IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE DIVISION, CAPE TOWN)

Case no: 17200/2016
Dates Heard: 1/11/2016;
2/11/2016; 1/12/ 2016
Date delivered: 7/2/2017
Reportable

K2012150042 (SOUTH AFRICA) (PTY) LTD Applicant

and

ZITONIX (PTY) LTD Respondent

JUDGMENT DELIVERED ON 7 FEBRUARY 2017

HOLDERNESS AJ

INTRODUCTION

[1] The applicant seeks an order confirming the cancellation of five written lease agreements concluded between it and the respondent ("the lease agreements"), and an order directing the respondent to vacate the leased premises, failing which the deputy sheriff be authorised to eject it from the premises.

[2] The application was launched, on an urgent basis, on 26 September 2016, and was initially enrolled for hearing on 6 October 2016.

[3] By agreement between the parties, the application was postponed for hearing on the semi-urgent roll on 6 October 2016. On 6 October 2016 the matter was postponed to 10 October 2016, and by agreement between the parties, was further postponed for hearing on the semi-urgent roll on 1 November 2016.

[4] After hearing argument on the merits, the respondent requested an opportunity to consider whether to persist with the competition law defence raised in the answering papers, and the matter was adjourned for this purpose.

[5] The parties agreed to a further postponement to 8 December 2016. After further written submissions had been delivered, the parties presented oral argument on the issue of referral of the competition law issue raised by the respondent to the Competition Tribunal ("the Tribunal").

URGENCY

[6] The sole grounds for urgency relied upon by the applicant are the following:

6.1 the respondent and the tenants were withholding occupation of the leased premises, notwithstanding the fact that their occupation is unlawful, given that the lease agreements had been validly cancelled;

6.2 Gateway Theatre of Shopping ("Gateway") is a shopping centre that is extremely busy over the festive season, and the applicant has substitute tenants

who are eager to occupy the leased premises at rentals favourable to the applicant;

6.3 The new tenants require time to remodel and fit out the premises, and this needed to be done by November 2016 to meet the demands of the festive season trading period; and

6.4 If the respondent could not be ejected from the leased premises by the end of October 2016, it would not be possible to give the new tenants occupation of the premises by the start of December 2016.

[7] These grounds for urgency, to extent that they properly constituted grounds for urgency in the first place, fell away when the parties requested that the competition issue be postponed for hearing in December 2016, in the second last week of term.

[8] I indicated to the parties, after argument had closed, that I would endeavour to deliver judgment by the end of term, if my workload permitted.

[9] In breach of the newly established protocol for parties requesting updates of reserved judgments to approach the Judge President or Deputy Judge President if they are of the view that the handing down of a judgment has been unduly delayed (usually not before three months have elapsed since the matter was heard), the applicant's attorneys contacted my registrar on several occasions before the start of the new court term, demanding details of when they could expect judgment to be handed down.

[10] This practice is to be deprecated, particularly in circumstances where the grounds for urgency have ceased to exist, and the litigants have elected to only have the matter finally heard almost three months after the application was first launched.

BACKGROUND

[11] The material facts, which are largely common cause, are as follows:

11.1 In February 2016 and at Cape Town, the respondent, represented by Marcel Joubert ("Joubert") concluded the lease agreements with the applicant, in terms of which it leased certain commercial premises in the Gateway Theatre of Shopping in Umhlanga ("Gateway"), from which it traded under the brands Aca Joe, Vertigo, Urban Degree, Hilton Weiner and Jenni Button ("the brands");

11.2 The respondent is an entity within the Platinum Group (Pty) Ltd ("the Platinum Group"), the holding company which owns the brands. The registered office of the respondent is 2 Ruyterplaats Lane, Hout Bay, Western Cape, and its chosen *domicilium citandi et executandi* is at the leased premises of the respective tenants;

11.3 Joubert is the controlling mind behind the Platinum Group, and was its sole director, until he was disqualified, by the sequestration of his estate, from holding any directorships;

11.4 Last year, several companies in the Platinum Group experienced significant financial difficulties, and were either placed under business rescue, wound up, or became dormant;

11.5 Because of these difficulties, most of the retail leases held by entities in the Platinum Group were terminated;

11.6 During the negotiations leading up to the conclusion of the lease agreements, it was agreed that the lease agreements would be backdated to August 2015, to allow the applicant to recover certain of the losses which it suffered when the previous Platinum Group leases with the applicant were terminated;

11.7 At the applicant's insistence, Joubert signed a limited deed of suretyship in favour of the applicant in respect of all five stores, up to a maximum of R1,000,000 per store, and R5,000,000 in total;

11.8 The respondent fell into arrears shortly after the lease agreements were concluded, and the applicant consequently cancelled the lease agreements. A dispute regarding the cancellation resulted in the parties entering into written reinstatement agreements in April 2016, in terms of which the lease agreements were reinstated on the same terms and conditions;

11.9 In May 2016, the respondent once again fell into arrears. The applicant notified it of its breaches, and afforded it an opportunity to remedy such breaches, as it was required to do in terms of section 16.1(a) of the lease

agreements, as amended by the written addendums entered into by the parties on the same day as the lease agreements;

11.10 In August 2016 the respondent was, once again, in arrears in respect of four of the five leased premises, namely Jenni Button, Hilton Weiner, Urban Degree and Vertigo.

11.11 On 6 May 2016 the applicant sent notices by registered mail to the respondent in terms of clause 16.1(a) of the lease agreements, informing it of the breaches. The respondent took issue with the fact that the breach letters do not distinguish between amounts due in respect of rental, utility charges, interest and operating costs, and yet does not deny that it was in arrears in the amounts claimed by the applicant;

11.12 The respondent failed to remedy its breach, and remained in arrears in the amount of approximately R790,000;

11.13 On 25 August 2016, the applicant sent letters of cancellation to the respondent in respect of three of the five premises, namely Hilton Weiner, Urban Degree and Aca Joe. The respondent failed to remedy its breach and the applicant cancelled the lease agreements in respect of these premises;

11.14 On 31 August 2016, the applicant sent further cancellation letters to the respondent in respect of all five premises, based on a new ground for cancellation, provided for in clause 16.1(e) of the lease agreements;

11.15 Clause 16.1(e) of the lease, read with 16.1.1, is as follows:

"16. Breach

16.1 (e) should any surety of the Tenant be sequestrated or placed in liquidation;

then and in any such event the Landlord shall have the right but shall not be obliged either:

16.1.1 forthwith to cancel the Lease and to resume possession of the Premises but without prejudice to its claim for arrears of rental and costs and other amounts owing hereunder and/or damages which it may have suffered by reason of the Tenant's breach of contract or of the premature cancellation;"

11.16 Joubert's estate was placed under final sequestration on 22 August 2016, triggering the further ground of cancellation in terms of clause 16.1(e).

11.17 For reasons which are self-explanatory, the respondent was not afforded an opportunity to remedy its default under section 16.1(e). Upon the sequestration of Joubert's estate, the applicant had the right to cancel the lease agreement forthwith.

THE DEFENCES RAISED BY THE RESPONDENT

[12] The respondent raised a plethora of defences. Several of the defences are procedural or dilatory in nature.

[13] The respondent contended that this court does not have concurrent jurisdiction, together with the *forum rei sitae*, to entertain the application. The further defences are the following: i) the deponent to the founding affidavit was not authorised to depose thereto; ii) the lack of detail in the breach letters rendered the application fatally defective; iii) Joubert was unaware of clause 16.1(e) with the result that the agreement falls to rectified by the striking out of such clause; and, iv) that the applicant has engaged in anti-competitive conduct, and that this issue requires a referral to the Competition Tribunal ("the Tribunal").

JURISDICTION

[14] The respondent contended that as this matter involves title to immovable property, the Court where the property is situated, the *forum rei sitae,* has exclusive jurisdiction to entertain the application.

[15] The answering affidavit was deposed to by Moira Tanya O'Reilly ("O'Reilly") on behalf of the respondent. O'Reilly is the sole director of the respondent following Joubert's disqualification, by virtue of the sequestration of his estate, from continuing to act as a director.

[16] The general, common law principles in respect of which a provincial or local division of the High Court will exercise territorial jurisdiction, in the absence of any jurisdictional limitations imposed by statute or the common law, are the doctrine of effectiveness and submission, and *actor sequitur forum rei.*[1]

[17] Section 21(1) of the Superior Courts Act 10 of 2013 ("the Superior Courts Act") gives effect to this principle by providing that:

> *"A Division has jurisdiction over all persons residing or being in, and in relation to all causes arising and all offences triable within, its area of jurisdiction and all other matters of which it may according to law take cognisance…"*

[18] The respondent relied on renowned writers, Pollak and Forsyth, and the authorities cited by them, including *Hugo v Bekker*[2] and *Hugo v Wessels*[3], for its contention that the *forum rei sitae* has exclusive jurisdiction to make orders where title to immovable property is concerned.

[19] The applicant's claim is founded in contract, and is not a possessory remedy involving title to immovable property. Accordingly, in my view these cases do not find application.

[20] It is trite that as the lessee in terms of the lease agreements, the respondent is only entitled to the temporary use and enjoyment of the property. One of the *naturalia* of any lease agreement is that upon termination of the agreement, the lessee is obliged to return the

[1] Herbstein and Van Winsen, *The Civil Practice of the High Courts of South Africa,* Vol 1, p 63
[2] (1909) 3 Buch AC 366
[3] 1987 (3) SA 837 (A)

property to the lessor (who may or may not be the owner), in the condition in which it was received, fair wear and tear excepted.

[21] If the lessee fails to comply with its duty to return the property to the lessor, the lessor is entitled to the normal contractual remedies, namely to an order for specific performance, in the present case an order directing the respondent to vacate the property, failing which it may be evicted therefrom, and to damages for any financial loss suffered.

[22] In the full bench decision in *Ebrahim v Pretoria Stadsraad*[4], the court confirmed that an occupier (or lessee) cannot dispute the title of the lessor.

[23] This issue was authoritatively decided by the Constitutional Court in *Mighty Solutions t/a Orlando Service Station v Engen Petroleum Ltd and another*[5], where the Court cited, with approval, the following passage from *Boompret Investments (Pty) Ltd and Another v Paardekraal Concession Store (Pty) Ltd,*[6]*:*

> *'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. This flows naturally from the rule that a valid lease does not rest on the lessor having any title..'*

[24] The respondent does not allege that it has any right, independent of the lease agreements, to occupy the properties. Therefore if I find that the lease agreements have been validly cancelled, no issue of title arises.

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[4] 1980 (4) SA 10 (T)
[5] 2016 (1) SA 621 (CC)
[6] 1990 (1) SA 347 (A)

[25] As observed in *Brisley v Drotsky*[7], where commercial leases are concerned the common law applies, and the only relevant considerations are that the lessor is the owner and that the lessee is unlawfully holding over.

[26] The argument raised by the respondent that this matters falls outside of the jurisdiction of this court is accordingly without merit.

[27] The respondent has its registered office in the Western Cape, and for the purposes of jurisdiction is therefore regarded as having its domicile in the Western Cape.

[28] The lease agreements were entered into in the Western Cape, and the reinstatement agreements appear to have been last signed on behalf of the respondent in the Western Cape.

[29] As envisaged in section 42(1) and (2) of the Superior Courts Act[8], any order granted by this Court directing the respondent to vacate the property, failing which it will be evicted, can be enforced by the Sheriff for the Kwa-Zulu Natal High Court, ensuring that should the application succeed, the order can be executed in Natal.

[30] In the circumstances, I am satisfied that this court has concurrent jurisdiction with the KwaZulu Natal High Court, and that there is no merit to the respondent's contention that the

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[7] 2002 (4) SA 1 (SCA)

[8] **42 Scope and execution of process**
(1) The process of the Constitutional Court and the Supreme Court of Appeal runs throughout the Republic, and their judgments and orders must, subject to any applicable rules of court, be executed in any area in like manner as if they were judgments or orders of the Division or the Magistrates' Court having jurisdiction in such area.
(2) The civil process of a Division runs throughout the Republic and may be served or executed within the jurisdiction of any Division.

forum rei sitae has exclusive jurisdiction to determine the contractual remedy sought by the applicant.

LACK OF AUTHORITY

[31] The second defence relied upon by the respondent is the alleged lack of authority of the deponent to the founding affidavit on behalf of the applicant, Lanton Joseph Foster ("Foster").

[32] Foster is a legal advisor in the employ of Old Mutual Property Management Services (Pty) Ltd ("OMP"), the previous property managers of Gateway.

[33] As proof of his authority to act for the applicant, Foster annexed a power of attorney ("POA"), signed on 25 November 2013, by the senior legal adviser for OMP, in terms of which he delegates to Foster the power, *inter alia*, to institute legal proceedings in respect of any rental agreement concerning or pertaining to immovable property owned by the applicant and administered by OMP. Foster annexed proof of his acceptance of the delegated powers.

[34] The respondent's objections to Foster's authority are as follows:

34.1 The POA purports to be the third consecutive delegation between legal advisers in the employ of OMP is concerned, and refers to a resolution dated 23 May 2013, which is not annexed. It is accordingly not possible to ascertain whether further delegations of this kind are permitted, having regard to the maxim *delegatus delegare non potest;*

34.2 The POA states that it is only effective while the property is administered by OMP, and that it is common cause that OMP is no longer the property manager of Gateway;

34.3 In the circumstances the applicant has failed to show that Foster has authority to bring the application.

[35] The leading decision on the authority to institute proceedings is *Ganes and Another v Telecom Namibia*[9], which followed the decision in *Eskom v Soweto City Council*[10].

[36] The upshot of these decisions is that the deponent to an affidavit in motion proceedings need not be authorised by the party concerned to depose to the affidavit. It is the institution of the proceedings and the prosecution thereof which must be authorised.

[37] In this application, as in the *Ganes* and *Telkom* decisions *supra*, the proceedings were instituted by a firm of attorneys purporting to act on behalf of the applicant. Indeed, it is common cause that the applicant's attorney of record, Mr. Grant Ford ("Ford") of Cliffe Dekker Hofmeyr, acted for the applicant at all material times, including during the pre-contractual negotiations leading up to the conclusion of the lease agreements after the previous Platinum tenants defaulted.

[38] In the absence of a proper challenge to the authority of the applicant's attorney to institute the proceedings, through the mechanism provided by Rule 7 of the Uniform Rules of

[9] 2004 (3) SA 615 at 624G-I
[10] 1992 (3) SA 703 (W) at 705C-J

Court, it must be accepted that the applicant's attorney is properly authorised, and it matters not whether Foster is specifically authorised, nor whether OMP are the current property managers.

[39] The respondent has not challenged the authority of the applicant's attorney in terms of Rule 7, and, in the premises, I am satisfied that the proceedings have been properly brought and that there is no merit to the respondent's objection to the authority of the deponent to the founding affidavit.

THE BREACH AND CANCELLATION NOTICES

[40] The respondent contends that the breach notices issued by the applicant in terms of section 16(1)(a) of the addendum to the lease agreements were defective because they were stated *'in broad terms'*.

[41] The essence of this objection appears to be that the breach letters set out the balance claimed, but fail to distinguish between the various types of charges and to give any *'explanation'* as to how the outstanding amount is calculated, or in respect of what period it accrued.

[42] The respondent, relying on this objection, concludes that the notices suffer from *'material defects which are fatal to the application'*.

[43] There is no merit to this point. It was always open to the respondent to request details of how the amounts claimed were made up. The lack of detail as to how amounts outstanding

have been calculated does not amount to a defect, and even if, at best for the respondent, it did constitute a defect, it does not follow that such defect is in any way fatal to the relief sought.

[44] It is apparent, from the fact that the respondent paid approximately R700,000 to the applicant after the lease agreements had been cancelled, that the respondent does not dispute that it was in arrears at the time the notices were issued, and has not requested an accounting or debatement of the amounts claimed.

[45] To my mind find the respondent was properly notified of its breach in terms of clause 16.1(a) of the agreement. In any event, in view of the applicant's reliance for cancellation on the alternative ground set out in clause 16.1(e), it is not necessary to decide this point, nor the further point raised by the respondent that the first breach notices were short served.

THE SURETYSHIP

[46] As regards the suretyship which Joubert signed to secure the respondent's obligations to the applicant, the respondent contended that, as it had paid a *'premium'* of almost R10 million to '*secure'* the leases, both parties must have envisaged a long-term tenancy.

[47] The respondent alleges that Ford knew that a judgment for R30 million had been taken against Joubert in October 2015, and as the negotiator on behalf of the applicant, he had a duty to bring clause 16.1 (e) to Joubert's attention at the time of the conclusion of the lease agreements and suretyships.

[48] It is common cause that Joubert, an experienced businessman, was represented by his attorney of record, Mr. Reid Corin ("Corin"), at all material times during the negotiations leading up to the conclusion of the lease agreements, and that Joubert had, on behalf of the Platinum Group, signed approximately 25 leases with Old Mutual over a seventeen-year period, and that all of these agreements included the term which the respondent now applies to have struck out.

[49] The respondent seeks to distinguish the lease agreements in this case on the basis that in previous OMP leases, there was no suggestion that suretyships were asked for, nor given, nor that the sequestration of the sureties, to the knowledge of the applicant's attorney, was imminent. It is noteworthy that Joubert is silent on whether he read the agreement.

[50] Essentially the respondent seeks to impute knowledge of Joubert's impending sequestration to Ford, and rely on this as a basis to claim rectification of the lease agreements.

[51] An unfortunate finger pointing between the parties' respective attorneys ensued. Ford denied any knowledge of Joubert's sequestration, and cited numerous instances, attaching excerpts from agreements as examples, which demonstrated that it was Joubert's habit to go through agreements with a fine-tooth comb, to change the wording of clauses, and to even correct typographical errors.

[52] To sum up the respondent's argument, it claims that Joubert was misled into signing the lease agreements, and the clauses should accordingly be *'struck out'* from the contracts,

and that, in any event *'it would be* dolus *for the applicant to rely on such clause and that under such circumstances the Respondent is entitled to rectification of the contract'.*

[53] Ford's evidence is that, in light of virtual collapse of the Platinum Group, the applicant, insisted that Joubert, whom he believed to have a property portfolio worth R75 million, to be *'personally on the hook'* for the respondent's obligations in terms of the lease agreements.

[54] It was not suggested in argument that Ford acted in any way fraudulently or unconscionably. The respondent's counsel made it clear that no such allegations were being levelled against him.

[55] It is immaterial whether Ford had knowledge of Joubert's pending insolvency, and this factual dispute need not be resolved either way.

[56] The legal position, as accepted by both parties, is that where a party attempts to enforce a contract affected by common mistake, the other party may rely on the mistake as a defence without counterclaiming for rectification, if it proves such facts as would entitle it to rectification.

[57] Even if one accepts that Joubert was unaware of clause 16.1(e), there is no suggestion that the applicant was unaware of its inclusion in the lease agreement. Any error in this regard is, at best for the respondent, unilateral.

[58] Rectification is a remedy which is available where there has been a common, and not a unilateral mistake, where the court is asked to rectify the agreement to bring it in line with the parties' true intention.

[59] Should the respondent successfully prove that it alone was mistaken, and that such mistake was both material and reasonable, the Court may declare the agreement void *ab initio* for want of consensus.

[60] The learned author Christie points out that there are conflicting *dicta* regarding whether rectification can be granted in cases of unilateral mistake induced by fraud or unconscionable conduct, however there is no suggestion that Ford acted fraudulently or unconscionably and therefore this case does not constitute such an exception.[11]

[61] Similarly to the binding decision of *Slipknot Investments 777 (Pty) Ltd v Du Toit,* [12] in which the surety also relied on a unilateral mistake, this case is not concerned with a misrepresentation, whether innocent or not, by the applicant inducing Joubert to sign the lease agreements, but an alleged omission by the applicant's agent to inform the respondent of the inclusion of a specific clause in the agreements it was called upon to sign.

[62] Joubert states that he was not aware of the inclusion of the impugned clause, and therefore never intended to be bound by such clause, which he argues should be struck out.

[63] It is trite that contractual liability, however, arises not only where there is a meeting of minds, but also by the doctrine of quasi-mutual assent.

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[11] GB Bradfield, *Christie's Law of Contract*, 7th ed, p 375
[12] *Slipknot Investments 777 (Pty) Ltd v Du Toit* 2011 (4) SA 72 (SCA)

[64] Per Malan JA in *Slipknot supra,* the decisive question to be asked in cases such as this has been formulated as follows:

> *"(D)id the party whose actual intention did not conform to the common intention expressed* (Joubert), *lead the other party, as a reasonable man, to believe that his declared intention represented his actual intention?..*
>
> *To answer this question, a three-fold enquiry is usually necessary, namely, firstly, was there a misrepresentation as to one party's intention; secondly, who made that misrepresentation; and thirdly, was the other party misled thereby? The last question postulates two possibilities: Was he actually misled and would a reasonable man have been misled?"*

[65] Clearly distinguishable from facts in the present case, in *Slipknot supra* the party seeking to escape a suretyship agreement was a farmer, not a businessman. The basis of his defence was that he was placed under considerable pressure to sign the suretyship, was led to believe that it would not affect him, and that it was enclosed in a bundle of documents and was not specifically pointed out to him.

[66] The Supreme Court of Appeal ("the SCA") held that a contracting party is generally not bound to inform the other party of the terms of the proposed agreement. He must do so, however, where there are terms that could not reasonably have been expected in the contract.

[67] Differing from the court *a quo,* the SCA in *Slipknot supra* found that, notwithstanding that the suretyship agreement appeared to be "hidden" in the bundle of documents, even a

cursory glance would have alerted the respondent that he was signing a suretyship, and that it's among the documents was not unexpected.

[68] As an experienced businessman, who has signed several lease agreements in his career in retail fashion, and who was shown to have been in the habit of very carefully reading and considering any agreement before appending his signature to it, I am of the view that the inclusion of clause 16.1 (e), which featured in all the previous agreements which Joubert had signed with OMP, was neither unexpected nor surprising. It was, in any event, incumbent on Joubert to carefully read the lease agreements before appending his signature to it.

[69] Moreover, in light of the financial hardships which had befallen the Platinum Group, and the fact that previous tenants had defaulted leaving millions of rands in arrear owing, one would have expected the applicant to have a safeguard in place, such as the clause in question, entitling it to cancel the agreement forthwith if its security was compromised, as is the case in the sequestration of a surety.

[70] For the reasons set out above, the respondent has failed to make out a case for rectification by the deletion of clause 16.1(e).

COMPETITION DEFENCE

[71] The respondent avers that the declaratory relief sought by the applicant, to eject the respondent in order to give occupation to H&M, amounts to a prohibited abuse of dominance *'in one or more of the forms set forth in section 8 of the Competition Act'.* The respondent

asked for the matter be referred to the Tribunal in terms of Section 65(2) of the Competition Act 89 of 1998 ("the Competition Act")

[72] Section 65(2) of the Competition Act, which deals with referral by a civil court to the Tribunal, provides as follows:

> **"*Civil actions and jurisdiction***
>
> *(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 must 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; and*
>
> *(ii) the resolution of that issue is required to determine the final outcome of the action.*

[73] The evidence tendered by the respondent in support of its defence of anti-competitive conduct is the affidavit of one Michael Rodel ("Rodel"), who annexed his LinkedIn profile as proof of his qualifications and experience.

[74] Rodel has extensive experience in property management, specifically in the retail industry, and was employed by OMP as *'Project Executive for the development of the iconic Gateway Theatre of Shopping, a 120,000m2 super-regional centre in Umhlanga, changing roles to General Manager of the centre to grow it through its early years."*

[75] Rodel was approached by Joubert, whom he had come to know over the years, to provide an opinion as to whether the actions by the owners of the Gateway Centre with regard to the *'sudden purported ejectment of the Platinum brand stores (in order to facilitate, so I have been advised, the substitution (at least in part) of these stores by H&M), constitutes a prohibited abuse of dominance within the meaning of section 8 of the Competitions Act.'*

[76] Rodel stated that, having considered the affidavits of O'Reilly and Joubert, the actions of the applicant constitute a prohibited abuse of dominance in that:

76.1 Gateway is the largest shopping centre in Africa, is also the largest mall in the southern hemisphere and is one of the top 50 largest malls in the world;

76.2 In his opinion, the market, within the meaning of the Competition Act, is indeed the centre itself, *alternatively*, at best for the applicant, the Durban North region;

76.3 In either case, the applicant has dominance, within the meaning of the Competition Act, in such market;

76.4 H & M is a Swedish multinational retail company with a presence of over 3,700 stores in 61 countries. It aims to be one of the largest participants in the fashion retail market in South Africa, whilst the Respondent is one of the smallest;

76.5 Rodel quoted a statement allegedly made last year by one Paul Simpson ("Simpson"), who is described as the former managing director of Woolworths Properties, as follows: '*...Four of the five (Platinum brands) are the best independents in the country, from a customer standpoint, and we are losing retail diversity in a market of overwhelming sameness",* and concluded that the actions of the Applicant herein will clearly aggravate this situation. There was no confirmatory affidavit by Simpson;

76.6 To his knowledge, the Platinum stores housing these brands played a major role in the establishment of the Gateway Centre to the level that it is now, and have always traded very successfully there;

76.7 The lease agreement, and in particular clause 15 thereof, provides, in his opinion, for the remedy available to a landlord in circumstances such as these. The 'accommodation' of H & M within the centre would clearly involve a large scale renovation within the meaning of clause 15.1. Rodel said that he

had been advised that this avenue was indeed attempted, and then abandoned, by the applicant; and

76.8 In all these circumstances, the ejectment of the respondent, effectively in favour of H & M, constitutes a refusal to give a competitor access to an essential facility when it is economically feasible to do and / amounts to an exclusionary act in circumstances where the anti-competitive effect of that act outweighs its technological efficiency or pro-competitive gain.

[77] There is no direct evidence that the applicant intends entering into a new lease with H&M in respect of the premises currently occupied, or that any such leases have already been concluded.

[78] The anti-competitive conduct is thus not alleged to be the conclusion of a new lease with a competing retailer, but rather the steps taken by the applicant to terminate the lease agreements and to require the respondent to vacate the leased premises.

[79] The applicant contended, correctly in my view, that neither Rodel, nor Joubert, nor O'Reilly, are qualified to give opinions on competition law issues. The applicant filed an affidavit by Ford indicating that it would apply at the hearing for the striking out of these allegations, however no such application was made.

[80] The respondent relied on a memorandum by Mr. Pretorius ("Pretorius"), who was asked to comment on the conclusion drawn by the applicant's legal advisors that the

competition issues raised by the respondent is precisely the type of frivolous and vexatious allegations that section 65(2)(b) of the Competition Act is designed to combat.

[81] The memorandum was unfortunately of limited assistance, as it was limited only to those averments made by the parties in regard to the alleged contravention by the applicant of the provisions of section 8(c) of the Competition Act, and was further limited as it did not attempt to draw any conclusions on the correct market definition, the nature of the applicant's dominance therein, or the exact anti-competitive effects in such defined market.

[82] Pretorius states that, if one accepts that that geographical market dimension is Gateway, then the product market dimension may very well be found to the *'the allocation of retail space in the shopping centre for the sale of a specific form of clothing.'* Pretorius does not state that this is the correct market definition, but rather that it is more plausible that this definition or a derivative thereof will constitute the product dimension of the market in this matter, and that the dimension of a relevant market *'is often a complicated endeavour which requires considerable evidence to be placed before the Competition Commission and/or the Tribunal.'*

[83] Pretorius suggests that although there is no '*rigorous market definition'* by either party, any attempt to do so would be inappropriate at this juncture, having regards to the import of section 65(2)(b) of the Competition Act.

[84] Pretorius concludes that if the market definitions set out in [81] above are eventually accepted, it would follow that the applicant will, at the very least, have a market share in excess of 50% and therefore be regarded as dominant in such a defined market. On this basis,

he concludes that it cannot be said that this issues has been raised in a frivolous or vexatious manner. I am not persuaded that this is correct, for the reasons set out more fully below.

[85] In addition to the memorandum by Pretorius filed on behalf of the respondent, the applicant's attorneys annexed a memorandum setting out the relevant principles applicable to the competition law issue raised, together with supplementary submissions by their counsel briefed to argue the competition law defence. The Court is grateful to both parties for the detailed submissions and memoranda furnished on their behalf.

[86] The difficulty with the definition of the market according to Pretorius, is that it is premised entirely on the assumption that the applicant allocates all the rental space in Gateway, however this is not founded upon any averments in the papers.

Referral by a civil court

[87] A civil court does not have jurisdiction to determine whether conduct contravenes the Act, however it does have the power to determine whether such an issue raised in the course of civil proceedings should be referred to the Tribunal in terms of section 65 (2) of the Competition Act, provided that certain requirements are met.

[88] In *Leonard v Nedbank*[13] *("Leonard"),* the Tribunal described a referral under section 65(2) as a *'drastic step',* which has a significant impact upon litigants who *'in seeking to recover their debt in one forum, have now been drawn into another at great expense and inconvenience',* and underscored the civil court's role in *'identifying opportunistic litigants*

[13] Case number 841/CR/AUG07

who may seek to stay civil proceedings by finding some inkling of competitive harm lurking in the civil dispute to which they are a party.'[14]

[89] A party seeking a referral must clearly set out what the prohibited conduct is for the court, and for the opposing party, to appreciate whether a case for referral has been properly made out.

[90] The opposing side and the court are entitled to know *'what was unlawful, why it was unlawful and why its remedy before the Competition Tribunal requires a stay of the Court's proceedings'.*[15]

[91] In *Platinum Holdings (Pty) Ltd v Victoria & Alfred Waterfront (Pty) Ltd*[16], which concerned a s 65(2) referral claim by none other than the holding company of the Platinum group, the SCA explained the court's role as follows:

> *"It is clear that the prohibition [in section 65] against consideration of the merits of a competition issue does not mean that a court can give no consideration to the issue at all. It merely means that it may not resolve the issue; but the question whether the competition issue is frivolous or vexatious is an issue for the court, not for the Competition Tribunal."*

[92] Pertinently, the SCA held that an issue can be said to have been raised in a frivolous manner *'if it is clearly groundless or insufficient'.*

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[14] *Leonard,* p 5
[15] *Leonard* supra, pp 6 & 7
[16] Unreported, Case number: 428/2003, 28/5/2004

[93] Unsurprisingly, the applicant objected to Rodel purporting to furnish an expert opinion on issues of competition law without providing any qualification to do so, and contended that Rodel's opinion regarding the relevant market, the applicant's dominance in such market and that the applicant's actions constitute a prohibited abuse of dominance, are inadmissible.

[94] Also inadmissible, as hearsay and opinion evidence, is the statement attributed by Rodel to *'one Paul Simpson',* as described more fully above[17].

[95] Regarding the statements in the memorandum by Pretorius (which are not under oath) the applicant contends that:

95.1 Firstly, the views expressed fail to assist the respondent in overcoming the hurdles presented by s 65(2); and

95.2 Secondly, Pretorius purports only to *'comment'* on the aforementioned issues *'in order to conclude whether the case made out by the Respondent in relation to a contravention by Applicant of Section 8(c) of the Act is plausible and therefore cannot be said to be frivolous or vexatious.'*

95.3 However, the question whether the issue raised by the respondent has been raised frivolously or vexatiously is the very issue which the Court must determine, and is pre-eminently an issue which the Court can determine

[17] See section 3(1) of the Law of Evidence Amendment Act 45 of 1988

> without recourse to opinion evidence, as it involves the application of legal provisions to facts. For this reason, opinion evidence is inadmissible because of its irrelevance.[18]

The prohibited conduct relied upon by the respondent

[96] Rodel narrows the respondent's competition issue down to two types of prohibited practices under section 8 of the Competition Act:

96.1 the refusal to give a competitor access to an essential facility, when it is economically feasible to do so, in contravention of s 8(b) of the Act (the exclusion complaint); and

96.2 an *'exclusionary act',* in circumstances where the anti-competitive effect of that act outweighs its technological efficiency or other pro-competitive gain, in contravention of section 8(c) of the Act (the exclusion complaint).

[97] The respondent notably has failed to aver facts to support the elements of each complaint, to enable the court to determine whether the applicant's conduct is prohibited in terms of the Competition Act.

[98] Section 8 of the Competition Act regulates the conduct of dominant firms. As a precursor to determining whether the applicant's conduct amount to an abuse of dominance, it must first show that the applicant is dominant, as defined in the Competition Act.

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[18] *Ruto Flour Mills Ltd v Adelson* 1958 (4) SA 235 (TPD) at 237B *De Klerk v Scheepers NO* 2005 (5) SA 244 (TPD) at [3]

Market determination

[99] In terms of section 7 of the Competition Act, a firm is dominant if:

99.1 Its market share is at least 45% of that market;

99.2 it has at least 35%, but not less than 45% of market, unless it can show that it does not have market power; or

99.3 it has less than 35% of that market, but has market power.

[100] The term *'market power'* is defined as the *'the power of a firm to control prices, or to exclude competition or to behave an appreciable extent independently of its competitors, customers or suppliers.'*[19]

[101] The starting point is therefore the identification of the market in which the respondent is alleged to meet one of the criteria in section 7 of the Competition Act.

[102] Once the relevant market has been identified, the boundaries of that market must be determined before a market share (or market power) can be attributed to a firm. The relevant market, and its boundaries, are typically determined according to the dimensions of product and territory.[20]

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[19] Section 1 of the Act

[20] Sutherland PJ, *Competition Law of South Africa,* para 7.7.4.1

[103] Rodel states that the respondent and H&M are participants in the fashion retail market in South Africa, but does not allege that the applicant is a participant in this product market. Rodel purports to identify a geographical dimension, namely Gateway or the Durban-North region, but neither Rodel nor O'Reilly clearly identify a product dimension or product market in which the applicant is alleged to be dominant.

[104] Moreover Rodel has not averred any facts upon which the court can determine that the applicant has either market share or market power.

[105] I am persuaded by the applicant's contention that the respondent's failure to set out any facts to support the allegation that the applicant is dominant in a relevant market is fatal to its claim for a referral under section 65(2) of the Competition Act.

The essential facility complaint

[106] I turn now to deal with the complaint raised by the respondent in terms of section 8(b) of the Competition Act.

[107] The applicant has not alleged facts to sustain its conclusion that the respondent is dominant, as defined in the Competition Act. Even if I were to find that the respondent had set out facts sustaining such conclusion, it has not made averments which might establish the remaining elements of a contravention of section 8(b) of the Competition Act, namely refusing to give a competitor access to an essential facility when it is economically feasible to do so.

[108] The applicant is a competitor in the (upstream) market of letting out space in shopping malls. The respondent and H&M are competitors in the (downstream) market of clothing retail. The relationship between the applicant and the respondent is – in competition terms – vertical, not horizontal. It therefore cannot be said that the applicant is refusing access to an entity which is a competitor in relation to it.

[109] Whilst it is not necessary to make a determinative finding on this point, it can never be said to be economically feasible to rent retail space to a tenant which repeatedly defaults on its rental obligations, and where the lessor's security has been materially compromised by the sequestration of the estate of its surety.

[110] The respondent fails in other respects, namely that it does not allege that the premises are an essential facility, which is defined in section 1(1)(viii) of the Competition Act as meaning *'an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers',* and it is neither alleged nor suggested that the respondent cannot carry on business elsewhere. In this regard, there are no facts alleged to support a conclusion that the ejectment of the respondent from the leased premises *'will..almost certainly mean the end of the respondent's brands.'* Even if it did, it would not be as result of any anti-competitive conduct on the part of the applicant.

The exclusion complaint

[111] Section 8(c) of the Competition Act prohibits a dominant firm from engaging in an exclusionary act if the anti-competitive effect of that act outweighs its technological,

efficiency or pro-competitive gain.

[112] An *'exclusionary act'* is defined in the Competition Act as *'an act that impedes or prevents a firm from entering into, or expanding within, a market.'*

[113] The requirement of an exclusionary act is separate from the requirement of an anti-competitive effect.

[114] An anti-competitive effect will be established *'if there is (i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals.'*[21]

[115] Even if one assumes that, if evicted from the leased premises the respondent will be prevented from expanding within the fashion retail market, the respondent has not alleged that it is unable to find alternative premises from which to conduct business.

[116] If the otherwise lawful ejectment of a lessee from commercial premises could constitute an exclusionary act in terms of section 8(c) of the Competition Act, it would have the absurd result that, most, if not all, commercial evictions would qualify for referral to the Tribunal, which is certainly not what could have been intended.

[117] It is apparent that the assumption in [115] above is correct, such an assumption is bedevilled by a conflation of different markets. If it is the respondent's case that the market in

[21] *Competition Commission v South African Airways (Pty) Ltd* 18/CVR/Mar01 *('SAA')* para 110

which the applicant is dominant is the market for the allocation of retail space in the Gateway, then the applicant's dominance is in a different market to the market in which the respondent is a competitor, namely the fashion retail market, which is also the market from which the respondent claims it will be excluded, and in which the effects of such exclusion would occur.

[118] The legal position is that whilst the Competition Act allows for the possibility that a firm may be dominant in one market and abuse its dominance or cause anti-competitive effects in a different market, such conduct has rarely been found to constitute an abuse of dominance, and only in situations *'where the dominant firm does, or intends to do, business in the second market.*[22]*'* This exception has not been relied upon by the respondent and is, as stated by the applicant, dispositive of any case which it might advance under section 8(c).

[119] In any event, the respondent has failed to make averments to sustain a single element of the exclusion complaint.

Failure by the respondent to make out a case for referral in terms of section 65(2) of the Competition Act

[120] I am of the view that the respondent has failed to raise an issue concerning conduct prohibited in terms of the Act, and the issues which it has raised are groundless. The issues have clearly been raised in a frivolous and vexatious manner, which in my view leads to the inescapable conclusion that they have been raised opportunistically r in order to delay the final determination of the matter.

[22] Sutherland PJ, *Competition Law of South Africa,* para 7.11.4; See also *York Timbers Ltd v South African Forestry Company Limited* 15/lR/Feb01 para 71

[121] This court is in a position to finally determine the application without resolution of the competition issue raised and without recourse to the Tribunal. The respondent has therefore failed to meet the second requirement for a section 65(2) referral, namely that the resolution of the issue raised *'is required to determine the final outcome of the action.*[23]*'*

CONCLUSION

[122] For these reasons, I am satisfied that the lease agreements have been validly cancelled and it follows that the applicant is entitled to an order directing the respondent to vacate the leased premises, and the respondent has failed to allege any facts on which the matter should be referred. It has furthermore failed to point to any authority for the proposition that there is any basis upon which the Tribunal may, on the facts of this case, prevent an otherwise lawful ejectment.

[123] Cancellation is a remedy available to a contracting party, if proper grounds exist for cancellation in terms of the agreement between the parties. It is not for the Court to confirm cancellation, however since this relief has specifically been sought, I will grant an order in terms of prayer 2 of the notice of motion.

[124] The application for a referral to the Tribunal in terms of section 65(2) of the Competition Act must, accordingly, be refused.

[23] Section 65(2)(b)(ii) of the Act

COSTS

[126] In terms of clause 16.3 of the lease agreements the applicant is entitled to recover all legal costs incurred by it, including attorney and own client costs, from the respondent.

ORDER

[127] In the circumstances, I make the following order:

1. The cancellation of the written agreements of lease concluded on or about 4 February 2016 (which were cancelled on 23 March 2016 and subsequently reinstated in and during April 2016) in respect of Shop F107 (Aca Joe); Shop F116 and F117 (Vertigo); Shop G313 (Hilton Weiner); Shop F105 (Urban Degree) and Shop G134 (Jenni Button), situated in the Gateway Theatre of Shopping Centre, No 1 Palm Boulevard, Umhlanga Ridge, Newtown Centre, Umhlanga ('the leased premises') are hereby confirmed;

2. The respondent and all those occupying the leased premises under it ("the tenants") are ordered to vacate all the relevant abovementioned leased premises within fourteen days of the date of service this order;

3. In the event that the respondent and the tenants fail to vacate the leased premises, the Sheriff or Deputy Sheriff of this Court is authorised to eject the aforesaid persons from the leased premises; and

4. The costs of this application are to be paid by the respondent on the scale as between attorney and own client.

M HOLDERNESS
Acting Judge of the High Court

APPEARANCES

For the applicant: I Jamie SC with K Reynolds, instructed by Cliffe Dekker Hofmeyr

M Norton SC with K Reynolds (Competition law issue)

For the respondent: R S van Riet SC, instructed by Reid Corin Attorneys