THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 232/2017

In the matter between:

ROAZAR CC **APPELLANT**

and

THE FALLS SUPERMARKET CC **RESPONDENT**

Neutral citation: *Roazar CC v The Falls Supermarket* (232/2017) [2017] ZASCA 166 (29 November 2017)

Coram: Tshiqi and Majiedt JJA and Plasket, Mokgohloa and Mbatha AJJA

Heard: 07 November 2017

Delivered: 29 November 2017

Summary: Contract – whether contract can be terminated without entering into negotiations – duty to negotiate in good faith – appellant not obliged to renew lease agreement – application for eviction upheld – not competent for court to import term not intended by parties simply on the basis of ubuntu.

ORDER

On appeal from: Gauteng Local Division, Johannesburg (Klaaren AJ sitting as court of first instance):

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the high court is set aside and substituted with an order in the following terms:

‘a) The respondent and all other persons who occupy through it the property described as ‘The Spar’, The Falls Shopping Centre, corner. Webb and Great North Roads, Northmead, Benoni (‘the premises’), are directed to be evicted from the premises.

b) Should the respondent and persons occupying the premises through it not vacate the premises within 30 days of service of the order upon them, the Sheriff of the Court is authorised to forcibly evict and eject the respondent and those who occupy the premises through it from such premises.

c) Should the respondent or any person who occupies the property through it refuse to vacate the premises, the Sheriff is authorised to take all steps necessary in evicting such persons who still remain in occupation on the premises.

d) The Sheriff is further authorised to utilise the services of the South African Police Service to give effect to the orders in a, b and c above.

e) The respondent is ordered to pay the costs of this application, including the costs consequent on the employment of two counsel.’

JUDGMENT

Tshiqi JA (Majiedt JA, and Plasket, Mokgohloa and Mbatha AJJA concurring):

[1] This appeal arises from an application brought by the appellant, Roazar Close Corporation (Roazar) in terms of which it prayed for an order evicting the respondent, the Falls Supermarket Close Corporation (The Falls) from the former's premises, a shopping centre in Northmead, Benoni, Gauteng. The Falls leased a part of the centre and conducts a business known as The Spar Supermarket from these premises. There were three separate but linked lease agreements that regulate the relationship between the parties, in respect of the same premises and for the same period and these agreements were concluded on the same day. In terms of the one agreement, hereinafter referred to as the main agreement, rental is payable to the lessor (Roazar) whilst in terms of the other two agreements it is payable to the individual members of Roazar Close Corporation. The Falls alleges that the reason why the parties entered into three agreements was to avoid income tax whilst Roazar alleges that this was for its internal book-keeping purposes.

[2] On 2 February 2016 The Falls wrote a letter to Roazar stating that it wished to renew the lease for a further period of five years, 'including two successive option period[s] of five years' commencing on 1 March 2016. It proposed the amount of rental to be paid, including escalation rates and further that the assessment rates and other terms be in accordance with the terms and conditions of the existing lease agreement. On 31 March 2016 Roazar's attorneys responded and said that the lease had terminated through the effluxion of time on 29 February 2016. It alleged that in terms of clause 3.5 of the agreement The Falls was required to give one month's written notice of its intention to exercise the right of renewal, which it failed to do, as the letter dated 2 February 2016 did not constitute timeous notice. It further alleged that The Falls had breached the lease agreement by its failure to pay full rental. It then gave The Falls notice to vacate the premises on or before 30 April 2016, failing which it would proceed with an application for eviction. It also stated that it would institute legal proceedings for the payment of arrear rentals. Further correspondence exchanged between the parties did not resolve the dispute between them.

[3] On 24 May 2016 Roazar filed the application for eviction in the Gauteng Local Division, Johannesburg and also instituted a separate action claiming certain amounts for alleged arrear rental. The Falls opposed the eviction application denying that it owed any arrear rental and alleging that the two ancillary agreements were

sham agreements. It alleged that these agreements were a means of avoiding tax, and termed the cash payments to the individual members in terms of these agreements as ‘kick-backs’. The Falls highlighted that from 2011 to April 2016 it was only invoiced for the amounts payable in terms of the main agreement and that it paid these amounts promptly. It stated that it had not paid the cash payments to the two individual members since March 2012.

[4] Regarding the exercise of the option to renew the agreement, The Falls stated that it had, on various occasions, since at least 2014, advised Roazar that it wished to exercise the right of renewal provided for in the main agreement. It alleged that in January 2016 it, again, had several meetings with one of the individual members in which the possible renewal of the lease was discussed. In reply, Roazar denied that the ancillary agreements were sham agreements and that the cash payments were kick-backs. It further stated that in the light of what it called vitriolic and defamatory allegations by The Falls that it had committed fraud, it had no intention of ever leasing its property to The Falls.

[5] Although one of the grounds cited by Roazar for the eviction is the alleged failure by The Falls to pay arrear rentals which were allegedly due in terms of the two ancillary agreements, the eviction dispute may be disposed of by determining whether Roazar was entitled to terminate the contract by invoking the terms of the main agreement. I will thus assume, for the purposes of the eviction application, that all three agreements are valid. A further consideration in this regard is that there is still an action pending in the high court for payment of the arrear rental.

[6] However, it bears mentioning that it cannot be open to The Falls to choose which of the agreements must be enforced and which ones must be disregarded. If its version concerning the two ancillary agreements is accepted, then it follows that all three agreements are tainted. This must be so because according to The Falls the rental reflected in the main agreement was understated in order to perpetuate a scheme with which to defraud the Receiver of Revenue. However, as stated above, it is not necessary to traverse this issue in any further detail. Suffice it to say that if the three agreements are invalid, once the notice was given to The Falls, it had no right to remain in occupation of the premises.

[7] This takes me to the main dispute between the parties. The first issue that arises is whether The Falls exercised its pre-emptive right of renewal within the time period provided in the agreement (interchangeably referred to as the contract).

[8] Clauses 3.2 to 3.7 of the main agreement provide as follows:

‘3.2 The lease shall be for the period stated in Section 4 of the Schedule.

3.3 The Tenant shall, if applicable, as indicated in item 5 of the Schedule, and provided the Tenant is not in breach of any of the terms of this lease at the time, be entitled to renew this lease for the period set out in item 5 of the Schedule (“the renewal period”) on the same terms and conditions as herein contained, save that the rental for the renewal period shall be set out in item 5 of the Schedule and to be negotiated at the stipulated time.

Clause 3.4 **Initial period**

3.4.1 The Tenant shall pay the Landlord as of 28 February 2011, the sum of R72 305.71 plus VAT of R10 122.80 in advance on or before the 1st (first) day of each and every month free of deduction, set-off and bank charges in respect of rental for the premises and parking bays which payment shall be made by the Tenant at the Landlord’s address, unless otherwise stipulated by the Landlord.

3.4.2 The monthly rental payable by the Tenant to the Landlord in terms of clause 3.4.1 above will escalate by 8% (eight per cent) on 1 March 2012 for the remaining duration of the initial period irrespective of the commencement date.

3.5 The renewal period is to be negotiated and discussed at least 1 (one) calendar month prior to the expiry of the lease period stated in Section 6 of the Schedule. The Landlord and Tenant shall endeavour to reach agreement on the monthly rental which shall apply during the renewal period and the escalation in respect of such rental.

3.6 In the event that the renewal of the lease is not negotiated prior to the expiry of the lease, the Lessee will be liable for the rental on the same terms and conditions of this lease.

3.7 In event of the situation envisaged in 3.5 above, the lease will then continue on a month to month basis, subject to 1 (one) calendar months written notice by either party for the cancellation thereof.'

[9] These clauses must be interpreted by having regard to the language used in the light of the ordinary rules of grammar and syntax; in the context of each other and the agreement as a whole, and their apparent purpose so as to give them a commercially sensible meaning. If more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective and not subjective. (*See Ekurhuleni Metropolitan Municipality v Germiston Municipal Retirement Fund* 2010 (2) SA 498 (SCA) para 3; *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA) para 18).

[10] The bone of contention between the parties in this regard is whether the one month period referred to in clause 3.5 relates to the time within which the option to renew the lease should have been exercised as submitted by The Falls, or whether the renewal terms had to be negotiated and agreed in writing one month prior to the expiration of the lease period as contended for by Roazar. The latter contends that at the time the letter dated 2 February 2016 was sent to it, the time for the agreement and negotiations had lapsed because the option to renew had to be exercised by no later than 29 January 2016 and that by this date the parties were required to have reduced into writing an agreement with renewal terms. The Falls submit that if an agreement had to be concluded one month prior to the expiration of the lease period, the reference to 'and negotiated' would be redundant and contradictory.

[11] I agree with the interpretation contended for by The Falls. If the parties envisaged that a written contract would be concluded by 29 January 2016, Clause 3.7 would have been superfluous. There would have been no need to provide for a term to regulate their relationship whilst they were still negotiating, because the contract would have come to an end. A sensible interpretation of the agreement is the following. The Falls had to notify Roazar at least one month before the expiry of the current lease period that it wished to exercise its right of renewal. It did not have to do so in writing. In that event, and whilst the parties were negotiating the renewal terms, the provisions of Clause 3.7 would be invoked if necessary. In that event the

lease agreement would continue on a month to month basis, subject to one month's notice by either party, until an agreement was reached or negotiations failed and notice was given by one of the parties. In the event The Falls elected not to exercise its right to renew the lease at least one month before the expiry of the lease period, the lease would terminate on 29 February 2016. If an agreement was reached to renew the lease, that agreement had to be in writing.

[12] Roazar chose to invoke the terms of clause 3.7 and in its letter of 31 March 2016 terminated the contract by giving one month's notice. That should have been the end of the matter, but The Falls contends that the contract could not be terminated until the good faith negotiations had taken place. For that reason it contends that the notice of termination and the application for eviction were premature. It contends further that until the good faith negotiations have been undertaken, the existing lease agreement should be allowed to continue.

[13] 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 & others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA) para 35; *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA)). 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. In *Southernport Developments* this court said in paras 11, 12, 15 and 16:

'The contract under consideration in *Firechem* contained no deadlock-breaking mechanism. In the present case, the agreement prescribes what further steps should be followed in the event of a deadlock between the parties. The engagement between the parties can therefore be analysed as requiring not merely an attempt at good faith negotiations to achieve resolution of any dispute but also the participation of the parties in a dispute resolution process that they have specifically agreed upon.

The duty to negotiate in good faith is known to our law in the field of labour relations. There, as well, because of the public interest in ensuring harmony in the workplace, deadlock-breaking mechanisms exist to ensure that the negotiating process is legally meaningful. The analogy between ordinary contract negotiations and collective bargaining in

our labour law regime is, to be sure, less than perfect. In ordinary contract negotiations, there is usually no public interest in a successful outcome or in the process of good-faith negotiations itself that is comparable to the interest in preventing labour strife.

. . . .

Certainty, it would appear, is the touchstone of enforceability of agreements to negotiate in good faith in Australia. *In Coal Cliff Collieries (Pty) Ltd v Sijehama (Pty) Ltd* (1991) 24 NSWLR 1, Kirby P stated at 26E-27B:

"From the foregoing it will, I hope, be clear that I do not share the opinion of the English Court of Appeal that no promise to negotiate in good faith would ever be enforced by a court. I reject the notion that such a contract is unknown to the law whatever its term. I agree with Lord Wright's speech in *Hillas* that, provided there was consideration for the promise, in some circumstances, a promise to negotiate in good faith will be enforceable . . . . Nevertheless, I believe that the proper approach to be taken in each case depends upon the construction of the particular contract . . ."

Kirby P then adverted to three situations. He stated of the first:

"In many contracts, it will be plain that the promise to negotiate is intended to be a binding legal obligation to which the parties should be held. The clearest illustration of this class will be cases where an identified third party has been given the power to settle ambiguities and uncertainties . . . But, even in such cases, the court may regard the failure to reach agreement on a particular term as such that the agreement should be classed as illusory or unacceptably uncertain . . . . In that event the court will not enforce the agreement."

Of the second:

"In a small number of cases, by reference to a readily ascertainable external standard, the court may be able to add flesh to a provision which is otherwise unacceptably vague or uncertain or apparently illusory . . ."

And, of the third:

"Finally, in many cases, the promise to negotiate in good faith will occur in the context of an 'arrangement' (to use a neutral term) which, by its nature, purpose, context, other provisions or otherwise makes it clear that the promise is too illusory or too vague and uncertain to be enforceable . . . ."

The principles enunciated in *Coal Cliff Collieries* accord with our law. The first and third situations alluded to by Kirby P are covered, respectively, by *Letaba Sawmills* and *Firechem*.' (See also *Letaba Sawmills (Edms) Bpk v Majovi (Edms) BPK* 1993 (1) SA 768 (A)).

[14] In *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) para 101 the Constitutional court said:

'Happily, here the agreement to negotiate in good faith the amount of the compensation payable contained a deadlock-breaking mechanism. The parties had agreed that in the event that they disagreed on the amount to be paid, Vodacom's CEO would determine the amount. While choosing the CEO may not be regarded as a delegation of power to a third party, the choice still constitutes a deadlock-breaking mechanism. It is how the parties in their wisdom formulated the relevant clause, and their choice must be respected and given effect. This is what they have bargained freely, and consequently they must be held to it.'

[15] The fundamental problem with the main agreement is that it has no deadlock-breaking mechanism. However, counsel for The Falls submitted that the contract contains what is akin to a deadlock breaking mechanism in that any deadlock would be resolved by maintaining the current rental and if it turned out to be unacceptable to either of the parties, either one could terminate the contract. This submission is not sustainable because the payment of current rental and the option to terminate are not aimed at the resolution of the impasse between the parties. Payment of the rental is a quid pro quo for the use of the premises and the termination does not resolve anything. It simply terminates the relationship between the parties. There was thus no obligation on Roazar to continue to negotiate with The Falls.

[16] In the alternative The Falls has submitted that the common law should be developed to recognise the validity of an agreement to negotiate in circumstances where there is no deadlock-breaking mechanism. For this contention it relies on s 39(2) of the Constitution of the Republic of South Africa and it referred to P*aulsen & another v Slip Knot Investments 777 (Pty) Ltd* 2015 (3) SA 479 (CC) where the Constitutional Court held that it is implicit in s 39(2) read with s 173 that where the common law as it stands is deficient in promoting the s 39(2) objectives, the courts are under a general obligation to develop the common law appropriately. Specific reference was also made to *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers*

(Pty) Ltd 2012 (1) SA 256 (CC) where the lease agreement contained a right of renewal clause which 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 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 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.'

[17] The minority judgment (per Yacoob J) would have upheld the appeal and would have referred the matter to the high court for consideration. It said in paras 36-37:

'The High Court's construction of the clause, without reference to public policy or to s 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 principle of contract provides meaningful parameters to render an agreement to negotiate in good faith enforceable is decidedly more consistent with s 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.

Suffice it to say that Everfresh has reasonable prospects of success in its quest to develop the common law in terms of s 39(2) of the Constitution. And it should not be denied this opportunity because the High Court did not consider s 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* approved a principle laid down by an Australian court 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. 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.'

[18] The majority (per Moseneke DCJ) dismissed the application for leave to appeal, not on the basis that it would not consider the development of the common law in this regard, but did so on the basis that the constitutional issue had not been raised in the high court and that the applicant had not shown exceptional circumstances as to why it should be allowed to raise the issue for the first time in the Constitutional Court. The thinking of the court was expressed obiter in paras 69-72:

'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.

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.

Had the case been properly pleaded, a number of interlinking 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" and envelopes "the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity".

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.'

[19] A development of the common law in order to compel parties to negotiate in good faith even in circumstances where there are no deadlock-breaking mechanisms is not without complications. In *Bredenkamp & others v Standard Bank of South Africa Ltd* 2010 (4) SA 468 (SCA) this court found it difficult to countenance the fairness of imposing on a Bank the obligation to retain a client simply because other banks are not likely to accept that entity as a client. The appellants were unable to find a constitutional niche or other public policy consideration justifying their demand. It found that there was no 'unjustified invasion of a right expressly or otherwise conferred by the highest law in our land'. The court said that the Bank had a contract, which was valid, and that gave it the right to cancel. It further said that the termination did not offend any identifiable constitutional value and was not otherwise contrary to any other public policy consideration. The court highlighted important considerations that militate against tampering with the notion of sanctity of a contract between two parties. It said in para 65:

'I do not believe it is for a court to assess whether or not a bona fide business decision, which is on the face of it reasonable and rational, was objectively 'wrong' where in the circumstances no public policy considerations are involved. Fairness has two sides . . .'

In para 56 it said:

‘The appellants’ argument is in many respects circuitous, self-destructive and, in any event, without merit. They accept that in terms of the valid agreement the bank was entitled to terminate without any cause, but they ask for an order that the bank may only terminate on good cause. This would require a tacit term or the development of the common law, both of which they eschew. But, they say, in this case the Bank cannot close the account with a bona fide reason because of consequences to them that cannot be laid at the door of the bank.’

[20] Carole Lewis, a member of this court, but wearing the academic cap in ‘The uneven journey to uncertainty in contract’ (2013) 76 THRHR 80 highlights some of the fundamental difficulties that a high court would have to deal with if asked to determine whether a party has negotiated in good faith. She says on page 92:

‘What would a high court, faced with parties who cannot agree on a material term of their contract, do to determine the dispute? It cannot make a contract for them. It cannot decide what future rental should be. Can it even decide whether their bargaining power is equal, given that they may be large corporate entities? And does equality of bargaining power depend on the parties’ monetary worth or their negotiating skills or their political or business influence?’

With reference to *Everfresh* Lewis says:

‘How could a court develop the common law in this regard? How would it enforce a duty to negotiate in good faith and precisely what does that mean? Does a failure even to discuss future rental amount to bad faith? I think not. If a court were to order parties to agree on a term, and they could not, would they be in contempt of court? And how would one determine who, if anyone, was at fault? How could Everfresh, in this matter, even rely on the expectation of renewal of the lease where there was no basis upon which to proceed? If it means simply talking, what is the point, given that Shoprite had decided that it did not wish to renew its lease with Everfresh? And that it had commercial reasons not do so, including a necessary renovation of the premises.

Perhaps Everfresh could have shown that it had taken steps to add to the value of Shoprite’s property such that it was entitled to a claim based on unjustified enrichment. That, in my view, is probably the only avenue available to a court in assessing whether the enforcement of the right to terminate the lease is contrary to public policy, assuming that the term embraces fairness and reasonableness, the values most commonly referred to when dealing with constitutional issues in relation to contract.’

On page 94 Lewis concludes by saying:

‘[T]he principle that agreements should be honoured is but one of the values that must be assessed in determining whether a contract does not conform to public policy. “Reasonable people”, irrespective of any philosophical or political bent, might disagree whether any particular value judgment was “correct”. But the primacy of different principles may differ in each case. There is, however, one principle that I would suggest is always paramount. The parties should know what their bargain is. That is invariably just and fair.

In my view, while there may be different understandings of what is fair or reasonable, and their importance may differ depending on the particular parties, there is little room for doubt that parties should know what their contract says. Each should be entitled to rely on it unless it offends any of the tenets of public policy, including the values embedded in the Constitution. No one can rely on a general duty to bargain in good faith. It is illusory’

[21] The facts in the present matter are a clear illustration of the complications highlighted by this court in *Bredenkamp* and by Lewis in her article.

[22] The Falls does not state how long the negotiations were required to take place and the contract is silent on this issue. It also does not state what criterion would be used to determine whether either of the parties was negotiating in good faith. What it says, however is that the negotiations to conclude renewal terms of the agreement commenced as early as 2014, but that the negotiations did not bear fruit because it refused to pay the rental due in terms of the two ancillary agreements. This version seems to suggest that the period of approximately two years was not long enough and that the fact that Roazar wished to be paid money due in terms of the two ancillary agreements must be said to show bad faith on its part. It is however not clear how the court should have determined what period of negotiations would have been fair and what criterion should have been used to measure whether Roazar was indeed negotiating in bad faith as alleged.

[23] What is however clear is that the parties consciously bound themselves to a contract that provided that each party could terminate it on one month’s notice in the event that there was no agreement on the renewal terms. If the version of The Falls that the negotiations had been going on since 2014 is accepted, it must also be accepted that Roazar on the one hand persistently wished to enforce the terms of the

two ancillary agreements whilst The Falls on the other, has persisted in its refusal to align itself with the two ancillary agreements. In that instance it would have to be concluded that the parties have been at loggerheads for a period of approximately two years on a material term of the contract. It is not clear, in the absence of a deadlock-breaking mechanism how much longer the impasse would have to continue before the parties would be held to have negotiated in good faith. In this case it is clear, however that the negotiations have come to an end without an agreement having been reached.

[24] Another concern is that there is presently litigation pending between the parties concerning the legal status of the two ancillary agreements. In its replying affidavit Roazar has objected to what it considers to be a vitriolic and defamatory attack by The Falls and the allegations that it is complicit in committing crime. It unequivocally states that it has no intention of ever leasing its property to The Falls. 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.

[25] For all those reasons the appeal must be upheld. I make the following order:

1. The appeal is upheld with costs including the costs of two counsel.
2. The order of the high court is set aside and substituted with an order in the following terms:

‘a) The respondent and all other persons who occupy through it the property described as ‘The Spar’, The Falls Shopping Centre, corner. Webb and Great North Roads, Northmead, Benoni (‘the premises’), are directed to be evicted from the premises.

b) Should the respondent and persons occupying the premises through it not vacate the premises within 30 days of service of the order upon them, the Sheriff of the Court is authorised to forcibly evict and eject the respondent and those who occupy the premises through it from such premises.

c) Should the respondent or any person who occupies the property through it refuse to vacate the premises, the Sheriff is authorised to take all steps necessary in evicting such persons who still remain in occupation on the premises.

d) The Sheriff is further authorised to utilise the services of the South African Police Service to give effect to the orders in a, b and c above.

e) The respondent is ordered to pay the costs of this application, including the costs consequent on the employment of two counsel.'

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

For the Appellant:	W Symon
Instructed by:	Glynnis Cohen Attorneys
	Lovius Block Attorneys, Bloemfontein
For the Respondent:	A de Kok SC
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