

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**

Case No: 31739/14

In the matter between:

5/6/2014

PICK-N-PAY RETAILERS (PTY) LTD

Applicant

and

LIBERTY GROUP LIMITED

1st Respondent

LIBERTY GROUP PROPERTIES (PTY) LTD

2nd Respondent

GAME STORES (PTY) LTD

3rd Respondent

MASSTORES (PTY) LTD

4th Respondent

JUDGMENT	<div style="text-align: center; font-size: small; border: 1px solid black; margin-bottom: 5px;">DELETE WHICHEVER IS NOT APPLICABLE</div> <div style="font-size: x-small;">(1) REPORTABLE: YES/NO. NY</div> <div style="font-size: x-small;">(2) OF INTEREST TO OTHER JUDGES: YES/NO. NY</div> <div style="font-size: x-small;">(3) REVISED: <input checked="" type="checkbox"/></div> <div style="margin-top: 10px; font-size: x-small;">5/6/14 [Signature]</div> <div style="text-align: center; font-size: x-small;">DATE</div>
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FOURIE, J:

[1] This is an urgent application for interim relief sought against the first, second and fourth respondents. The nature of the relief is that of an interim interdict prohibiting the first and second respondents from acting in breach of their contractual obligations to the applicant pending the outcome of arbitration proceedings and against the fourth respondent from interfering in the contractual relationship between the applicant and the first and second respondents pending the outcome of action proceedings to be instituted.

[2] The notice of motion does not refer to the fourth respondent. However, it appears to be common cause that it is the fourth respondent that operates Game Stores in South Africa and to this end only the fourth respondent has filed an answering affidavit on behalf of "Game Stores" in these proceedings. An application to join the fourth respondent as a party was filed simultaneously with the applicant's replying affidavit. That application has not been opposed. It was pointed out on behalf of the applicant that the relief sought against the third respondent in the notice of motion will now be sought against the fourth respondent.

[3] The applicant (as lessee) and the first and second respondents (as lessor) are parties to a lease agreement which relates to a particular portion of a shopping centre in Pietermaritzburg, known as the Midlands Mall. The applicant relies on clause 11.1 of the agreement which reads as follows:

"11.1 SAVE FOR THE SUPERMARKET, the LESSOR shall not permit the following businesses to be conducted on the PROPERTY:

11.1.1 a hypermarket or supermarket; or

11.1.2 a fruit and vegetable shop exceeding 200 (two hundred) square metres; or

11.1.3 a grocery, fresh fish shop, butchery, bakery, fruit and vegetable shop and deli in respect of the mall extending from the SUPERMARKET mall entrance from the parking to the

SUPERMARKET entrance as demarcated on the SHOPPING CENTRE PLANES in yellow, without the LESSEE's prior written consent, which consent shall not be unreasonably withheld."

[4] According to the applicant the fourth respondent intends to expand its business by selling an extensive range of perishable and non-perishable food items under the "FoodCo" brand within the existing Game Store in the Midlands Mall. The applicant contends that this expansion of business, if permitted, would render the Game Store a supermarket which will be a violation of its right to exclusivity as provided for in clause 11.1 of the lease agreement.

[5] The applicant's cause of action against the first and second respondents is therefore founded in contract, while its cause of action against the fourth respondent is founded in delict. The first and second respondents have indicated that they will abide the Court's decision on whether the applicant has proven a right to restrain them in the manner sought in this application. The fourth respondent opposes the application and contends that it is for the applicant to establish the existence of (and give content to) the right which it has asserted.

[6] To succeed in obtaining interim relief against the first, second and fourth respondents the applicant must demonstrate: a *prima facie* right, though open to some doubt; a well-grounded apprehension of irreparable harm if the interim relief is not granted and the ultimate relief is eventually

granted; that the balance of convenience favours the granting of an interim interdict; and that the applicant has no other satisfactory remedy.

[7] The term "supermarket" is not defined in the lease agreement. The correct approach should therefore be to determine the ordinary grammatical meaning of this word, unless that would lead to some absurdity or inconsistency. In the Shorter Oxford English Dictionary, 6th Ed. (2007) the word "*supermarket*" is defined as a "*large self-service store, freq. one of a chain, selling a wide range of foods, household goods, etc.*"

[8] It was argued on behalf of the fourth respondent that it is for the applicant to prove the characteristics of a "*supermarket*" and to establish that the proposed expansion will render the Game Store in the Midlands Mall such a "*supermarket*". It was contended, therefore, that it is not simply a matter of interpretation, but that oral evidence will be required to determine this issue between the parties.

[9] I do not agree with this submission. In describing this development to the second respondent during November 2013, the fourth respondent stated in an e-mail that Game intended "*to re-launch the Liberty Midlands Mall with the inclusion of our 'FoodCo' department on the 25th June 2014*". It was also pointed out that the "*re-launch*" would render Game Midlands Mall a "*NEW generation game*" store. To illustrate what the Game Midlands Mall will look like once the proposed expansion to incorporate a FoodCo department is complete, the applicant attached

photographs of the Game Store in Rosebank, which already incorporates a Game FoodCo. These photographs indicate an extensive range of perishable and non-perishable foods, personal care products, pet foods and other household goods.

[10] This evidence is a *prima facie* indication (and I make no final ruling in this regard) that the fourth respondent intends to expand its business in the Midlands Mall to such an extent that it could be regarded as a supermarket as defined above and referred to in clause 11.1 of the lease agreement.

[11] However, the fourth respondent asserts that it has all along proceeded on the understanding that it was entitled to expand its food offerings in the manner it has described. According to the fourth respondent it has acted with the knowledge and consent of the second respondent. It was therefore contended that even if the said Game Store is a supermarket, the fourth respondent did not act unlawfully and intentionally by interfering with the contractual rights of the applicant.

[12] Interference with a contractual relationship is present where a third party's conduct is such that a contracting party does not obtain the performance to which he is entitled *ex contractu*, or where a contracting party's contractual obligations are increased (Neethling, Potgieter & Visser, Law of Delict, 6th Ed., p 306, par 6). The learned authors also point out (at p 307, footnote 263) that an adducement and a breach of contract are not prerequisites to a successful action for the unlawful and

intentional interference by a third party in another party's contractual relationship. I shall therefore accept, for purposes of this application, that unlawfulness, intentional interference and harm are requisites for this delict.

[13] Both the second and fourth respondents have devoted a considerable part of their answering affidavits to a description of the correspondence which has passed between them. On 16 April 2014 the second respondent informed a senior property manager in the employment of the fourth respondent about the existence of the applicant's exclusive right to conduct the business of a supermarket at the Midlands Mall. This was a reply to the fourth respondent's request for a letter of consent for the purposes of obtaining a licence. The following was said in this regard:

"PnP further contended that the introduction of FoodCo as suggested, would effectively render Game a 'supermarket' and therefore, Liberty would be in breach of its obligations under the Lease Agreement concluded with PnP, should it allow Game to introduce the FoodCo. In effect, PnP has raised an objection to Game's introduction of FoodCo at the Mall.

Liberty is in no position to determine the definition of a 'supermarket'. Liberty can however confirm that its lease agreement with PnP contains a clause that prohibits Liberty from allowing a business of a 'supermarket' or 'hypermarket' on the property, save for PnP.

Under the circumstances, Liberty is not in a position to provide Game with a consent letter for purposes of obtaining a licence to sell or supply meals or perishable foodstuffs in accordance with clause 6.2.1 of the lease agreement, until such time that the issue relating to the definition of 'supermarket' in this regard, is resolved, by either a declaratory order, alternatively through the judgment that will be handed down in the pending litigation between Game and Shoprite Checkers."

[14] On 24 April 2014 the second respondent gave notice to the fourth respondent that it was, by introducing a FoodCo at the Midlands Mall, acting in breach of its contractual obligations to the second respondent. This was explained as follows:

"We have established that you have introduced a FoodCo at the leased premises without our written consent as required in terms of clause 6.2 of the lease agreement ...

Your actions in this regard constitute a breach of the terms of the lease agreement ... You are hereby given notice to remedy the abovementioned breach within 7 (seven) days from date hereof ..."

[15] It is not necessary to determine whether or not the second respondent had given permission to the fourth respondent, prior to 16 April 2014, to introduce a FoodCo as suggested by the fourth respondent. It appears that there is evidence (I make no final assessment in this regard) that during April 2014 representatives of the fourth respondent were made aware of the following: the existence of the exclusivity clause

in the lease agreement between the applicant and the second respondent; the fact that the applicant by then had already contended that the introduction of a FoodCo as suggested, would render the Game store a "*supermarket*" and had raised an objection to the introduction thereof; and, if the fourth respondent would proceed with the introduction of a FoodCo, that it would constitute a breach of the terms of the lease agreement between the second and fourth respondent.

[16] By introducing a FoodCo in these circumstances would in my view constitute (at least) an attempt to unlawfully and intentionally interfere with the contractual relationship between the applicant and the second respondent. Interference of this nature, if allowed to continue, will probably have the effect that the applicant will not obtain the performance to which it is entitled *ex contractu*, i.e. to enjoy the right of exclusivity. In my view this would be sufficient to constitute harm for purposes of this particular delict. I therefore conclude that the applicant has demonstrated a *prima facie* right for purposes of an interim interdict.

[17] Insofar as the requisites of irreparable harm and no alternative remedy are concerned, it is clear from the evidence that the fourth respondent intends to expand its Game Store at the Midlands Mall to incorporate a Game FoodCo. The applicant has explained that once this is done, it will suffer damages which are largely unquantifiable and thus irreparable. In my view an award of damages in due course will therefore not be a suitable alternative remedy in these circumstances.

[18] As far as the balance of convenience is concerned, the fourth respondent has pointed out that the prejudice it would suffer, should interim relief be granted, is considerable. Not only will the fourth respondent be prevented from taking steps to recover its significant investment in the refurbishment of its store (approximately R20 million), but it will also suffer damage to its goodwill as a result of the expectations of customers being unable to be realised.

[19] In answer thereto, the applicant points out that the costs of the development have been incurred in the knowledge that there was a dispute between the applicant and the second respondent which may result in the development of the Game FoodCo being stopped. It was therefore argued that the harm to the fourth respondent which may have flowed from its own decision to continue the development in the knowledge of that dispute, is of its own doing.

[20] It is not necessary for me to finally decide this issue. Suffice it to say that to me it appears that if interim relief is not granted, and the fourth respondent continues with its development in the interim, the prejudice that the applicant will suffer will probably be more severe than the prejudice to be suffered by the fourth respondent if the interim relief is granted. Having regard to these considerations, I am satisfied that the balance of convenience favours the applicant.

[21] In view of all the evidence, I am of the view that the application should succeed. However, it needs to be emphasised that I make no final

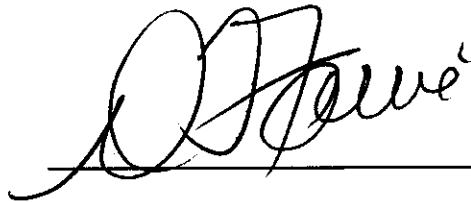
ruling with regard to any of the issues between the parties. These issues can be finally determined in the arbitration or action proceedings to be instituted.

[22] In the result I make the following order:

- (a) The fourth respondent is joined as a party to this application;
- (b) An interim interdict is granted in terms of which the first and second respondents are prohibited from acting in breach of their contractual obligations to the applicant by permitting and/or consenting and/or allowing the fourth respondent to operate a "*Game FoodCo*" within the existing Game Store at the Liberty Midlands Mall in Pietermaritzburg, and to preserve the status quo as it was before the introduction of a "*Game FoodCo*", pending the outcome of arbitration proceedings which are to be instituted by the applicant on or before 18 June 2014;
- (c) An interim interdict is granted in terms of which the fourth respondent is prohibited from interfering in the contractual relationship between the applicant and the first and second respondents by opening or operating a "*Game FoodCo*" within the existing Game Store at the Liberty Midlands Mall in Pietermaritzburg, and to preserve the status quo as it

was before the introduction of a "*Game FoodCo*", pending the outcome of action proceedings which are to be instituted by the applicant against the fourth respondent on or before 18 June 2014;

- (d) The costs of this application are reserved.

A handwritten signature in black ink, appearing to read 'D S Fourie', written over a horizontal line.

D S FOURIE
JUDGE OF THE HIGH COURT
PRETORIA

Date: ⁵~~14~~ June 2014