IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, JOHANNESBURG)

(1)	REPORTABLE: Electronic reporting only
(2)	OF INTEREST TO OTHER JUDGES: No.
(3)	REVISED.

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DATE	SIGNATURE

Case no: 24858/18

In the matter between:

VIOLETSHELF INVESTMENTS (PTY) LTD Applicant

and

VINESH CHETTY Respondent

Case Summary: **Contract – Lease – Business Premises - Option given to lessee to extend the lease for a further period 'provided that the parties agree in writing to the rental, conditions and provisions of the proposed lease' - no deadlock breaking mechanism should the parties fail to reach agreement – unenforceable – lessor not obliged to extend or renew lease.**
Lease agreement had expired by effluxion of time - valid termination of lessee's right to possess the leased premises. Eviction ordered.

JUDGMENT

MEYER J

[1] The applicant, Violetshelf Investments (Pty) Ltd (Violetshelf), is the owner of an immovable property, namely Noordwyk Shopping Centre, 516 Lever Road, Noordwyk, Midrand, in which a shop - no. 005 - had been let to the respondent, Mr Vinesh Chetty,

from where he has been conducting the business of a liquor store under consecutive agreements of lease since 2002. The last agreement of lease between Violetshelf and Mr Chetty was concluded on 30 April 2013. It provides, inter alia, for a lease period of five years commencing on 1 June 2013 and expiring on 31 May 2018, and incorporates a term giving Mr Chetty the following option to lease the premises for a further period:

'1.5 The Lessor is prepared to let the leased premises to the Lessee for a further period after the expiry date of this lease, *provided that the parties agree in writing to the rental, conditions and provisions of the proposed lease* at least 3 (three) months before such expiry date. If the Lessee wishes to extend the lease as aforesaid, he must notify the Lessor of his intention to do so in writing at least 3 (three) months before the expiry date of this lease, failing which it shall be deemed that he does not wish to renew the lease.'

(Emphasis added.)

[2] Mr Chetty, it is common cause, did not notify Violetshelf of his intention to extend the lease three months before the expiry date of the lease on 31 May 2018. Primo Negotium Holdings (Pty) Ltd (Primo), the managing agent of the shopping center owned by Violetshelf, by letter dated 24 April 2018, notified Mr Chetty as follows:

'NOTICE TO VACATE IN RESPECT OF AGREEMENT OF LEASE BETWEEN VIOLETSHELF INVESTMENTS (PTY) LTD AND VANESH CHETTY T/A LIQUORLAND IN RESPECT OF PREMISES IN THE PROPERTY KNOWN AS NOORDWYK CENTRE.

We act on behalf of Violetshelf Investments (Pty) Ltd.

This letter serves to notify you that your lease agreement expires on 31st May 2018. You therefore need to vacate Shop 005, Noordwyk Shopping Centre, 516 Lever Road, Noordwyk, Midrand, by no later than 31st May 2018.

Kindly ensure that the shop is left in a neat and tidy condition and hand in the keys for the premises to the Primo Offices situated at 587 Makou Street, Monument Park, Pretoria by no later than Friday 1st June 2018.

The owner, nor its agent Primo Properties, or any of its employees will not be responsible for any items of whatsoever nature left in the shop after keys of the premises have been returned.'

[3] Mr Chetty's subsequent attempts to convince Violetshelf to nevertheless extend the lease for a further period after its expiration, were to no avail. Violetshelf, for reasons that are not presently relevant, does not want to have Mr Chetty as a tenant

any longer. Thus, the present application in which Violetshelf seeks an order for the eviction of Mr Chetty from the premises.

[4] Mr Chetty raises the doctrine of estoppel by representation as a defence to Violetshelf's claim for his eviction. He relies on certain representations that were made by Violetshelf or its agents through their conduct, which representations, according to him, he reasonably believed to mean that the lease agreement would be renewed on its expiration without him having to exercise the option in accordance with clause 1.5 of the agreement of lease. The factual grounds which allegedly support Mr Chetty's justification to invoke the defence of estoppel against Violetshelf are essentially twofold: First, he states that the series of lease agreements concluded with him during the past 18 years 'were on the basis of Applicant's agents offering to conclude further lease agreements without holding [him] to a term that requires [him] to indicate [his] intention to renew the lease agreement, three months prior to its expiry'. He states that it 'simply became customary that Applicant or its agents would remind [him] that the lease is about to expire and enquire if [he] wanted to renew the lease as they were still happy to have [him] as a tenant'. Second, during 2017 Mr Chetty undertook renovations and improvements to the premises amounting to just over R 220 000 to which Violetshelf or its agent consented. He states that 'it must have been clear to Applicant and/or their agents that he intended to enjoy the benefits of the refurbishments for at least another 5 years'.

[5] The view I take of the matter, however, renders it unnecessary to consider Mr Chetty's defence of estoppel. Even if it is assumed (and I make no finding in this regard) that Violetshelf is precluded, i.e. estopped, from relying on Mr Chetty's failure to have exercised the option to extend the lease timeously and in accordance with clause 1.5 of the lease agreement, the offer to extend the lease, on acceptance, would not have brought about a renewal of the lease. The offer to extend the lease subject to the parties reaching agreement in writing on 'the rental, conditions and provisions of the proposed lease', is not definite and complete and will not on acceptance effect a renewal or extension of the lease.

[6] In *Makete v Vodacom Ltd* 2016 (4) SA 121 (CC) paras 95-103, Jafta J sets out the current legal position regarding agreements to agree, which are considered a species of the *pacta de contrahendo* (agreements to agree), thus:

'[97] Therefore, currently the position in our common law is that an agreement to negotiate in good faith is enforceable if it provides for a deadlock-breaking mechanism in the event of the negotiating parties not reaching consensus. The position was reaffirmed by the Supreme Court of Appeal in *Southernport Developments* [*Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) ([2005] 2 All SA 16; [2004] ZASCA 94]. In that case parties to a lease agreed to enter into good faith negotiations in respect of certain specified properties. The agreement provided that if the parties were unable to agree on any of the terms of the yet to be negotiated lease, the dispute would be referred to an arbitrator whose decision would be final and binding.'

[98] When the defendant refused to negotiate, the plaintiff instituted action, seeking an order directing the defendant to negotiate in good faith. This was met with an exception grounded on the contention that the agreement to negotiate in good faith, on which the plaintiff relied, was not enforceable. Following *Firechem Free State* [*Premier, Free State, and others v Firechem Free State (Pty Ltd* 2000 (4) SA 413 (SCA) ([2000] 3 All SA 247; [2000] ZASCA 28)] the High Court upheld the exception and dismissed the claim. The Supreme Court of Appeal in *Firechem Free State* had declared that-

'an agreement that parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or to disagree . . .'.

[99] In *Southernport Developments* the court distinguished *Firechem Free State* on the basis that the agreement in *Firechem Free State* had no deadlock-breaking mechanism. In rejecting the argument that the agreement was not enforceable Ponnan AJA stated:

'I can conceive of no reason why the principle that *Letaba Sawmills* [*Letaba Sawmills (Edms) Bpk v Majovi (Edms Bpk* 1993 (1) SA 768 (A)] so firmly establishes should be circumscribed to the determination solely of the rental in a contract of lease. The flexibility that *Letaba Sawmills* introduces must logically extend to other terms as well as the formulation of which the parties to a contract may have chosen to delegate to a third party.'

[100] Whether an agreement to negotiate in good faith is enforceable where there is no deadlock-breaking mechanism remains a grey area of our law. This is because *Firechem* suggests that it is not enforceable, while *Everfresh* [*Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (1) SA 256 (CC) (2012 BCLR 219; [2011] ZACC 30] suggests otherwise. In *Everfresh* Moseneke DCJ saud:

'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 agreement in good faith.

[101] Happily, here the agreement to negotiate in good faith the amount of the compensation payable contained a deadlock-breaking mechanism. . . . '

(Footnotes omitted.)

[7] The general rule applicable to an agreement that the parties will negotiate to conclude another agreement was also in a recently reported judgment of the Supreme Court of Appeal in *Roazar CC v The Falls Supermarket CC* 2018 (3) SA 76 (SCA) para 13, reaffirmed. There, the appellant also claimed the eviction of the respondent from a shopping centre after the lease had terminated through effluxion of time despite the fact that the respondent timeously exercised an option to renew the lease, which option entitled the respondent, as lessee, to renew the lease on the same terms and conditions as contained in the lease, 'save that the rental for the renewal period shall be . . . negotiated at the stipulated time'. The lessee contended 'that until the good faith negotiations have been undertaken, the existing lease agreement should be allowed to continue' and that 'the common law should be developed to recognize the validity of an agreement to negotiate in circumstances where there is no deadlock-breaking mechanism.

[8] Tshiqi JA, who wrote the unanimous judgment for the Supreme Court of Appeal, referred to the general rule as follows:

'As a general rule 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 (see *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) ([2000] 3 All SA 247; [2000] ZASCA 28) para 35; *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) ([2005] 2 All SA 16; [2004] ZASCA 94)). However, the courts have been prepared to enforce the terms of a contract that require parties to negotiate in good faith in instances where there is a deadlock breaking mechanism.'

[9] The invitation by counsel for the lessee 'that the common law should be developed to recognize the validity of an agreement to negotiate in circumstances where there is no deadlock-breaking mechanism', was declined. Tshiqi JA referred inter alia to the complications in developing the common law thus as highlighted in *Bredernkamp & others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA), by Carole Lewis in '*The uneven journey to uncertainty in contract'* (2013) 76 THRHR 80 and by the facts of the *Roazar* case, and concluded as follows (paras 19-24):

'. . . I find myself in agreement with Roazar that it would be against public policy for a court to coerce a lessor to conclude an agreement with a tenant whom it does not want to have as a tenant any longer. In instances of breach, there are adequate legal remedies available. It is difficult to conceive how a court, in a purely business transaction, can rely on 'ubuntu' to import a term that was not intended by the parties, to deny the other party the right to rely on the terms of the contract to terminate it.'

[10] Here, the option given to Mr Chetty in clause 1.5 of the lease agreement concluded between the parties on 30 April 2013 to extend the lease for a further period 'provided that the parties agree in writing to the rental, conditions and provisions of the proposed lease' has no deadlock breaking mechanism and is, therefore, unenforceable. Violetshelf is not obliged to extend or renew the lease. The agreement of lease had expired by effluxion of time on 31 May 2018, and there was a valid termination of Mr Chetty's right to possess the premises.

[11] In the result the following order is made:

1. The respondent and all persons occupying Shop No. 005, Noordwyk Shopping Centre, 516 Lever Road, Noordwyk, Midrand (the premises), are evicted from the premises.
2. The respondent shall vacate the premises on or before 28 February 2019, failing which the Sheriff for the area within which the premises are situated is authorised to evict the respondent and all persons occupying the premises through and under him.
3. The respondent shall pay the costs of the application on the attorney and client scale.

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P.A. MEYER
JUDGE OF THE HIGH COURT

Date of hearing:	4 December 2018
Date of judgment:	28 January 2019
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