

Let's agree to disagree

By [Lionel Egypt](#) and [Ashley Pillay](#)

20 Sep 2012

Two recent judgments by our superior courts have given rise to uncertainty about the requirements for an "agreement to agree" to be valid and enforceable.

Both the Western Cape High Court's ruling in *Indwe Aviation vs Petroleum Oil and Gas Corporation of South Africa* 2012 JDR 0824 (WCC) and the judgment of the Constitutional Court in *Everfresh Market Virginia (Pty) Ltd vs Shoprite Checkers (Pty) Ltd* 2012(1) SA 256 (CC) indicate the ongoing impact of South Africa's constitutional dispensation on the common law of contract.

Before *Indwe* and *Everfresh*, the common law position was authoritatively set out by the Supreme Court of Appeal in *Southernport Developments (Pty) Ltd vs Transnet Limited* 2005 (2) SA 202 (SCA). In this case it was noted that "an agreement that parties will negotiate to conclude another agreement is not enforceable, because of the absolute discretion vested in the parties to agree or disagree".

May be legally enforceable

Ponnan AJA went on to hold that an agreement to engage in further negotiations may nevertheless be legally enforceable in circumstances in which:

- The parties have clearly agreed to engage in negotiations
- The parties have already reached agreement on all of the "essential terms" of the ultimate agreement and the relevant further negotiations are needed only to "settle subsidiary terms [that are] still within the contemplation of the parties"; and
- There is a dispute resolution mechanism that brings sufficient certainty to the "agreement to negotiate" by creating an objective mechanism for concluding the negotiations in the event of the parties being unable to reach agreement on the remaining "subsidiary terms".

In *Everfresh*, the Constitutional Court was faced with a request to develop the common law in relation to agreements to negotiate on the basis of the principles of good faith and ubuntu.

The case dealt with the possible renewal of a lease agreement and the negotiations between the parties in relation to that renewal. Although Moseneke DCJ, on behalf of the majority of the court, declined to develop the common law, he commented that "[w]here 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".

In *Indwe*, adopting a somewhat liberal interpretation of *Southernport Developments*, it was held that the latter case had introduced a "more flexible approach" to the validity and enforceability of agreements to negotiate. The Western Cape High Court went on to rule that: "[t]he absence of an agreed dispute resolution clause that is applicable between the parties is not fatal to the validity of an agreement to negotiate and that such an absence could be remedied inter alia by [the] standards of reasonableness and good faith [that] can readily be implied in a suitable case" (emphasis added).

Blignault J concluded that the communication to the applicant of the contents of a resolution by the respondent's board of directors, in which it had been resolved that the respondent would engage in negotiations with the applicant, and the acceptance of the (implied) offer contained in that board resolution, was sufficient to conclude a valid and enforceable agreement to negotiate between the parties.

An interesting and novel interpretation

The court thus introduced an interesting and novel interpretation of the requirements for validity established in *Southernport Developments*, particularly the requirement regarding the existence of objective dispute resolution mechanisms, previously thought to be a sine qua non for enforceability.

Although *Everfresh* and *Indwe* make no reference to one another, both indicate that South African law is in the midst of radical changes over the enforceability of an obligation to engage in contractual negotiations. It is surely only a matter of time before a court sees fit to accept Moseneke DCJ's implicit offer and take the developments introduced by *Southernport Developments* one step further.

ABOUT THE AUTHOR

Lionel Egypt is director and Ashley Pillay candidate attorney, dispute resolution practice of Cliffe Dekker Hofmeyr.

For more, visit: <https://www.bizcommunity.com>