

SOUTH AFRICA / JUDGMENT

Roazar CC v Falls Supermarket CC (12328/2016) [2016] ZAGPJHC 393; [2017] 2 All SA 665 (GJ) (23 December 2016) [2016] ZAGPJHC 393

COURT

South Gauteng High Court, Johannesburg

BEFORE

Klaaren

CASE / FILE NUMBER

12328/2016

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REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 12328/2016

(1) REPORTABLE: YES / NO

(2) OF INTEREST TO OTHER JUDGES: YES/ NO

DATE : 23/12/2016

In the matter between:

ROAZAR CC

Applicant

and

THE FALLS SUPERMARKET CC

Respondent

J U D G M E N T

KLAAREN, AJ:

INTRODUCTION

- [1] This case comprises an application for eviction brought by Roazar CC (Roazar) against The Falls Supermarket CC (Falls Supermarket).

The application was opposed on the basis that the Falls Supermarket remains in lawful possession of the property. A distinctive

aspect of this case is the existence beyond the main lease agreement of two additional agreements between the parties, in terms of which additional monies were agreed to be paid in cash by the Falls Supermarket to the individual members of Roazar.

- [2] The defence to the eviction is predicated on interpreting the main lease agreement as allowing for a right to renew to be exercised, and to be exercised other than in writing. Depending on these initial interpretive issues, a further issue may arise: whether the common law ought to be developed in terms of s 39(2) of the Constitution of the Republic of South Africa, 1996 (Constitution) to the effect that an agreement entailing an obligation to negotiate is enforceable in judicial proceedings in the circumstances of this case.
- [3] In a separate and yet-to-be-heard trial action, Roazar seeks to be paid arrears due in terms of the additional agreements, which they allege to be in the realm of R8m. As Roazar is seeking final relief here on its application for eviction, the Plascon-Evans rule applies.[1] Roazar can only succeed if the facts averred by the Falls Supermarket together with the facts averred by Roazar which are admitted by the Falls Supermarket entitle it to the relief it seeks.

FACTS

- [4] The Falls Supermarket carries on business as a retail supermarket under the name The Spar in Northmead, Benoni. Roazar is a close corporation owning the building known as the Falls Shopping Centre. The Falls Supermarket leases premises of 2800 square meters on the ground floor.

- [5] The Falls Supermarket currently has two members: Alexis Tzanos and Christostomos Tzanos. In 2011, it had a different

membership: Efstratios Tzanos and Alexis Tzanos. Efstratios Tzanos, who passed away in June 2011, was the father of

Alexis and Christostomos. The membership of Roazar, Dimitri Pseftelis and Basil Janos, has remained constant during the period of time covered by this litigation.

- [6] The Falls Supermarket has occupied its premises since 2000 with various lease agreements. On 23 May 2011, Roazar and the Falls Supermarket entered into the latest agreement of lease, what I will term the main lease agreement. This agreement is provided in Annexure DP2 of the papers and is discussed further below. Roazar contends the main lease agreement expired on 29 February 2016.

- [7] It is common cause that Roazar and the Falls Supermarket actually purported to enter into three agreements in May 2011. In addition to the main lease agreement, the parties also entered into what Roazar terms two ancillary agreements of lease and what the Falls Supermarket terms sham agreements. I will refer to these agreements as the additional agreements.
- [8] The additional agreements did not differ much from the main lease agreement. In particular, they provide for the same lease period as the main lease agreement. Where they do differ and where their apparent purpose lies is in respect of providing for cash and off-the-record payments (sometimes known as kickbacks) to the individual members of Roazar. The main lease agreement sets out, in item 7 of the Schedule of the lease agreement, “Basic rental for lease period:” and then a table of monthly rental, VAT, and Total columns escalating each year from 1 March 2011 to 28 February 2012 through to 1 March 2015 through to 28 February 2016 [sic]. The first additional agreement has, for item 7, the phrase “Basic rental for individual member of Roazar CC: Basil Janos” and then a table of monthly rentals also escalating from 1 March 2011 to 28 February 2012 through to 1 March 2015 through to 28 February 2016 [sic], without VAT and Total columns. The second additional agreement is the same except for the wording “Basic rental for individual member of Roazar CC: Dimitri Psftelis”. Item 7 which is common to the additional agreements thus does not use the term “lease period”. The Falls Supermarket alleges that these payments had to be made in cash.
- [9] The Falls Supermarket explains these additional agreements by averring that, when the previous lease agreement came up for renewal
- in 2011, the members of Roazar demanded that the Falls Supermarket agree to pay each of them R65 000 per month in cash in order to renew the lease agreement. Faced with losing the premises, their investment in the premises, and the goodwill of the business, the then members of the Falls Supermarket acceded and paid these amounts monthly. On this version, the two additional agreements were never intended to operate as lease agreements, but were only to provide “some or other ‘paper trail’” for the payments.
- [10] After the senior Mr Tzanos died, the sons took legal advice. The advice was that the cash payments constituted an unlawful scheme to avoid taxation and such scheme was possibly in fraud of creditors and that the Falls Supermarket was possibly at risk of liability if it knowingly abetted the scheme. They resolved, as the Falls Supermarket, to no longer make such illegal payments, which stopped in April 2012. The Falls Supermarket was invoiced and did pay regularly the rental due under the main lease agreement.
- [11] The terms of the main lease agreement were valid through end February
2016. As early as 2014, the Falls Supermarket avers it notified Roazar that it wished to exercise the right of renewal that it claims it has in the main lease agreement. On the version of Alexis Tzanos, the only real obstacle to a renewal in these negotiations between the parties was a demand by Roazar for the payment of kick-backs in arrears since 2012. Tzanos states in his affidavit: “On various occasions, since at least 2014, the respondent has advised the

applicant that it wished to exercise the right of renewal provided for in the true lease agreement. My brother and I travelled to Greece to discuss this with Mr Janos. I had numerous discussions with Mr Pseftelis (who visited the Spar at least once a week). In January of this year I again had several meetings with Mr Pseftelis in which I advised him that the respondent was exercising its right of renewal and impressed upon him the need to agree to the rental payable during the next five years (i.e. from 1 March 2016 to 28 February 2021). In all of these discussions Mr Pseftelis had no objection to the respondent remaining as tenant and to a renewal at a market related rental which could, if needs be, be determined by an independent expert or by Spar head offices (which deal with the determination of such rentals on a regular basis).

The only substantial point of difference was that Mr Pseftelis insisted that, before any renewal could be agreed upon, the respondent would have to pay him and Mr Janos in cash for the “arrear” kick-backs (i.e. from April 2012 onwards) in an amount which they calculated as some R8 million. The respondent could not agree to this.”

[12] Alexis Tzanos continued: “In order to formalize the discussions between the parties and to bring matters to a head, I, on 2 February 2016, delivered to the applicant a written offer in respect of the rental payable during the next five years. A copy of the offer is annexed to the founding affidavit as annex “DP6”. The amount of this offer was calculated as the prevailing rental (as at 28 February 2016) plus 8% (being the escalation rate provided for in the true lease agreement).”

The proposal contained in this written offer of 2 February 2016 in respect of rental payable was based on the table in the main lease agreement. Such amounts appear to be substantially below-market.

Roazar demanded that the Falls Supermarket vacate the property with a month’s notice, by means of a letter delivered on 31 March

2016. The Falls Supermarket has refused to vacate and has continued to occupy the premises to date, paying over the amount offered as rental though this amount has not been accepted by Roazar. On 1 April 2016, the Falls Supermarket’s

attorneys wrote to Roazar’s attorney with an indication of resistance to any eviction, and the present dispute began.

DID THE FALLS SUPERMARKET HAVE AN OPTION TO RENEW WHICH IT COULD EXERCISE?

[13] The first issue to address is whether the main lease agreement properly interpreted provides for renewal. In engaging in the necessary exercise of interpretation of the agreement, a court is to recognize the meaning of the words and language of the agreement, its context, and to give commercial sense to the contract. In line with this interpretive mode of commercial sensibility, in *Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund*, [2] Lewis JA stated: “The principle that a provision in a contract must be interpreted not only in the context of the contract

as a whole, but also to give it a commercially sensible meaning, is now clear. It is the principle upon which Bekker NO was decided, and, more recently, *Masstores (Pty) Ltd v Murray & Roberts (Pty) Ltd* was based on the same logic. The principle requires a court to construe a contract in context – within the factual matrix in which the parties operated. In this regard see *KPMG Chartered Accountants v Securefin*. (Footnotes omitted).”

[14] Although broadly agreeing on the applicable principles, Roazar and the Falls Supermarket nonetheless offer two differing interpretations

of the agreement. In order to properly interpret the main lease agreement, it is convenient first to set out some of its terms including some of the items (also referred to as sections) the agreement contains in its Schedule.

[15] Section 3 of the agreement is headed “Lease Period and Right of Renewal”. After two clauses dealing with the lease period, Clause 3.3 provides: “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.” Item 5 of the Schedule provides: “Fixed date: 1 March 2011.” Item 6 of the Schedule provides: “Renewal period: 5 (five) YEARS (To be agreed in writing and negotiated between Tenant and Landlord 1 (one) month prior to the expiration of the lease period.” The date “1 March 2011” and the phrase “5 (five) YEARS” are in bold type.

Clause 3.5 provides: “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 endeavor to reach agreement on the monthly rental which shall apply during the renewal period and the escalation in respect of such rental.” The content of item 6 of the Schedule is noted above.

Clause 3.6 provides: “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.”

Clause 3.7 provides: “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.”

[16] The interpretations contended for by the parties both effectively began with clause 3.3. The Falls Supermarket emphasized the option to renew that clause 3.3 grants to the Lessee. The commercial balance and business sense of the main lease agreement is in the balancing between the lessee’s option to renew and the lessor’s power to negotiate around the period of renewal and the rental amount and escalation. Such a view of the commercial sense of the agreement also recognizes the investment the lessee has made into building up the

goodwill of the business as well as investing in the premises. Part of the value of the contract in 2011 for the lessee was that the lessee was able to say that it would be able to lease the premises for another five years beyond the end of the lease period.

- [17] Roazar emphasized the terminology in clause 3.3 circumscribing the entitlement to renew on the part of the lessee – the language of “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”. Roazar contended that the entitlement to renew was circumscribed by the performance of the obligations – the payments -- in the additional agreements. On this view, failure by the Falls Supermarket to pay monies purportedly owed to Roazar in terms of the additional agreements meant that Roazar was within its rights provided for within this set of agreements as a whole, to insist on the arrears being paid before entering into negotiations around the renewal period, rental, and the escalation. This interpretation reads the additional agreements as linked to the main lease agreement, despite their formal design as separate agreements.
- [18] Roazar’s interpretation cannot be sustained. The Falls Supermarket asserts that the principal agreement was intended as a true lease agreement whereas the additional agreements were intended to avoid the law. That version of the true intention of the parties is not denied by Roazar.[3] Note also that the item 7 common to the additional agreements does not speak of a lease period. As noted above, the question of whether the monies are recoverable by Roazar from the Falls Supermarket is not before this court and is the subject of a separate matter on which this court expresses no opinion. In this matter, the issue is the true nature of the main lease agreement, and insofar as relevant to the renewal of the lease, the additional agreements. As alleged and argued by the Falls Supermarket, the additional agreements constituted a fraud on the fiscus by hiding monies from the tax commissioner. With a commercial sensibility, one can see that these additional agreements potentially also laid a basis for fraud against third parties in commerce such as creditors and sureties.[4] The true nature of these additional agreements was thus illegal.
- [19] The case relied upon by Roazar is not to the contrary. In *Automotive Toolings v Wilkens*, the Supreme Court of Appeal stated: “The mere fact that a contract is unsuccessfully designed to escape the provisions of the law does not in itself render it unenforceable. It is unenforceable only if the true nature of the relationship is one that the law forbids.”[5] On the version alleged by the Falls Supermarket and not denied, the true nature of the relationships put into place by the additional agreements was as sham relationships. This differs significantly from the unsuccessful legal design at issue in *Wilkens*. The true purpose of these additional agreements was illegal avoidance of disclosure of the regular payments to the state, and to third parties. Therefore, the view of this court is that non-performance under the additional agreements was no bar to the exercise by the Falls Supermarket of its entitlement to renew the main lease agreement.

MUST THE OPTION TO RENEW BE EXERCISED IN WRITING?

[20] The sharpest point of the argument at the hearing centred on the issue of the form of the exercise of the option to renew.

Roazar contended that the exercise of the option to renew needed to be in writing and done one month before the expiry of the lease.

It sourced these two requirements in item 6 of the main lease agreement. As set out above, Item 6 of the Schedule to the

lease agreement provides: “Renewal period: 5 (FIVE) YEARS (To be agreed in writing and negotiated between Tenant and Landlord 1 (one) month prior to the expiration of the lease period).” Roazar would read this item with clauses 3.5 and 3.7 to yield the result that the agreement terminates if the option to renew was not exercised at least one month before expiry of the lease period. Further, without written notice by the Tenant of the exercise of this right of renewal at least one month before expiry of the lease period, the lease agreement would come to an end at the end of February 2016.

[21] For its part, the Falls Supermarket also argued that the main lease agreement should be interpreted so that the option of renewal needed to be exercised more than one month before the expiry. However, in the Falls Supermarket’s interpretation such exercise was not required to be done in writing. The Falls Supermarket argued that the agreement does not prescribe when and how the respondent must exercise its right to renewal. It was instead implied that the option to renew would have to be exercised no less than one month prior to the expiry of the existing lease agreement. This was by implication of clause 3.5 (where the renewal period is to be “negotiated and discussed” one month prior to the expiry of the agreement) and of item 6 (where the renewal period was to be agreed in writing and negotiated one month prior to the expiration of the lease).

[22] On the interpretation of the Falls Supermarket, once the option to renew was exercised, the parties would then need to negotiate the renewal period and the rental and escalation during the renewal period. During this negotiation period, the lease would

continue on a month to month basis, in terms of clause 3.7, subject to that clause’s cancellation power.

[23] This dispute regarding the written nature of the exercise of the option to renew gives rise to a dispute on the papers regarding the timely exercise of the right to renew. Roazar claims that any such exercise was not within time, since it was only on 2 February 2016, less than a month from the date of the expiry of the lease agreement, that the Falls Supermarket directed a letter to Roazar with a proposal for the rental amount and escalation during the renewal period. The Falls Supermarket argues that such a view incorrectly conflates the exercise of the option of renewal and the negotiation process which must follow the exercise of that right. The Falls Supermarket claims it exercised the option to renew more than a month before the end of the main lease agreement.

[24] The only mention of writing is in the Schedule (item 6), not in the clauses of the section entitled “Lease Period and Right of Renewal”. The lack of explicit mention of writing in clause 3.3 or elsewhere accords with the notion that the agreement requires that the result of the negotiation process over the renewal period be put into writing. The phrase “To be agreed in writing and negotiated between Tenant and Landlord 1 (one) month prior to the expiration of the lease period” is directed to the renewal period.

[25] Best interpreted, the main lease agreement does not require the exercise of the right to renew to be in writing. In this

agreement, the writing comes after the negotiation and does not kick off such a process. The explicit mention of writing is thus relegated to an item of the schedule rather than where one would otherwise expect it, had it been the intention of the parties to require the exercise of the right to renew to be in writing. This accords with the overall character of the agreement which is suffused with notions of negotiation, discussion, and agreement.

CAN THE OBLIGATION TO NEGOTIATE IN GOOD FAITH BE ENFORCED?

[26] On the interpretation of the contract I have favoured in resolving the issues above, a further issue -- whether an agreement entailing an obligation to negotiate in good faith is enforceable -- is now raised pertinently. The agreement between the parties to negotiate regarding the renewal period, the rental and the escalation in respect of such rental, is in part implied and in part provided for in clause 3.5 where the agreement states: “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 endeavor to reach agreement on the monthly rental which shall apply during the renewal period and the escalation in respect of such rental.”

[27] On the Falls Supermarket’s version, Roazar has refused to enter into any negotiations with the Falls Supermarket or at least into any negotiations that do not commence with the paying of arrears of kick-backs since 2012. Assuming the enforceability of an obligation to negotiate, this cannot be considered good faith negotiation. If the obligation to negotiate is enforceable, the Falls Supermarket is a lawful occupier and the eviction application is premature.

[28] The place to begin with this issue is with a Constitutional Court case very similar to the one at hand, *Everfresh Market Virginia v Shoprite Checkers*.^[6] Like this matter, *Everfresh* concerned a renewal of a lease of a supermarket. The Court upheld the ejectment only on the basis that the constitutional issue of the potential development of the common law in terms of section 39(2) was not adequately canvassed in the pleadings and in the courts below.

[29] Despite the result in the case, the Court fairly clearly indicated its thinking on the issue. In *Everfresh*, Moseneke DCJ said: “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.” Indeed, Moseneke DCJ called the potential development a “highly desirable and necessary infusion”. The dissent was even more positively inclined towards such a development. Yacoob J writing for the four-judge dissent would have sent the issue back to the High Court for re-interpretation and potential development.[7]

- [30] A further indication of the direction of the Court came in the later case of *Makate v Vodacom Ltd*. First, the Court helpfully summarized the doctrinal developments in this area of our law[8] and stated the common law as follows: “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.”[9] Then, the Constitutional Court crisply stated: “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 Free State* suggests that it is not enforceable while *Everfresh* suggests otherwise.”[10] Legal academic opinion also supports the development of the common law to recognize a duty to negotiate in good faith in the context of renewal options.[11]
- [31] The issue foreshadowed but not adequately canvassed in the pleadings in *Everfresh* is squarely presented in this case. The pleadings here on behalf of the respondent engage the obligation of this court to, in an appropriate case, consider the potential to develop the common law through s 39(2) of the Constitution.[12]
- [32] In arguing for the development of the common law to recognize an agreement to negotiate in the circumstances of this case, counsel for the Falls Supermarket canvassed several relevant points. The principle of *pacta sunt servanda* is reflective of the constitutional values of freedom and dignity.[13] The principle of good faith is significant in understanding contracts and contracts are not merely “a matter of each side pursuing his or her own self-interest without regard to the other party’s interests.”[14] An objective standard “such as the *arbitrium boni viti* could be applied to the conduct of a contracting party who undertakes an obligation to negotiate a further agreement. Such a party would be obliged to act honestly and reasonably in the conduct of the negotiations and a court would be able to determine whether it complied with such standards.”[15] In upholding and recognizing as enforceable obligations to negotiate in good faith with deadlock-breaking mechanisms, the Constitutional Court and the Supreme Court of Appeal have considered the agreed negotiation process inherent in an agreement with a deadlock-breaking mechanism to be enforceable in and of itself.[16]

- [33] The question of the recognition of the Everfresh dictum is to some extent already decided in this court. In *South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others*, the court ordered parties to negotiate in good faith in a judgment of 2 September 2016.[17] While this point is not extensively canvassed in that judgment, that decision is binding upon me unless wrong. For the reasons above, I do not think it wrong.
- [34] Further, this case represents possibly an exercise of judicial power even less extensive than the judicial power in *SABC SOC*. The concern not to trespass beyond an “adjudicative” role has been a concern for courts considering this issue. In *Southernport Developments*[18], a case decided prior to *Everfresh*, the court stated: “It needs to be emphasized that, on the facts here present, a court would not be making the contract for the parties, thereby going beyond its adjudicative role.”[19] Here, the order consequential upon accepting that the agreement is enforceable is a dismissal of the application for eviction. In *SABC SOC*, the court needed to affirmatively include the obligation to negotiate as part of its order.[20]
- [35] In light of the above, it is appropriate to give the following order. The application is dismissed. There is no reason here to depart from the usual rule regarding costs and costs should follow the result.

J KLAAREN

ACTING JUDGE OF THE HIGH COURT OF SOUTH AFRICA

COUNSEL FOR THE APPLICANT : RG Cohen

Mr PAUW

INSTRUCTED BY

: GLYNNIS COHEN ATTORNEYS

COUNSEL FOR THE RESPONDENT : D WATSON

INSTRUCTED BY

: Christelis Artemides Attorneys

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- [1] *Plascon-Evans Paints (TVL) Ltd. v Van Riebeck Paints (Pty) Ltd.* (53/84) [1984] ZASCA 51; [1984] 2 All SA 366 (A); 1984 (3) SA 623; 1984 (3) SA 620 (21 May 1984).

- [2] Ekurhuleni Metropolitan Municipality v Germiston Municipality Retirement Fund (457/08) [2009] ZASCA 154; 2010 (2) SA 498 (SCA) ;
- [2010] 2 All SA 195 (SCA) (27 November 2009), 13.
- [3] Commissioner for South African Revenue Service v NWK Ltd (27/10) [2010] ZASCA 168; 2011 (2) SA 67 (SCA) ;
- [2011] 2 All SA 347 (SCA) (1 December 2010).
- [4] Ibid., para. 55.
- [5] Automotive Tooling Systems (Pty) Ltd v Wilkens and Others (581/05) [2006] ZASCA 167; [2007] 4 All SA 1073 (SCA); 2007 (2) SA 271 (SCA) (28 September 2006), 6.
- [6] Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC)) [2011] ZACC 38; [2011] ZACC 30 (17 November 2011).
- [7] Ibid., para. 42.
- [8] Makate v Vodacom (Pty) Ltd (CCT52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) (26 April 2016), 95–99.
- [9] Ibid., para. 97.
- [10] Ibid., para. 100.
- [11] Graham Glover, *Kerr's Law of Sale and Lease*, 4th ed. (Pietermaritzburg, South Africa: LexisNexis Butterworths, 2014), 546–47; Andrew Hutchison, “Agreements to Agree: Can There Ever Be an Enforceable Duty to Negotiate in Good Faith?” *South African Law Journal* 128 (2011): 273.
- [12] Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd (2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC)) [2011] ZACC 38; [2011] ZACC 30 (17 November 2011), 30, 33, 34.
- [13] Barkhuizen v Napier (CCT72/05) [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (4 April 2007).
- [14] Botha and Another v Rich N.O. and Others (CCT 89/13) [2014] ZACC 11; 2014 (4) SA 124 (CC); 2014 (7) BCLR 741 (CC) (17 April 2014).
- [15] Indwe Aviation (Pty) Ltd v The Petroleum Oil and Gas Corporation of South Africa (Pty) Ltd and Another (4610/2011, 14366/2010)
- [2011] ZAWCHC 249; 2012 (6) SA 110 (WCC) (1 June 2011), 28.
- [16] Southernport Developments (Pty) Ltd v Transnet Ltd (440/03) [2004] ZASCA 94;
- [2005] 2 All SA 16 (SCA) (29 September 2004); Makate v Vodacom (Pty) Ltd (CCT52/15) [2016] ZACC 13; 2016 (6) BCLR 709 (CC); 2016 (4) SA 121 (CC) (26 April 2016), 107.

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- [17] South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others (13/23293) [2016] ZAGPJHC 228 (2 September 2016).
- [18] Southernport Developments (Pty) Ltd v Transnet Ltd (440/03) [2004] ZASCA 94; [2005] 2 All SA 16 (SCA) (29 September 2004).
- [19] Ibid., para. 17.
- [20] South African Broadcasting Corporation SOC Ltd v Via Vollenhoven and Appollis Independent CC and Others (13/23293) [2016] ZAGPJHC 228 (2 September 2016), 60.
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