Short notes on:

THE LANDLORD'S ROLE IN EXCLUSIVITY AND ANTI – COMPETITIVE CLAUSES IN RETAIL LEASE AGREEMENTS

Introduction

Shopping centres are an integral part of the South African landscape with customers and retailers thriving in a one-stop convenience and experience location.Tenant mix is vital to any potential retailer who considers letting space in a shopping centre. It informs whether the intended target market is a consumer at the particular centre and what the return on investment is likely to be.

Larger retailers have an interest in securing their positions as anchor tenants and are the draw cards to a shopping centre. The anchor tenants often require landlords to grant them certain exclusivities to trade in a particular way in the shopping centre. We will unpack how these exclusivities will impact trade in a shopping centre.

The "anchor" tenant:

It is a common belief that Landlords dictate the terms of the lease to tenants, but this is not the case. Armed with sufficient information the terms of the contract are negotiable to the degree that the transaction makes commercial sense to the landlord and tenant.During planned development of a shopping centre, the banks would only advance finance for the development once a large food retailer has been secured as the anchor tenant for at least the loan term, generally 10 or 15 years.

The anchor tenant, often large grocery retailers, is now in a power position to negotiate a long term trading exclusivity which the landlord will impose on other tenants in the shopping centre. The impact on the remaining tenant mix is that they will not be allowed to trade in some of their services and have a limited offering in that shopping centre so that the landlord can give effect to the anchor tenant's exclusivity.

Are these exclusivities anti-competitive?

Exclusivity clauses in long terms leases have been considered problematic, and in 2009 the Competition Commission launched an investigation into major supermarket chains including Pick 'n Pay, Shoprite Checkers, Woolworths, Massmart, and others.

The Commission was of the preliminary view that exclusivity clauses give rise to considerable competitive concerns but did not amount to a breach of the provisions of the Competition Act as many complaints were received from, among others, *Fruit and Veg City and Aquarella Investments 437 (Pty) Ltd t/a Mamas.*

At the close of the investigation, the Commission decided not to refer the complaints as the evidence gathered would not support a substantial lessening of competition because of exclusivity clauses in lease agreements.
It was noted by the Commission that despite the non – referral there were still concerns regarding long term operating exclusivity clauses as contained in leases over 20 years.

In late 2013 and 2014 the Commission received several complaints related to exclusivity clauses against Pick 'n Pay, Massmart, Shoprite Checkers, and Spar and notably one of the complainants was the South African Property Owners Association.

At present, the position in respect of findings by the Competition Commission is that exclusivity agreements, while problematic and concerning, are not wrongful in terms of the provisions of the Competition Act.

It must be carefully noted that there is a movement to establish clear rules regarding the operation of exclusivity clauses in lease agreements with major retail/ anchor tenants. Following the spate of complaints made to the Competition Commission during 2013 and 2014 gave rise to the second investigation where public hearings were held around the country in 2017. The investigation was set to conclude around March 2018, but to date, the inquiry is not completed.

The Competition Commission has published a notice in Government Gazette No. 41932 wherein the inquiry is extended to 30 September 2019.

The position of the Landlord:

After the first investigation, many landlords had concluded agreements that effectively compromised exclusivity clauses contained in the agreements with the belief that long-term exclusive lease agreements would not be enforced as they may not be legal.

This had led to major retailers aggressively enforcing their rights in terms of their contracts with Landlords and were largely successful. In many instances, the retailers, as in this case Pick 'n Pay, sought to interdict other retailers who they claimed interfered with the contractual exclusivity rights.

Notably in the case of *Masstores (Pty) Ltd vs Pick 'n Pay Retailers (Pty) Ltd [2016] ZACC 42*, the exclusive lease provision was at the centre of a dispute. In this matter, the Court did not focus on the requirements of the Competition Act but was concerned with the correct remedy to enforce an exclusive clause in a lease agreement.

One tenant (Pick 'n Pay) attempted to enforce its contractual exclusivity right (granted to it by the landlord) against another tenant (Game) in the complex. There was no contractual relationship between the two tenants.

The Court confirmed that mere interference with a contractual right of exclusivity by a third party who is not a party to that contract is not wrongful. There is no general legal duty on third parties not to infringe contractually derived exclusive rights of others. Third parties must nevertheless exercise their contractual rights in a reasonable manner.

What this entails is that while Game did not wrongfully interfere with the contractual rights of Pick 'n Pay, the contractual rights to be enforced existed between the landlord and Pick 'n Pay.

Should the landlord knowingly and willfully enter into agreements which results in damage suffered by another tenant, in this case, Pick 'n Pay, by usurping exclusivity restraint clauses, the tenant may take legal action to enforce its rights in terms of the contract. However, it must be noted (and supported by the decision in *First Pharmacy CC v Shoprite Checkers (Pty) Ltd and Ziningi Properties (Pty) Ltd, Western Cape High Court, case number 17682/08, Judgement delivered 13 February 2009*) where a landlord confers similar trading rights/ exclusive rights to different tenants it would not invalidate any of the lease agreements. The difficulty that the person conferring the right faces that being the landlord is in discharging his obligations to the tenant to which he would be unable to deliver. This may result in the landlord being exposed to an action for specific performance or an

action for damages. In the latter case, the tenant who contends the landlord failed to deliver in terms of his obligations would have to prove that damage was suffered.

Conclusion

The position is currently unclear regarding the enforceability of exclusive lease agreements and is further untenable save to mention once more that major retailers have been successful in enforcing such exclusivities to date.

In cases involving several merger applications that have appeared before the Competition Commission Tribunal, the Tribunal imposed conditions on merger approval that sought that the negotiation of exclusivity clauses must be negotiated in good faith and end relative exclusivity and the termination of the lease. In most cases, the retailers did not agree to the termination of the clause.

A practical measure to resolve the issues is to assess how long such a retailer requires the exclusivity to operate to justify the return on its investment. Should the return have been maximised, it may be worthwhile to negotiate with the retailer the relaxation or removal of the exclusivity at a later stage of the duration of the lease.

With the Competition Commission having taken decisions regarding exclusivity clauses operating for limited periods in other sectors, such as the Liquid Petroleum Gas Sector, the landlord may consider approaching the retailer to amend the exclusivity clause either to operate in less restrictive terms or for a continued limited time or to remove the clause altogether.

We therefore recommend that advice is sought from an expert at SchoemanLaw.

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