REPUBLIC OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 44500/10

DATE:28/03/2011

In the matter between:

ERF 179 BEDFORDVIEW (PTY) Ltd Applicant

and

BEDFORD SQUARE PROPERTIES (PTY) Ltd First Respondent

and

WOOLWORTHS (PTY) LTD Second Respondent

REASONS FOR DECISION

SPILG, J:

APPLICATION CONTEXTUALISED

1. The Applicant is the owner of properties on which the Village View shopping centre is located. The First Respondent (who will also be referred as Bedford Square) had sought local government approval to develop a large shopping centre near that of the Applicant and also near the Eastgate Shopping Mall. A dispute arose when the Ekurhuleni Metropolitan Municipality approved the development. The Applicant, Liberty Group Limited (as owners of the land on which the Eastgate Mall is situated) and some other property owners appealed the decision to the Township Board for Gauteng.

2. On 4 November 2003 Bedford Square and the Ekurhuleni Metropolitan Municipality as Respondents in the proceedings before the Township Board concluded a written agreement with the Appellants, including the Applicant. The agreement is entitled "*Settlement Agreement"*.

3. The purpose of the agreement was to amicably settle the appeal against the Metro Council's decision to remove certain conditions from the title deeds of the property purchased by Bedford Square and to effect a rezoning so that it could develop the property as a major shopping complex, which subsequently became known as the Bedford Centre.

4. The opening paragraph of the agreement records the events relating to that appeal and concludes in paragraph 1.4 with the following statement:

   "*The parties hereto have agreed to settle the appeal on the terms and conditions as set out in this settlement agreement* "

   .

5. The paragraph that followed set out the negotiated amendments to the town planning scheme. These amendments allowed Bedford Square to provide up to 10 500 sq metres of gross leasable floor area of shops, restaurants and the like in its proposed shopping centre.

6. The key provision for the purposes of this case, contained in clauses 3.1, is Bedford Square's undertaking not to,

" ... *at any time within a period of eleven years commencing from the date of conclusion of this agreement conclude a lease agreement in terms of which any rental space located on the PROPERTY is let to Woolworths or Mica Hardware. This provision shall be registered as a praedial servitude against the PROPERTY in favour of the following properties….*"

7. The properties referred to expressly included that of the Applicant and the provisions of the agreement were subsequently registered as praedial servitudes.

8. The period of the restraint expires on 3 November 2014.

9. In effect the agreement and praedial servitude are of limited scope. They preclude Bedford Square from concluding lease agreements with only two of South Africa's large and potential anchor retail tenants, being Woolworths (the Second Respondent) and Mica Hardware, until the beginning of November 2014.

10. Before half the restraint period had expired and seemingly disenchanted with its pact, Bedford Square first lodged a complaint with the Competition Commission in May 2009. It alleged that the provisions of the notarial deed of restraint, which constituted a servitude, were void and unenforceable because they resulted in anti-competitive behaviour amounting to an abuse of dominance in contravention of section 8 of the Competition Act, no 89 of 1998 (*the Act)*. The submission made was that the servitude did not serve to protect any legitimate commercial, legal or other interest, but was a restrictive practice and served *…merely as a naked restraint inhibiting free and fair competition*" .

11. In late September 2009 the Commission notified Balfour Square that after investigation it found the complaint under section 8(d) (i) to be unsubstantiated and issued a Notice of Non-Referral. It however considered that the agreement might contravene section 4(1) (b) (ii) as

one between competitors to allocate the market share amounting to a restrictive horizontal practice. As this was not covered by the complaint the Commission elected to initiate its own complaint under section 49B (1) of the Act.

12. Dissatisfied with this result, a month later in October 2009 Bedford Square launched High Court proceedings against the applicant to declare the notarial deed of restraint unenforceable on grounds of public policy. It also cited Woolworths and Mica Hardware as parties to the proceedings. Why Bedford Square persisted in seeking a means to renege from the agreement it had concluded with open eyes and with no claimed bargaining disadvantage would only become evident later.

13. Bedford Square disavowed reliance on the provisions of the Act, as it was obliged to do in order to ensure that it would not fall foul of the exclusive jurisdiction enjoyed by the Competition Tribunal and Competition Appeal Court (loosely referred to as the Competition Courts). It was also content not to pursue the section 4 investigations initiated by the Competition Commission or parallel remedies under the Act. In particular it did not seek to either lay a further complaint, attempt to obtain a prompt referral of the matter to the Competition Tribunal nor, and perhaps most significantly, otherwise position itself as a complainant for purposes of obtaining interim relief under section 49C of the Act.

14. On 10 December 2009 the High Court application was dismissed. Willis J held (at para 4) that the first hurdle Bedford Square needed to overcome, as conceded by it , was whether the contract underpinning the notarial deed was contrary to public policy. The learned judge after hearing argument found that it was not and dismissed Bedford Square's application.

15. On 7 May 2010 Bedford Square was granted leave to appeal .The SCA recently heard argument and its decision is awaited.

16. The Applicant believed that Bedford Square had launched the High Court application to declare the servitude unenforceable pursuant to an abortive attempt to let retail space to Woolworths. This averment was not disputed.

17. However after leave to appeal was granted and during August 2010 the Applicant noticed large signs being erected outside the Bedford Centre advertising that Woolworths would be opening there on 1 March 2011.

18. Despite attempts to obtain clarity regarding the intentions of Woolworths and Bedford Square, the applicant was met with what can best be described as *"stonewalling".* The Applicant believed that it had no option but to launch the present application, which it did in early November 2010.

19. The application, as originally brought, sought to;

    a) interdict and prohibit Bedford Square from concluding, or acting pursuant to, any lease agreement in terms of which retail space was allocated to Woolworths on Erf 39 Bedford Gardens and the Remaining Extent of Erf 135 Bedfordview Extension 10 Township until the earlier of 3 November 2014 or the final finding that the written agreement of settlement concluded between inter alia the Applicant and Bedford Square on 3 and 4 November 2003 and the notarial deed of restraint, executed by the Applicant and the First Respondent on 21 June 2006, are unenforceable;
    b) direct Bedford Square to cancel any lease agreement that it had concluded with Woolworths in terms of which retail space located on the property is to be let to the Second Respondent at any time prior to 3 November 2014;
    c) obtain costs against Bedford Square, but if Woolworths opposed then costs against them as well.

20. On 15 November 2010 Woolworths gave notice of its intention to abide the court's decision.

21. Bedford Square filed notices under Rule 35(12) requesting documents. The applicant contended that they were not relevant but nonetheless produced some 150 pages of documents and then called on Bedford Square to deliver its Answering Affidavit. This was met with a rule 30A notice. The Applicant submitted that this was part of the dilatory tactics adopted by Bedford Square which was intent on giving occupation of the premises to Woolworths on 1 March 2011. The applicant requested that the matter be set down for hearing on the week of 2 February 2011.

22. By the time the matter was heard Bedford Square had still not filed an answering affidavit. On 10 February 2011 Claassen J dismissed the First Respondent's rule 30A notice and held that it ought to have filed an answering affidavit. Claassen J declined to accept a brief affidavit from the first respondent and granted an interim order prohibiting it from concluding or acting pursuant to any lease agreement contemplated in the original application. The order was granted with immediate effect and returnable on 1 March 2011. Leave was given to anticipate the return date.

23. Bedford Square then anticipated the return day and sought a variation of the order. *Watt-Pringle AJ* set aside the interim relief granted on 10 February and ordered that: *Pending the final determination of this application the first respondent is interdicted from permitting the second respondent to open its premises to the public for trading without first having given written notice to the applicant's attorneys of not less than three weeks prior thereto.* Bedford Square was also directed to serve its answering affidavit by 25 February 2011. Costs were ordered to be in the cause.

24. The learned judge considered that :

    a) The main application was for final relief (at para17):
    b) Bedford Square was entitled to anticipate the return day as it did and seek the amended order even though it had not filed an affidavit in the main application:

c) The applicant was not entitled to the relief claimed in the main application of November 2011 because Bedford Square had still not filed an answering affidavit and that only an interim order could be made at that stage.

25. . Watt Pringle AJ then made the following order on 17 February 2011:

a) The interim relief granted by Claassen J on 10 February 2011 was set aside:
b) Pending the final determination of the main application, Bedford Square was interdicted and restrained from permitting Woolworths opening its premises to the public for trading without first having given written notice to the applicant's attorneys, not less than three weeks prior thereto:
c) Bedford Square was to file its answering affidavit by 25 February 2010;
d) Costs to be in the cause.

26. It will be recalled that a day before this order was made, the SCA heard argument in the appeal from Willis J's substantive order dismissing Bedford Square's application to declare the notarial restraint unenforceable.

27. It is evident that at this stage the First Respondent was running out of options, particularly if the SCA decided not to uphold its appeal. This is so because despite Woolworths' undertaking to abide the court's decision and despite the decision of Willis J being binding unless set aside on appeal, it appears that Woolworths continued fitting out the Bedford Square premises with the intention of open its doors for business in time to attract trade over the Easter weekend which now is just under a month away, Good Friday falling on 22 April.

28. On 21 February 2011 Bedford Square then launched urgent interim proceedings before the Competition Tribunal. It appears that Bedford Square may have initiated a further complaint to qualify as a complainant

under section 49C for the purposes of acquiring *locus standi*. However the resolution of these matters falls within the exclusive jurisdiction of the Tribunal. I will therefore assume for present purposes that Bedford Square satisfies the *locus standi* requirements under section 49C of the Act.

29. I return to the Applicant's High Court application. On 25 February 2011 Bedford Square delivered its answering affidavit, in which the existence of a written lease agreement between the two Respondents was disclosed for the first time. The salient features of this lease are:

a) The document is the product of proposals identified inter alia as "*Bedford Square\Master HoA Corporate FSA 2008.10.doc"* and was last edited on 27 April 2010:
b) The agreement was signed on 4 May 2010 by Bedford Square and on 26 May 2010 by Woolworths:
c) In terms of the printed document the commencement date of the lease was to be no later than 1 October 2010. This was altered in manuscript on an unknown date to 15 March 2011 and then to 24 March 2011 (see clause 6.1):
d) Should the commencement date not have occurred prior to 1 November 2010 (subsequently changed in manuscript to 15 April and then again to 28 April 2011) then Woolworths would be entitled to cancel the lease:
e) The lease period is 10 years from the commencement date with a right to renew on four occasions- and on each occasion the period would be 5 years:
f) Woolworths was entitled to take beneficial occupation rent free:
    a) at least 60 days ahead of the commencement date at no cost "*for shopfitting purposes"* ;
    b) at least 88 days prior to the commencement date of the refrigeration plant room:
g) Bedford Square indemnified and held Woolworths harmless against all loss, liability, damage or expense which it may suffer as a consequence of *"…. any claim which may be made against the Lessee*

arising out of or in any way related to any existing restrictions that may be implemented or imposed by statute, law, law or regulation or regulatory body or court of law against Woolworths opening a store in Bedford Square".

30. The Applicant filed its reply. A supplementary affidavit on behalf of Bedford Square was later filed by consent. It dealt with subsequent events relating to the proceedings before the Tribunal, namely that the Commission confirmed on 9 March 2011 that it would be serving and filing its referral application under section 49B with the Tribunal on 14 March 2011 and that Bedford Square's application before the Tribunal for interim relief under section 49C was set down for hearing on 15 April 2011.

31. The last two features resulted in the Applicant amending the relief sought to cater for the outcome of any proceedings before the Competition Courts. The applicant also contends that there was no need for this court to refer the section 4(1) (b) (ii) issue raised by Bedford Square in these High Court proceedings to the Tribunal since there was now a competent referral by the Commission itself. I agree with this submission and I do not deal with it further.

32. A significant feature in contextualising the proceedings that have culminated in the application before me and the relief Bedford Square seeks from the Tribunal is Bedford Square's admission that Woolworths intends operating at the Bedford Centre pending the outcome of the SCA decision and the outcome of both proceedings now before the Tribunal. The objectives are plain. They are to achieve a *fait accompli* with Woolworths opening its doors come Good Friday. This court cannot fail to appreciate that if Woolworths opens for business either before the SCA decision is pronounced or the Tribunal decides on the section 4(1) (d) (ii) referral by the Commission then it can claim that circumstances have changed, employees may be out of work and so forth.

33. It is plain that Bedford Square has consistently breached the terms of its own bargain and has yet to offer an explanation as to why it did not exhaust its legal remedies before concluding the agreement with Woolworths and before implementing its terms by giving Woolworths access to fit out the store and advertise at its Centre that Woolworths would commence trading some three and a half years before the restraint expired.

34. The argument presented during the proceedings before me demonstrates that Bedford Square believes it is worth taking the risk that a court will not wish to disturb a *fait accompli* even if achieved by persistent breaches of a contract which it has already been told by a court, and which, unless upset on appeal, is binding on the basis of *res iudicata* or precludes a defence by reasons of at least issue estoppel (See *Liley v Johannesburg Turf Club* 1983 (4) SA 548 (W) at 551-552, *Horowitz v Brock* 1988 (2) SA 160 (A) and *Kommissaris Van Binnelandse Imkomste v Absa Bank Bpk* 1995 (1) SA 653 (A)). The question is whether Bedford Square is lawfully entitled to do so. I proceed to consider the issues raised as to whether the application before me should succeed or not.

THE ISSUES

35. The issues are confined to a narrow compass. They are:

a) Whether the First Respondent can challenge the agreement and whether the Tribunal has jurisdiction to consider whether the agreement amounts to a prohibited practice under the Act, because the rights that the Applicant seek to enforce are not pursuant to an agreement between parties but rather a praedial servitude existing over land registered against a servient tenement in favour of a dominant tenement:
b) Whether this Court has jurisdiction to deal with a defence raised under section 4(1)(b)(ii) of the Act even if raised in interdictory proceedings:

c) Whether the common law attack based on public interest is *res iudicata*:
d) Whether the relief sought is final or interim. And:

a) If final whether this court would in effect be determining the existence or otherwise of a prohibited practice which falls within the exclusive jurisdiction of the Competition Courts; and
b) if interim whether the Applicant is obliged to demonstrate a *prima facie* right *and* a balance of convenience in its favour even though it may be able to establish a clear right. This issue arises because the Applicant did not deal with the question of balance of convenience:

e) Whether the applicant is not adequately protected by an ordinary damages claim:
f) Whether circumstances have changed.

36. Common to many of the issues is the question of whether this court's jurisdiction to grant interdictory relief is curtailed by the exclusive jurisdiction conferred on the Competition Courts, and that will be answered in part by whether the orders now sought would finally dispose of the issues regarding whether the agreement is a prohibited restrictive practice and therefore void or unenforceable under the Act. I will start with the issue of jurisdiction and the nature of the relief sought.

36. In short Mr *Peter* argues that Bedford Square can straddle both jurisdictions, and as long as it has one foot in the exclusive jurisdiction of the Tribunal Bedford Square is untouchable and can continue implementing its lease with Woolworths in continued breach of its common law obligations. The result would of course render the High Court decision ineffectual until the issues under the Competition Act are eventually determined.

37. Mr *Blou* for the Applicant contends that such a consequence is saved by section 65 (1) of the Act. I agree albeit on broader grounds. If this was not

so the decision of this court and indeed by the SCA, if it dismisses Bedford Square's appeal, would lack effectiveness under the Act.

38. I proceed to give my reasons regarding the applicability of section 65(1) of the Act.

HIGH COURT JURISDICTION AND SECTION 65(1) OF THE ACT

39. Section 62 of the Act is headed "*Appellate Jurisdiction*" and deals with the right to appeal a decision of the Competition Tribunal to the Competition Appeal Court and, in respect of a matter *not* within its exclusive jurisdiction, from there (subject to applicable legislation) to the SCA and the Constitutional Court. Nonetheless it also creates areas of exclusive jurisdiction and also non-exclusive jurisdiction for what I continue to loosely term the Competition Courts.

40. Exclusive Competition Court jurisdiction is to be found in sections 62(1) and (3)(a). Non-exclusive jurisdiction is acknowledged in sections 62(2) and (3)(b). Section 62(5) also recognises that these specialist bodies have no jurisdiction to assess damages despite the claim arising from a prohibited practice.

41. The following portions of sections 62(1) and (2) are relevant for the purposes of this case:

> "*62(1) The Competition Tribunal and Competition Appeal Court share exclusive jurisdiction in respect of the following matters:*
> *(a) Interpretation and application of Chapters 2, 3 and 5, other*
> *(i) A question or matter referred to in sub-section (2); or*
> *(ii) …..*
> *(b) The functions referred to in section 21(1), 27(1) and 37, other than a question or matter referred to in subsection (2)*

(2) *In addition to any other jurisdiction granted in this Act to the Competition Appeal Court, the Court has jurisdiction over –*

(a) ……

(b) ……

(c)the question whether a matter falls within the excusive jurisdiction granted under subsection (1).”

42. The reference in section 62(1)(b) to section 27(1) is relevant because of the provisions of subsection (d) which read:

“*27(1) The Competition Tribunal may-*

……

(d) make any ruling or order necessary or incidental to the performance of its functions in terms of this Act”

43. An order necessary or incidental to the Tribunal’s functioning is expressly provided for in section 49C, namely the grant of interim relief “*in respect of the alleged practice”* (my emphasis), ie a prohibited practice under section 4 of the Act. One of the considerations for the grant of such relief is the “… *need to prevent serious or irreparable damage to the applicant”.* An Applicant who can qualify for interim relief is limited to the person who submitted a complaint against an alleged prohibited practice to the Commission in the prescribed form. See the section 1(1) (iv) definition read with section 49C (1).

44. The Applicant relies on Section 65(1) for the relief it seeks. Section 65 as a whole is directly relevant in order to determine the application of section 65(1). This section falls under Chapter 6 of the Act (which is headed *“Enforcement”)*.Therefore, by reason of the application of section 62 all its subsections are beyond the exclusive jurisdiction of the Competition Courts, which are limited to Chapter 2,3 and 5 matters. This also leaves it open for a High Court to pronounce on the proper interpretation of section 65 as a whole.

45. Section 65 reads:

> "***65. Civil actions and jurisdiction***
>
> (1) *Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void.*
>
> *(2) If , in any action in a civil court, a party raises an issue concerning conduct that is prohibited in terms of this Act, that court must not consider that issue on its merits, and –*
>
> *(a) if the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or the Competition Appeal Court to the issue; or*
>
> (b) *otherwise, the court <u>must</u> refer that issue to the Tribunal to be considered on its merits, if the court is satisfied that-*
>
> (i) *the issue has not been raised in a frivolous or vexatious manner; <u>and</u>*
>
> (ii) *the resolution of that issue is required to determine the <u>final outcome</u> of the action".* (emphasis added)

46. Bedford Square argues that the legislature carefully selected the word "*unless"* in section 65(1) instead of "*until*" and that " …. *nothing in the Competition Act renders void a provision of an agreement and in terms of the Competition Act is either prohibited or may be declared void unless the Competition Tribunal or Competition Appeal Board declares that provision to be void" (Heads para 21)*. I understand the argument to be that the section is limited to not rendering void the agreement until it is declared void or is prohibited under the Act but has no jurisdictional or other consequences.

47. Replacing the word *" unless*" with *"until*" is unhelpful. Even if there is a distinction it is one without significance having regard to the context of

section 65(1). In any event it is apparent that the legislature was careful to assume and ensure the continued validity of an agreement *unless* disturbed by a pronouncement of the Competition Courts and despite it being subject to a section 4 complaint or subsequent hearing.

48. Section 65(1) must be read in the context of the legislation as a whole, and the knowledge that can readily be imputed to the legislature that the Act would result in parallel litigation before the High Court (and possibly concluding in final and binding decisions of the SCA on appeal), in respect of unlawful competition including unfair restraints, prior to a Competition Tribunal being seized of a restrictive practices complaint arising from the same agreement.

49. Moreover the legislature would have been aware of the delay that may arise before the Tribunal finalises its deliberations.

50. It should also be recalled that the sanction for engaging in a prohibited restrictive practice is not directed at providing compensation to the counterparty to the agreement but rather an administrative penalty against those involved in these practices. The object of the Act is to protect the public against anti-competitive behaviour.

51. Moreover the question of preserving the agreement between the parties as provided for in terms of section 65(1) does not amount to " *an issue concerning conduct that is prohibited "*. On the contrary it concerns conduct that is expressly permitted until there is a declaration by the Tribunal.

52. It is also significant that the legislature has only clothed a complainant with *locus standi* to bring an interim order under section 49C. No relief is afforded under the Act to a person who wishes to enforce a restraint in the interim. Finally an interim order under section 49C is limited to interdicting the continuation of the alleged prohibited practice, and then for no more

than a period of six months at a time, subject to extensions on application not exceeding a further six months .

53. If Bedford Square's argument is sound then:

a) There would be a *lacuna* in the Act since a person in the position of the Applicant armed with a High Court order would not be able to approach any Court of competent civil law jurisdiction (because of the exclusive jurisdiction of the Competition Courts) nor would it be able to approach the Tribunal for interim relief to enforce the judgment pending the outcome of a complaint under the Competition Act. Mr Peter conceded that this could take a considerable time. More glaring would be the omission, if the SCA dismissed Balfour Square's appeal yet the Applicant was remediless to obtain relief pending the outcome of the Competition Courts deliberations:

b) An Applicant would be remediless to apply for interim relief before a High Court even if armed with an SCA judgment dismissing an appeal based on unlawful competition, despite the acknowledgment in the Act that the agreement is not void unless declared so by a Competition Court, yet there is nothing in the Act barring a complainant seeking an interim interdict while the agreement remains valid under section 65(1).

54. On an ordinary interpretation of the section in its context, and having regard to the procedures provided for in the Act as a whole and the overlapping of common law rights *inter partes* and the protection consumers are entitled to if anti-competitive behaviour is found to amount to a prohibited practice, I am satisfied that section 65 (1) was intended to ensure that the agreement in issue remained valid unless the Competition Court declared otherwise.

55. There are other important aids to interpreting statutes that would reinforce this result and would be inimical to the position adopted by Bedford Square. The first is that where there is a right there is a remedy *(ubi ius ibi remedium)*. See *Minister of the Interior & Another v Harris & Others*

1952 (4) SA 769 (A) at 780 – 781 and *August & Another v Electoral Commission & Others* 1999 (4) BLCR 363 (CC) at para 34.

56. Since section 65(1) preserves the validity of an agreement unless it is declared void or prohibited by the Tribunal or Competition Appeal Court then a party to the agreement seeking to have its terms respected in the interim must be entitled to approach a court of competent jurisdiction for relief.

57. A High Court is competent to grant interim relief to preserve the *status quo*. Since section 65 falls outside the Competition Courts' exclusive jurisdiction, and in any event has limited jurisdiction to only confer *locus standi* on a complainant who wishes to stop an alleged prohibited practice, section 65(1) must be read in a way that preserves the right to approach a court for a remedy. This is supported also by *Airoadexpress (Pty) Ltd v Chairman, Local Road Transportation Board, Durban, and others* 1986(2) SA 663 (A) at p676D where it was accepted that a court retains the inherent jurisdiction to grant interim relief to avoid an injustice.

58. Moreover if the legislature intended to take away the High Court's jurisdiction to grant interim relief it would have done so in express terms or at least by necessary implication. This was not done.

59. Mr Peter was eventually constrained to concede the point. He however contended that section 65(1) affords no more than interim relief and does not afford a litigant final relief. He also argues that the Applicant has not made out a case for interim relief. This brings me to the next substantive issue for determination.

NATURE OF APPLICANT'S RELIEF

60. I agree with Mr Peter that section 65 is not intended to be a springboard for final relief. In its terms it presupposes that the agreement might be declared void or its application be otherwise prohibited. I have no quarrel with that. The section provides only that as long as the Competition Court

has not pronounced on the agreement in issue it remains effective. If the Competition Courts do not hold it void or otherwise prohibit its application, the agreement will continue to enjoy validity subject to the common law as between the parties to the agreement and, in this case, the praedial servitude.

The issue is whether the applicant seeks relief that is final in effect or not. In considering this, I should have regard to how the court has previously regarded the nature of this application.

61. It is apparent that Claassen J did not purport to classify the nature of the relief sought. The interim order granted was concerned with providing relief until an answering affidavit was filed and the main application could be heard.

62. Watt Pringle AJ regarded the main application as one for final relief. However this may have been because, as appears from the judgment, Applicant's counsel argued for this very proposition.

63. Before me, Mr Blou contended that the relief sought should not be classified either as permanent or interim. The relief was that based on an application of the provisions of section 65(1) of the Act.

64. In my view it is necessary to characterise the relief sought.

65. The starting point is that the relief claimed before the High Court had to traverse both common law and statutorily created rights and limitations in order to meet the First Respondent's utilisation of both civil court and the Competition Tribunal procedures.

66. Mr. Blou contends that the Applicant has a clear right to the relief sought. In short the Applicant relies on the agreement as being enforceable at common law and the fact that a court of competent jurisdiction has found that its terms are not against public policy and has refused to declare it

unenforceable. In regard to its statutory position the applicant relies on the right accorded or recognised under section 65(1) of the Act to treat the agreement as valid unless the Competition Court declares it void or prohibits its application.

67. In order to establish a clear right an applicant must prove on a balance of probabilities facts which in terms of substantive law give rise to the right. See *Nienaber v Stuckey* 1946 AD 1049 at 1053 – 1054.

68. The Applicant claims a clear right, by reason of the provisions of section 65(1), to interdictory relief pending the proceedings initiated under the Competition Act that the agreement constitutes a prohibited restrictive horizontal practice. I have already found that in its terms section 65(1) preserves the validity of an agreement unless the Tribunal or Competition Appeal Board declares it void or prohibits its application, contingencies that have not taken place to date.

69. As regards its common law position, the Applicant has a clear right to enforce its judgment and to meet any defence to it on that basis or that of *issue estoppel (*see above). The question of whether the application for leave to appeal suspended the operation of the judgment was not raised before me, the First Applicant accepting that the order appealed against was that it was not entitled to a declaratory order rendering the agreement unenforceable. The only real issue raised was an argument based on changed circumstances to which I will refer later.

71. Accordingly the reliance on section 65(1) does not result in relief that is final in effect. It does no more than afford relief based on a remedy that is contingent on the outcome of proceedings before the Tribunal or the Competition Appeal Court. A contingent right always remains dependent on the outcome of the stipulated event occurring and is not of final effect

until the result is known. Compare CIR *v Golden Dumps* 1993 (4) SA 110 (AD).

70. Accordingly, provided the interdictory relief remains contingent on the outcome of proceedings before the Tribunal or on Appeal from it, sitting as a High Court I will not be granting an interdict of final effect and therefore will not be making a decision that directly or indirectly usurps the exclusive jurisdiction of the Tribunal to determine whether the agreement constitutes a prohibited horizontal restrictive practice under section 4 of the Act.

71. Subject to the question of whether damages are a suitable alternative remedy, I am satisfied that the Applicant has demonstrated a clear right under the common law to interdictory relief. The relief cannot be final in effect since the SCA may find that the appeal succeeds. However until the outcome of the SCA decision, Willis J's judgment has the effect of pronouncing on the applicant's rights , a decision which is effectively binding on me as *res iudicata* or which precludes a defence to the merits based on that or on principles which underpin issue estoppel.

REQUIREMENTS FOR INTERIM RELIEF

72. It is evident that the relief to which the Applicant is entitled cannot be final in effect since it will terminate if the SCA upholds the appeal or if the Tribunal declares the agreement void or otherwise unenforceable.

73. Mr Peter contends that the Applicant has not averred prejudice and is required to demonstrate this if it is to obtain relief that is in substance not of final effect. He also contends that if a clear right is established then the applicant is confined to final relief and may not obtain interim relief because its rights have been definitively determined.

74. The first proposition offends the basic principles of interim interdictory relief. It should not be overlooked that the need to demonstrate only a

prima facie right, provided the balance of convenience is favourable and subject to the court's discretion, simply alleviates the applicant from the more onerous evidentiary burden of demonstrating a clear right. Nothing more. Accordingly if the applicant can demonstrate a clear right it does not have to show in addition that the balance of convenience favours it. The applicant then only has to show further an injury actually committed or reasonably apprehended and the absence of a satisfactory alternative remedy. See standard text books such as *Herbstein & Van Winsen*'s *The Civil Practice of the Supreme Court of South Africa* (4th ed) at p1065, (5th Ed) at 1456 and the seminal decision of *Setlogelo v Setlogelo* 1914 AD 221 at p 227.

75. The facts of this case demonstrate the fallacy of the second argument. So too the case where an order freezing a bank account is obtained pending the outcome of proceedings to recover stolen funds. An interim interdict will be granted irrespective of whether the applicant demonstrates a clear right or a prima facie right and the balance of convenience favours it. It is not compelled to seek a final interdict.

76. There remain three further issues concerning the interim relief sought. I will deal with them briefly.

77. I am satisfied that the applicant does not have a satisfactory alternative remedy. It was entitled to enforce the restraint under common law and unless it is declared void or is otherwise prohibited by a decision under the Competition Act, the agreement is regarded as valid and therefore enforceable by reason of section 65(1) of the Act.

78. There is no merit in the contention that circumstances have changed. The first respondent suggests that because the applicant has tied up Woolworths at its shopping centre for another extensive lease period there is no need for the protection of the restraint. In my view the argument misses the point. The applicant's shopping centre attracts customer traffic because there is a specific tenant mix and because Woolworths is an anchor tenant. If Woolworths becomes a tenant at the first respondent's

larger centre, the commercial risk is that passing trade and regular customers who frequent the applicant's centre will migrate. This no doubt was a significant commercial consideration for the eleven year restraint that locked out only Woolworths and Mica Hardware when the First Respondent wished to put up its larger shopping complex.

79. Finally I should say something about the construction of the order.

80. It is axiomatic that if the SCA upholds the appeal then the interdict lapses. I do not believe that this needs to be mentioned. It follows as a matter of law. If the appeal is disallowed then the order of Willis J stands and the interdict gives effect to it. As with cases where an interim interdict properly construed is of final effect, this order clearly is not of final effect but is pending the outcome of the SCA decision. If the decision is to dismiss the appeal then it is the finality of that decision which is determinative.

81. The various contingencies arising from the proceedings before the Tribunal which render the interdict not to be final in effect are catered for in paragraphs 1 (a) and (b) of the order.

82. These various contingencies that have yet to mature also explain why the order seeking cancelation of the lease must be postponed to await the outcome of the SCA decision and the various proceedings under the Competition Act.

ORDER

83. It is for these reasons that I made the following order on 15 March 2011:

> 1. The First Respondent is interdicted and prohibited from concluding, or acting pursuant to, any lease agreement in terms of which retail space allocated on Erf 39 Bedford Gardens and the Remaining Extent of Erf 135 Bedfordview Extension 10 Township is let to the Second

Respondent until the earlier of 3 November 2014 or unless prior thereto, and for so long as its order or declaration remains effective (having regard not only to the consequences of any appeal or review to a court of competent jurisdiction but also *inter alia* to the provisions of section 49C of the Competition Act no 89 of 1988);

a) The Competition Tribunal or Competition Appeal Court declares void the effective provisions of the written agreement of settlement concluded between *inter alia* the Applicant and Bedford Square on 3 and 4 November 2003 or declares void the notarial deed of restraint, executed by the Applicant and the First Respondent on 21 June 2006; or

b) The Competition Tribunal grants an interim order against the Applicant herein under section 49C of the Competition Act as a consequence of a complaint that the effective provisions referred to in (a) hereof are prohibited under Chapter 2 of that Act.

2. The relief sought by the Applicant for an order directing the First Respondent to cancel any lease agreement that it had concluded with Woolworths in terms of which retail space located on the property is to be let to the Second Respondent at any time prior to 3 November 2014 is postponed *sine die* and at least 15 days notice must be given to the other party/parties if this part of the relief is to be set down for hearing.

3. The First Respondent is ordered to pay the costs of this application, including the costs of two counsels when engaged.

DATES OF HEARING: 11 March 2011

DATE OF ORDER: 15 March 2011

REVISED JUDGEMENT: 28 March 2011

LEGAL REPRESENTATIVES:

For the Plaintiffs; Adv J Blou SC

Adv J.J Bitter

Instructing Attorneys; Rothbart Inc.

For 1st and 2nd Respondents; Adv J Peter SC

Adv M J Engelbrecht

Instructing Attorneys; Vining Camerer Inc.