CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 211/14

In the matter between:

MIGHTY SOLUTIONS CC T/A ORLANDO SERVICE STATION Applicant

and

ENGEN PETROLEUM LIMITED First Respondent

CONTROLLER OF PETROLEUM PRODUCTS Second Respondent

Neutral citation:	*Mighty Solutions CC t/a Orlando Service Station v Engen Petroleum Ltd and Another* [2015] ZACC 34
Coram:	Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J, Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Van der Westhuizen J, Wallis AJ and Zondo J
Judgment:	Van der Westhuizen J (unanimous)
Heard on:	11 August 2015
Decided on:	19 November 2015
Summary:	Common law — commercial eviction — sub-lessee cannot raise sub-lessor's lack of title as defence Section 39(2) of the Constitution — circumstances when common law ought to be developed — common law rule does not require development Rule 33 of the Uniform Rules of Court — argument cannot be entertained if court sitting as court of first and last instance

ORDER

On appeal from the Gauteng Local Division of the High Court, Johannesburg:

1. Condonation for the late filing of the statement of facts and record is granted.
2. Leave to appeal is refused.
3. The applicant must pay costs, including costs of two counsel.

JUDGMENT

VAN DER WESTHUIZEN J (Mogoeng CJ, Moseneke DCJ, Cameron J, Jafta J Khampepe J, Madlanga J, Matojane AJ, Nkabinde J, Wallis AJ and Zondo J concurring):

Introduction

[1] The South African common law of contract is as old as the ancient city of Rome. It developed over centuries in Europe and in the courts of bygone colonies and provinces now making up the Republic of South Africa. Like customary law that has grown from the soil of our continent, it has proven its value over time, but does not always meet the requirements of a constitutional democracy. Therefore it has to be developed in accordance with the spirit, purport and objects of the Bill of Rights.[1]

[1] Section 39(2) of the Constitution states:

> "When interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights."

[2] This application for leave to appeal raises questions on the content of the law of lease. It concerns an attempt by a petrol wholesaler to evict a licensed petroleum retailer from premises in Soweto where the retailer had conducted business under the wholesaler's brand.

Facts

[3] The applicant, Mighty Solutions CC trading as Orlando Service Station (Mighty Solutions), is a licensed petroleum retailer in terms of the Petroleum Products Act (Act).[2] The first respondent is Engen Petroleum Limited (Engen), a licensed wholesaler and distributor of petroleum products. The second respondent is the Controller of Petroleum Products (Controller), appointed pursuant to the Act. It was cited insofar as it may have an interest, but did not participate in the proceedings.

[4] Engen leased a property from its registered owner on the corner of Soweto Highway and Mooki Street, Orlando East, Soweto.[3] It developed the property into a branded service station, investing its capital in installing the necessary equipment, including underground tanks and pumps. In September 2005 Engen entered into an operating lease with Mighty Solutions. Pursuant to this lease, which would be valid until the end of March 2008 and was cancellable at a month's notice by either party, Mighty Solutions operated a service station on the site. It used Engen's equipment, signage and trademarks.

[5] The operating lease between Engen and Mighty Solutions expired at the end of March 2008. It then continued on a month-to-month basis until it was validly cancelled in July 2009. Following the cancellation, Mighty Solutions continued to occupy the site. It continued using Engen's equipment, signage and trademarks without paying rent to Engen or the registered property owner.

[2] 120 of 1977.

[3] The property is now part of a deceased estate.

Previous applications to this Court

[6] Mighty Solutions was one of several fuel retailers that previously sought direct access to this Court in *Gundu Service Station*.[4] The parties sought to challenge the validity of the agreements that major oil companies enter into with petrol station retailers. They argued that the agreements infringe several of the retailers' fundamental rights recognised in the Bill of Rights and that the Act had created a new dispensation in the industry, one based on the allocation of manufacturing, site, wholesale and retail licences, to the exclusion of private contractual agreements. These private agreements, it was argued, enforced and perpetuated the dominant position of oil companies in a way that was at odds with the purpose of the Act. The application was dismissed on the grounds that it was not in the interests of justice to hear it at that stage.

[7] Mighty Solutions annexed the *Gundu Service Station* application to its application for leave to appeal to this Court, stating that its contents were incorporated by reference.

High Court

[8] In 2013 Engen applied to the Gauteng Local Division of the High Court, Johannesburg (High Court) for an order to evict Mighty Solutions. The parties filed a joint practice note in which the issues to be determined were stated as (a) "[w]hether [Engen] has *locus standi* at common law to move for an eviction order"; and (b) "[w]hether [Mighty Solutions] may rely on possessory rights arising from its fuel retail licence as read with the Petroleum Products Act as amended".[5] It was common cause that Mighty Solutions had no common law right to continue occupying the

[4] CCT 134/13 *Gundu Service Station CC and Others v Engen Petroleum Limited* (*Gundu Service Station*). The first applicant in this matter, Gundu Service Station CC, again approached this Court in July 2014 (CCT 123/14 *Gundu Service Station CC and Others v Engen Petroleum Limited and Others*). This latter application was dismissed with costs for lack of prospects of success.

[5] *Engen Petroleum Ltd v Mighty Solutions CC t/a Orlando Service Station* [2014] ZAGPJHC 426 (High Court judgment) at 2.

premises, as both the operating lease and any subsequent lease arrangements had been validly terminated.

[9] Engen argued that the onus was on Mighty Solutions to show why Engen was not entitled to evict it. It cited several authorities to show that a lessee has no right in law to challenge the right of a lessor to occupy the property. One authority was the 1990 Appellate Division decision in *Boompret*, in which the following was said:

> "It is, of course, true that in general a lessee is bound by the terms of the lease even if the lessor has no title to the property. It is also clear that when sued for ejectment at the termination of the lease it does not avail the lessee to show that the lessor has no right to occupy the property."[6]

[10] Mighty Solutions submitted that the Act had effectively abolished Engen's common law rights. It argued that a retail licence-holder in its position acquired possessory rights under the Act and that these could only be terminated after the licence was revoked by the Controller. It relied mainly on section 2A(5)(a) of the Act, which provides:

> "(5) No person may make use of a business practice, method of trading agreement, arrangement, scheme or understanding which is aimed at or would result in—
>
> (a) a licensed wholesaler holding a retail licence except for training purposes as prescribed."

[11] Mighty Solutions argued, as it did in *Gundu Service Station*, that the contract between it and Engen amounted to a scheme that resulted in a wholesaler effectively holding a retail licence. It further argued that, once a retail licence had been granted to a party to sell petrol on a particular piece of land, the landowner or lessor could not evict that licence-holder. If a landowner or lessor wished to evict a licensed retailer, they had to apply to the Controller to have the licence revoked.

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[6] *Boompret Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd* 1990 (1) SA 347 (A) (*Boompret*) at 351.

[12] In a judgment by Matthee AJ, the High Court found that Engen had a common law right to evict Mighty Solutions and that this right had not been superseded by the Act. The Court found that the common cause facts did not disclose the sort of business arrangement contemplated by section 2A(5)(a). Furthermore, it held that, given the rule in *Boompret*, it was "unpersuaded that [Mighty Solutions was] able to question the right of [Engen] to occupy the property".[7] The Court found no support for an interpretation of the Act that took away Engen's common law rights and conferred on Mighty Solutions a possessory right that only the Controller could terminate. Accepting Mighty Solutions' argument would "create a new type of lessee, a sort of super lessee, with rights far in excess of rights of other lessees", the Court stated.[8]

[13] The High Court noted that if, in theory, there were some merit in Mighty Solutions' argument, "there would be more appropriate methods and fora to test [this]".[9] The Act provides for arbitration when retailers allege unfair or unreasonable contractual practices by wholesalers.[10] This would have been an appropriate way for Mighty Solutions to challenge the terms of the contract, it stated.

[14] Thus the eviction of Mighty Solutions was ordered. Mighty Solutions had to pay costs.

Supreme Court of Appeal

[15] Mighty Solutions applied for leave to appeal to the Supreme Court of Appeal. The application was dismissed with costs, on the grounds that it had no reasonable prospects of success.

[7] High Court judgment above n 5 at 7.

[8] Id at 9.

[9] Id at 10.

[10] Section 12B(1).

[16] Mighty Solutions applied to this Court for leave to appeal. During oral argument, its counsel confirmed that it had now been evicted.

Leave to appeal

[17] Mighty Solutions argues that this matter raises important constitutional issues of public interest, including the right to freedom of trade, occupation and profession, property rights and the principle of legality. It further submits that it raises this Court's obligation to "develop the common law to give effect to the rights of persons and entities that hold retailers' licences".

[18] Mighty Solutions abandoned its argument put forward in the dismissed *Gundu Service Station* application that its retail fuel licence gave it statutory possessory rights. This argument was its central contention before the High Court. In this Court it persisted with its submission that Engen lacked legal standing to evict it, because Engen's head lease with the site owner had terminated before eviction proceedings commenced. In its written and oral submissions Mighty Solutions argued for the first time that it had a real right to the premises in the form of an enrichment lien.

[19] Engen argues that it is not in the interests of justice to hear the appeal, because the application has no prospects of success. It submits that Mighty Solutions acted in a brazenly unlawful fashion in that it had no common law right to occupy the premises after the termination of the lease agreement. Further, it contends that Mighty Solutions used Engen's equipment and branding for its own benefit for four to five years, without paying rent, under the spurious premise that it had a retail licence to do so.

[20] To the extent that this case requires us to consider whether the common law ought to be developed so as to align it with the Bill of Rights, it raises a constitutional matter, which triggers this Court's jurisdiction. After dealing with the prospects of

success, I reach a conclusion later in this judgment on whether leave to appeal should be granted.

Condonation

[21] Mighty Solutions applied for condonation for the late filing of its statement of facts and the record as it faced logistical difficulties in filing its papers. Engen opposed condonation on the basis that the filing was one day late, and because Mighty Solutions raised a new argument relating to enrichment that would prejudice Engen.

[22] Since the short delay was satisfactorily explained, condonation must be granted. To the new argument and joint practice note, I return later when the prospects of success are considered.

Did Engen have standing to evict?

[23] According to Mighty Solutions, Engen lacks legal standing to seek its eviction because Engen's head lease with the site owner had terminated before the commencement of the eviction proceedings. The High Court's finding, based on the common law rule enunciated in *Boompret*,[11] that a lessee has no right in law to question the right of a lessor to occupy a property, is correct only on a "superficial reading" of the common law, Mighty Solutions argues.

[24] Mighty Solutions cites an explanation of the principle provided in the 1910 Transvaal Provincial Division decision of *Clarke*, in which the Court stated:

> "It seems to me that the rule [that the lessee cannot dispute the lessor's title] may be based upon one or other of two very simple grounds. The first is, that the lessor having performed his part of the contract, and having placed the lessee in undisturbed possession of the property, is entitled to claim that the lessee should also perform his part of the contract and should pay him the rent which he agreed to pay for the use and enjoyment of the premises. The second ground is, that the lessee having had the

[11] *Boompret* above n 6.

> undisturbed enjoyment of the premises under the lease, and having thus had all for which he contracted, it would be against good faith for him to set up the case that the lessor had no right to let him the property."[12]

[25] Mighty Solutions claims that it had agreed with Engen in the operating lease that Engen's head lease with the owner of the premises – and hence Engen's possessory rights regarding the premises – would expire in August 2011. Unlike in *Clarke*, it was therefore not contrary to good faith to challenge Engen's possessory rights after August 2011. On these facts, the ratio for application of the general contractual principle falls away and accordingly the principle cannot find application. Thus Mighty Solutions may indeed challenge Engen's right to occupy the property. As Engen did not prove this right, it has no standing to move for an eviction order, so it is argued.

[26] Engen contends that it is long-standing law that lessees cannot raise the defence that the lessor has no right to occupy the property when being sued for ejectment at the termination of the lease. It points to the underlying logic. First, one of the natural incidents of the contract of lease, imported into the contract unless the parties agree otherwise, is that, at the end of a lease, the lessee is obliged to restore vacant possession of the property. Second, the lessor has a contractual right to demand the ejectment of the lessee at the end of the contract, irrespective of whether the lessor has any real or personal rights entitling it to occupation.

[27] Engen argues that the position of a sub-lessor would be untenable if it could not eject the sub-lessee at the termination of a lease without first demonstrating its title. If the head lease and the sub-lease expired at the same time, the sub-lessor would be bound contractually to the lessor under the head lease to restore vacant possession of the premises to it. If the sub-lessor did not do so because its sub-tenant remained in occupation it would become liable to pay damages for holding over to its lessor. At

[12] *Clarke v Nourse Mines Ltd* 1910 TS 512 (*Clarke*) at 520-1. In its written argument, Mighty Solutions mistakenly attributed this quote to *Hillock and Another v Hilsage Investments (Pty) Ltd* 1975 (1) SA 508 (A).

the same time, on Mighty Solutions' argument, it would have no legal standing to seek an ejectment order against the sub-tenant, which would be under no obligation to pay rental for its occupation of the premises. It would be unable to fulfil its own contractual obligations and unable to compel the sub-tenant to fulfil its obligations. That would be an untenable situation. It is no answer to say that the lessor under the head lease would have standing. It might choose to confine itself to a claim for damages against its tenant.

[28] So, what is the common law position? As noted in *Boompret*, it is an established rule that when being sued for eviction at the termination of a lease, a lessee cannot raise as a defence that the lessor has no right to occupy the property.[13] This flows naturally from the rule that a valid lease does not rest on the lessor having any title. In *Frye's* – for example – it was stated that there "can be no doubt that neither a sale nor a lease is void merely because the seller or lessor is not the owner of the property sold or leased".[14] Unless expressly agreed, a lessor does not warrant that it is entitled to let.[15]

[29] As far back as the 1893 Supreme Court of Transvaal decision in *Salisbury*,[16] one finds abundant reference in our common law to the rule mentioned in *Boompret*. For example, in *Loxton* the Supreme Court of the Cape of Good Hope held in 1905 that "it is not competent to a lessee to dispute his landlord's title".[17] It was prepared to apply this rule in the context of a lessee attempting to resist eviction (though the summons in that case claimed only damages). In *Loxton* the claim was brought by the owners. In *Kala Singh* the Transvaal Provincial Division in 1912 directly applied the rule in the context of a sub-lessor seeking to evict a sub-lessee after the termination of the sub-lease.[18] In a manner analogous to Mighty Solutions' defence in this case, the

[13] *Boompret* above n 6.

[14] *Frye's (Pty) Ltd v Ries* 1957 (3) SA 575 (A) (*Frye's*) at 581A.

[15] See the various cases cited in Cooper *Landlord and Tenant* 2 ed (Juta & Co Ltd, Cape Town 1994) at 27.

[16] *The Salisbury Gold Mining Company v The Klipriviersberg Estate* (1893) Hertzog 186 (*Salisbury*) at 190.

[17] *Loxton v Le Hanie* (1905) 22 SC 577 (*Loxton*) at 578.

[18] *Kala Singh v Germiston Municipality* 1912 TPD 155 (*Kala Singh*).

sub-lessee attempted to resist ejectment on the basis that the sub-lessor's head lease with the owner of the land was invalid. The Court rejected this argument because "as between lessor and lessee it does not lie in the mouth of the lessee to question the title of his landlord".[19]

[30] In *Boompret* the Court considered whether a lessee can refuse to vacate a property upon termination of a lease in circumstances where the lessor does not have title *and* where the lessee has acquired an independent right to remain in occupation. The majority was sympathetic to the possibility that a lessee *can* rely on such a defence if the lessor brought its eviction claim on the basis of the *actio locati*,[20] but not if the lessor's claim is based on a possessory remedy.[21] The majority regarded it as unnecessary to decide this, because the appellants were unable to establish that they had acquired an independent title.[22] The minority went further and found that the rule that a tenant may not dispute a lessor's title did not apply, where a claim for ejectment was based on the *actio locati*. The lessee's "alleged independent title, being susceptible of relatively easy proof, may be raised as a defence", it said.[23]

[31] *Boompret* therefore left the common law unchanged. The decision did not create a specific *Boompret* "rule" or "principle". The High Court applied the common law correctly. It was unpersuaded that Mighty Solutions was able to raise the defence that Engen no longer has a right to occupy the premises. This would be true even on the assumption (which counsel for Engen conceded may be made) that Engen no longer had title when it moved to evict Mighty Solutions.

[19] Id at 159-60. Dating back to *Clarke*, above n 12 at 520-1, the rule has also been applied in cases where a lessee, after having used and enjoyed the property, challenged the validity of the lease in a bid to avoid paying rent.

[20] This is the action to recover possession on termination of a lease.

[21] *Boompret* above n 6 at 352H-J.

[22] Id at 353G-358D.

[23] Id at 358F-I.

[32] The facts of this case do not require this Court to consider – as the Court did in *Boompret* – whether a lessee can rely on a defence that the lessor lacks valid title in circumstances where the lessee asserts its own independent title to the premises. Mighty Solutions did not establish that it had acquired any independent title to the premises. It wisely abandoned its argument that its retail licence gave it statutory possessory rights. And although counsel for Mighty Solutions submitted that the belatedly asserted enrichment lien constituted "independent title" as contemplated in *Boompret*, this argument is of little assistance. In *Boompret* the Court considered a scenario where the lessee might have obtained an "independent" right to remain in occupation, one "acquired *dehors* [outside the scope of] the lease".[24] The existence of an enrichment lien against Engen – doubtful as this proposition may be – would anyway not give rise to independent title. It would not be a right against the owner and would thus fall outside the circumstances contemplated in *Boompret*.

[33] Mighty Solutions' submission that the common law rule "falls away", because its rationale does not apply in this case, is untenable. The rule is clear: a lessee or sub-lessee cannot rely on a defence that its lessor or sub-lessor lacks title in order to resist eviction upon termination of the lease. Mighty Solutions is a sub-lessee trying to do exactly that. Under the common law Engen had standing to evict Mighty Solutions. Questioning the rationale for the rule takes us rather to a separate question, namely whether the law ought to be developed.

Does the common law have to be developed?

[34] Counsel for Mighty Solutions contended in oral argument that there is a need to develop the common law. He submitted that the present rule "conceals facts" from courts and limits their ability to establish "the truth", to the detriment of lessees. This is contrary to the values of an open and democratic society, in which countervailing interests need to be balanced. The post-1994 constitutional dispensation calls for the

[24] *Boompret* above n 6 at 351I.

truth to be uncovered, so it was submitted. The argument seems to rely on transparency as a constitutional value, or on the right of access to courts.

[35] Section 39(2) of the Constitution states that "when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purport and objects of the Bill of Rights".[25] When is a court allowed or obliged to develop the common law in this way?

[36] Our common law evolved from an ancient society in which slavery was lawful, through centuries of feudalism, colonialism, discrimination, sexism and exploitation. Furthermore, apartheid laws and practices permeated and to some extent delegitimised much of the pre-1994 South African legal system. Courts have a duty to develop the common law – like customary law – to accord with the Bill of Rights.

[37] Caution is called for though. It is tempting to regard precedents from the pre-democratic era with suspicion. This may be more so when language is used, which some may regard as archaic and reminiscent of a patriarchal feudal era, as when the Court in *Kala Singh* said that "it does not lie in the mouth of a lessee to question the title of his landlord".[26] However, the mere fact that common law principles are sourced from pre-constitutional case law is not always relevant. Age is not necessarily a reason to change. Some of the lessons gained from human experience over the ages are timeless and have passed the logical and moral tests of time. The Constitution indeed recognises the existing common law and customary law. In *Zuma* Kentridge AJ said that it is not the case that under our constitutional dispensation "all the principles of law which have hitherto governed our courts are to be ignored. Those principles obviously contain much of lasting value."[27] Furthermore, legal certainty is essential for the rule of law – a constitutional value. It is also understandable that litigants who find themselves on the wrong side of the common

[25] Section 39(2) above n 1.

[26] *Kala Singh* above n 18 at 160.

[27] *S v Zuma and Others* [1995] ZACC 1; 1995 (2) SA 642 (CC); 1995 (4) BCLR 401 (SA) (*Zuma*) at para 17.

law or customary law will – often at a late stage in proceedings – seek what they would call its "development".

[38] Before a court proceeds to develop the common law, it must (a) determine exactly what the common law position is; (b) then consider the underlying reasons for it; and (c) enquire whether the rule offends the spirit, purport and object of the Bill of Rights and thus requires development. Furthermore, it must (d) consider precisely how the common law could be amended; and (e) take into account the wider consequences of the proposed change on that area of law.

[39] In *Carmichele* Ackermann J and Goldstone J stated that "where the common law deviates from the spirit, purport and objects of the Bill of Rights the courts have an obligation to develop it by removing that deviation".[28] The Court reminded us though that, when exercising their authority to develop the common law, "[j]udges should be mindful of the fact that the major engine for law reform should be the Legislature and not the Judiciary".[29] The principle of separation of powers should thus be respected.

[40] This Court dealt with the scope of the police's common law duty to take steps to prevent individuals from harm in *Carmichele*. The Court found that the High Court had misdirected itself by failing to consider whether this duty should be developed in light of section 39(2) of the Constitution.[30] The Supreme Court of Appeal had also failed to do so.[31] This Court remitted the matter to the High Court and both the High Court and later the Supreme Court of Appeal held that the state's delictual duties ought to be expanded.[32] In *K v Minister of Safety and Security* this Court adapted the

[28] *Carmichele v Minister of Safety and Security and Another (Centre for Applied Legal Studies Intervening)* [2001] ZACC 22; 2001 (4) SA 938 (CC); 2001 (10) BCLR 995 (CC) (*Carmichele*) at para 33. See also *Phumelela Gaming and Leisure Ltd v Gründlingh and Others* [2006] ZACC 6; 2006 (8) BCLR 883 (CC).

[29] *Carmichele* id at para 36.

[30] Id at paras 37 and 60.

[31] Id at para 37.

[32] See *Carmichele v Minister of Safety and Security and Another* 2003 (2) SA 656 (C) at para 32 and *Minister of Safety and Security and Another v Carmichele* [2000] ZASCA 149; 2004 (3) SA 305 (SCA) at para 36.

test for vicarious liability so as to render it compliant with the Bill of Rights.[33] *F v Minister of Safety and Security* further expanded the scope of vicarious liability attached to the State.[34] In *Holomisa*, on the other hand, the Court declined to find that the common law of defamation was inconsistent with the provisions of the Constitution.[35] In *Everfresh* the majority of this Court refused to develop the law of contract to require parties who undertake to negotiate a new rent for a renewed term of lease to do so reasonably and in good faith. It held that there were no special circumstances justifying the Court to do so as a court of first and last instance.[36]

[41] The common law has also been developed in the area of criminal law. In *Masiya* a majority of this Court held that the common law definition of rape should be expanded so as to promote the spirit, purport and object of the Bill of Rights.[37] It was developed to include anal penetration of a female, in addition to vaginal penetration.[38] The minority held that the definition could be further extended to include male victims,[39] but the majority declined to go that far.[40]

[42] The importance of pleading the development of the common law before reaching the apex court was recognised in *Carmichele*.[41] In *Everfresh* Yacoob J found that if this Court is asked to develop the common law as a court of first and last instance, it must consider whether it will be unfair or prejudicial to determine the issue based on the pleaded and established facts. In some cases courts are obliged to raise

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[33] *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 44.

[34] *F v Minister of Safety and Security and Others* [2011] ZACC 37; 2012 (1) SA 536 (CC); 2012 (3) BCLR 244 (CC) (*F v Minister of Safety and Security*) at paras 79-82.

[35] *Khumalo and Others v Holomisa* [2002] ZACC 12; 2002 (5) SA 401 (CC); 2002 (8) BCLR 771 (CC) (*Holomisa*) at para 45.

[36] *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* [2011] ZACC 30; 2012 (1) SA 256 (CC); 2012 (3) BCLR 219 (CC) (*Everfresh*) at para 64.

[37] *Masiya v Director of Public Prosecutions, Pretoria and Another (Centre for Applied Legal Studies and Another, Amici Curiae)* [2007] ZACC 9; 2007 (5) SA 30 (CC); 2007 (8) BCLR 827 (CC) (*Masiya*) at para 32.

[38] Id at para 74.

[39] Id at paras 84-8.

[40] Id at para 46.

[41] *Carmichele* above n 28 at para 41.

the matter *mero motu* even though it has not been raised by the parties, but such cases are rare.[42]

[43] This Court has often indicated that it benefits from the arguments and reasoning of the lower courts. In *Fick* Jafta J noted that the Supreme Court of Appeal and the High Courts were best suited for the development of the common law. He stated:

> "[T]he views of the other courts on the development of the common law are highly valued by this Court; this Court defers to the Supreme Court of Appeal and the High Court to determine whether the common law needs to be developed to meet the objects of section 39(2) of the Constitution and if so, the form that development should take."[43] (Footnotes omitted.)

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[42] *Everfresh* above n 36 at paras 27 and 31. In *Minister of Local Government, Western Cape v Lagoonbay Lifestyle Estate (Pty) Ltd and Others* [2013] ZACC 39; 2014 (1) SA 521 (CC); 2014 (2) BCLR 182 (CC) (*Lagoonbay*) this Court reviewed the principles laid down in *Director of Public Prosecutions, Transvaal v Minister of Justice and Constitutional Development, and Others* [2009] ZACC 8; 2009 (4) SA 222 (CC); 2009 (7) BCLR 637 (CC). At para 39 of *Lagoonbay*, it summed these up as follows:

> "(a) A court may, of its own accord, raise the unconstitutionality of a law that it is called upon to enforce. This ensures the supremacy of the Constitution and further ensures that we have a coherent system of law based on the Constitution as a foundational document.
>
> (b) In an instance where a point of law is apparent on the papers, but the common approach of the parties proceeds on a wrong perception of what the law actually is, then a court should, of its own accord, raise the point of law and require the relevant parties to deal therewith.
>
> (c) 'Courts should observe the limits of their powers. They should not constitute themselves as the overseers of laws made by the Legislature. Ordinarily, therefore, they should raise and consider the constitutionality of laws that are properly engaged before them and where this is necessary for the proper resolution of the dispute before them.'
>
> (d) A court may, of its own accord, decide a constitutional issue if 'it is necessary for the purpose of disposing of the matter before it'.
>
> (e) A court may also, of its own accord, decide a constitutional issue if it is in the interests of justice to do so. Determining the interests of justice entails, inter alia, considerations of public interest and whether the matter has already been fully and fairly aired." (Footnotes omitted.)

[43] *Government of the Republic of Zimbabwe v Fick and Others* [2013] ZACC 22; 2013 (5) SA 325 (CC); 2013 (10) BCLR 1103 (CC) (*Fick*) at para 104.

[44] In this case, Mighty Solutions has not called for a minor development of the common law. The changes made in *Carmichele*,[44] *K v Minister of Safety and Security*[45] and *F v Minister of Safety and Security*[46] were part and parcel of the incremental development of the common law of delict on a case-by-case basis. Under section 39(2) of the Constitution this development is guided by the spirit, purport and objects of the Bill of Rights. Even radical changes to the common law might sometimes be required. As was held in *Carmichele*, if a common law rule fails to promote the section 39(2) objectives, our courts have no choice but to develop it. This is a "general obligation" and not a discretion.[47] But fundamental changes to the fabric of the common law and customary law are often more appropriately made by way of legislation.

[45] In the present case, Mighty Solutions takes aim at the heart of the common law of lease. The rule at stake is so entrenched that it is a natural incident of all contracts of lease. That is, it is implied by law unless the parties expressly agree otherwise.[48] For this reason, a development of the common law would itself not be enough for Mighty Solutions' success. Even if this settled common law rule were adjusted, the contract between Engen and Mighty Solutions would still stand. Mighty Solutions seeks to escape the legal obligations it undertook when it concluded the operating lease by asking that a basic principle of the law of lease be abolished with retrospective effect. It could succeed only if this Court retrospectively altered the contract. Mighty Solutions would have needed to establish that the contractual term was contrary to public policy. It did not attempt to do so.

[44] *Carmichele* above n 28.

[45] *K v Minister of Safety and Security* above n 33.

[46] *F v Minister of Safety and Security* above n 34.

[47] *Carmichele* above n 28 at para 39.

[48] *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 531D-532G. See also *South African Maritime Safety Authority v McKenzie* [2010] ZASCA 2; 2010 (3) SA 601 (SCA) at para 11.

[46] This Court is sensitive to the fact that to summarily change an implied term affects countless existing contracts concluded on the basis of the existing principle. The parties to those contracts would not have thought it necessary to provide expressly for the specific eventualities covered by the implied term. To alter the implied term changes the contractual relationship retrospectively and converts it to one on terms that the parties might never have agreed to.

[47] This point is illustrated by the facts of this case. The operating lease between Mighty Solutions and Engen made provision for what was to occur if Engen was itself a lessee and its lease terminated. It said that the sub-lease would automatically terminate and the parties would have no claim against one another flowing from the termination. However, if the cause of the termination of the head lease was a breach by Engen of its obligations under that lease, Engen was obliged to offer Mighty Solutions similar premises elsewhere or would have to pay compensation.

[48] There were other situations under the operating lease where its termination was contemplated. Either party would have been entitled to terminate the lease on written notice of not less than 180 days, within 90 days of resale price maintenance of petrol ceasing to be determined by legislation. It could be cancelled on not less than 12 months' notice if Engen wished to provide additional facilities or undertake a conversion of any facility and Mighty Solutions was not prepared, after an assessment of the reasonableness of the additional facilities or the conversion, to agree to the work being undertaken. If the whole of the premises were expropriated the lease would terminate with effect from the date of expropriation. It would also do so if changes in legislation, industry structure or regulatory measures caused Engen to propose unacceptable amendments to the lease. In that event Mighty Solutions would be entitled to terminate the lease on 90 days' notice.

[49] In none of these events was it expressly provided in the operating lease that Mighty Solutions would vacate the premises and restore vacant possession to Engen. It was unnecessary, because the implied terms of the contract obliged Mighty

Solutions to do so and entitled Engen to enforce those terms by way of eviction proceedings. If that had not been the law when the contract was concluded there can be little doubt that Engen would have insisted on incorporating into the operating lease express terms to that effect in order to protect its own position. And such express terms could not in any case simply be struck down by this Court because, as already mentioned, Mighty Solutions did not attack them on the basis that they were contrary to public policy.

[50] Mighty Solutions asks for more than simply a development of the law. But, in any case, there is no basis for developing it in the manner suggested.

[51] Contrary to the submission advanced by Mighty Solutions, several of the justifications for the common law rule are applicable and indeed make good sense in this case. As explained in *Clarke*,[49] having got what they bargained for in terms of a lease (undisturbed enjoyment), it would be bad faith for a lessee then to try to avoid a term of the contract by disputing the lessor's title. If neither the lessor nor the lessee has title, why should the lessee's interests prevail in a commercial context, in a manner that is contrary to the agreement entered into? Mighty Solutions had no right to remain in occupation of the premises. Doing so, using Engen's branding and equipment and without paying rent, certainly seems in bad faith.

[52] Logic and the reality of commercial practice support the rule. In the context of retail, commercial and industrial leases, the property-owning entity seldom leases the property out. Frequently it is an operating arm or subsidiary that does so. A defence which allowed a lessee without title to remain in rent-free occupation until the lessor proved its title could easily be exploited. A dispute over a lessor's title, regardless of its merits, could pave the way for prolonged occupation by lessees acting in bad faith. As counsel for Engen emphasised, the position of sub-lessors could be even worse, as they still have to meet their obligations in terms of the head lease during the relevant periods. The argument made by Mighty Solutions that it always remains open to the

[49] *Clarke* above n 12 at 520-1.

original title-holder to evict a recalcitrant sub-lessee misses the point: owners are often reluctant to deal with sub-lessees and insist that their lessee does so.[50]

[53] The submission on behalf of Mighty Solutions about the "truth" is deeply unconvincing. The common law of lease does not provide for secrecy. And it does not protect untruths. It merely states that possible defects in the lessor's title are not a valid defence in cases like this.

[54] *Boompret* correctly states that the common law rule applies "in general".[51] The Court was open to finding that it did not apply in cases where a lessee has obtained independent title and the lessor no longer has title, but did not have to. This question is still open. There may well be other scenarios where the rule should not apply.

[55] The fundamental rights considerations that might arise in the context of a residential eviction are covered by the Prevention of Illegal Eviction from and Unlawful Occupation of Land Act.[52] These are not implicated in this type of commercial setting. The eviction is not alleged to leave a poor family without a roof over their heads.

[56] There is no apparent reason to develop the common law in this case. The rule does not offend the spirit, purport and objects of the Bill of Rights, or the values of our constitutional democracy. Fuel retailers like Mighty Solutions and the numerous applicants preceding it in cases like *Gundu Service Station*[53] may have justified grievances about the structure of the fuel industry and the conduct of large oil companies in their dealings with retailers. However, Mighty Solutions chose the

[50] If a head lease has expired, but the property is still occupied, the lessor will generally bring ejectment proceedings against the lessee, not the sub-lessee, and the latter does not have the right to be joined or to intervene. See *United Watch & Diamond Co (Pty) Ltd and Others v Disa Hotels Ltd and Another* 1972 (4) SA 409 (C) at 417B-C where the Court held that "[t]he subtenants' right to, or interest in, the continued occupancy of the premises sub-leased is inherently a derivative one depending vitally upon the validity and continued existence of the right of the tenant to such occupation".

[51] *Boompret* above n 6 at 351H-J.

[52] 19 of 1998 (popularly known as "PIE").

[53] *Gundu Service Station* above n 4.

wrong avenue to prosecute these grievances. The High Court suggested approaching the Competition Tribunal if anti-competitive practices were alleged.[54] To relax the common law rule so as to allow Mighty Solutions to remain in occupation until Engen proved valid title would be unjust and commercially reckless and might well have far-reaching and unnecessary implications for the law of lease and of contract in general.

Enrichment

[57] In its written argument, Mighty Solutions introduces a new argument that it has a real right to the premises in the form of an enrichment lien. It referred to clause 41 of schedule 2 of its contract with Engen, which allegedly states that, if Mighty Solutions' tenure is prematurely terminated, it will "not have the right to any compensation" in respect of its "loss of the business". Mighty Solutions first argued that the relevant sub-clauses were contrary to the spirit of the Act and hence unlawful and invalid. It then submitted that when the contract was cancelled, Engen became unjustifiably enriched at Mighty Solutions' expense, because the business – including its goodwill (an "intellectual property asset") – contractually transferred to Engen upon cancellation of the contract. This gave rise to an enrichment lien and a right of retention of possession.

[58] Engen argues that Mighty Solutions impermissibly went beyond the common cause facts and issues agreed in the joint practice note before the High Court. Its submissions in this Court contradict certain agreed common cause facts; and it introduces false and misleading allegations that did not form part of the evidence in the High Court. Engen submits that all common cause facts and factual disputes were settled by the joint practice note agreed on by counsel for both sides. This note provided the basis for adjudicating the matter.

[54] The High Court judgment also suggested that Mighty Solutions could approach the Department of Energy with its grievances "with a view to the Minister [of Minerals and Energy] making the appropriate regulations". See High Court judgment above n 5 at 11.

[59] Mighty Solutions argues that the joint practice note was nothing more than a guideline on facts that were common cause. It is not binding on this Court. It submitted that in the High Court both parties were entitled to and did in fact rely in addition on the affidavits and documents before that Court.

[60] Rule 33(1) of the Uniform Rules of Court provides that parties to a dispute may agree upon a written statement of facts in the form of a special case for the adjudication of points of law.[55] This statement sets out the facts agreed upon and the questions of law in dispute between the parties, as well as their contentions.[56] Rule 33(3) gives the court the discretion to draw any inference of fact or law from the facts and documents as if proved at trial. In *Bane* it was said that rule 33(1) and (2) made it clear that the resolution of a stated case proceeds on the basis of a statement of agreed facts.[57] It is, after all, seen as a means of disposing of a case without the necessity of leading evidence.

[61] The Rules of this Court do not speak of a practice note or statement of facts. Rule 29 does not list rule 33 of the Uniform Rules as applicable to this Court.

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[55] Rule 33 states in relevant part:

> "(1) The parties to any dispute may, after institution of proceedings, agree upon a written statement of facts in the form of a special case for the adjudication of the court.
>
> (2) (a) Such statement shall set forth the facts agreed upon, the questions of law in dispute between the parties and their contentions thereon. Such statement shall be divided into consecutively numbered paragraphs and there shall be annexed thereto copies of documents necessary to enable the court to decide upon such questions. It shall be signed by an advocate and an attorney on behalf of each party or, where a party sues or defends personally, by such party.
>
> (b) Such special case shall be set down for hearing in the manner provided for trials.
>
> . . .
>
> (3) At the hearing thereof the court and the parties may refer to the whole of the contents of such documents and the court may draw any inference of fact or of law from the facts and documents as if proved at a trial."

[56] Id rule 33(2).

[57] *Bane and Others v D'Ambrosi* [2009] ZASCA 98; 2010 (2) SA 539 (SCA) (*Bane*) at para 7. See also *National Union of Mineworkers and Others v Hartebeestfontein Gold Mining Co Ltd* 1986 (3) SA 53 (A) at 56G–57E and *Minister of Police v Mboweni and Another* [2014] ZASCA 107; 2014 (6) SA 256 (SCA) at paras 7-8.

However, until recently it was for some time a practice of this Court to issue directions calling upon parties to submit an agreed statement of facts. The reason for this mirrors that of the Uniform Rules of Court in that it negates the need for evidence and informs this Court as to what the facts of the case are about.

[62] The joint practice note in the High Court was not only an agreement on facts. It was an agreement on the issues to be decided by the High Court. The High Court regarded itself as bound by the note. It confined itself to the two issues in it. The judgment dealt with the issues of standing and possessory rights under the Act. If this Court were to entertain anything beyond those two issues it would prejudice Engen, as it had no opportunity to rebut the claim, whether on the facts or the law. Furthermore, it would make this Court a court of first and last instance. An application for leave to appeal must be adjudicated on whether and how the court below erred. This Court can do so on the two issues only. It would hardly be in the interests of justice for an appeal court to overturn the judgment of a lower court on the basis of an issue that Court was never asked to decide. As lawyers often say, "on this basis alone" this Court should not entertain the enrichment argument.

[63] Furthermore, Mighty Solutions did not raise enrichment in its notice of motion.[58] It did so in its written and oral submissions. In *Barkhuizen* Ngcobo J noted that this Court may consider a point of law that is raised for the first time on appeal if the point is covered by the pleadings and its consideration on appeal involves no unfairness to the other parties.[59] *Khumalo* supports this.[60] In *Lagoonbay* this Court

[58] Mighty Solutions' notice of motion indicated:

> "1. That the appellant be granted leave to appeal against the whole of the order and judgment of the South Gauteng High Court delivered and handed down on 28 March 2014 by His Lordship Mr Justice Matthee (AJ), leave to appeal having been made in due course and refused by the Supreme Court of Appeal on 19 November 2014;
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> 2. That the aforesaid order be replaced with an order that the application is dismissed with costs".

[59] *Barkhuizen v Napier* [2007] ZACC 5; 2007 (5) SA 323 (CC); 2007 (7) BCLR 691 (CC) (*Barkhuizen*) at para 39.

[60] *Khumalo and Another v MEC for Education, KwaZulu-Natal* [2013] ZACC 49; 2014 (5) SA 579 (CC); 2014 (3) BCLR 333 (CC) (*Khumalo*) at para 90:

stated that it must be in the interests of justice, which takes into account the public interest and whether the matter has been fully and fairly aired, to hear a new argument for the first time.[61] In this case the issue was not properly raised on either the facts or the law.

[64] Even if the enrichment point were to be entertained, the prospects of success are slim. Mighty Solutions relies on the British Columbia Court of Appeal case of *Haigh v Kent* as authority that goodwill is a form of enrichment.[62] The import of Mighty Solutions' reliance on this case was not altogether clear. Engen correctly argues that the submission regarding goodwill is novel in South African law and it would require the ears and attention of lower courts to ventilate this issue. A glance at the unjustified enrichment landscape indicates that this area has yet to be developed.[63]

[65] Factual strings on the goodwill issue are in any event still untied. There is no evidence speaking to the profitability of the business. The amount of R2 000 000, which Mighty Solutions values the goodwill at, is hotly disputed. In considering the goodwill, we would need to pay attention to factors like whether Engen's potential benefit from Mighty Solutions' goodwill is outweighed by the benefit Mighty Solutions received from Engen's goodwill in using its branding for several years.[64]

> "The MEC must stand or fall on the pleaded cause of action. As illustrated above, it is evident that she deliberately chose to institute a claim founded in administrative justice. Her disavowal of reliance on the [Labour Relations Act 66 of 1995] precludes any court from adjudicating a claim based on the [Labour Relations Act 66 of 1995], even if the facts pleaded were capable of sustaining such a claim. In [*Gcaba v Minister for Safety and Security and Others*], this Court rejected the notion that, if pleaded facts sustain a claim not relied on by an applicant, a court may adjudicate such claim. The Court said:
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> > 'While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognisable only in another court.'" (Footnotes omitted.)

[61] *Lagoonbay* above n 42 at para 39.

[62] *Haigh v Kent* 2013 BCCA 380.

[63] See Visser *Unjustified Enrichment* (Juta & Co, Cape Town 2008) at 10-27 in general. Visser discusses the development of enrichment in South Africa, but does not speak about goodwill being part of this landscape.

[64] In *Rail Commuters Action Group and Others v Transnet Ltd t/a Metrorail and Others* [2004] ZACC 20; 2005 (2) SA 359 (CC); 2005 (4) BCLR 301 (CC) at paras 41-3, this Court stated:

[66] This Court may not entertain the enrichment claim. It did not appear in the practice note that guided and bound the High Court; was raised in argument before this Court for the first time; and depends on evidence that is not available.

Conclusion

[67] Under the common law of lease Mighty Solutions may not question Engen's title as a defence in eviction proceedings after the valid termination of the lease agreement between it and Engen. The common law position does not call for development on the facts of this case. The enrichment argument cannot be entertained. Engen has standing to evict Mighty Solutions.

[68] This application bears no prospects of success. Leave to appeal has to be dismissed.

Costs

[69] In a commercial dispute between two private parties costs should follow the result. Mighty Solutions' conduct in bringing in a completely new argument to this Court does not mitigate its circumstances.

Order

[70] The following order is made:

> "The SCA has similarly held that new evidence should be admitted on appeal under this section only in exceptional circumstances. This is because on appeal, a court is ordinarily determining the correctness or otherwise of an order made by another court, and the record from the lower court should determine the answer to that question. It is accepted however that exceptional circumstances may warrant the variation of the rule. Important criteria relevant to determining whether evidence on appeal should be admitted were identified in *Colman v Dunbar*. Relevant criteria include the need for finality, the undesirability of permitting a litigant who has been remiss in bringing forth evidence to produce it late in the day, and the need to avoid prejudice.
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> . . .
>
> The Court should exercise [these] powers . . . 'sparingly' and further evidence on appeal (which does not fall within the terms of Rule 31) should only be admitted in exceptional circumstances. . . . The existence of a substantial dispute of fact in relation to it will militate against its being admitted." (Footnotes omitted.)

1. Condonation for the late filing of the statement of facts and record is granted.
2. Leave to appeal is refused.
3. The applicant must pay costs, including the costs of two counsel.

For the Applicant:	C Woodrow and D Jordaan instructed by Venn & Muller Attorneys
For the First Respondent:	M Chaskalson SC and C van der Spuy instructed by A D Hertzberg Attorneys