IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL LOCAL DIVISION, DURBAN

CASE NO 8021/2014

In the matter between:

THE SPAR GROUP LIMITED Applicant

And

SYNERGY INCOME FUND LIMITED First Respondent

MASSTORES (PTY) LTD Second Respondent

GAME Third Respondent

CAMBRIDGE FOOD Fourth Respondent

JUDGMENT

OLSEN J

[1] By notice of motion dated 8 July 2014 the applicant, the Spar Group Limited, launched an application for the grant of a rule nisi (with interim relief) calling upon the respondents to show cause why an order should not be made protecting what the applicant contends to be its sole trading rights in the shopping centre known as King Senzangakhona Shopping Centre at Ulundi. The first respondent is the applicant's current landlord, Synergy Income Fund Limited. The second, third and fourth respondents are related entities which fall under the control of Massmart Holdings (Pty) Ltd.

[2] The applicant is a wholesaler and distributor which, as its name suggests, is the supplier to Spar supermarkets, and which runs the Spar organisation. The second, third and

fourth respondents feature in this application representing the interests of the retail outlets known as Game and the supermarkets known as Cambridge Food.

[3] For the sake of convenience I will refer in this judgment to the second, third and fourth respondents as "Massmart".

[4] In May 2008 the applicant concluded a lease in respect of large premises in the shopping centre. The lease was concluded with Khuthala Alliance (Pty) Ltd ("Khuthala"), then the owner of the property. In terms of the lease the applicant had the right to sub-let the premises to a retail member of the Spar Guild of Southern Africa. The intention was that the applicant would hold the head lease over the premises and sublet them to a retailer who would conduct the business of a Spar Supermarket. The agreement of lease provided that the landlord would not during the period of the lease or any renewal thereof lease any portion of the shopping centre (or any extension of it) to a tenant whose business comprised, in whole or in part, a bakery, a butchery, a superette, supermarket, greengrocer, trading store, hypermarket, wholesaler, cash and carry or other like business, department store with a food department (other than Jet Mart), a liquor store (other than a Tops liquor outlet) or a delicatessan. The applicant sublet the premises to a Spar retailer which opened its business and traded.

[5] In March 2011 Khuthala and the second respondent, Masstores (Pty) Ltd, concluded a lease over a store in the shopping centre for a Game retail outlet. That outlet was opened.

[6] In May 2014 it came to the attention of the applicant that Massmart had decided to convert the Game retail outlet into a Cambridge Food supermarket. This application was launched with a view to putting a stop to that as a matter as urgency. As it turned out the level of urgency fell away somewhat and arrangements were made for the parties to put in a fairly substantial set of papers which has served before me. A proposal that the matter could perhaps be decided finally on these papers was not agreed to by all parties. In the result I must consider whether the applicant has made out a case for the issue of a rule nisi calling upon the respondents to show cause why interdicts should not be granted protecting the applicant's exclusive trading rights claimed under its lease; and whether the applicant is entitled to an interim order giving it protection pending the final determination of these proceedings. In my view there are issues of fact which arise on the papers that require

more interrogation than has been managed on paper. Insofar as the applicant's case on the merits is concerned, this judgment is therefore far from final, and must address only the question as to whether the requisite prima facie case has been made out. I intend to grant a rule nisi and interim relief. In this judgment I must tread a fine line between furnishing reasons for the orders I propose to make and the error of appearing unduly to influence the final outcome of the case. At this stage a decision must be made based in some respects on facts which are not common cause, and on material which is likely to turn out to be incomplete because, as is usual in these matters, the parties were pressed for time in preparing the papers.

[7] The first respondent, Synergy Income Fund Limited, now owns the shopping centre, having bought it from Khuthala. The agreement in terms of which the property was sold to the first respondent is not included in the papers. The first respondent has not addressed the question as to whether there were any express terms in the agreement under which it bought the shopping centre, governing the transfer of rights and obligations flowing from the various leases with tenants of the shopping centre. The case has been conducted upon the basis that the first respondent stepped into the shoes of Khuthala by reason of the doctrine of huur gaat voor koop.

[8] All of the respondents argued that the applicant fails at the first hurdle because, whatever its content, the appplicant's right to restrict the use of the shopping centre by others was enforceable only against Khuthala, as the restrictive condition, although incorporated in the lease, created a mere collateral right enforceable by the applicant against Khuthala, but unconnected with the lease. Massmart referred in particular to *Mignoel Properties (Pty) Ltd vs Kneebone* 1989 (4) SA 1042 (A) at 1051 B as authority for the proposition that when a purchaser of property acquires the rights and obligations of the seller by operation of the doctrine of huur gaat voor koop, collateral rights or obligations unconnected with the lease are not transferred.

[9] The question as to what might be regarded as collateral was dealt with in *Spearhead Property Holdings v E & D Motors* 2010 (2) SA 1 (SCA) where the issue was whether an option to purchase incorporated in a contract of lease was enforceable against a purchaser of the property. The following appears in paragraph [52] of the judgment.

> 'In my view, the problem must be approached from an objective point of view which keeps in focus the basic object of huur gaat voor koop. On this approach the question is simply whether the "collateral right" (or the collateral obligation) relates to the lessee's real right of occupation as lessee. It seems to me that this question can hardly ever be answered in the affirmative when it relates to the rights and obligations flowing from an option to purchase.'

[10] In my view the question as to whether the restriction on trading rights the original landlord gave to the applicant relates to the applicant's real right of occupation as lessee is one to be determined on the facts. The relevant facts disclosed on the papers are relatively uncomplicated. The point of the restriction is preventing the sale elsewhere in the shopping centre of products which are principal features of a Spar supermarket. (There is no dispute about the fact that a Cambridge Food store would be direct competition to a standard Spar store.) The applicant took the premises on hire for the purpose of running a Spar store. In the language of landlord and tenant, that was the use to which the tenant was to put the property. The profitability of such an enterprise on those particular premises would depend inter alia on the question as to whether the store would have to trade in competition with other retail outlets for custom in the shopping centre. The proposed enterprise being a commercial one, the value of occupation of the premises had to depend in part upon the potential to generate profits on the premises. The rental stipulated in the lease was accompanied by the clause which recorded the applicant's right to be immune from material competition, a profit advantage. In the absence of evidence to contradict it in the particular context, one can only conclude that the restraint clause was a material feature affecting the rental and the right to occupy a portion of the shopping centre. I am satisfied that the applicant has established that, prima facie, the clause in its lease which restricts competition relates to the applicant's real right of occupation of the premises as lessee. The obligation not to let to competition therefore passed to the first respondent.

[11] Turning to the content of the landlord's obligation relating to competition, Massmart argues that upon a proper construction of the clause what was forbidden was the conclusion of a lease agreement with a tenant whose business at the time comprised in whole or in part one of the listed restricted activities. The clause commences as follows.

> 'The landlord shall not during the period of this lease, or any renewal hereof, lease any other portion of the shopping centre or any extension or addition thereto, to a tenant whose business in whole or in part comprises: …' (the list follows in the text).

The argument is that the subsequent lease to Massmart (in its guise as Game) was for the conduct of the business of a traditional Game outlet. The lease was not to a tenant whose business was a restricted activity. A later decision by Massmart to alter the nature of the retail business conducted on the premises to bring it within the restricted list does not generate a breach of the agreement by the first respondent because the act of concluding a lease is all that is affected by the restriction imposed by the applicant's lease. Against that counsel for the applicant argues that to give any sense to the clause, the word "lease", where it is used as a verb in the introduction to the list, must be taken to denote the continuing act of letting.

[12] It must be allowed that there is some ambiguity in the language employed in the clause, if one confines oneself to linguistic analysis. But of course the enquiry is wider than that, as appears from this extract from paragraph [18] of the judgment in *Natal Joint Municipal Pension Fund v Endumeni Municipality* 2012 (4) SA 593 (SCA).

> '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.'

[13] In my view the construction of the clause advanced by Massmart leads to an unbusinesslike insensible result, and allows for the purpose of the restriction to be undermined. The applicant's lease was one of a relatively long term. Taking up occupation would involve a considerable investment, certainly on the part of the Spar retailer who would take the sublease. The clause that Massmart contends for would allow the intended protection to be circumvented with ease, especially where, as may have been the case with the Massmart lease, it was not the intention at the outset that such an outcome should

eventuate. In my view, and bearing in mind that I must consider the context and its ramifications only on the papers before me, the applicant's construction of the contract is correct. In the circumstances the clause in question imposed a continuing obligation on the landlord not to allow any tenant to undertake one of the restricted activities in the shopping centre.

[14] The applicant's claim to an interdict against the first respondent is for the enforcement of these rights which have their origin in the applicant's lease.

[15] When the applicant launched the application it had no knowledge of the particular provisions of the lease which Massmart had concluded for Game with Khuthala in March 2011. As I understand it the applicant first gained access to the document when it was produced by the respondents in this application. Against that background in its founding papers the applicant asserted a right to an interdict against Massmart upon the basis that it (Massmart) was intentionally engaging in the delict of unlawful competition, by intentionally causing or assisting the first respondent to breach its obligations as landlord under the applicant's lease. During argument counsel for Massmart repeatedly stressed the contention that the claim against Massmart was for an interdict preventing unlawful competition. That contention does not fairly reflect the basis upon which the applicant approached the court. In its founding papers the applicant also claimed that its rights with respect to the restricted activities ranked prior in time to any right that Massmart may have obtained from the first respondent in terms of Massmart's later lease, and that if such a clash should be revealed (as it was, given the terms of the Massmart lease) the applicant's rights would prevail upon the basis of the doctrine that the earlier right is stronger in law. That contention seems to me to raise the question which was debated at length in argument, that in relation to the claim against Massmart it was a clash of rights that had also to be considered. In this regard Massmart's case had as a theme the proposition that the rights obtained by the applicant were personal, whereas those obtained by Massmart were real; and that real rights prevail over personal rights. I will revert to this later. First I turn to some facts relevant to the arguments still to be considered.

[16] A Mr Ivan Morris (whose affidavit was procured by Massmart) stated that he has worked for many years as a consultant and advisor in the commercial property industry, and

that in that capacity he dealt with Khuthala, the owner of the shopping centre. He was in fact a director of Khuthala. In about November 2010 it came to his attention that Game was contemplating opening in Ulundi, and he saw an advantage to the shopping centre in having Game take up premises there. This would benefit not only the landlord but also the existing tenants, including the applicant.

[17] Mr Morris was put on to a Ms Sugandrie Gounder (who also attested to an affidavit), a senior property manager in the Massmart group, in order to negotiate a lease. In November 2010 Ms Gounder conveyed Game's "basic terms of lease" to Mr Morris, which included a requirement that the lease should contain no restrictions in respect of Game's merchandise mix. Mr Morris was aware of the restrictions contained in the applicant's lease and said that he had a number of meetings with representatives of the applicant and its sub-tenant during which he explained that if Game could not be accommodated in the shopping centre it would no doubt establish itself elsewhere in Ulundi, which would not be good for business and the shopping centre. Although it is not perfectly clear from Mr Morris's affidavit what it was that concerned him about Game's proposal (given that on the face of it, unlike a Cambridge Food Supermarket, Game was not in the full sense a competitor of a Spar outlet), it is apparent from Ms Gounder's affidavit that Game had for many years included some non-perishable food items on its shelves. In argument counsel referred to items such as potatoes chips, packaged snacks and sweets as examples of what Ms Gounder regarded as a traditional Game offering.

[18] Mr Morris said in his affidavit that to ensure that there should be no misunderstanding between the parties as to Game's requirements he asked Ms Gounder to furnish him with a written communication spelling out the position and attitude of Game. This he received by way of an email on 17 February 2011. He said that whilst he has no direct independent evidence of having made a copy of that email available to any representatives of the applicant, he believes that he did so. In reply the applicant's position is that there is no recollection on the part of its representatives that the email was produced. It is said to have been seen for the first time as an annexure to the papers in the present matter. But it seems to me that for two reasons nothing really turns on the question as to whether the email was actually produced at the time.

(a) Firstly, the applicant has adopted the position that it is willing to fall in line with the contents of the email, which has resulted in an amendment to the provisions of the rule nisi which it sought originally in these proceedings.

(b) Secondly, given the purpose for which Mr Morris solicited the email, whether or not he showed it to the applicant's representatives, he would presumably have negotiated with them for their consent to Game's tenancy upon the basis of the contents of that email.

He received the applicant's consent by email dated 31 March 2011 from a Mr White of the applicant in the following terms.

> "Further to our conversation, I am able to confirm that the Supertrade Group, at their board meeting yesterday, raised no objection to the forthcoming arrival of Game, with their full offer, at the Ulundi Centre."

[19] It is not disputed that the "full offer" of a Game Store at the time bears no resemblance to a Cambridge Food Store. On the papers before me the probabilities are that the "full offer" is what is spoken about in the email dated 17 February 2011 from Ms Gounder to Mr Morris. It is apparent from that email that before it was written Ms Gounder had conveyed to Mr Morris that Game had started introducing a form of store known as a "Game Foodco Store". Such a store sold some perishable food items such as fruit and vegetables (fresh and refrigerated), frozen pre-packs, meat and chicken, eggs, processed meat, dairy and dairy products, juices and bread. She set out in the email that the current allocation of such goods in the Game range would be a floor area of 99.2 square metres, "hardly a threat one would say to a 3,500 square metre - 5,500 square metre supermarket anchor", she said.

[20] The next two paragraphs of the email read as follows.

> "As mentioned - you must take note that even though it is highly unlikely this store will commence trading with the Foodco range (due to logistics and store size) - our board will not entertain the signature of leases with any restrictions to the extension of our range; to the advantage of others (supermarkets) and the detriment to our brand. We will not subject our brand to exclusivities imposed by another retailer.

> We hope that your food anchor is able to appreciate the benefit that the Game store is going to add to Ulundi, the centre & indeed his business; without letting the possible extension of range into perishable goods decimate the real value added by Game's introduction to your centre."

[21] Massmart argues that the email states clearly that no provision of the Game lease would be allowed to restrict the range of activities Massmart could undertake on the premises. In my view, and again without the benefit of sufficient evidence of context and proper interrogation of the document, that is not what it says. The email must be considered as a whole. In my view, properly construed, what Ms Gounder conveyed was that there was no intention to modify the standard Game offering to include its new "Foodco" offering at the Ulundi Store; but if that were to happen there would be a restricted area of just short of 100 square metres dedicated to the sale of foodstuffs not normally part of a Game offering. It seems to me that it is that "extension of our range" which the board would not allow to be obstructed. What was sought to be protected was "our brand"; the brand she was speaking about was the Game brand, not any other. She stated in the email that what might happen (i.e. the introduction of some 100 square metres of perishable foodstuffs) could hardly be regarded as a threat to a supermarket anchor such as the applicant. Obviously it would have been preposterous for her to state that a wholesale conversion of the Game offering to a supermarket offering would not pose such a threat, and she did not say that.

[22] It seems to me that on the papers the position is as follows.

(a) The email, and the accounts of negotiations given by Ms Gounder and Mr Morris, indicate that Ms Gounder (who was authorised to negotiate the Massmart lease) was given notice of the existence of rights on the part of the applicant to restrict competition with regard to foodstuffs.

(b) As a matter of probability Ms Gounder's email reflects the background against which the applicant consented to the introduction of Game as a tenant.

(c) Both Mr Morris and Ms Gounder state that the latter drafted the lease, and that the parties thereto subsequently signed the Massmart lease, upon the basis that, in the light of the consent given by the applicant, Massmart could legitimately

> hire the premises upon terms which permitted it to do what it liked thereon. On the papers this contention does not coincide with the probabilities. Given that Ms Gounder's email emanates from Massmart itself, and given the purpose for which it was solicited (i.e to provide the information necessary to be given to the applicant in order to secure its consent), it is established prima facie on these papers that Khuthala and the second respondent could not have proceeded to sign the agreement in the belief that the applicant had consented to the premises being used for any of the restricted uses stated in the applicant's lease besides Game's ordinary non-perishable offerings and 100 square metres of perishable foodstuffs.

[23] On that basis when the Massmart lease was concluded Massmart had notice of the fact that the applicant had acquired and still retained rights in conflict with the provisions of the Massmart lease which allowed unlimited use of its premises.

[24] Massmart argues, as I have said, that it has acquired and holds a real right to trade as it wishes on the premises it leases from the first respondent. In its answering affidavit the first respondent revealed that far from simply extending the usual Game offering to a Foodco offering of 100 square metres, some 30% of the leased Game area has now been allocated to a full range of food products. In reply the applicant has stated that it was quiet unaware of this fact, even when it launched the application, and would be seeking an interdict against the continued operation of such a food enterprise on the premises leased by Massmart. Massmart says that it has a real right with respect to the 30% it is using now, and a real right to change the entire offering on the premises to a supermarket trading under the name of Cambridge Food. It does so on the basis of the proposition which, as far as it goes, is accepted by all the parties, that once a tenant takes possession of property under a lease it acquires a limited real right to the property of another for the duration of the lease, and will thereafter be protected by the rule huur gaat voor koop. I quote the development of that argument directly from the heads of argument delivered on behalf of Massmart.

> "The ambit of the real right which the lessee, who has taken possession, obtains, depends on the ambit of the right of temporary use which the lease confers on the lessee, i.e. the premises may be used for the purpose for which it was let."

That proposition strikes me as correct. But it seems to me that surely all the terms of the lease (save those which are truly collateral) define the real right and govern the enjoyment of it. That argument is one which Massmart must make in order to sustain its claim to a real right to convert the store to a supermarket; a right which it claims originates in its contract, and which as to some 70% of the area of the premises it has never exercised.

[25] If the same line of reasoning is applied to the applicants lease, then the question arises as to why, if I am correct in stating that the restrictions on trading imposed on the property as a whole in terms of that lease are not mere collateral terms of the lease, the applicant's real rights (gained equally through occupation of its premises) do not incorporate what might be called a negative servitude with respect to the rest of the premises. Ownership includes the right to determine what may be done on the owner's property. If in fact, contemporaneously with and as an integral part of its delivery to the applicant of its leased premises, the landlord relinquished also part of its right to determine what could and could not be done on the balance of the area of the same piece of property, did the landlord's right to determine that the restricted trades could be conducted on the remainder of the property still vest in it as owner, with the result that it could deliver that right to Massmart? Massmart answers in the affirmative arguing that until registered, negative restrictive rights or negative personal servitudes remain personal. Reference was made in this regard to *Cape Explosive Works Limited v Denel (Pty) Ltd* 2001(3) SA 569 (SCA) at 580; *National Stadium SA (Pty) Ltd v First Rand Bank* 2011 (2) SA 157 (SCA) at 166; and *Van Vuuren v Registrar of Deeds* 1907 TS 289 at 295 – 6. But I do not read any of those cases to have addressed the question as to whether a negative servitude may become a real right by reason of it being a material, intrinsic (ie non-collateral) provision of a lease which ripens into a real right with possession (as opposed to registration).

[26] It seems to me that the question need not be answered at this time. I have already held that on these papers I must proceed upon the assumption that Massmart had prior notice of the applicant's rights with respect to the restricted trading activities. That notice preceded not only delivery of the premises to Massmart, but also the conclusion of the lease in terms of which Massmart purported to secure an unhindered trading opportunity on the premises. Massmart concedes the proposition that when B acquires a right against A for the conferral upon B of a real right, and A thereafter undertakes to confer the same or

an inconsistent real right upon C, if C has knowledge before acquiring its real right, then C's right has to yield to B's earlier right. However it seems to me that it is more than just a question of yielding. *Bowring NO v Vrededorp Properties CC and Another* 2007 (5) SA 391 (SCA) is to the effect that, using the example given by counsel for Massmart, B may in fact be entitled to enforce its right directly against C. The absence of contractual privity between B and C is not an insurmountable hurdle. (See also *Meridian Bay Restaurant (Pty) Ltd and others v Mitchell NO* 2011 (4) SA 1 (SCA) at paragraphs [30] to [31].)

[27] If I find on these papers, as I do, that the applicant has made out a prima facie case for the proposition that as a matter of fact Massmart had knowledge of the applicant's prior right to restrict certain trading activities on the premises before Massmart obtained its leasehold rights, then nothing stands in the way of direct enforcement of the applicant's rights against Massmart (by interdict) without resorting to the law concerning unfair competition. As it was put by Brand JA in *Bowring*:

> 'The doctrine of notice is an equitable remedy and its manner of application should be determined largely by what is considered to be equitable to all concerned in the circumstances of the particular case.'

In my view direct enforcement in this case is equitable, and indeed practical and logical. The fact that the landlord (the person against whom Massmart would look for enforcement of its contested right) is joined seems to me to exclude any possibility of conflicting decisions concerning the enforceability of the applicant's rights, whether they be regarded as personal (with respect to the first respondent) or real (with respect to the property on which the shopping centre is constructed).

[28] Turning briefly to the applicant's claim that it is entitled to an interdict against Massmart because what has been done (with regard to the use of 30% of the floor area of the premises as a food market), and what is proposed to be done (the wholesale conversion of the Game premises to a Cambridge Food supermarket), constitutes unlawful and wrongful interference in the contractual rights of the applicant, some elements of Massmart's contentions in support of the proposition that such a claim is not established have already been dealt with above.

[29] After this matter had been argued before me, and on 3 October 2013, the judgment of the Constitutional Court in *Country Cloud Trading CC v MEC Department of Infrastructure Development, Gauteng* [2014] ZACC 28 was handed down. This judgment was kindly and very properly drawn to my attention by the attorneys acting for Massmart. The case concerned a delictual claim for damages for pure economic loss. In the Constitutional Court the plaintiff sought to establish the requirement of wrongfulness in the conduct of the defendant by contending for a proposition which had already been rejected by the Supreme Court of Appeal, namely that its case fell within one of the categories of pure economic loss cases where wrongfulness had already been established; namely the case of intentional interference with contractual relations. Commenting on this the following was stated in paragraph [30] of the judgment of Khampepe J.

> 'The cases where conduct may arguably be prima facie wrongful are limited. They involve a situation where a third party, A, the defendant, intentionally induces a contracting party, B, to breach his contract with the claimant, C, without lawful justification for doing so.'

Ms Gounden drafted and concluded a lease with the landlord which gave Game unlimited trading rights. She did so against the background of the knowledge she must have had when she wrote the email, to which I referred earlier. She should be taken, at least prima facie, to have intentionally induced the first respondent's predecessor, Khuthala, to conclude a lease in conflict with the applicant's rights. Whilst, as I have said, everything surrounding that email and the events which generated and followed it will have to be elucidated in due course, if when she wrote the email Ms Gounder had it in mind, as she appears to say she did, to draft a lease which would give Game unlimited trading rights on the premises in competition with the applicant, then by design or neglect the email generated a false impression of her true intention. On her stated premise, intent (ie design) seems to me to be prima facie established. Ms Gounden was clearly well acquainted with the shopping centre letting market, and the forces at play between tenants *inter se*, and the sometimes conflicting interests of a landlord and tenants in such a centre. If she wanted to secure the applicant's consent to the letting of premises to Massmart on terms which would allow any use at all in competition with the applicant's franchisee, then the email appears on the face of it to be a studied obfuscation of her true intent.

[30] In paragraph [31] of *Country Cloud* the court commented on cases in which liability was established when A refuses to vacate premises owned by B, which interferes with a lease agreement between B and C, causing the latter loss. Dealing with the case of *Lanco Engineering CCV v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D) Khampepe said the following.

> 'The active interference in Lanco involved the holding–over of leased premises. The defendant there did not simply cause the plaintiff to lose its right to occupy the premises. The defendant usurped that right, appropriating it for itself. It also did so in a manifestly "dishonest and mischievous" way.'

I do not think that it was intended to convey in *Country Cloud* that the label "dishonest and mischievous" must be attached to the conduct of an interfering defendant as a requirement for wrongfulness. It is now accepted that in cases concerning the doctrine of notice, regarding fraud or mala fides as the theoretical foundation for an enquiry into wrongfulness gives rise to confusion. (See *Meridian Bay* (supra) at paragraph [17], with reference to *Associated South African Bakeries (Pty) Ltd v Oryx and Vereinigte Bäckereien (Pty) Ltd en Andere* 1982 (3) SA 893 (A).) One would think that the same observation should be made concerning the enquiry into wrongfulness in the context of interference with contractual relations. Fault may be a relevant factor in an enquiry into wrongfulness, but it is not an indispensable feature, as discussed in paragraphs [34] to [40] of the judgment in *Country Cloud.* Fault nevertheless remains a self-standing requirement for liability to be imposed. Concerning Massmart's intention now to open a Cambridge Food Store on the Game premises, on the facts I find established prima facie, it intends to do so with knowledge of the applicant's prior rights. With respect to the first respondent Massmart wrongfully claims a right to enforce its own alleged but contested contractual rights, well knowing that if the first respondent allows it, that will result in a breach of the first respondent's contractual obligations owed to the applicant. Massmart has wrongfully induced the first respondent to support it, and resist the enforcement of the applicant's rights arising from its contract with the first respondent. Massmart proposes in effect to usurp the sole trading rights which are the applicant's entitlement.

[31] Defences of waiver and estoppel were raised by all the respondents, but not pressed with much conviction in oral argument. The claims turn around the original consent given

by the applicant, the repeat of it generated by an enquiry from Nedbank, the fact that the Game Liquor Store has been permitted to operate without objection, and the fact that the extended food operation (to 30% of the floor area) which started in October 2013 generated no objection. As to the last mentioned, the applicant denies any knowledge of it. As to the remaining conduct, I do not see how any of it could have been misunderstood, on the facts available to me on the papers, to convey a waiver or abandonment of all of the applicant's rights to restrict trading. There is a considerable distance between what has been permitted or communicated by the applicant, and both the full ambit of the applicant's rights and what Massmart now proposes to do.

[32] I take the view that the applicant has established a well-grounded apprehension of irreparable harm if interim relief is not granted, and that the balance of convenience favours the applicant.

[33] As far as the balance of convenience is concerned, much was made by Massmart of the failure of the applicant to tender an undertaking to pay damages in the event of it transpiring that the applicant was not entitled to the interim relief it seeks in this application. At the eleventh hour an undertaking was given which in my view meets the exigencies of the occasion.

[34] The applicant decided on the day this matter was argued to narrow the scope of the interim relief it seeks to allow the status quo to be maintained. This means that, pending the determination of the application, Massmart will continue to market food in an expanded area (said to be 30% of its leased area) as it is now doing. I must also modify the provisions of the interdict sought by the applicant, as it appears to have been overlooked that the applicant's consent to the letting of premises to Game had to have implied consent to the sale of Game's uncontested traditional offering of non-perishable foodstuffs.

[35] In so far as costs are concerned, it was suggested that the costs incurred in the argument over the question of interim relief should be made the subject of an order at this stage. Argument took a full day and was essentially over the question of whether any interim relief should be granted. However I take the view that the court finally determining this application will be better placed to make an appropriate order. A costs order made now in favour of the applicant might prove to have been manifestly unjust if it should turn

out, for instance, that the applicant has been at fault in not placing relevant facts before the court when seeking interim relief. I do not think that the parties would contest the proposition that each is quite capable of bearing its own costs for the time being. I must however mention that counsel for the first respondent suggested that if the claim for interim relief had been confined from the outset to the maintenance of the status quo, the first respondent would have chosen to abide the decision of the court. I accept that counsel may have advised the first respondent to take that course, but not that it would have been followed. The deponent to the first respondent's affidavit recorded that the first respondent is in fact obliged to oppose the application. Given the provisions of the contract between Massmart and the plaintiff, it is perhaps not surprising that such a statement would be made. I do not see how lessening the impact of the interim relief alters that position. Furthermore it would have been a simple enough matter, if the first respondent was not concerned about the consequences for it of doing so, for the first respondent to have indicated from the outset that it would not oppose the grant of the rule nisi and interim relief if the applicant would confine itself to an interim order maintaining the status quo. That would have implied a concession that the applicant had made out a prima facie case, even if open to some doubt - a concession which was not made by the first respondent in argument. Judgement on the first respondent's claim to costs must also be reserved.

I make the following order.

[1] A rule nisi is issued calling upon the respondents to show cause, if any, on the 4th of December 2014 at 9.30 am or as soon thereafter as the matter may be heard, why an order in the following terms should not be made.

> **[a] The first respondent is interdicted and restrained, during the period of the lease agreement annexure "C" to the founding affidavit, or any renewal thereof, from leasing, permitting or allowing any portion (other than the premises leased to the Applicant) of the shopping centre referred to in the said lease, or any extension or addition thereto, to be used for the conduct of a business which in whole or in part comprises:**

[i] a bakery;

[ii] a butchery;

[iii] a superette, supermarket, greengrocer, trading store, hypermarket, wholesaler, cash and carry or any other like business;

[iv] a department store with a food department other than Jet Mart;

[v] a liquor store, other than a TOPS liquor outlet;

[vi] a delicatessen.

All save for an area of 99.2 square metres and the activities therein which are identified in the email from Saloshini Gounder dated 17 February 2011, a copy of which appears at indexed page 401 of the papers; and save for non-perishable food items of the type traditionally sold by Game stores

("a restricted business").

[b] The Second, Third and Fourth Respondents are interdicted and restrained, during the said period, from conducting a restricted business in the said shopping centre.

[c] The respondents, jointly and severally, the one paying the other to be absolved, shall pay the Applicant's costs.

[2] The orders set out in paragraphs [1][a] and [b] hereof shall operate as interim relief pending the final determination of this application, subject to the qualification that no interim relief is granted in respect of the 30% area referred to in paragraph 18 at indexed page 193 of the papers, and the liquor store referred to in paragraph 16 at pages 182 – 183 of the papers.

[3] All costs to date are reserved.

DATE OF HEARING:	29 September 2014
DATE OF JUDGMENT:	5 November 2014
FOR THE APPELLANTS:	G D Harpur SC, instructed by GARLICK & BOUSFIELD INC.
FOR THE FIRST RESPONDENT:	RGL Stelzner SC, instructed by SMITH TABATA BUCHANAN BOYES, locally represented by JOHNSON & PARTNERS.
FOR THE SECOND, THIRD AND FOURTH RESONDENTS:	SA Cilliers SC and K Green instructed by CLIFFE DEKKER HOFMEYR INC, locally represented by DE JAGER CLEMENS & ASSOCIATES