THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case no: 1318/2018

In the matter between:

SHEPHERD REAL ESTATE INVESTMENTS (PTY) LTD **APPELLANT**

and

ROUX LE ROUX MOTORS CC **RESPONDENT**

Neutral citation: *Shepherd Real Estate Investments (Pty) Ltd v Roux Le Roux Motors CC* (1318/2018) [2019] ZASCA 178 (2 December 2019)

Bench: Ponnan, Leach and Nicholls JJA and Weiner and Dolamo AJJA

Heard: 21 November 2019

Delivered: 2 December 2019

Summary: Contract – validity of – agreement that the rental and costs shall be mutually agreed upon in writing between the landlord and the tenant when the right of renewal in a lease is exercised – void for vagueness.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Davis J sitting as court of first instance):

1 The appeal is upheld with costs, including those of two counsel.

2 The order of the court below is set aside and replaced with the following:

'(a) The application succeeds with costs, including those of two counsel.

(b) The respondent and all those holding title under it, if any, are ordered to vacate the property described as Erf 562, Mbekweni, Paarl, Western Cape Province, situated on the corner of Jan van Riebeeck Drive and Wamkelekile Street, Mbekweni, Paarl, Western Cape Province, held by the applicant under title deed number T065358/10 (the property), within 14 (fourteen) calendar days of the date of this order.

(c) In the event of the respondent failing to comply with paragraph (b) hereof, the Sheriff or his/her lawful deputy for the area in which the property is situated is directed to eject the respondent and all persons and/or entities found to be in occupation of the property.'

JUDGMENT

Ponnan JA (Leach and Nicholls JJA and Weiner and Dolamo AJJA concurring):

[1] To borrow from Kirby P in *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd*:[1]

'The problem presented by this case is not by any means unique. Courts and lawyers may expect the agreements of business people to be clear and complete. Unfortunately, in the market place, agreements often fall short of these lawyerly desires.'

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[1] *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 19.

Kirby P's observations are particularly apposite to this matter, which concerns the interpretation of a clause in a written agreement of lease (the agreement) that reads:

'Such renewal for the second lease renewal period, shall be on terms and conditions in compliance with the Landlord's then standard letting policy, except that there shall be no right of further renewal and that the rental and costs shall be mutually agreed upon in writing between the Landlord and the Tenant when the right of renewal is exercised. The provisions of this clause will only apply if the Tenant shall at all times have faithfully and punctually performed all its obligations under this Lease.' (The relevant clause)

[2] The agreement was concluded on 7 November 2007 between Shepherd Industrial Commercial Real Estate CC (Shepherd Industrial) and the respondent, Roux Le Roux Motors CC, pursuant to which, the former let to the latter, a commercial property situated at the corner of Jan van Riebeek Drive and Wamkelekile Street, Paarl (the property) for the purpose of conducting the business of a petrol station. The commencement date of the lease was 1 December 2007. It was to endure for an initial term of five years, with a renewal period of '5 plus 5 years'. The rental at commencement was R 18 000 per month, escalating at 8 per cent per annum over the initial term.

[3] Clause 6 of the lease agreement, headed 'Renewal Period', provided:

'The Tenant shall have the option to renew this Lease of the Premises for a further period as set out in the Terms of Lease subject to the following:

6.1 The strict adherence & compliance to all terms and conditions of this agreement by the Tenant and all moneys due being paid by him;

6.3 The Tenant requesting such renewal in writing from the Landlord no later than 6 (Six) months prior to the expiry of the lease period. The Landlord will remind the Tenant to exercise the option 8 (Eight) months prior to the expiry of the lease period.

Such first renewal period shall be on terms and conditions in compliance with this agreement and the rental payable by the Tenant to the Landlord during the option period shall be increased on each anniversary of the commencement date by 8% of the monthly rental, which was payable during the year proceeding the option period.'

This was followed by the relevant clause.

[4] The respondent validly exercised the option in terms of clause 6 during the initial term and the agreement came to be renewed for 'the first renewal period', namely a second five-year term. The second five-year term was due to end on 30 November 2017. Prior thereto, on 11 October 2017, Shepherd Industrial ceded its rights and delegated its obligations under the agreement to the appellant, Shepherd Real Estate Investments (Pty) Ltd.

[5] When the respondent attempted to exercise the second option to renew for a third five-year term, the appellant adopted the stance that it was amenable to the proposed renewal at an agreed rental of R150 000 per month, plus VAT. In response, the respondent contended that a fair rental was an 8 per cent per annum escalation on the then prevailing rental. That, however, was not acceptable to the appellant. Nor was the suggestion that the dispute be referred to arbitration in terms of clause 34, which provided:

'34. Arbitration

34.1 In the event of any dispute arising between the parties as to the true intent and meaning of this agreement or the implementation thereof, such dispute shall be determined by an arbitrator who shall be an advocate of at least five years standing agreed upon by the parties and failing agreement appointed by the President from the time being of the Cape Bar Council.

34.2 The decision of such arbitrator shall be final and binding on the parties and the award and awards interim or final of such arbitrator may be made an order of any competent Court in South Africa on the application of any party.'

[6] The ensuing exchange of correspondence proved fruitless and eventually, the appellant, contending that inasmuch as there had been no renewal and the lease agreement had expired by effluxion of time, applied to the Western Cape Division of the High Court, Cape Town inter alia for the ejectment of the respondent.[2] In support of the application it was stated on behalf of the appellant:

[2] The appellant sought an order in these terms:

'1. confirming that the lease agreement concluded between the respondent and Shepherd Industrial & Commercial Real Estate CC (registration number 1996/044978/23) on 7 November 2007 ("the lease agreement") (including the terms of lease, the conditions of lease, all the annexures thereto, addendums / written variations and deeds of suretyship in respect thereof) ceded to the applicant on 11 October 2017, having been already renewed for a further five year term, lapsed / expired at the end of 30 November 2017 by the effluxion of time;

2. confirming that the respondent and all those holding title under it, if any, are in unlawful occupation of the property, being occupied for commercial purposes, described as Erf 562, Mbekweni, Paarl, Western

'13. First, the applicant does not have a "standard letting policy" (I am advised that this is something that the applicant can unilaterally determine). Secondly, and most importantly, the rental amount in respect of any possible further / extended 5 year period is neither determined nor determinable. The applicant and the respondent are required to agree on the rental amount payable in respect of the property before the lease can again be extended for a third 5 year period. They have not done so (I will elaborate on this later). I am advised that the above quoted portion of clause 6 of the conditions of lease is, as such, nothing more than an agreement to agree and is void for vagueness. It is also worth mentioning at this juncture that clause 28 of the conditions of lease provides that the lease agreement "constitutes the whole agreement between the parties and no warranties or representations whether express or implied shall be binding on the parties other than as recorded [in the lease agreement]".

14. I am advised that the second submission made in the aforegoing paragraph is an established principle that has been determined and settled by the Supreme Court of Appeal in the judgment of *Roazar CC v The Falls Supermarket CC* [2017] JOL 39326 (SCA). There is undoubtedly no obligation on either the applicant or the respondent to negotiate in good faith or to reach an agreement on a rental amount that is objectively reasonable. The respondent is also not entitled to ask this court or any third party to create an agreement of lease by determining the rental amount. In other words, if no agreement is reached in respect of the rental amount then no rental agreement comes into existence.

. . .

Cape Province, situated on the corner of Jan van Riebeeck Drive and Wamkelekile Street, Mbekweni, Paarl, Western Cape Province, held by the applicant under title deed number T065358/10 ("the property");

3. directing that the respondent and all those holding title under it vacate the property within 14 (fourteen) calendar days from the granting of the requested order in this application;

4. directing that the respondent complies with its obligations in terms of clause 17.18 of the conditions of lease (attached to the lease agreement) by doing all things reasonably necessary to ensure that the property is fit for occupation by a new tenant on the first business day following the date the property is vacated, including the repair of any damage that may have been caused to the property during the subsistence of the lease period (the period from 1 December 2007 to 30 November 2017) and the holding-over period;

5. failing such departure, directing the Sheriff of this Honourable Court or his/her lawful deputy for the area in which the property is situated to eject the respondent and all persons and/or entities found to be in occupation of the property;

6. authorising and directing the Sheriff of this Honourable Court to do all things necessary in order to give effect to prayers 4 and 5 above;

7. confirming that in terms of clause 9.2 of the conditions of lease (attached to the lease agreement), the respondent is liable for the reasonable costs that may be incurred, at the applicant's sole discretion, in respect of cleaning, clearing and restoring the property to its original condition at the time when the respondent took occupation thereof, fair wear and tear excepted;

8. the respondent be ordered to pay the reasonable costs to be incurred by the applicant in respect of cleaning, clearing and restoring the property to its original condition at the time when the respondent took occupation thereof, fair wear and tear excepted'.

16. I am further advised that the only possible way to have cured the vagueness and invalidity of clause 6 of the conditions of lease (as quoted above) would have been the inclusion of an express deadlock-breaking mechanism (e.g. a formula or the appointment of an expert to make a binding determination – see for instance *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) and *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC)). There is no deadlock-breaking mechanism contained in the lease agreement. In particular, the general arbitration clause requiring certain disputes relating to the interpretation and enforcement of the lease agreement is not a deadlock-breaking mechanism (it is a means of resolving a dispute relating to an existing contract and not the determination of an essential term of prospective contract). Given the provisions of the lease agreement in this matter a court (or arbitrator) will be tasked to create an agreement on behalf of the parties. I am advised that this would undermine the principles set out by the Supreme Court of Appeal and the Constitutional Court in the cases cited in this paragraph 16. Written and oral arguments shall be presented to this Honourable Court on this point, if necessary.'

[7] The response from Mr Dupre le Roux, the controlling mind of the respondent, was: 'Subject to the content of paragraph 4.1 to 4.14 and 11 above, it is denied that the rental amount cannot be determined or is not determinable. That occurred already when the first 5 year renewal was implemented from 1 December 2012. I also deny that the lease is an agreement to agree and is void for vagueness.'

The relevant portions of paragraphs 4.1 to 4.14 and 11 read:

'4.2 The parties to the lease voluntarily agreed to arbitration, with no right to appeal, in respect of disputes arising from the true intent and meaning of the lease or the implementation thereof;

. . .

4.5 . . . There are, however, a number of provisions in clause 6 that were never discussed, negotiated or agreed to during negotiations ("the negotiations") between myself, acting on behalf of the CC and Mr Shepherd, representing the cedent, whose rights and obligation now vest in Applicant, when the lease was agreed to verbally between myself and Mr Shepherd, acting as said, including when our continuing common intention came into existence ("the common intention") prior to and existing during the signing of the lease on 7 November 2007;

. . .

4.8 during the negotiations between Mr Shepherd and I, it was specifically verbally agreed, constituting a part of the common intention, that the lease period and renewal period, added together, would endure for at least 15 years, at the negotiated reasonable rental and the

reasonable escalation of 8% in the rental per annum, as confirmed in the terms and the conditions, having regard to clause 6, but excluding the last paragraph thereof;

4.9 the content of the last paragraph of clause 6, heavily relied upon by Applicant and Mr Shepherd for the allegations contained in par 12, 13, 14 and 16 of the affidavit was never discussed or referred to during the negotiations. It was never agreed to and did not become part of the common intention. Moreover, Mr Shepherd, who was responsible for the drafting of the lease, apparently used the cedent's standard form of contact, but did not bring the last paragraph of clause 6 to my attention. I did not notice or expect that provision as part of the lease, having regard to clauses 6, 10, 15 and 16 of the terms and clause 6, excluding the last paragraph thereof ("the final paragraph"). I also had no reason for believing that it would, being contrary to our common intention. Clause 15 of the terms, after all, provides expressly for a renewal period of 5 + 5 years and clause 10 of the terms fixed the escalation rate at 8%. The presence of the final paragraph as part of clause 6 is the result of a *bona fide* mistake or the intentional act of Mr Shepherd, and does not reflect the common intention. That provision is contrary to the terms and the common intention. It was never envisaged or agreed that we would have to renegotiate any renewal or the terms thereof, as is suggested by Mr Shepherd;

4.10 accordingly, the CC would be entitled to rectification of the lease by deleting the whole of the final paragraph of clause 6 of the lease, and also the phrase "such first renewal period" in the penultimate paragraph of clause 6, substituting therefor the words "the renewal periods as set out in clause 15 of the terms of lease" in order to give effect to the common intention;

. . .

4.12 alternatively, (apart from the fact that the 8% escalation in rental and the rental were agreed in terms of the lease as reasonable), if rectification were to be refused, I submit that it was a tacit term of the lease that the escalated rental, in respect of the last 5 year renewal would be a reasonable rental, and should be determined by Mr Shepherd and I, both acting *arbitrio boni viri*, which could be established and determined objectively, moreover, that we would be obliged to establish such reasonable rental in that manner, i.e. reasonable rental as the yardstick. That tacit term derives from the common intention, inferred from the express terms of the lease referred to and the applicable surrounding circumstances alluded to above;

. . .

11. Only the express provisions of the lease (excluding the final paragraph of clause 6) are admitted, as contained in annexure "SS2", subject to the content of paragraphs 4.1 to 4.14 above.'

[8] The application failed before Davis J, who dismissed it with costs, but granted leave to the appellant to appeal to this court. In dismissing the application, the learned judge reasoned:

'Given the way in which the provision in respect of which the option for the second renewal was framed, Mr la Grange, who appeared together with Mr van Loggerenberg on behalf of the applicant, referred to the Constitutional Court's decision in *Makate v Vodacom Ltd* 2016 (4) SA 121 (CC) at para 97 where the court held:

"Currently the position in our common law is that an agreement which was negotiated in good faith is enforceable if it provides for a deadlock breaking mechanism in the event of the negotiating parties not reaching consensus."

In other words, the invalidity of an option to renew a lease agreement that requires the parties to agree on the rental amount payable during the contemplated renewal period is cured only if there is a requisite deadlock breaking mechanism contained in the option.

In this connection the decision in *Southern Port Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA) assumes importance. In *Southern Port Developments*, supra, the option to renew a lease agreement contained the following express provision:

"Should the parties be unable to agree on any of the terms and conditions of either the definitive agreement or of the alternative agreement within 30 days of the date of any notice given by either such parties to the other of them requiring such agreement then the dispute shall be referred for decision to an arbitrator agreed on by the parties."

At para 17 Ponnan JA held:

"The express undertaking to negotiate in good faith in this case is not an isolated edifice. It is linked to a provision that the parties, in the event of their failing to reach agreement, will refer such dispute to an arbitrator whose decision will be final and binding. The final and binding nature of the arbitrator's decision renders certain and enforceable what would otherwise have been an unenforceable preliminary agreement."'

[9] Davis J concluded:

'On the basis of the law as analysed in this judgment, this dispute is not a case of an agreement such as that which vexed the Court in *Roazar*, supra, but rather one that falls within the scope of a lease which contains a deadlock breaking mechanism. Once it is held that the lease exists and that the parties needed to employ the contractually created deadlock breaking mechanism, in respect of implementation it stands to reason that the very basis upon which the applicant's relief is predicated is fundamentally flawed. There is no need to exercise a discretion to stay the

proceedings in that the arbitration mechanism needs to be employed. It is the indicated and intended deadlock breaking mechanism. If the outcome of any arbitration fails to satisfy one of the parties then an application for review, is of course always open to that party.

Given the approach that I have adopted, there is no need for me to deal with the further defences, namely of rectification of the contract nor of the existence of the tacit term. In short, there is a mechanism to resolve the impasse between the parties. It should have been employed.'

[10] In arriving at the conclusion that the application had to fail, Davis J placed much reliance on *Southernport Developments (Pty) Ltd v Transnet Ltd*.[3] Given the juristic debate that *Southernport* appears to have provoked,[4] it may be useful to retrace our steps and revisit some essential propositions. In *Hillas & Co Limited v Arcos Limited*,[5] Lord Wright expressed the view that:

'There is then no bargain except to negotiate, and negotiations may be fruitless and end without any contract ensuing; yet even then, in strict theory, there is a contract (if there is good consideration) to negotiate . . . .'

That, however, was rejected in *Courtney and Fairbairn Limited v Tolaini Brothers (Hotels) Ltd*.[6] According to Lord Denning MR:

'That tentative opinion by Lord Wright does not seem to me to be well founded. If the law does not recognise a contract to enter into a contract (when there is a fundamental term yet to be agreed) it seems to me that it cannot recognise a contract to negotiate.'[7]

Lord Diplock added:

'I agree and would only add my agreement that the dictum – for it is no more – of Lord Wright . . . to which Lord Denning MR has referred, though an attractive theory, should in my view be regarded as bad law.'[8]

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[3] *Southernport Developments (Pty) Ltd v Transnet Ltd* 2005 (2) SA 202 (SCA); [2005] 2 All SA 16 (SCA).

[4] In *Indwe Aviation v Petroleum Oil and Gas Corporation of SA* 2012 (6) SA 96 (WCC) para 23, Blignaut J stated: 'The question of the validity of an agreement to negotiate a further agreement has received much attention in the case law. The former general approach in our law was that an agreement to negotiate a further agreement is too vague to be enforceable. The judgment of Ponnan AJA in *Southernport* . . ., however, is indicative of a more flexible approach.' See also P Schoeman *Agreements to agree in South African Law – a balancing act between certainty and fairness* LLM Dissertation University of the Witwatersrand (2014); H Schultz 'What is a lease without rent' 13(2) *Juta's Business Law* 51; C Lewis 'The uneven journey to certainty in contract' (2013) 76 *THRHR* 80; L T C Harms 'The Puisne Judge, The chaos theory and the common law' (2014) 131 *SALJ* 3.

[5] *Hillas & Co Limited v Arcos Limited* [1932] All ER 494 at 505-507.

[6] *Courtney and Fairbairn Limited v Tolaini Brothers (Hotels) Ltd* [1975] 1 All ER 716.

[7] Ibid at 720.

[8] Ibid.

Lawton LJ agreed with both Lord Denning MR and Lord Diplock.

[11] In *Walford v Miles*,[9] the House of Lords affirmed the correctness of *Courtney v Fairbairn.* Lord Ackner took the view that:

'The reason why an agreement to negotiate, like an agreement to agree, is unenforceable is simply because it lacks the necessary certainty.'

[12] That position obtained in other jurisdictions, such as Canada, New Zealand and until *Coal Cliff*, in Australia as well. In *Coal Cliff*, Kirby P discussed the principles relating to contract formation and agreements to negotiate. He recognised that courts will not enforce an agreement to agree, but observed, after considering the American literature on the subject, '. . . 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'.[10]

[13] In *United Group Rail Services Limited v Rail Corporation New South Wales*,[11] Allsop P expressed the view that:

'[Kirby P], if I may respectfully put it this way, was cautiously, but decidedly, putting the view that an agreement to negotiate in good faith might be enforceable, depending on its terms and context. Kirby P was dealing with, if I may say so, the blunt uncompromising and generally expressed views of Lord Denning and Lord Diplock in *Courtney*. His Honour was not stating an all encompassing generalised test or formula.'

[14] In *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd*,[12] the Court of Appeal made the point that uncertainty and incompleteness were distinct concepts. Samuels JA said:

'However, as I have observed [the] argument on appeal was not that the contract was uncertain, but, I infer, that it was incomplete, and a contract that is incomplete is one that requires further agreement; or, in the present case, subsequent negotiation.'

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[9] *Walford v Miles* [1992] 2 AC 128; [1992] 1 All ER 453 at 460.
[10] *Coal Cliff Collieries Pty Ltd v Sijehama Pty Ltd* (1991) 24 NSWLR 1 at 24.
[11] *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 para 43.
[12] *Trawl Industries of Australia Pty Ltd v Effem Foods Pty Ltd* (1992) 27 NSWLR 326 at 343.

Later, he cited with approval the following from *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd*:[13]

'It is established by authority, both ancient and modern, that the court will not lend their aid to the enforcement of an incomplete agreement, being no more than an agreement of the parties to agree at some time in the future. Consequently, if the lease provided for a renewal "at a rental to be agreed" there would clearly be no enforceable agreement.'

[15] Allsop P drew on this important distinction in *United Group Rail Services Limited*.[14] He stated:

'In *Trawl*, Samuels JA made the valuable point (by reference to the learned authors, Greig and Davis in their text *The Law of Contract*) that uncertainty and incompleteness were different concepts. I agree. Samuels JA also considered that *Booker* may not be consistent with Kirby P's views in *Coal Cliff*. I disagree. *Booker* concerned incompleteness; *Coal Cliff* concerned uncertainty.'

Allsop P added:

'Whilst this necessarily incomplete review of authorities reveals that the law in Australia is not settled as to the place of good faith in the law of contracts, this Court should work from the position that it has said on at least three occasions . . . that good faith in some degree or to some extent, is part of the law of performance of contracts.

. . .

'In relation to *Courtney*, the reasoning of Lord Denning MR equated an agreement to negotiate with an agreement to agree. The latter is, of course, not enforceable. . . . It does not follow, however, that an agreement to undertake negotiations in good faith fails for the same reason. An agreement to agree to another agreement may be incomplete if it lacks essential terms of the future bargain. An agreement to negotiate, if viewed as an agreement to behave in a particular way may be uncertain, but is not incomplete.'[15]

[16] Thus, although the position in relation to 'agreements to negotiate in good faith' remains a complex one in Australia in the light of *Coal Cliff Collieries,*[16] courts there, like

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[13] *Booker Industries Pty Ltd v Wilson Parking (Qld) Pty Ltd* (1982) 149 CLR 600 at 604.
[14] *United Group Rail Services Limited v Rail Corporation New South Wales* [2009] NSWCA 177 para 50.
[15] Ibid para 61 and 64.
[16] J Carr-Gregg '*Coal Cliff Collieries v Sijehama'* 1992 AMPLA Yearbook 629. See also *Con Kallergis Pty Ltd (t/a Sunlighting Australasia Pty Ltd) v Calshonie Pty Ltd (Formerly C.W. Norris Pty Ltd)*, unreported judgment of the Court of Appeal, Supreme Court of Victoria, 25 March 1997; (1997) 14 BCL 201 (Vic CT App) at 24 which stated: 'Some of the writing in this area seeks to suggest that there can be only one

other comparable jurisdictions, will not enforce 'an agreement to agree'. That accords as well with the position in our law. As Schutz JA made plain in *Premier, Free State, and Others v Firechem Free State (Pty)* Ltd:[17]

'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 . . . . Such a discretion was vested in the parties as they were to sign "a contract" the precise terms of which were not fixed in the letter of acceptance, which, unlike the Action Committee's recommendation, did not refer to annexure B. As the Tender Board neither awarded a contract for the whole of the Free State nor exactly followed that Committee's recommendations as to demarcation, the elusive annexure B, whatever it did contain, could not have served as the contract to be signed. There was, accordingly, room for a breakdown in negotiations before a contract was concluded. The position is similar to that described in *Namibian Minerals Corporation Ltd v Benguela Concessions Ltd* 1997 (2) SA 548 (A) at 567A-C:

"Since this provision was couched as a suspensive condition, it cannot, in my judgment, be said that the parties could have intended to have had a binding agreement simply upon the exercise of the option. They had expressly agreed that only a fuller arrangement would have bound them to the joint venture. Fulfilment of the condition was necessary and the condition required *consensus* of the parties. It is thus not a case where the exercise of the option would have given rise to a contract and that other terms would merely have been left for later negotiation and agreement. I therefore am of the view that the exercise of the option could not have given rise to a contract with certain or ascertainable terms and that on this ground the "farm-in" clause is void for vagueness."'

[17] The proper approach in an enquiry such as the present depends upon the construction of the particular agreement. Accordingly, it becomes necessary to analyse the relevant paragraph to decide whether its proper characterisation is merely an agreement to agree or whether it contained legally enforceable obligations. This was not

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answer to the general question whether an agreement to negotiate is enforceable. The discussion by the members of the courts who decided *Coal Cliff* and *Trawl Industries*, as well as the discussion by Giles, J. of the problems he had to consider in *Hooper Bailie* and in *Elizabeth Bay* show that the question may be more complex than the simple statement of it may suggest and that the answer to the problem may vary according to the precise terms of the agreement. They suggest that it is only when all of the circumstances are known that it can be seen whether the obligations of the parties (described as "to negotiate") can be identified with certainty.'

[17] *Premier, Free State, and Others v Firechem Free State (Pty) Ltd* 2000 (4) SA 413 (SCA); [2000] 3 All SA 247 (A) para 35.

a case where an external arbitrator was nominated to resolve certain outstanding differences. An arbitrator would have been ill-equipped to fill in the blanks or resolve the questions that the parties could not. An arbitrator certainly could not give effect to arrangements that the parties themselves had not concluded and then require the party, who is resisting, to continue with the ongoing relationship. Nor, for that matter could the arbitrator simply invoke certain vague, ill-defined objective standards. But, there is a further insurmountable difficulty in the path of the respondent in this case. It is this: the arbitration clause did not survive the agreement. Thus, once the agreement terminated by effluxion of time, the respondent could no longer invoke the arbitration clause.

[18] In *Southernport* (para 16), reference was made to the three situations adverted to by Kirby P in *Coal Cliff*, namely:

(i) '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';

(ii) '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

(iii) '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'.

[19] *Southernport* added: '[t]he 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* (supra) and *Firechem* (supra).' The agreement in *Southernport* fell into the first category. This agreement, like *Booker*,[18] is concerned with incompleteness. It accordingly falls into the third.[19]

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[18] Supra fn 13.

[19] See also *Roazar CC v The Falls Supermarket CC* [2017] ZASCA 166; [2018] 1 All SA 438 (SCA); 2018

[20] It follows that the high court misconceived the enquiry and that its conclusion on this leg cannot be supported.

[21] Turning to the respondent's rectification defence: The defence was not raised, as one would have supposed, right at the outset of the dispute. The respondent only took issue with the relevant paragraph. For the rest, the agreement would appear to be a true reflection of the common intention of the parties. Even then, the explanation advanced for the presence of the relevant paragraph is that it was as a result of a '*bona fide* mistake or [an] intentional act . . . and does not represent the common intention of the parties'. A party is entitled to rectification of a written agreement which, through common mistake incorrectly records the agreement which the parties intended to express in the written agreement. Here, on Mr Le Roux's own version, there is no common mistake. Relying on *Gralio (Pty) Ltd v D E Claassen (Pty) Ltd*,[20] the respondent contended that as the appellant had not sought a referral to oral evidence, it was entitled on the application of the *Plascon-Evans* Rule[21] to have the court adjudicate the rectification defence in its favour.

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(3) SA 76 (SCA) para 13, where Tshiqi JA reiterated that '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'.

[20] *Gralio (Pty) Ltd v D E Claassen (Pty) Ltd* [1980] 1 All SA 423 (A); 1980 (1) SA 816 (A) at 824A-C, held: 'Indeed (leaving aside cases in which the contract is by law required to be in writing), a defendant who raises the defence that the contract sued upon does not correctly reflect the common intention of the parties, need not even claim formal rectification of the contract; it is sufficient if he pleads the facts necessary to entitle him to rectification and asks the Court to adjudicate upon the basis of the written contract relied upon by plaintiff as it stands to be corrected.'

[21] The rule was expressed as follows in *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* [1984] 2 All SA 366 (A); 1984 (3) SA 623 (A) at 634-635: '. . . where in proceedings on notice of motion disputes of fact have arisen on the affidavits, a final order, whether it be an interdict or some other form of relief, may be granted if those facts averred in the applicant's affidavits which have been admitted by the respondent, together with the facts alleged by the respondent, justify such an order. The power of the Court to give such final relief on the papers before it is, however, not confined to such a situation. In certain instances the denial by respondent of a fact alleged by the applicant may not be such as to raise a real, genuine or *bona fide* dispute of fact. . . . If in such a case the respondent has not availed himself of his right to apply for the deponents concerned to be called for cross-examination under Rule 6 (5) (g) of the Uniform Rules of Court . . . and the Court is satisfied as to the inherent credibility of the applicant's factual averment, it may proceed on the basis of the correctness thereof and include this fact among those upon which it determines whether the applicant is entitled to the final relief which he seeks. . . . Moreover, there may be exceptions to this general rule, as, for example, where the allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them merely on the papers. . . '.

[22] The fallacy of the respondent's argument is this; as Streicher JA pointed out in *Boundary Financing v Protea Property*:[22]

'Rectification of an agreement does not alter the rights and obligations of the parties in terms of the agreement to be rectified: their rights and obligations are no different after rectification. Rectification therefore does not create a new contract; it merely serves to correct the written memorial of the agreement. It is a declaration of what the parties to the agreement to be rectified agreed. For this reason a defendant who contends that an agreement sued upon does not correctly reflect the agreement between the parties may raise that contention as a defence without the need to counterclaim for rectification of the agreement (see *Gralio (Pty) Ltd v D E Claassen (Pty) Ltd* 1980 (1) SA 816 (A) at 824A-C).'

[23] Here, acceptance of the respondent's contention will result not in rectification, but the creation of a new contract for the parties. Moreover, the respondent relied on the relevant paragraph in support of its main defence. But, relying on the provision for the purposes of its main defence and seeking to escape it for the purposes of its alternative defence is mutually incompatible. 'No person can be allowed to take up two positions inconsistent with one another, or as is commonly expressed to blow hot and cold, to approbate and reprobate'.[23] What is more, the defence raised is plainly contrived. To borrow from *Plascon-Evans,* the allegations of the respondent are so far-fetched or clearly untenable that a court would be justified in rejecting them merely on the papers. After all 'a person who signs a contractual document thereby signifies assent to the contents of the document, and if these subsequently turn out unfavourably there is no one to blame but him- or herself'.[24]

[24] There remains the further alternative defence, namely that 'it was a tacit term that the rental, in respect of the last five-year renewal would be a reasonable rental and should be determined . . . *arbitro boni viri'.* First, this defence is incompatible with the previous defences. Second, a tacit term, explained Corbett JA,

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[22] *Boundary Financing Limited v Protea Property Holdings (Pty) Limited* [2008] ZASCA 139; 2009 (3) SA 447 (SCA); [2009] 2 All SA 7 (SCA) para 13.
[23] *Hlatswayo v Mare and Deas* 1912 AD 242 at 259.
[24] G B Bradfield *Christie's Law of Contract in South Africa* 7 ed (2016) at 205.

'. . . is a provision which must be found, if it is to be found at all, in the unexpressed intention of the parties . . . The Court does not readily import a tacit term. It cannot make contracts for people; nor can it supplement the agreement of the parties merely because it might be reasonable to do so. Before it can imply a tacit term the Court must be satisfied, upon a consideration in a reasonable and businesslike manner of the terms of the contract and the admissible evidence of surrounding circumstances, that an implication necessarily arises that the parties intended to contract on the basis of the suggested term.'[25]

Third, and this flows from the second, no such necessary implication can possibly arise, because, given the express terms of the agreement there plainly can be no room for importing the alleged tacit term asserted by the respondent. Indeed, as it was put it in *Robin v Guarantee Life Assurance Ltd*:[26]

'A tacit term cannot be imported into a contract in respect of any matter to which the parties have applied their minds and for which they have made express provision in the contract. As was said by Van Winsen JA in *SA Mutual Aid Society v Cape Town Chamber of Commerce* 1962 (1) SA 598 (A) at 615D:

"A term is sought to be implied [a tacit term in the terminology of *Alfred McAlpine*] in an agreement for the very reason that the parties failed to agree expressly thereon. Where the parties have expressly agreed upon a term and given expression to that agreement in the written contract in unambiguous terms, no reference can be had to surrounding circumstances in order to subvert the meaning to be derived from a consideration of the language of the agreement only. . . ."'

It follows that the further alternative defence must also fail.

[25] In the result:

1 The appeal is upheld with costs, including those of two counsel.

2 The order of the court below is set aside and replaced with the following:

'(a) The application succeeds with costs, including those of two counsel.

(b) The respondent and all those holding title under it, if any, are ordered to vacate the property described as Erf 562, Mbekweni, Paarl, Western Cape Province, situated on the corner of Jan van Riebeeck Drive and Wamkelekile Street, Mbekweni, Paarl, Western

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[25] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* [1974] 3 All SA 497 (A); 1974 (3) SA 506 (A) at 532G-533A.

[26] *Robin v Guarantee Life Assurance Co Ltd* [1984] 2 All SA 422 (A); 1984 (4) SA 558 (A) at 567C-D. See also *Pan American World Airways Incorporated v SA Fire and Accident Insurance Company Ltd* [1965] 3 All SA 24 (A); 1965 (3) SA 150 (A) at 175C.

Cape Province, held by the applicant under title deed number T065358/10 (the property), within 14 (fourteen) calendar days of the date of this order.

(c) In the event of the respondent failing to comply with paragraph (b) hereof, the Sheriff or his/her lawful deputy for the area in which the property is situated is directed to eject the respondent and all persons and/or entities found to be in occupation of the property.'

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V M Ponnan

Judge of Appeal

APPEARANCES:

For Appellant:	M H van Heerden SC (with him N J A van Loggerenberg)
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For First to Third Respondents:	J W Olivier SC
	Instructed by: Werksmans Attorneys, Cape Town McIntyre van der Post, Bloemfontein