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THE RENEWAL OF LEASES AND UBUNTU

Leases sometimes contain a clause entitling the lessee to renew the lease at a rental to be agreed upon. It has long been established law that such a clause is unenforceable as it requires the parties to agree on the rental. A right of renewal is enforceable only if the rent is stated or is determinable by a formula or by referral to arbitration.

In a recent case Shoprite purchased a retail centre with the intention to redevelop the centre. Everfresh was a lessee. The right of renewal clause stipulated that the rental "shall be agreed upon at the time". If the rental was not agreed upon, the right of renewal would be null and void. Everfresh exercised its right of renewal and proposed a rent in accordance with the existing annual escalation of 10,5% per annum. Shoprite responded by stating that the clause did not impose any contractual obligation on the lessor to renew and that Shoprite would not negotiate the extension of the lease because of the pending redevelopment. Everfresh refused to vacate the premises and Shoprite applied to the High Court for an order of eviction and was successful. Everfresh took the matter on appeal and remained in occupation until the matter came before the Constitutional Court two and a half years later.

The majority judgment of the Court dismissed the appeal and confirmed the eviction order. However in a minority judgment four of the Judges including the new Chief Justice and the new Deputy Judge President of the Appeal Court held that they would have granted the appeal and regarded the renewal clause as enforceable on the principle of Ubuntu or good faith. The Judges in the majority rejected the minority view not so much because they disagreed but because the constitutional issues and the requirement of good faith had not been dealt with in the lower Courts. The Deputy Chief Justice recognised the constitutional imperative to develop the common law and "to infuse the law of contract with constitutional values, including values of Ubuntu." He pointed out that in the past the Court had had regard to the concept of Ubuntu which "carries in it the ideas of humaneness, social justice and fairness" and envelopes key values of "group solidarity, compassion, respect, human dignity and conformity to basic norms".
The Judge held that agreements seriously entered into should be enforced and that contracting parties need to relate to each other in good faith. If there were a contractual obligation to negotiate then the negotiation must be done reasonably and with a view to reaching an agreement in good faith. However the Court did not impose any obligation in this instance because the issue had been raised for the first time in the Constitutional Court instead of in the High Court.

In the minority judgment the Judges noted that contract law has been shaped by "colonial legal tradition represented by English law, Roman law and Roman Dutch law." The development of the law of contract "should take cognisance of the values of the vast majority of people" whose approach would be to "place a higher value on negotiating in good faith than would otherwise have been the case. Contract law cannot confine itself to colonial legal tradition alone."

The minority judgment also held that it could not be argued that a contract of lease between two business entities did not "implicate questions of Ubuntu". This would be too narrow an approach.

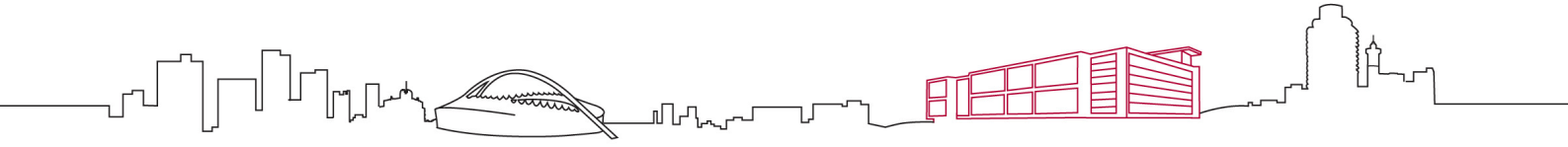
This case whilst noble in its endeavour to introduce the principle of good faith into the interpretation of contracts also introduces an element of uncertainty. No longer will it be possible to interpret a contract strictly in accordance with the common law or even in accordance with the clear meaning of the words. The concept of Ubuntu, not yet a clear legal principle, will need to be taken into account.

The principle of good faith is not new to our law. The expression *bona fides* as meaning good faith is regularly referred to. Roman law established the principle that "all contracts are *bonae fidei* and therefore should receive an equitable interpretation. It is a long established principle that courts aught not to assume that one party to a contract intended to get an unfair or unreasonable advantage over the other. Instead the courts must presume the contrary". So wrote Chief Justice Wessels nearly one hundred years ago in his leading work on the law of Contract.

Roman law went further and adopted the principle of *uberrima fideis* which is the utmost good faith. This is an essential requirement for the validity of certain contracts such as partnership, insurance and agency. Nonetheless the overriding principle is that courts do not make contracts for the parties before them. Judges interpret contracts. If the thinking expressed by the Constitutional Court is to be implemented further, then difficulties are bound to arise. The court was conscious of this and alluded to some of the difficulties of interpretation.

Shoprite purchased the retail centre after examining the Everfresh lease. It was satisfied that the right of renewal was unenforceable in accordance with current contract law. Even in argument, Everfresh conceded that the clause was unenforceable as the law stood. It contended however that the law should be developed by applying constitutional principles.

Were a court to add to a contract by instructing litigants to negotiate in good faith and reach agreement, what would be the outcome if the parties still failed to reach agreement? Would the court determine a fair rental? Had it done so in this instance, not only would the court have pronounced upon a commercial matter but the enforcement of the renewal clause would have frustrated the commercial intention of Shoprite to acquire a property for redevelopment.



The sanctity of a contract is foundational to relationships between parties and is essential to undergird commercial transactions.

Whilst raising concerns for jurists and businessmen, the judgment is a clear call to lessors and lessees to decide whether the lessee is in fact being granted a right of renewal. Why insert a clause which purports to create a right and which might mislead an unwary lessee but which is a misnomer because the lessee has no right to enforce? A contract should not have meaningless clauses. If such clauses are omitted from future leases, the Constitutional Court will have made a salutary contribution to the manner in which leases are drafted in the future. However in the same manner as the concept of *bona fides* has limited application in our law of Contract, so the spirit of Ubuntu, admirable in itself, should have limited application in our common law.

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