moseneke DCJ's comments, Yacoob J, who presented the dissenting minority judgement, saw Everfresh's proposal to adapt the common law in different light. Yacoob J was of the view that a proposition for 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 one which is not.<sup>106</sup> In addition, Yacoob noted that not only was Everfresh's proposition in line with constitutional ethos, but also that it was consistent with principles like the sanctity of contract and the important moral denominator of good faith.<sup>107</sup> It is an already established principle in South African law that every contract is deemed to be *bona fidei*, which involves good faith as a criterion for interpreting a contract.<sup>108</sup>

Why was it necessary for the Court to have seriously considered developing common law relating to a promise to negotiate in good faith as urged upon by Everfresh? An answer could be found in the particular circumstances of the case. In the circumstances of *Everfresh*, two parties (the original lessor and lessee) had created rights and obligations in clause 3 of the

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<sup>104</sup> See 4.1 above.

<sup>105</sup> Yacoob J, writing for the minority in para 36, calls the incremental developmental of common law of contract to align it with constitutional values, an emerging "contractual constitutional order".

<sup>106</sup> Para 36.

<sup>107</sup> See also para 36.

<sup>108</sup> *Meskin NO v Anglo-American Corporation of SA Ltd* 1968 4 SA 793 (W) 802A.

contract and had the necessary *animus contrahendi*<sup>109</sup> to be bound by an agreement signed in good faith. Despite their intentions, enforcement of the rights and obligations so created by clause 3 of the lease agreement was frustrated by a common law rule that does not yet consider a promise or duty to negotiate in good faith enforceable, especially in the absence of a deadlock-breaking mechanism such as an arbitration clause.<sup>110</sup> Shoprite, who became a successor in title,<sup>111</sup> spotted the gap in common law and decided to exploit it in order to escape from its obligations that were created by the good faith negotiations concluded between the original lessor and Everfresh.<sup>112</sup>

It is not difficult to see that Shoprite took advantage of the undeveloped common law of contract as pointed out above.<sup>113</sup> Shoprite's action was motivated by a desire to pursue a new business direction.<sup>114</sup> This desire could have been frustrated had Shoprite chosen to be bound by the good faith "obligation" to negotiate with Everfresh. Shoprite had discovered that after all, such an obligation was not enforceable at common law as it stood at the time<sup>115</sup> and sadly, as it still stands today.<sup>116</sup> It is this anomaly that Everfresh sought to persuade the Court to correct by developing the common law contractual doctrine of good faith so that promises to negotiate reasonably and in good faith can become enforceable. Sadly, the Court failed to see any exceptional grounds to hear this important claim to develop the common law as a court of first instance. The Court then non-suited Everfresh on slender grounds such as Everfresh's

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<sup>109</sup> A serious intention to create binding obligations. A contract that clearly gives rights to one party in the manner that clause 3 did, by necessary implication imposes a duty on the other party to fulfil the obligations flowing from the agreement.

<sup>110</sup> See the High Court's ruling on this matter in *Shoprite Checkers v Everfresh Market Virginia (Pty) Limited* Case No 6675/09, KwaZulu Natal High Court, Pietermaritzburg (25-05-2010), unreported, para 9.

<sup>111</sup> After taking over from the original lessor, H.R Geering C.C.

<sup>112</sup> According to *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 148 (W) para 198A-B, "a party that adopts an ambivalent posture with a view to manipulating the situation to his own advantage when he can see more clearly where his best advantage lies has a state of mind that falls short of the requirements of *bona fides* (good faith)".

<sup>113</sup> This is an untenable situation that the Court and other courts like the High Court and SCA are enjoined by their constitutional mandate to remedy whenever the common law is found to be deficient.

<sup>114</sup> See *Everfresh* para 5 for Shoprite's response dated 3 September 2008 to the letter written by Everfresh on 14 July 2008. The third paragraph of the letter reveals the new business direction desired by Shoprite. Shoprite wrote to Everfresh, "Apart from the fact that you are not legally entitled to renew the lease, we are in any way 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 ... beyond the current termination date ..."

<sup>115</sup> See *Everfresh* para 5. In the second paragraph of its response letter, Shoprite argues as follows, "... 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 capable of being exercised ..."

<sup>116</sup> Even during arguments, Shoprite contended that clause 3 must not be enforceable because the concept of good faith is vague, thereby taking full advantage of the loophole in a provision that its predecessor in title had willingly inserted into the lease. See para 22.

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alleged failure to make this claim in the High Court first and its omission to allege that it was in the interests of justice for the Court to hear the claim.

The Court's reasoning that Everfresh's application fell to fail for the reason that the claim to develop the common law was raised for the first time in the Court, could be found to be not consistent with what the Constitution provides for. It is not inconceivable under the Constitution or rules of the Constitutional Court that applicants can bring their applications directly to the Constitutional Court. Section 167(6) of the Constitution in fact allows for direct approach and appeal to the Constitutional Court when it is in the interests of justice for parties to do so.<sup>117</sup> Non-suiting Everfresh on the ground that the development was raised for the first time in the Constitutional Court was not only unfair. If anything, it could even be found to be a contestable limitation of Everfresh's right of access to courts,<sup>118</sup> when viewed in the light of section 167. Yacoob J probably had this in mind when he made the following important *dicta* in his dissenting judgement:

“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.”<sup>119</sup>

In deciding against remitting the matter to the High Court to consider the question of development of the common law, the Court appears to have been fixated on avoiding prejudice to Shoprite. Regrettably, this was also misdirection on the part of the Court and it shifted its focus away from what, in my view, mattered more, that is, the Court's obligation to develop the common law. I agree with Yacoob J in this regard that there is no discernible prejudice where a matter was to be decided by the Court on the facts pleaded and accepted in the High Court. Everfresh was not seeking to rely for its case in the Constitutional Court on facts that were not pleaded in the High Court. The facts were basically common cause as already argued above.<sup>120</sup> There was no introduction of new facts that, contrary to Moseneke

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<sup>117</sup> S 167(6) provides thus, “National legislation or the rules of the Constitutional Court must allow a person when it is in the interests of justice and with the leave of the Constitutional Court –

(a) to bring a matter directly to the Constitutional Court; or

(b) to appeal directly to the Constitutional Court from any other court.”

<sup>118</sup> S 34 of the Constitution.

<sup>119</sup> Para 27.

<sup>120</sup> The facts had to do with terms of a lease agreement, subsequent renewal of the lease on a previous occasion with the original lessor, and the refusal to negotiate the rental for a further renewal by Shoprite – the successor in title.

DCJ's assertion,<sup>121</sup> would prejudice Shoprite because it would not have had the opportunity to traverse them. Even if the Court had found that the legal argument advanced by Everfresh on appeal in the Court was different to the one advanced during the trial court, the Court would still have been obliged to decide on the correct legal interpretation of a contract where the facts that form the basis of the interpretation are common cause.<sup>122</sup>

It could be helpful at this stage to summarise the efficacy of Yacoob J's dissenting judgement and why it is contended that it presented a convincing alternative to the outcome favoured by the majority. I should state that the judgement of Yacoob J strikes me as a more balanced and thoroughly reasoned outcome as compared to the majority ruling that appeared to be more alive to the prejudice to Shoprite than any kind of contractual unfairness to Everfresh. This is just one example of how Yacoob J appeared to have carefully analysed the strengths and weaknesses of the applicant's case and the respondent's defence before making a finding that it was in the interests of justice to grant leave to appeal: The learned judge was not oblivious to the weaknesses in each party's case. With respect to Everfresh's case, Yacoob J did not mince his words as he castigated the applicant for its failure to traverse the interests of justice in its application for leave to appeal,<sup>123</sup> and further expressed displeasure at the manner Everfresh conducted its case.<sup>124</sup> In particular, Yacoob J criticised the manner in which Everfresh changed its arguments in the High Court. This, however, needs to be counterbalanced by the fact that despite all this, and as Yacoob J acknowledges, Everfresh maintained its main argument between the High Court and the Constitutional Court. Everfresh's contention that the contract obliged Shoprite to negotiate in good faith was made consistently.<sup>125</sup> With respect to Shoprite's case, Yacoob J was clear that he did not accept that a party to a contract should be allowed to "ignore detailed provisions of a contract as though they had never been written"<sup>126</sup> and I would dare add, agreed upon in good faith. Yacoob J warned that if that were to be allowed to happen, it would be found to be "less consistent with

<sup>121</sup> See Moseneke DCJ's surprising comments in this regard in para 65.

<sup>122</sup> *Barkhuizen v Napier* [2007] ZACC paras 37-42 is authority for this assertion.

<sup>123</sup> Para 20.

<sup>124</sup> In para 26, Yacoob J was not impressed by the manner in which the applicant "blew hot and cold and changed its case from time to time".

<sup>125</sup> See para 26.

<sup>126</sup> Para 36. In my view, this is a critical point as it juxtaposes the approach of Yacoob J to that of Moseneke DCJ and the majority, exposing the judgement of the latter's limited depth and balance. The majority judgement's silence on Shoprite's apparent disdain of contractual obligations in preference of business convenience to the prejudice of Everfresh required at least the Court's censure, even if it is to be accepted that its decision bears some fairness. It can be argued that Shoprite's conduct in this regard was unconscionable, and such conduct cannot be said to be congruent with the constitutional values of contractual justice, equity, and fairness.

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these contractual precepts, precepts that are in harmony with the spirit, purport, and objects of the Constitution”.<sup>127</sup>

It is respectfully submitted that the majority’s overall ruling in *Everfresh* was unfortunate. The incorrect verdict in the case was partly a result of the Court’s failure to fully appreciate the courts’ general obligation to develop the common law in line with sections 8(3) and 39(2) of the Constitution and the Court’s specific duty to do so in *Everfresh*.<sup>128</sup> As argued by Yacoob J, the question whether the Constitution requires courts to encourage good faith in contractual dealings and whether the Constitution insists that good faith requirements are enforceable should be determined sooner rather than later. Yacoob J reasons that good faith is central in business transactions and to contract law in South Africa since many people enter into contracts daily and every contract has a potential to be performed in good faith.<sup>129</sup> The Court in *Everfresh* was fortunate in that it was urged upon by the applicant to develop the common law to bring it in line with the objectives of section 39(2).<sup>130</sup> The Court thus had no choice and was indeed duty-bound to develop common law concept of good faith in line with the “matrix of the [Constitution’s] normative objective system”.<sup>131</sup> The seriousness of the obligatory constitutional mandate to develop common law is such that a court may even be obliged to raise the question on its own even when parties fail to do so.<sup>132</sup> In this regard, the Court will be expected to then require full argument from parties before making its final decision.

*Everfresh* adds its voice to the growing call that a promise to negotiate in good faith needs to be developed beyond existing precedent, in so far as it relates to agreements to agree whose enforceability is not yet crystal clear in South African law in the absence of an arbitration clause, as demonstrated in 2.3 above.<sup>133</sup> As such, the obligatory duty imposed on courts to develop common law, should have led the Court in *Everfresh* to follow a two-stage inquiry

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<sup>127</sup> See para 36.

<sup>128</sup> See 2.1.2 above for a more detailed discussion of the courts’ constitutional mandate to develop the common law of contract.

<sup>129</sup> Para 22.

<sup>130</sup> See the important *dicta* of the SCA in *Fourie v Minister of Home Affairs* 2005 3 SA 429 (SCA) para 5, “Taken together, these provisions [s 39(2)] create an imperative normative setting that obliges courts to develop the common law in accordance with the spirit, purport and objects of the Bill of Rights. Doing so is not a choice. Where the common law is deficient, the courts are under a general obligation to develop it appropriately.”

<sup>131</sup> *Carmichele* para 55, as discussed in 2.1.2 above.

<sup>132</sup> Du Bois *Wille’s Principles of South African Law* 9 ed (2007) 94.

<sup>133</sup> This is the same conclusion which Yacoob J arrived at in his dissenting judgement on para 32. Also see Hutchison 2010 *SALJ* 273-296.

process as suggested in *Carmichele*.<sup>134</sup> According to this proposal (in *Carmichele*), the Court must have investigated whether the common law falls short of the spirit, purport, and objects of the Bill of Rights. Where the answer is found to be in the affirmative, which I argue should have been the outcome in *Everfresh*, the Court should then have moved to the second stage of the process, and inquired into how such a development was to take place.<sup>135</sup> A positive answer in the first stage of the inquiry should have led to the outcome favoured by Yacoob J, and remitting the matter to the High Court appears like a more competent result than the opposite outcome, which Moseneke DCJ and the majority preferred, as argued above.

## 5 CONCLUSION

In the light of the expositions made in the preceding sections, I reach two closely connected conclusions in my critical analysis of the Court's decision in *Everfresh*. My first conclusion is that the Court misdirected itself when it refused the applicant leave to appeal after concluding that no special circumstances existed to require the Court to remit the matter to the High Court to consider developing common law to ensure that an agreement to negotiate made in good faith is rendered enforceable. The Court arrived at this outcome as a result of making incorrect decisions on key legal issues in the matter and by incorrectly concluding that the Court had no need discernible to develop common law. As argued and established above, this misdirection of the Court was a consequence of its fixation on avoiding prejudice to Shoprite without balancing this with an adequate assessment of potential contractual injustice to *Everfresh*.<sup>136</sup> If the Court had made the correct legal analyses on key issues and was alert to its duty to develop the common law, as Yacoob J's judgement did, the outcome could and should in fact have been different.

Was *Everfresh* another missed opportunity to develop the common law of contract, especially settling of the question whether a promise to negotiate in good faith is enforceable? In this regard, I further conclude that since it was implicit in *Everfresh* that good faith needed to be developed beyond precedent, the Court's misdirection on key points resulted in a good opportunity to develop the common law principle of good faith being lost. As Yacoob J observed in *Everfresh*, the question whether the spirit, purport, and objects of our Constitution require courts to encourage good faith in contractual dealings or whether the

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<sup>134</sup> See fn 2 above.

<sup>135</sup> See *Carmichele* para 40.

<sup>136</sup> See section 4.2 above.



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Constitution insists that good faith requirements are enforceable is a matter which should be determined sooner rather than later.<sup>137</sup> This legal question remains unsettled and has caused controversy in the judiciary in South Africa from the days of *Bank of Lisbon*<sup>138</sup> to *Barkhuizen v Napier*.<sup>139</sup> *Bank of Lisbon* sowed seeds of expectation of the development of good faith when it rejected the *exceptio doli generalis* as unnecessary since all contracts are *bona fidei* (that is based on good faith). Although it was already known in South African law that all contracts are based on good faith,<sup>140</sup> there was so much expectation with the advent of constitutionalism in 1993 and 1996, that good faith would feel the void left by the demise of the *exceptio doli generalis* and contribute towards contractual justice in the new constitutional and democratic South Africa governed by principles such as equity, justice and fairness.

It was therefore unsurprising when in 1997 the dissenting judgement of Olivier JA in *Saayman*<sup>141</sup> generated so much hope and a bit of confusion in the High Courts. The spirit, purport, and objects of the Bill of Rights provided impetus for heightened expectation as far as the development of the common law of contract is concerned, especially the principle of good faith. The little gains good faith enjoyed after *Saayman* appeared to have been pegged back by *Drotsky*.<sup>142</sup> When the SCA was expected to make a definitive pronouncement on good faith, what followed was disappointing to those who hoped for the development of good faith. *Drotsky* dismissed the views of Olivier JA in *Saayman* as those of a single judge. Good faith, it was disappointingly held, could not be used as “an independent or free-floating basis” for setting aside or enforcing contractual provisions. *Barkhuizen* did not do any better as it simply confirmed *Drotsky*’s position. As demonstrated in 4.2, whether a duty to negotiate in good faith is enforceable in the absence of a deadlock-breaking mechanism presents a grey area in South African law. Also as established in 4.2, since *Everfresh* presented a case for developing common law, the Court should, as it is duty-bound, at least have seized the

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<sup>137</sup> Para 22.

<sup>138</sup> See fn 8 above

<sup>139</sup> See fn 2 above.

<sup>140</sup> Zimmerman and Visser *Southern Cross, Civil Law and Common Law in South Africa* (1996) 240. The authors state that “in more recent years, it has been asserted again and again that in modern South African law all contracts are *bona fidei*. The requirement of bona fide thus underlies and informs the South African law of contract.” The authors then buttress this point by reference to the following dicta of Jansen J in *Meskin v Anglo-American Corporation of South Africa Ltd* 1968 (4) SA 793 (W) about the role of good faith in SA at 804: “It is now accepted that all contracts are bona fidei ... This involves good faith (*bona fides*) as a criterion in interpreting a contract...”

<sup>141</sup> See fn 8.

<sup>142</sup> See fn 2.

chance to either refer the matter to the High Court for reconsideration, or develop common law on its own.

If good faith is indeed the basis of contracts in South Africa, it is inconsistent with sections 8(3) and 39(2) of the Constitution that good faith still plays a peripheral role in resolving contractual disputes. Time has come for the judiciary to develop good faith to become enforceable as an independent rule for actively promoting contractual fairness, and not this limited supportive role it currently plays.