



THE GAUTENG DIVISION OF THE HIGH COURT, PRETORIA

DELETE WHICHEVER IS NOT APPLICABLE

(1) REPORTABLE: ~~YES~~ / NO.

(2) OF INTEREST TO OTHER JUDGES:

~~YES~~ / NO.

(3) REVISED.

DATE 26/9/14 SIGNATURE

26/9/2014.

CASE NO: 46501/2014

DATES HEARD: 2 – 4 September 2014

In the matter between:

PICK N PAY RETAILERS (PTY) LTD

Applicant

and

MASSTORES (PTY) LTD

First Respondent

HYPROP INVESTMENTS LTD

Second Respondent

JUDGMENT

J W LOUW, J

[1] During February 2006, the first respondent, Masstores (Pty) Ltd ("MS") concluded an agreement with the Capegate Regional Centre Joint

Venture (the JV)¹ in terms whereof MS leased premises in the proposed Capegate shopping centre from the JV. Clause 12 of the lease agreement provides the following:

" **THE TENANT'S USE OF THE PREMISES**

12.1 The tenant may use the premises for the purpose of a retail business being a business dealing in general merchandise and non-perishable food and all other ancillary and related business or for any other retail business. Subject to the qualification that the tenant will not trade as a general food supermarket (except in the circumstances described in clause 12.2, the tenant may, in its sole discretion, determine what products it will sell in its store.

12.2 If, at any time during the lease, for a period of 90 consecutive days, there is no general food supermarket trading in the shopping centre the tenant may expand the tenant's business to include trading as a general food supermarket."²

[2] During May 2006, the applicant, Pick n Pay Retailers (Pty) Ltd ("PnP") entered into a lease agreement with the JV in terms whereof PnP leased premises, described in the lease agreement as "the Supermarket", in the proposed shopping centre. The second respondent, Hyprop Investments (Pty) Ltd ("Hyprop") is the successor in title to the JV. Clause 10.1 of the lease agreement provides the following:

" **EXCLUSIVITIES AND LETTING RESTRICTIONS**

¹ The members of the JV were Capegate Regional Property Ltd and Bones Development Phase 3 (Pty) Ltd.

² The agreement between MS and the JV was replaced in 2008 by a new lease agreement concluded between MS and the new owner of the shopping centre at the time, Attfund Ltd. Clause 12 of the new agreement is identical to clause 12 of the previous agreement, save that a bracket was inserted after the words "in clause 12.2" in clause 12.1. The omission of the bracket in the previous agreement was clearly an error.

10.1 Save for the Supermarket and Checkers, the lessor shall not permit the following businesses to be conducted in the shopping centre or on the property:

10.1.1 a hypermarket or supermarket; or

10.1.2 a store with either a single or several food departments, the aggregate square meterage of which exceeds 100 (one hundred) square metres; or

10.1.3 a cafe or delicatessen which sells fresh fish or meat; or

10.1.4 a grocery, fresh fish shop, butchery, bakery or fruit and vegetable shop."

[3] MS, which trades as Game, carries on business as a general merchandise retailer. The general merchandise products include so-called hardlines, such as appliances, and so-called softlines, such as bedding. At some stage prior to 2010, Game started selling non-perishable food and grocery items such as tinned foods, pasta, rice, maize, tea, coffee, washing powders, toiletries, etc. in its stores. In late 2010 or in 2011, Game began introducing the so-called Foodco concept into certain of its stores. The introduction of Foodco mainly involved introducing fresh fruit and vegetables and fresh pre-packed meat and poultry products.

[4] Foodco was first introduced into the Game store in the Capegate Shopping Centre on 19 September 2013. Hyprop advised Checkers (but not PnP) of MS's intentions in this regard. The Checkers lease agreement also contained exclusivity provisions. Checkers reacted immediately and on 22 October 2013 obtained an interim interdict which prevented the continued operation of Foodco at the Capegate Shopping Centre pending an action to be instituted for final relief. PnP became aware that Game was operating a Foodco in Capegate as a result of the wide publication of the Checkers application. In view of the interim interdict which had been granted to Checkers, PnP did not at that stage take any action to protect its exclusivity rights.

[5] The interim interdict which was granted to Checkers was, however, discharged during April 2014 by agreement between MS and Checkers. PnP thereafter launched the present application. In its amended notice of motion it seeks a final interdict against MS prohibiting it from interfering in the contractual relationship between PnP and Hyprop by carrying on the business which PnP has the exclusive right to do in terms of its lease agreement, alternatively from operating a general food supermarket. In the alternative, it seeks an interim interdict in the same terms pending the outcome of an action to be instituted against MS. In the alternative to the relief sought against MS, it seeks an interim interdict against Hyprop requiring Hyprop to initiate urgent legal proceedings against MS to prohibit MS from operating a general food supermarket and/or from doing that which PnP has the exclusive right to do pending the outcome of arbitration proceedings to be instituted by Hyprop against MS.

[6] The cause of action relied upon by PnP is the delict of unlawful competition, more particularly what is referred to as interference with a contractual relationship, in this case the contractual relationship between PnP and Hyprop. Van Heerden and Neethling, *Unlawful Competition*,³ define the delict in the following terms:

"Interference with a contractual relationship is present where a third person's conduct is such that a contracting party does not obtain the performance to which he is entitled from the other party, or where a contracting party's contractual obligations are increased by a third person."

[7] An example of unlawful interference with a contractual relationship is where a third party intentionally induces a party to a contract to commit a

³ 2nd ed., p. 245

breach of his/her contract with another party.⁴ Intentionally assisting a person to breach his contract may also constitute unlawful competition.⁵

[8] In the present matter, MS did not induce or assist Hyprop to commit a breach of its lease agreement with PnP. When MS introduced Foodco into its Capegate store in late 2010 or in 2011 it was not aware of the terms of PnP's lease. It became aware of PnP's exclusivity rights for the first time when PnP's attorneys sent it a letter during April 2014 demanding an undertaking not to act in breach of its lease agreement. In the context of the present matter, the question to be asked is whether, if a lessee acts in breach of the terms of its lease agreement with a lessor by conducting a trade which is prohibited by its lease agreement, thereby causing the lessor to be in breach of its obligation to another lessee not to permit such trade by other lessees, such conduct will constitute unlawful interference with the contractual relationship between the other lessee and the lessor. In the absence of knowledge of the terms of the other lessee's lease, there can be no intention to commit such delict. But once it becomes aware of the rights of the other lessee, its continued breach of its lease agreement will, in my view, constitute an unlawful interference with the rights of the other lessee.⁶ The *boni mores* will, in my view, not countenance such conduct and will regard it as wrongful.⁷

[9] The first question to be determined is therefore whether, by introducing fresh fruit and vegetables and fresh pre-packed meat and poultry products into its Capegate store, MS is acting in breach of clause 12.1 of its lease agreement with Hyprop. The answer to the question depends on whether, as a result of the introduction of those products, MS is trading as a general food supermarket. In terms of clause 12.2 of its lease agreement, MS may only expand its business to include trading as a general food market if, at any time

⁴ See *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd* 1981 (2) SA 173 (T) at 202

⁵ See *Genwest Batteries (Pty) Ltd v Van der Heyden* 1991 (1) SA 727 (T) at 728I – 729B;

⁶ See *Van Heerden and Neethling, op. cit.*, p. 252

⁷ In regard to the determination of wrongfulness, see *Steenkamp NO v Provincial Tender Board, Eastern Cape* 2007 (3) SA 121 (CC) 139; Neethling-Potgieter-Visser, *Law of Delict*, 6th ed, p. 33 *et seq.*

during the lease, for a period of 90 consecutive days, there is no general food supermarket trading in the shopping centre. PnP contends that MS is trading as a general food market. MS denies that it is.

[10] In construing the meaning of clause 12 of MS's lease agreement, the approach to be adopted was formulated as follows in *Natal Joint Municipal Pension Fund v Endumeni Municipality*.⁸

"The present state of the law can be expressed as follows: Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective, not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation; in a contractual context it is to make a contract for the parties other than the one they in fact made. The 'inevitable point of departure is the language of the provision itself', read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[11] In regard to the context and background of clause 12, the purpose to which it is directed and the material known to those responsible for its production, reference may be had to the affidavit of Diane Linda Bolton. In 2005 she was the property manager employed by Massdiscounters, a division of MS. As such she was the person who negotiated and settled the terms of leases entered into by MS and she handled the negotiations for the MS lease in the Capegate shopping centre. She states the following:

"5. When I below refer to the lease terms of the premises in the Centre hired by Masstores, it will be seen that they contain the term that

⁸ 2014 (2) SA 593 SCA) para [18]

'the tenant will not trade as a general food supermarket'. I have been asked to comment on the origin of this term.

5.1 *As will appear more fully below, the term was included in lease terms drawn and proposed by Masstores (and not by the lessor).*

5.2 *The background to Masstores including this term in the lease terms proposed by it was the following.*

5.2.1 *Lessees, such as Masstores, preferred to lease premises where there was already, or would be, and anchor tenant, such as a supermarket. It was not uncommon for anchor tenants, such as supermarkets, to require some form of exclusivity from the lessor. Masstores did not intend to become a general food supermarket.*

5.2.2 *Because some form of exclusivity was commonly required by supermarkets, Masstores offered to accept, and incorporated into its proposed lease terms, the term that it would not trade as a general food supermarket."*

[12] It was submitted by Mr. Unterhalter SC on behalf of PnP that, read against the context and background provided by Ms. Bolton, clause 12 operated to prevent MS from combining its existing general merchandise business with the business of a general food supermarket which sells both perishable and non-perishable foods. I agree with this submission.

[13] It is common cause that MS is selling both perishable and non-perishable foods in its Capegate store. MS, however, denies that it is trading as a supermarket. It relies in this regard, *inter alia*, on the evidence of Dr. D A Prinsloo, who has been the managing member of Urban Sollutions CC since 1991, and of his son, Mr D N Prinsloo, a research manager employed by the

close corporation. The close corporation specialises in market feasibility studies and property market research. The Prinsloos give a list of what they call "*characteristics connoted by the word 'supermarket' in the industry of development, letting and use of properties for retail purposes*". The list includes the following: Supermarkets are large stores, of the order of 2 000 m² to 5 000 m²; they sell predominantly (in the order of 80%) food products measured in terms of area and revenue; the remainder of the sales are household products; the range of food products sold is very wide; they offer a range of brands within a range of products; they carry large stocks of products on their shelves. Dr. Prinsloo states that these requirements for a supermarket are not achieved by premises where the food is traded in an area of 630 m² such as in MS's premises in the Capegate shopping centre.

[14] The evidence of Dr. Prinsloo and his son amounts to no more than what, in their experience, the characteristics of supermarkets are in the industries to which they refer. The word 'supermarket' is, however, an ordinary English word which does not bear any technical meaning. It does not require the assistance of experts to interpret it and expert evidence to explain its meaning is therefore impermissible.⁹ The word is defined in the OED as "*A large self-service store, freq. one of a chain, selling a wide range of foods, household goods, etc.*"

[15] The word 'large' is, of course, a relative term. It is obvious that not all supermarkets are of the same size. Without attempting to define what large in the context of a supermarket means, it appears to me that if the area from which trade is carried on is sufficiently large to carry a wide range of foods and household goods, it will qualify as a supermarket. It is therefore necessary to consider the evidence which has been presented in this regard.

[16] It is common cause that the food offering at the Game Foodco in the Capegate shopping centre consists of non-perishable and perishable foods. A substantial number of photographs are attached to PnP's founding affidavit. What can be seen and identified on the photographs are shelves which are stacked with meat products, dairy products, fresh fruit and vegetables, cold

⁹ See the unreported judgment of Fourie J in *Pick-n-Pay Retailers (Pty) Ltd v Liberty Group Ltd and Others*, Gauteng Division of the High Court, Pretoria, case no. 31739/14, para [7].

drinks, juices, and a large number of non-perishable foods such as rice, chutney, mustard, mayonnaise, tinned foods, teas, cereals, pastas, frozen foods, breads, bread rolls, eggs, sweets, chips, detergents, toiletries, pet foods, baby foods and baby nappies. At PnP's request, MS has provided a long list of the products (referred to as Stock Keeping Units or SKUs) which are stocked at the Capegate Foodco. One of the deponents to MS's affidavits, Mr L. B. Robbertze, has in his supplementary replying affidavit provided a break-down of the SKUs which are typically stocked at Game Foodco's, such as the one at Capegate. He states that Game offers approximately 1 665 SKU's in its dry grocery range, 1335 in its perishables range, 930 in its confectionary range, 490 in its beverages range and 790 in its personal care range. All of this evidence confirms that a wide range of foods and household goods is sold at the Capegate Foodco. Mr. Robbertze states that, by contrast, many more SKUs are stocked by supermarkets such as PnP. That may be so, but as I have already said, supermarkets vary in size. The range of food items and household goods which is stocked at the Capegate Foodco is clearly not small or insignificant. Although it may not be the widest range to be found, it is in my view sufficiently wide to qualify it as a supermarket.

[17] It follows that MS stores is trading as a supermarket at its store in the Capegate shopping centre. Clause 12.1 of its lease prohibits it from trading as a "general food supermarket". It was not argued by the parties that the word "general" or the word "food" in any way qualifies the meaning of the word "supermarket". The selling of food is included in the dictionary meaning of a supermarket. The word general adds nothing to its meaning. I conclude, therefore, that MS is acting in breach of its obligations in terms of clause 12.1 of its lease agreement. By intentionally continuing to do so after it was made aware of the terms of PnP's lease agreement, it is unlawfully preventing PnP from obtaining the performance to which it is entitled in terms of clause 10.1 of PnP's lease agreement with Hyprop, being the benefit of exclusivity provided therein.

[18] It was submitted by Mr. Cilliers SC on behalf of MS that MS has a real right (*ius in rem*) which it can assert against the world, and that its

real right trumps PnP's right to exclusivity, which is a personal right (*ius in personam*). The difficulty I have with this argument is that, in terms of clause 12.1 of its lease agreement, MS does not have a real right to use the leased premises to trade as a general food supermarket. Its real right to use the premises is restricted by clause 12.1. It may use the premises to carry on any retail trade save the trade of a general food supermarket.

[19] A further submission made on behalf of MS was that the exclusivity provisions of clause 10.1 were collateral provisions of the lease agreement which PnP concluded with the JV, and that the obligations of the JV pursuant thereto did not pass to Hyprop in terms of the *huur gaat voor koop* rule when Hyprop subsequently acquired the property on which the shopping centre was constructed. Reliance was placed in this regard on the decisions in *Mignoele Properties (Pty) Ltd v Kneebone*¹⁰ (which dealt with whether a purchaser of the leased property acquired the rights which the seller had against a surety); *In re Umkomaas Central Sugar Mill Ltd., In Liquidation*¹¹ (which dealt with whether a purchaser of the leased property was bound to an undertaking given by the lessor to purchase the cane grown by the lessee at a particular price); and *Spearhead Property Holdings Ltd v E & D Motors (Pty) Ltd*¹² (which dealt with whether an option to purchase contained in a lease agreement bound the purchaser of the leased property). In *Umkomaas* and *Spearhead* it was held that the obligation or right in question did not pass to the purchaser of the leased property. But in *Mignoele* a different conclusion was reached in respect of the question whether the purchaser of the leased property acquired the rights which the seller had against a surety. The court said the following:¹³

"From the foregoing it follows, in my view, that (the effect of the application of the *huur gaat voor koop* maxim is that) once the lessee elects to remain in the leased premises after a sale, the seller *ex lege* falls out of the picture and his

¹⁰ 1989 (4) SA 1042 (AD) 1050J – 1051B

¹¹ 1916 NPD 178 at 192 - 3

¹² 2010 (2) SA 1 (SCA) para. [53]

¹³ At 1050J – 1051B and 1051H - J

place as lessor is taken by the purchaser. No new contract comes into existence; all that happens is that the purchaser is substituted for the seller as lessor without the necessity for a cession of rights or an assignment of obligations. On being so substituted for the seller, the purchaser acquires all the rights which the seller had in terms of the lease, except, of course, collateral rights unconnected with the lease.

.....

It is a logical and natural result of such a substitution that the purchaser also acquires the rights which the seller had against a surety for the lessee's obligations under the lease. The respondent bound himself to the lessor in terms of his deed of suretyship, for the due payment by the lessee 'of all such sums of money which may... become owing... from any cause whatsoever, in respect of (the) lease'. As the appellant was substituted as lessor, he acquired the lessor's right to sue respondent as surety, in the same way as the lessor could have done. This was not a collateral right unconnected with the lease; it was a right which the lessor had, *qua lessor, in respect of the tenant's obligations under the lease.*"

[20] In the present matter, the rights to exclusivity contained in clause 10.1 of PnP's lease agreement are similarly not collateral rights which are not connected with the lease. They are directly connected to PnP's rights in terms of the lease. They are rights which PnP have, *qua lessee*, in respect of Hyprop's obligations under the lease. They oblige Hyprop not to permit any of the businesses listed in clause 10.1 to be conducted in the shopping centre during the currency of PnP's lease. Hyprop furthermore accepts that it is bound by this obligation.

[21] For the foregoing reasons, I find that PnP have succeeded in proving that they are entitled to a final interdict against MS. It was not contended that PnP can obtain similar protection by any other remedy. In prayer 2 of PnP's amended notice of motion it seeks, in the alternative to the order originally sought, which was to interdict MS from carrying on the business which PnP had the exclusive right to carry on, a final interdict prohibiting MS from interfering with the contractual relationship between PnP and Hyprop by operating a general food supermarket, *"being a food store which sells both perishable and non-perishable food stuffs on a non-trivial scale"*. There is, in my view, no justification for qualifying the meaning of a general food supermarket by the addition of these words. The words do not appear in clause 12 of the MS lease.

[23] In view of the conclusion which I have reached, PnP's alternative claim for relief against Hyprop need not be considered. It follows that Hyprop will be entitled to its costs of the application, which it claims.

[22] In the result, I grant the following orders:

- (a) The first respondent is interdicted from interfering with the contractual relationship between the applicant and the second respondent by operating a general food supermarket at the Capegate Shopping Centre in Brackenfell in the Western Cape.
- (b) The first respondent is ordered to pay the applicant's costs of the application, including the costs of two counsel.
- (c) The applicant is ordered to pay the second respondent's costs of the application, including the costs of two counsel.

Counsel for applicant: Adv D N Unterhalter SC; Adv G D Marriott.

Instructed by: Nortons Incorporated.

Counsel for first respondent: Adv S A Cilliers SC; Adv K Green.

Instructed by: Cliffe Dekker Hofmeyr Inc.

Counsel for second respondent: Adv H van Eeden SC; Adv L Schäfer.

Instructed by: Walkers Attorneys