CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 242/15

In the matter between:

MASSTORES (PTY) LIMITED Applicant

and

PICK N PAY RETAILERS (PTY) LIMITED Respondent

Neutral citation:	*Masstores (Pty) Limited v Pick n Pay Retailers (Pty) Limited* [2016] ZACC 42
Coram:	Nkabinde ADCJ, Froneman J, Jafta J, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J
Judgments:	Froneman J (majority): [1] to [54] Jafta J (minority): [55]-[106]
Heard on:	30 August 2016
Decided on:	25 November 2016
Summary:	delict — unlawful interference with contractual relations — wrongfulness — contractual exclusivity — lease agreement — interdict requirements — third party interference — category of delictual interference — Aquilian liability

ORDER

On appeal from the Supreme Court of Appeal (hearing an appeal from the High Court of South Africa, Gauteng Division, Pretoria) the following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds and the orders of the High Court and Supreme Court of Appeal are set aside.
3. The High Court order is substituted with the following:

   "The application is dismissed with costs, including the costs of two counsel."
4. The respondent is ordered to pay the costs in this Court and the Supreme Court of Appeal, including the costs of two counsel.

JUDGMENT

FRONEMAN J (Nkabinde ADCJ, Khampepe J, Madlanga J, Mbha AJ, Mhlantla J, Musi AJ and Zondo J concurring):

> "I am not the first nor will I be the last to lament upon the difficulty of determining the dividing line between lawful and unlawful interference with the trade of another. . . ."[1]

Introduction

[1] This is a case about alleged interference by the applicant (Masstores) with the trade of the respondent (Pick n Pay). The "trade" Pick n Pay seeks to protect is not the run of the mill competitive trade between equal participants in a free market. It is an

[1] Van Dijkhorst J in *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Gwhano (Pty) Ltd* 1981 (2) SA 173 (TPD); (*Atlas Organic)* at 186E.

exclusive contractual right to trade as a supermarket in a shopping complex, granted to Pick n Pay by its lessor (Hyprop) in a lease agreement. Hyprop is also the owner of the shopping complex.

[2] Pick n Pay does not seek enforcement of the contractual exclusivity right against Hyprop, but against Masstores, who is also a tenant in the complex. There is no contractual relationship between Pick n Pay and Masstores. Pick n Pay seeks relief against Masstores under the delict of "interference with contractual relations".

[3] A recognised form of that delict in our law is one where a third party induces a party to a contract to breach its contract with the complainant. But Pick n Pay does not rely on any inducement delict. The interference with the contract between Hyprop and Pick n Pay is said to lie in Masstores's breach of its *own* lease with Hyprop. This conduct, in turn, allegedly intentionally interfered with Pick n Pay's contractual exclusivity rights in terms of its lease with Hyprop. Whether our law recognises that kind of interference with contractual relations as actionable in delict lies at the heart of this dispute.

Background

[4] Hyprop entered into separate lease agreements with Masstores (Masstores lease) and Pick n Pay (Pick n Pay lease). The Masstores lease was entered into on 20 February 2006, before Pick n Pay appeared on the scene. Masstores undertook not to trade as a general food supermarket in the shopping complex except where there was no general food supermarket trading in the shopping centre for 90 consecutive days.[2] At the time

[2] Clause 12 of the lease agreement, which contained a restriction on Masstores's use of the property, provided that:

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

the Masstores lease was concluded it was aware of another anchor tenant (Shoprite) having contractual exclusivity rights to trade as a supermarket at the shopping complex. Under the Pick n Pay lease, concluded on 11 May 2006, Hyprop undertook not to permit hypermarkets or supermarkets to be conducted at its shopping centre, save for existing ones.[3] Masstores started trading as a general supermarket at the shopping complex in 2013.[4] It only became aware of Pick n Pay's contractual exclusivity rights in May 2014.

[5] Pick n Pay sought and obtained a final interdict in the High Court[5] that prevented Masstores from operating a general food supermarket at the shopping centre, on the basis that doing so interfered with the contractual relations between Pick n Pay and Hyprop under the Pick n Pay lease. It originally sought interdictory relief against Hyprop in the alternative, but that was later abandoned. Hyprop is no longer a party to the proceedings.

[6] In view of the differences in approach between this judgment and that of Jafta J (second judgment), which I have had the privilege of reading, it is necessary to fully set out the basis of Pick n Pay's claim for relief against Masstores:

> "61. . . . Masstores has been fully aware of the provisions of the lease agreement between Hyprop and Pick n Pay, including the restraints contained therein,

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

[3] Clause 10 of the agreement (the exclusivity clause) contained a number of restrictions on the letting of the premises. Notably, the lessor undertook towards Pick n Pay not to "permit" the following business to be conducted in the centre:

> "10.1.1: a hypermarket or supermarket;
>
> 10.1.2: a store with either a single or several food departments, the aggregate square meterage of which exceeds 100 (one hundred) square metres; or
>
> 10.1.3: a cafe or delicatessen which sells fresh fish and meat; or
>
> 10.1.4: a grocery, fresh fish shop, butchery, bakery or fruit and vegetable shop."

[4] Masstores disputed that it traded as a general supermarket, but the High Court found that it did and the Supreme Court of Appeal confirmed that finding on appeal. There is no ground for this Court to interfere with the factual finding.

[5] *Pick n Pay Retailers (Pty) Ltd v Masstores (Pty) Ltd* [2014] ZAGPPHC 769.

since at least 9 May 2014, when Hyprop sent a letter of demand [to Masstores] . . . calling [for cessation].

. . .

63. Capegate's [Masstores's] unlawful conduct in continuing to trade as a supermarket . . . in the face of these demands, and indeed in flagrant disregard of them, is plainly intentional conduct designed to undermine and thus interfere with Pick n Pay's contractual rights in respect of its lease agreement with Hyprop.

64. Masstores continue to show a flagrant disregard for Pick n Pay's contractual rights.

65. Masstores in full knowledge that its conduct in operating a supermarket . . . constitutes an unlawful interference with the contractual relations which exist between Hyprop and Pick n Pay, is nevertheless intentionally continuing to operate as such notwithstanding a clear and unequivocal indication from Pick n Pay's attorneys and from Hyprop's attorneys that it is not entitled to do so. It is on this basis which Pick n Pay seeks final interdictory relief against Masstores."

In its answer Masstores denied that it owed Pick n Pay any duty and thus denied unlawfulness (wrongfulness) on its part. Pick n Pay's reply does not take the matter any further. In its original claim against Hyprop, Pick n Pay explicitly relied on Hyprop's alleged breach of contract of its lease with Hyprop, in contrast to its case against Masstores.

[7] Masstores appealed to the Supreme Court of Appeal. That Court dismissed the appeal and confirmed the High Court order.[6] Masstores now seeks leave to appeal against that order.

[6] *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* 2015 [ZASCA] 164; 2016 (2) SA 586 (SCA) (*Masstores SCA*).

Final interdict requirements

[8] The remedy sought and obtained by Pick n Pay was a final interdict and not a claim for damages. The requirements for a final interdict are usually stated as (a) a clear right; (b) an injury actually committed or reasonably apprehended; and (c) the lack of an adequate alternative remedy.[7] In order to succeed in obtaining the remedy of an interdict against a third party like Masstores, Pick n Pay thus had to show: (a) that the contractual right it obtained from Hyprop protects an interest that is also enforceable against third parties outside the contract (part of the "clear right" enquiry); (b) that the third party, Masstores, unlawfully infringed or threatened to infringe that right (part of the "injury actually committed or reasonably apprehended" enquiry); and (c) that there was no adequate alternative remedy.

[9] The second judgment approaches these requirements differently. It proceeds from the premise that Pick n Pay's papers do not say whether its cause of action was grounded in delict or contract, but that it was likely grounded in contract.[8] It then explores whether a claim based on contract has been proved[9] and comes to the conclusion that it has.[10] It states that "[t]he proposition that a contract may not be enforced against a person who was not a party to it finds no application here. This is because the relief sought is an interdict and not specific performance or enforcement of the contract. There is a clear difference between the two remedies."[11] On the basis that the facts show that Masstores was operating a food supermarket, it finds that Masstores infringed Pick n Pay's exclusive right and that Pick n Pay has established the requirements for an interdict.[12]

[7] *Setlogelo v Setlogelo* 1914 AD 221 at 227.

[8] Second judgment at [70].

[9] Id at [71].

[10] Id at [95].

[11] Id at [86].

[12] Id at [106].

[10] I fundamentally disagree with this approach. There is no contract between Pick n Pay and Masstores. So the alleged unlawful interference by Masstores cannot lie in a breach of contract with Pick n Pay. The statement that "[t]he proposition that a contract may not be enforced against a person who was not a party to it finds no application here", is a startling one.[13] There is a fundamental distinction in our law between rights *in rem*, protected against all the world, and rights *in personam* that carry protection only between immediate parties. Only one of the cases referred to in the second judgment, *Godongwana*, contradicts this distinction.[14] It was not followed in *Motloung v Rokhoaena*[15] and *Reddy v Decro Investments CC*,[16] and I consider it to have been wrongly decided. I know of no basis in our law, other than delict, that could found unlawfulness in Masstores's alleged interference in Pick n Pay's contractual relations with Hyprop. That is the basis upon which the case has been conducted by all throughout. I fail to discern any ground in the second judgment upon which the alleged interference with Pick n Pay's rights can be said to be unlawful. And I do not know how an interdict can be granted where there is no actual or threatened unlawfulness in the infringement of a right.

Legal issues

[11] Masstores contends that the Supreme Court of Appeal misinterpreted this Court's judgment in *Country Cloud*,[17] and in consequence gave the wrong decision. Pick n Pay argues that its claim falls squarely within the established deprivation category of interference cases recognised in *Country Cloud*, and is therefore a case where wrongfulness does not need to be established positively but can be presumed. Even without that initial presumption it contends that wrongfulness has nevertheless been established.

[13] Id at [86].

[14] *Godongwana v Mpisana* 1982 (4) SA 814 (Tk).

[15] 1991 (1) SA 708 (W).

[16] 2004 (1) SA 618 (D).

[17] *Country Cloud Trading CC v MEC, Department of Infrastructure Development, Gauteng* [2014] ZACC 28; 2015 (1) SA 1 (CC); 2014 (12) BCLR 1397 (CC) (*Country Cloud*).

[12] The issues that arise from this are:

(a) Whether Pick n Pay's claim falls within the alleged recognition in *Country Cloud* of a second category of delictual interference with contractual relations (narrow delictual enquiry).

(b) If it does not, a further issue may arise, namely whether Masstores's conduct, whilst not falling into the established categories of the delict of unlawful interference with contractual relations, nevertheless was actionable on an extended or analogous application of the principles of the delict of unlawful competition (extended unlawful competition enquiry).

Leave to appeal

[13] This Court has jurisdiction to deal with these issues. They involve the assessment of wrongfulness in delict. This assessment raises matters of policy, infused by constitutional values. This Court has on a number of occasions held that this is sufficient to found constitutional jurisdiction.[18]

[14] The delict that takes the form of interference with contractual relations is a relatively undeveloped aspect of our law. Its application and development is of broad concern not only for the parties but also for commerce in general. It is in the interests of justice to obtain further clarity on this aspect of our law. In addition, as I will attempt to show, there are reasonable prospects of success. Leave to appeal should thus be granted.

[18] *Loureiro v Imvula Quality Protection (Pty) Ltd* [2014] ZACC 4; 2014 (3) SA 394 (CC); 2014 (5) BCLR 511 (CC) (*Loureiro*) at paras 34-5; *Steenkamp NO v Provincial Tender Board* [2006] ZACC 16; 2007 (3) SA 121 (CC); 2007 (3) BCLR 300 (CC) at para 19; *Phumelela Gaming and Leisure Limited v Gründlingh* [2006] ZACC 6; 2007 SA (6) 350 (CC); 2006 (8) BCLR 883 (CC) (*Phumelela*) at para 23; *K v Minister of Safety and Security* [2005] ZACC 8; 2005 (6) SA 419 (CC); 2005 (9) BCLR 835 (CC) at para 19.

Merits

Narrow delictual enquiry

[15] In its judgment the Supreme Court of Appeal sought to draw three propositions from this Court's judgment in *Country Cloud*.

[16] The first was that this Court's reference in *Country Cloud* to the "usurpation of rights" that occurred in *Lanco*[19] could be equated to the examples of "deprivation of interests" in cases involving the delict of interference with contractual relations given in the Supreme Court of Appeal's own judgment in *Country Cloud SCA*.[20] The Supreme Court of Appeal likened Pick n Pay's claim to one for the intentional deprivation of a contractual benefit, a cause of action which had been confirmed in those terms in *Country Cloud SCA*,[21] and then stated that this was in turn confirmed by this Court in *Country Cloud*, "where the Constitutional Court referred to it is 'a usurpation of [a] right'."[22]

[17] This is an overstatement of what Khampepe J actually stated in *Country Cloud*. Referring to non-inducement cases, she stated:[23]

> "Liability has also been established in cases where A refuses to vacate premises owned by B, which interferes with the lease agreement between B and her tenant, C, causing C loss. Both *Dantex* and *Lanco* involved these circumstances. While the plaintiff's claim in *Dantex* failed because fault was not alleged, the plaintiff in *Lanco* succeeded. But that case is different from Country Cloud's. The act of 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,*

[19] *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D) (*Lanco*).

[20] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* [2013] ZASCA 161; 2014 (2) SA 214 (SCA) (*Country Cloud SCA*).

[21] *Masstores SCA* above n 6 at para 22: "Turning from the general to the specific – in the present instance the claim is based on the intentional deprivation of a benefit a contracting party would otherwise have obtained from performance under a contract. Such a cause of action has again been confirmed recently in [*Country Cloud SCA*]."

[22] Id at para 22: "This was confirmed in *Country Cloud Trading CC v MEC, Department of Infrastructure Development* where the Constitutional Court referred to it as a 'usurpation of [a] right'."

[23] *Country Cloud* above n 17 at para 31.

> *appropriating it for itself.* It also did so in a manifestly 'dishonest and mischievous' way. The factual matrix in this case – where the defendant's supposed act of interference is the cancellation of an entirely different contract – is thus distinguishable from that which confronted the court in *Lanco*."

[18] In *Country Cloud* this Court did not equate the "usurpation of rights" with a "deprivation of interest". It did not use the latter phrase, but more importantly it characterised the *Lanco* decision as one that involved both the loss of the right to use the premises *and* the taking over of that right,[24] not as similar or alternative losses. Whatever the merits of a pure "deprivation" case may be, this Court's decision in *Country Cloud* cannot serve as authority that it is a case where wrongfulness does not need to be established positively but can be presumed.

[19] The second proposition was that this Court in *Country Cloud* made a twofold classification of delictual interference with contractual relations cases, as consisting of one category where only inducement is required and others where a breach of a duty or infringement of a subjective right is involved.[25] This could possibly be read as indicating that in "inducement" delicts the breach of a legal duty or the infringement of a subjective right does not form part of the wrongfulness inquiry in determining whether a delictual action lies. That would be unfortunate and wrong.

[20] This Court did not say so in *Country Cloud*. It referred to the "inducement" cases as a possible limited instance where inducement "may arguably be *prima facie* wrongful",[26] but earlier referred with approval to the statement in *Loureiro* that the

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[24] Id: "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."

[25] *Masstores SCA* above n 6 at para 22:

> "But by that the court did not seek to restrict the cause of action to inducement cases only. On the contrary, as stated, the court expressly recognised those cases where a 'right is usurped', or what this court referred to as the 'deprivation of a benefit'. There are therefore two types of delictual action in interference cases, namely those where inducement or enticement feature and others where there is a breach of a legal duty or the infringement of a subjective right. The present matter falls into the latter category."

[26] *Country Cloud* above n 17 at para 30.

wrongfulness enquiry is "based on the duty not to cause harm – indeed to respect rights – and questions the reasonableness of imposing liability".[27]

[21] Ours is not a law of separate and distinct torts; it is one where all forms of delict must conform to the general requirements of Aquilian liability. This also has been authoritatively recognised in relation to all the various forms of unlawful competition in our law.[28] As we will see, the right at stake in unlawful competition cases is usually that of goodwill,[29] and "inducement" cases are no exception. Inducement without harm to or infringement of the right to goodwill, will not usually be wrongful.[30]

[22] The third proposition was that because *Country Cloud* recognised *dolus eventualis* as an appropriate form of fault in interference cases, the presence of that kind of intention here would be sufficient to constitute an actionable delict on the part of Masstores.[31]

[23] It is true that in *Country Cloud* this Court recognised *dolus eventualis* as sufficient in relation to the element of fault in a delictual claim. But the Court went further and dealt with the importance of assessing the intensity of fault in the wrongfulness enquiry, as opposed to the fault enquiry:

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[27] Id at para 21 and *Loureiro* above n 18 at para 53.

[28] *Phumelela* above n 18 at para 31 and cases referred to in Loubser "Principles and Policy in Unlawful Competition: An Aquilian Mask?" (2000) 40 *Acta Juridica* 167 at fn 22.

[29] Neethling *Van Heerden-Neethling Unlawful Competition* 2 ed (LexisNexis, Durban 2008) at 106.

[30] Id at 129.

[31] *Masstores SCA* above n 6 at para 23:

> "In *Country Cloud* the Constitutional Court agreed with the findings of this court that *dolus eventualis* would suffice as far as intent is concerned in a claim such as the present one. It held that subjective foreseeability that interference would cause loss, coupled with a reconciling with the foreseen consequences, is sufficient to sustain such a claim. In the present instance Masstores was asked in writing on 9 May 2014 by Hyprop to desist from conducting a supermarket at Game, Capegate. Masstores failed to heed this and other demands issued by Hyprop and Pick n Pay. Masstores'[s] conduct clearly constitutes direct intent or, at the very least, *dolus eventualis*. *The requirements of the delictual action had therefore been proved by Pick n Pay, as the court a quo correctly found*."

> "The relevance of the nature of fault and fault-related considerations in the wrongfulness enquiry has been recognised on a number of occasions by the Supreme Court of Appeal. Summing up this trend, the Supreme Court of Appeal in *Roux* held:
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> > 'Amongst the considerations that may influence the policy decision whether or not to impose liability, is the nature of the fault that is proved, as well as other fault-related factors. Accordingly, while intentional conduct may sometimes attract legal liability, the same conduct may not be regarded as wrongful if the degree of fault established was no more than negligence. In other factual situations conduct may not even be regarded as wrongful when it was intentional, but only when it was accompanied by a motive to cause harm or by a particular awareness of the risk of serious harm that may follow.'
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> And this approach makes sense. As is noted by the Supreme Court of Appeal in the present case, the element of fault is satisfied by either intention or negligence. The form of fault is generally irrelevant in the fault enquiry; proof of either form suffices. It can, however, be given weight under the wrongfulness enquiry. This is not to conflate the elements of fault and wrongfulness, or to suggest that the establishment of fault is necessarily a prerequisite for the establishment of wrongfulness. Fault, like all other delictual elements, must still be separately established. It is merely recognition of the fact that where fault rises to the level of intention, and where other fault-related elements (such as motive to cause harm) are present, this may be relevant to establishing wrongfulness."[32]

[24] So, in summary, this Court's judgment in *Country Cloud* is no authority for the proposition that the deprivation of contractual rights in delictual claims for interference with contractual relations is *prima facie* unlawful. Nor did it lay down that in inducement cases the wrongfulness enquiry need not be concerned with the duty not to cause harm or the infringement of rights. And it confirmed that the degree or intensity of fault may indeed play an important role in the wrongfulness enquiry in these kinds of claims.

[32] *Country Cloud* above n 17 at paras 39-40.

[25] The limits of this Court's judgment in *Country Cloud*, as explained, effectively disposes of Pick n Pay's contention that *prima facie* wrongfulness on the part of Masstores has been established. A right can be deprived without usurping it. Holding-over cases involve both, but the present case does not. Masstores's trading as a general supermarket does not deprive Pick n Pay of its entitlement to continue trading as a supermarket in the shopping centre. There may have been a deprivation of part of Pick n Pay's trading interest, namely its exclusivity, but Masstores has not "usurped" that exclusivity. Masstores did not usurp any exclusive right of Pick n Pay and appropriate it as its own. It claims no entitlement to exclusivity. Nor did the Supreme Court of Appeal enquire whether Masstores's degree or intensity of fault played any role in the wrongfulness enquiry.

[26] Masstores submitted that this finding should be the end of the matter, because Pick n Pay nailed its colours to a narrow mast. In the papers it did not make out a case for a finding of wrongfulness beyond the confines of a legally presumed *prima facie* wrongfulness. It had to establish wrongfulness[33] and should not be allowed to do it now for the first time on a more general basis. This characterisation of Pick n Pay's pleaded case is not, however, entirely accurate. As we have seen, the case pleaded was that of "intentional conduct designed to undermine and thus interfere with Pick n Pay's contractual rights in respect of its lease agreement with Hyprop".[34] This is an assertion that our law recognises a wider form of delictual interference with contractual relations and that the facts of this case fall within that wider ambit.[35]

[33] Id at para 23.

[34] *Masstores SCA* above n 6 at para 6.

[35] In motion proceedings the affidavits serve as pleadings of both fact and law. *Minister of Land Affairs and Agriculture and Others v D & F Wevell Trust* [2007] ZASCA 153; 2008 (2) SA 184 (SCA) at para 43. Also see Peté et al *Civil Procedure, A Practical Guide* 2 ed (Oxford University Press, Cape Town 2011) at 122-4.

Extended delict of unlawful competition

[27] I then turn to examine whether our law recognises an extended form of the delict of unlawful competition under the common law. This enquiry should not be confused with the statutory regulation of unlawful competition under the Competition Act.[36]

[28] Recognition that the *actio legis Aquiliae* underlies a claim for patrimonial loss caused by unlawful competition has a venerable ancestry in our law. It was so recognised more than ninety years ago in *Matthews v Young*,[37] where it was stated:

> "In the absence of special legal restriction a person is without doubt entitled to the free exercise of his trade, profession or calling. . . . But he cannot claim an absolute right to do so without interference from another. Competition often brings about interference in one way or another about which rivals cannot legitimately complain. But the competition and indeed all activity must itself remain within lawful bounds. All a person can, therefore, claim is the right to exercise his calling without unlawful interference from others. Such an interference would constitute an *injuria* for which an action under the *lex Aquilia* lies if it has directly resulted in loss."[38]

[29] Much development in our law has taken place since then, but for present purposes we need only go to this Court's own jurisprudence that brings these common law principles in line with our constitutional framework. In *Phumelela* Langa CJ stated:

> "The delict of unlawful competition is based on the Aquilian action and, in order to succeed, an applicant must prove wrongfulness. This is always determined on a case by case basis and follows a process of weighing up relevant factors, in terms of the *boni mores* now to be understood in terms of the values of the Constitution.
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> Any form of competition will pose a threat to a rival business. However, not all competition or interference with property interests will constitute unlawful competition. It is accordingly accepted that it is only when the competition is wrongful that it becomes actionable. The role of the common law in the field of unlawful

[36] 89 of 1998.

[37] 1922 AD 492.

[38] Id at 507.

> competition is therefore to determine the limits of lawful competition. This determination, which takes account of many factors, necessitates a process of weighing up interests that may in the circumstances be in conflict. Fundamental to a determination of whether competition is unlawful is the *boni mores* or reasonableness criterion. This is a test for wrongfulness which has evolved over the years.
>
> The Bill of Rights protects the right to property, and also promotes and protects other freedoms, notably in this case, the right to freedom of trade. The consequence of the right to freedom of trade is competition.
>
> The question is whether, according to the legal convictions of the community, the competition or the infringement on the goodwill is reasonable or fair when seen through the prism of the spirit, purport and objects of the Bill of Rights. Several factors are relevant and must be taken into account and evaluated. These factors include the honesty and fairness of the conduct involved, the morals of the trade sector involved, the protection that positive law already affords, the importance of competition in our economic system, the question whether the parties are competitors, conventions with other countries and the motive of the actor."[39]
>
> "In its judgment, the Supreme Court of Appeal noted that goodwill is a valuable asset in the sphere of competition. The Bill of Rights does not expressly promote competition principles, but the right to freedom of trade, enshrined in section 22 of the Constitution is, in my view, consistent with a competitive regime in matters of trade and the recognition of the protection of competition as being in the public welfare."[40]

[30] The development of the law of unlawful competition must thus be accomplished in terms of the general principles of Aquilian liability. In general this involves conduct in the form of an unlawful and culpable act or omission that causes damage in the form of economic loss to another.[41] It is not the conduct itself that establishes unlawfulness, but its harmful result.[42] In the case of an interdict, as here, actual loss need not necessarily be shown, only potential impending or continuing harm.[43] There is no

[39] *Phumelela* above n 18 at para 31.

[40] Id at para 36.

[41] Neethling et al *Law of Delict* 7 ed (LexisNexis, Durban 2015) 305-13; and Loubser n 28 at 173.

[42] *H v Fetal Assessment Centre* [2015] ZACC 34; 2015 (2) SA 193 (CC); 2015 BCLR 127 (CC) at paras 53-5.

[43] See [10] above. Also see Neethling et al *Law of Delict* above n 41 at 269.

general right not to be caused pure economic loss,[44] but in unlawful competition cases, as this one is, our courts have recognised that the loss may lie in the infringement of a right to goodwill or in the legal duty to respect the right to goodwill.[45]

[31] The focus in this case is on the element of wrongfulness, but this should not obscure the fact that in other cases that may shift to the other elements necessary to establish Aquilian liability.[46]

[32] The right to goodwill is a convenient starting point. Without the existence of the right there can be no breach of the duty to respect it and no infringement of the right. In order to consider the necessity for the development of the delict of unlawful competition it will be helpful to investigate whether an analogous extension of wrongfulness may be drawn from existing precedent involving the protection of the right to goodwill.[47]

[33] The protection of the general right to goodwill is recognised by our law, but it is not this general right that Pick n Pay seeks to protect, it is its *exclusive* right to trade in terms of its lease with Hyprop, that it seeks protection for. Our law does not usually recognise this kind of exclusive right as worthy of general protection. The reason lies in the fact that the underlying purpose of the law of unlawful competition is to protect free competition, not to undermine it by making it less free.[48] Our courts have often acknowledged the need for protection of free competition as an important policy consideration when assessing the unlawfulness of competitive conduct by confirming

[44] *Country Cloud* above n 17 at para 22.

[45] *Phumelela* above n 18 at para 36.

[46] Compare *Country Cloud* above n 17 at para 25.

[47] See generally Price "The Contract Delict Interface in the Constitutional Court" (2014) 25 *Stellenbosch Law Review* 501-10.

[48] See *Workforce Group (Pty) Ltd v Bezuidenhout* [2008] ZAFSHC 8; *Payen Components SA Ltd v Boric CC* 1995 (4) SA 441 (A) at 453B-C; *Union Wine Ltd v Edward Snell & Co Ltd* 1990 (2) SA 189 (C) at 203D-E; *Bress Designs (Pty) Ltd v GY Lounge Suite Manufacturers (Pty) Ltd* 1991 (2) SA 455 (W) at 473H; *Schultz v Butt* [1986] ZASCA 47; [1986] 2 All SA 403 (A) 679E; *Lorimar Productions Inc v Sterling Clothing Manufacturers (Pty) Ltd, Lorimar Productions Inc v OK Hyperama Ltd, Lorimar Productions Inc v Dallas Restaurant* 1981 (3) SA 1129 (T) at 1154G and 1155A-B.

the need for free and active competition or by taking into account that by prohibiting competition an unlimited monopoly will be bestowed upon the complainant.[49]

[34] In *Taylor & Horne*,[50] the appellant sought to interdict a competitor who was distributing a product for which the appellant had earlier obtained (from a foreign manufacturer) the exclusive contractual right to market and distribute in South Africa. In the course of dismissing the appeal Van Heerden JA stated:

> "It has often been said that competition is the life blood of commerce. It is the availability of the same, or similar, products from more than one source that results in the public paying a reasonable price therefor. Hence competition as such cannot be unlawful, no matter to what extent it injures the custom built up by a trader who first marketed a particular product or first ventured into a particular sphere of commerce."[51]
>
> "In the result it seems clear that the appellant must stand or fall by the contention that because of the existence of the exclusive supply agreement between it and ESPE [the foreign manufacturer], nobody may lawfully market Impregum in the Republic in competition with the appellant. *Acceptance of this contention would certainly lead to startling consequences. It would mean that for as long as the sole agency endures the appellant would enjoy a monopoly, akin to that derived from a patent, in regard to the commercial distribution of Impregum in this country. It would also mean that the agreement that created purely contractual rights between the parties thereto would in effect bind would-be competitors no matter from what source or however honestly they obtained supplies from Impregum. A further result would be to impose an unwarranted restriction on the right of ownership of a person who legitimately acquired supplies of Impregum.*"[52]

[35] Restraint of trade cases exhibit the same tendency. It is generally accepted that a restraint "will be considered to be unreasonable, and thus contrary to public policy,

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[49] *Premier Hangers CC v Polyoak (Pty) Ltd* [1996] ZASCA 119; 1997 (1) SA 416 (SCA); [1997] 1 All SA 134 (A) at 423A-424F.

[50] *Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 (1) SA 412 (A) (*Taylor & Horne*).

[51] Id at 421J-422B.

[52] Id at 422H-J.

and therefore unenforceable, if it does not protect some legally recognisable interest of the employer, but merely seeks to exclude or eliminate competition".[53]

[36] As a general proposition then, there is no legal duty on third parties not to infringe contractually derived exclusive rights to trade. Do the particular circumstances of this case justify a different finding?

[37] Pick n Pay sought that justification by an application of the "deprivation of contractual rights" principle it argued was established in *Lanco* and *Country Cloud*. I have already stated that I do not agree that these cases established any general principle to that effect. There is also no compelling reason to rely on these cases to establish an analogous general "deprivation of contractual rights principle" as the underlying basis for contractual interference cases based on unlawful competition. *Lanco* was not an unlawful competition case. *Country Cloud* did not, in any event, establish any new extension of the law of delict. *Lanco* served to protect the underlying right of possession to property and might well have been differently decided if a contractual remedy against the lessor was available. The lesson to be learnt from these cases is not that the mere interference or deprivation of a contractual right by a third party is sufficient to establish the wrongfulness of interference, but that the nature of the interest protected by the contractual right is of crucial importance. If the nature of the interest is of the kind that commands protection against the whole world, and not only the protection afforded to the contracting parties themselves by the provisions of the contract, interference by third parties is more likely to be found wrongful than otherwise.

[38] It is a relevant and material factor in the wrongfulness enquiry that the interest Pick n Pay seeks to protect is an exclusive one – in effect one to restrict competition – in the first instance enforceable against the contracting party who agreed to it, Hyprop. Why should Pick n Pay not enforce the right at its origin, in contract? Or at least be

[53] *Automotive Tooling Systems (Pty) Ltd v Wilkens* [2006] ZASCA 167; [2007] 4 All SA 1073 (SCA); 2007 (2) SA 271 (SCA) at para 8. Also see Neethling *Unlawful Competition*, above n 29 at 20 at fn 46; and Saner *Agreements in Restraint of Trade in South African Law* (Butterworths, Durban 2005) at 7-4 and 7-5.

required to show that Hyprop breached the contract and that its breach could not be remedied by using ordinary contractual remedies?

[39] Pick n Pay contended that in other contractual interference cases priority for claiming in contract first, or showing actual breach and no remedy in contract, is not required.

[40] Reference was made to restraint of trade cases where not only the contractually bound employee, but also the new employer, may be interdicted, without complying with these requirements. Yet the analogy is not apt. Those cases establish the principle that reasonable restraints are binding on the contracting parties themselves and that third parties are only secondarily liable as accessories to the contractual breach.[54] And, as seen above, if the contractual restraint is a bare restriction on competition, not linked to protectable interests like goodwill, it will not be enforced against either the contacting party or the third party who assisted or induced the breach. Here the enforceability of the exclusivity clause in the lease between Pick n Pay cannot be challenged by Masstores, because it is not a party to that contract.

[41] In other "inducement to breach contract" cases, there is also no requirement that the breach must in fact have happened, or that the contractual remedies for the breach must have been exhausted before relief is granted against the third party. The explanation, however, lies in the fact that in those cases there is a breach of a generally recognised right – to goodwill in unlawful competition cases[55] and to other aspects of property in non-competition cases[56] − which is sufficient to establish wrongfulness, while that is not the case in contractually created exclusive trade cases.

[54] *Wespoint Trading 91 CC t/a SkinPhd v Annelize Carolynn Smit* [2016] ZALCJHB 251; *Basson v Chilwan* [1993] ZASCA 61; 1993 (3) SA 742 (A); *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] ZASCA 116; 1984 (4) SA 874 (A).

[55] Neethling *Unlawful Competition* above n 29 at 106.

[56] Compare *Dantex Investment Holdings (Pty) Ltd v Breener NO* [1988] ZASCA 122; 1989 (1) SA 390 (A) (*Dantex*) and *Lanco* above n 19.

[42] This is not a case where the issue of a concurrence of actions against the same party is at stake. But similar policy reasons for restricting Pick n Pay's claim to the private source of its exclusive right to trade exist. By excluding Hyprop from the dispute, Masstores is excluded from relying on any deficiencies that may exist in relation to the contract that is the origin of Pick n Pay's right to trade exclusively. What policy or other reasons justify holding a third party liable for infringement of a right that arises solely from contract, if that right cannot be enforced contractually? In *Country Cloud* it was stated that "the law should hesitate before scrubbing out the lines [contracting parties] have laid down by superimposing delictual liability. That could subvert their autonomous dealings".[57] In the case of third parties the danger is that the effect of "their autonomous dealings" is extended to others who have no autonomous say at all. And to make matters worse, the alleged delictual duties of the third party may then be different and more onerous from the allocation of duties agreed between the contracting parties themselves.

[43] These considerations might also justify another basis for rejecting Pick n Pay's claim for an interdict. The third requirement for an interdict is that no alternative remedy be available. Pick n Pay has an alternative remedy in contract available against Hyprop.

[44] In *Country Cloud* it was stated that where a party has taken, or could have taken, steps to protect itself from or to avoid loss suffered, this is an important factor counting against a finding of wrongfulness in pure economic loss cases.[58] If Pick n Pay sought protection of its exclusive right against the whole world, and not only from its opposing contracting party, it could have negotiated for a real right, like a negative personal servitude, not merely a personal right. This would have given notice to all later lessees that their usage of their leased premises is limited.

[57] *Country Cloud* above n 17 at para 65.

[58] Id at paras 51-7.

[45] Pick n Pay also sought assistance in the case of *Howorth*,[59] a matter where a farmer was prohibited from selling goods on the farm, where the exclusive right to do so had been granted by the Municipality to his neighbour. The judgment is rather sparse, but it seems to have been a material factor that the alleged interference with the right involved trespass of the neighbour's property.[60] In addition, the original source of the exclusive right was a grant from the Municipality in terms of its public powers.[61] Publicly sourced rights to exclusive trade involve different considerations from purely privately negotiated rights.[62] Neither trespass – an invasion of property – nor a statutorily-sourced kind of monopoly is at stake here.

[46] Our law has often sought guidance in English law in cases involving some kind of commercial interference in the trade of another, because "the analysis of the problem to be found in English cases is often illuminating and can be of assistance to solving the problem of how to apply the principles of our own law to the facts of a particular case".[63] This must of course be done both with the general caution expressed by this Court of comparable context and text,[64] and the particular caution that here those cases must be reconciled with Aquilian principles.[65] In English law two distinct torts have been recognised in this field, namely the "procurement of breach of contract"[66] and "unlawful interference with economic interests".[67] The first probably inspired our own inducement form of delict, but it is the latter that is relevant in deciding whether extension for another form is called for in our law. In *OBG Ltd* the House of Lords in

[59] *Howorth v Fox & Hart* (1906) 20 EDC 276.

[60] Id at 279.

[61] Id at 276.

[62] See Unterhalter "The abuse of dominance" in Brassey (ed) *Competition Law* (Juta, Cape Town 2011) 194 for a discussion of statutory monopolies, licences, permissions, patent rights and trademarks that function within a statutory framework of exclusivity.

[63] *Weber-Stephen Products Co v Alrite Engineering (Pty) Ltd* 1990 (2) SA 718 (T) at 734-5.

[64] See, for example, *S v Makwanyane* [1995] ZACC 3; 1995 (3) SA 391 (CC); 1995 (6) BCLR 665 (CC) at para 39; *H* above n 42 at paras 28-31.

[65] *Weber-Stephen Products Co* above n 63 at 734.

[66] Since the case of *Lumley v Gye* [1853] 2 E&B 216.

[67] *OBG Ltd & Others v Allan & Others* [2007] 4 All ER 545 (HL) (*OBG Ltd*).

effect held that the means used by the third party to prevent performance must be independent of the normal means used in contractual interference cases.[68] Transposed here, it would mean that something more than Masstores's breach of its own lease with Hyprop is required: the unlawfulness of that breach *vis-a-vis* Hyprop does not automatically translate into delictual wrongfulness as against Pick n Pay.

[47] So analogous reasoning from existing authority does not yet make a compelling case for extension. That may be an indication that none should take place, or perhaps that it should rather be sought in general principles.

[48] *Phumelela* is authority for the proposition that the *boni mores* or reasonableness criterion must be used to establish wrongfulness in cases not covered by existing precedent. That test has recently been refined by decisions in this Court and the Supreme Court of Appeal in matters that did not involve the delict of unlawful competition.[69] The refinement probably lies in the recognition that, ultimately, the wrongfulness enquiry "questions the reasonableness of imposing liability".[70] Recognising that reality, however, does not necessarily assist in determining when it is reasonable to do so.

[49] In unlawful competition cases it has been suggested that the *boni mores* or reasonableness criterion on its own is often too vague to provide a rational yardstick for the delimitation of the right to goodwill in the wrongfulness enquiry.[71] Van Heerden and Neethling[72] suggest that the particular concretisation of the *boni mores* test may be found in what they term the "competition principle":

[68] Id at paras 8, 40, 278 and 320.

[69] *Country Cloud* above n 17 at paras 20-1.

[70] Id quoting *Loureiro* above n 18.

[71] Neethling *Unlawful Competition* above n 29 at 127.

[72] Id at 128-133.

> "The competition principle is therefore that the competitor who delivers the best or fairest (most reasonable) performance, must achieve victory, while the one rendering the weakest (worst) performance, must suffer defeat."[73]
>
> "Victory over a rival may be obtained in two ways: either by offering the same performance at a lower price, or by bettering performance at the same price."[74]

[50] Van Heerden and Neethling recognise that this principle can be properly applied only where the activities of the competitors are comparable, or expressed differently, where the playing fields are even.[75] Where the playing fields are even, or in their terms, where there is "performance (merit) competition", competitive conduct by a rival will in principle be lawful.[76]

[51] Applying this "competition principle" to the facts of this case, the same conclusion is reached, namely that as a general proposition there is no legal duty on third parties not to infringe contractually derived exclusive rights to trade. The underlying rationale too, is the same: exclusive trading rights make the competitive field uneven.

[52] Is there nevertheless room for a delictual claim to be found elsewhere? Yes, possibly. The justification for the claim would then not, however, lie in the direct infringement of Pick n Pay's contractual exclusive trade rights, or a breach of the duty to respect them, but in the possibly unreasonable manner Masstores used or exercised its own rights. Liability in these kinds of circumstances has been variously described as being grounded in malice,[77] or as an abuse of rights,[78] or where the level of intention and other fault-related elements such as "motive to cause" are highly relevant in

[73] Id at 129.

[74] Id at 129 at fn 83.

[75] Id at 132-3.

[76] Id at 132.

[77] *Atlas Organic* above n 1 at 179G-H.

[78] Neethling *Unlawful Competition* above n 29 at 134-9.

establishing wrongfulness.[79] But to extend Pick n Pay's pleaded case to this kind of situation would be a step too far. Despite the challenge to the alleged unlawfulness of its conduct by Masstores, Pick n Pay did not seek to widen it. It is an issue that needs to wait for another day.

[53] In the result the appeal must succeed with costs, including the costs of two counsel.

Order

[54] The following order is made:

1. Leave to appeal is granted.
2. The appeal succeeds and the orders of the High Court and Supreme Court of Appeal are set aside.
3. The High Court order is substituted with the following:
   "The application is dismissed with costs, including the costs of two counsel."
4. The respondent is ordered to pay the costs in this Court and the Supreme Court of Appeal, including the costs of two counsel.

JAFTA J:

[55] I have had the benefit of reading the judgment prepared by my colleague Froneman J (first judgment). Regrettably I do not support the order proposed in it.

[56] In the first place I am not persuaded that leave to appeal should be granted. The case does not raise any constitutional issue. On the contrary it involves an enforcement of commercial rights sourced from contract by way of an interdict. It has long been

[79] *Country Cloud* above n 17 at para 40.

settled in our law that the granting of an interdict is discretionary.[80] The remedy of the interdict itself has been described as unusual.[81]

[57] This remedy is termed discretionary in the sense that a court may not grant an interdict in circumstances where there is an alternative remedy available to an applicant for an interdict and which may satisfactorily safeguard the right sought to be protected. Put differently the discretion of the court is bound up with the question whether the rights of the party complaining can be protected by an alternative and ordinary remedy.[82]

[58] In view of the analysis of the delict of unlawful competition outlined in the first judgment, it appears that there is no alternative remedy for an effective protection of Pick n Pay's right to exclusively trade as a supermarket at the Capegate Shopping Centre. This shows that the granting of an interdict may have been justified if the other two requisites were also met, even if the High Court incorrectly applied relevant principles.

[59] Therefore, assuming that Masstores establishes that this Court has jurisdiction and that it is in the interest of justice to grant leave, the appeal can only succeed if it is shown that the order issued was not supported by the facts on record and the application of the relevant law to them. A decision of a court is not overturned merely because wrong reasons were invoked to support it. In our law no appeal lies against reasons in a judgment.[83] Instead, the appeal lies against an order. Hence it often occurs that an

[80] *United Technical Equipment Co (Pty) Ltd v Johannesburg City Council* 1987 (4) SA 343 (T); *Burger v Rautenbach* 1980 (4) SA 650 (C) and *Grundling v Beyers* 1967 (2) SA 131 (W).

[81] *Transvaal Property Investment Co v SA Townships Mining and Finance Corp* 1938 TPD 521.

[82] Id at 351.

[83] *Pretoria Garrison Institutes v Danish Variety Products (Pty) Limited* 1948 (1) SA 839 (A); *Western Johannesburg Rent Board v Ursula Mansions (Pty) Ltd* 1948 (3) SA 353 (A).

appeal is dismissed but for reasons different from those advanced by the lower court whose judgment is the subject of an appeal.

[60] In short I am not persuaded that, when the correct principles are applied to the present facts, the interdict ought not to have been granted. An enquiry into this issue leads us into determining whether Pick n Pay as the applicant for an interdict, has established the requisites of this remedy. A proper assessment of the issue requires consideration of the facts.

Facts

[61] Hyprop Investments Limited (Hyprop) is the owner of the Capegate Shopping Centre. As owner, it has given permission to various businesses to trade at the centre. Despite trading licences which these businesses may have attained from the relevant authorities, their operation from the centre is regulated mainly by lease agreements concluded with Hyprop and which entitle them to be in the centre. This means that even if a particular trader's licence covers a wider scope of business, that trader is not automatically entitled to operate the full scope of its business, if there are limitations in the lease concluded with Hyprop. This is because the licence to trade does not empower the holder to trade specifically at the Capegate Shopping Centre, without Hyprop's permission.

[62] Hyprop as owner of the centre was free to determine the extent of trading rights to be exercised by each trader on its property. In this context, Hyprop granted Pick n Pay and Checkers exclusive rights to trade in food items as supermarkets. In contrast Masstores was afforded less rights which excluded operating a supermarket. All these rights were contractual in nature. They were sourced from the leases concluded separately with Hyprop. The lease between Masstores and Hyprop was concluded on 20 February 2006 and the one between Pick n Pay and Hyprop on 11 May 2006.

[63] In 2013 Masstores in breach of clause 12 of its lease commenced trading as a supermarket. Clause 12 stipulated that Masstores would not trade as a general

supermarket and could operate only as a "general food supermarket" in the centre if for a period of 90 consecutive days, there was no general food supermarket trading there. On the facts this provision was not activated. When Masstores commenced trading as a food supermarket, there were two supermarkets operating in the centre, namely, Checkers and Pick n Pay.

[64] Checkers sought and obtained an interim interdict against Masstores in the Western Cape Division of the High Court (High Court). But the dispute between them was later settled and the interdict was discharged. This turn of events meant that Pick n Pay's exclusive right was again exposed to interference by Masstores. Pick n Pay engaged Hyprop for protection to no avail.

Litigation background

[65] When it became clear that Hyprop was not willing to take urgent steps to protect Pick n Pay's rights against interference by Masstores, Pick n Pay instituted an application for an interdict in the High Court. It sought relief in these terms:

> "That a final interdict be granted in terms of which [Masstores] is prohibited from interfering in the contractual relationship between [Pick n Pay] and [Hyprop] by operating a supermarket; and/or a store having a food department or departments which have an aggregate square meterage exceeding 100 (one hundred) square metres; and/or a grocery shop; and/or a fruit and vegetable shop at the Capegate Shopping Centre in Brackenfell in the Western Cape."

[66] In the alternative Pick n Pay sought an interim interdict that was formulated as follows:

> "Alternatively, that an interim interdict be granted in terms of which [Masstores] is prohibited from interfering in the contractual relationship between [Pick n Pay] and [Hyprop] by operating a supermarket; and/or a store having a food department or departments which have an aggregate square meterage exceeding 100 (one hundred) square metres; and/or a grocery shop; and/or a fruit and vegetable shop at the Capegate Shopping Centre in Brackenfell in the Western Cape, pending the outcome of action

> proceedings which are to be instituted by [Pick n Pay] against [Masstores] within twenty court days of the judgment and the order in this matter."

[67] Pick n Pay cited as respondents both Masstores and Hyprop. In the further alternative it sought a mandamus directing Hyprop to initiate legal proceedings to secure relief which would protect Pick n Pay's exclusive right. However the claim against Hyprop was abandoned in the High Court before the matter was heard.

[68] In the founding affidavit, Pick n Pay pleaded the case against each of them separately. The case against Masstores was formulated in these words:

> "Masstores' 'expanded operations' at the Capegate Game, whether described as a '*Game Foodco*' or otherwise, plainly fall within the scope of the exclusivity provisions contained in clause 10 of the lease agreement of Masstores' operation at the Capegate Shopping Centre is in clear breach of Pick n Pay's rights in terms of clause 10 of the lease agreement."

[69] Having asserted that Masstores's conduct breached its exclusive right, Pick n Pay alleged in conclusion:

> "Masstores in the full knowledge that its conduct in operating a supermarket, a store having a food department in excess of 100 (one hundred) square metres, a grocery and fruit and vegetable shop at the Capegate Game constitutes an unlawful interference with the contractual relations which exist between Hyprop and Pick n Pay, is nevertheless intentionally continuing to operate as such notwithstanding a clear and unequivocal indication from Pick n Pay's attorneys and from Hyprop's attorneys that it is not entitled to do so. It is on this basis which Pick n Pay seeks final interdictory relief against Masstores. If, however, for any reason the court is not satisfied that it can grant final relief on the papers before it, Pick n Pay seeks interim relief pending the outcome of action proceedings which it will institute against Masstores within twenty court days of the date of the grant of interim relief."

[70] The papers do not say whether this cause of action was grounded in delict or contract. But a reading of the two statements together suggests that it was based on

contract. In the first statement Pick n Pay averred that the conduct complained of amounted to a breach of its contractual exclusive right. However, it is possible that the same statements may support a claim in delict.

[71] As I see it, in present circumstances the application may be dismissed only if both claims cannot succeed. In a case such as the present where the applicant has not explicitly nailed its colours on a delictual claim, it will not be fair to dismiss the entire application on the ground that a claim in delict was not established, without exploring whether a claim based on contract has been proved. It appears to me that the correct approach would be the one usually adopted in rescission of judgment applications in circumstances where the applicant does not specify whether the application is brought under rule 31 or rule 42 of the Uniform Rules of the High Court or in terms of the common law. Whilst there may be overlapping, each of these avenues has its own requirements. Ordinarily a court would consider whether a case has been made out in respect of any one of them before dismissing the application.[84]

[72] I can think of no reason why that approach should not apply here. This is more so if the fact that the case was brought against both Masstores and Hyprop is kept in mind. There could be no basis for pursuing a delictual claim against Hyprop because the delict was committed by Masstores. Yet the converse is not true. A claim for an interdict based on a contract could be pursued against Hyprop and Masstores.

[73] What requires attention is the question whether Pick n Pay has established the requisites for a final interdict. These are a clear right, injury actually committed or reasonably apprehended and the absence of another satisfactory remedy.

[84] *Mutweba v Mutweba* 2001 (2) SA 193 (TkH) at paras 10-2; *Nyingwa v Moolman NO* 1993 (2) SA 508 (Tk); *Bakoven Ltd v GJ Howes (Pty) Ltd* 1992 (2) SA 466 (E).

Clear right

[74] The phrase "clear right" connotes a legal right that has been sufficiently established on a balance of probabilities.[85] In the leading case of *Setlogelo*, Innes CJ said:

> "The requisites for the right to claim an interdict are well-known; a clear right, injury actually committed or reasonably apprehended and the absence of similar protection by any other ordinary remedy. Now the right of the applicant is perfectly clear. He is a possessor, he is in actual possession of the land and holds it for himself. And he is entitled to be protected against any person who against his will forcibly ousts him from such possession."[86]

[75] It is important to note that the court of first instance in *Setlogelo* had refused to grant an interdict on the ground that, as a black person, the applicant was prohibited by statute from holding, leasing or purchasing the land in respect of which he sought the respondent to be restrained from entering. On appeal Innes JA had no difficulty in recognising the applicant's right as worthy of protection in law. And also accepting that the right had been adequately proved in evidence. This plainly suggests that the source and the nature of the right are not material to the enquiry. What is important, instead, is whether the applicant has a right recognised in law and has established its existence by way of acceptable evidence.

[76] Consistent with this approach Eksteen J in *De Villiers* accepted that a clear right for a final interdict was shown where the applicant had asserted that in terms of the concessions issued to him, he had the sole right to purchase aloe juice in Transkei and Ciskei. The applicant sought an interdict against the respondent who held a similar concession to the ones the applicant had. In dealing with the issue of the clear right the Court stated:

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[85] *Free State Gold Areas Ltd v Merriespruit (OFS) Gold Mining Co* 1961 (2) SA 505 (W) at 515.

[86] *Setlogelo* above n 7 at 227.

> "It is common cause on the papers that the applicant has the concessions he contends for and that he therefore has a clear right to be protected against any infringement of that right. It is also common cause that during January 1973 the respondent had bought two cans of aloe juice near Butterworth in the Transkei in ignorance of the fact that at that time too the applicant held a similar concession to the one he now holds."[87]

[77] However, in that case a final interdict was not granted on the ground that the applicant had failed to establish a reasonable apprehension of harm, in light of the undertaking by the respondent that he would not buy aloe juice in Transkei and Ciskei. Notably, the Court did not consider the applicant's exclusive right which extended to cover the whole of Transkei and Ciskei as undermining free competition and not worthy of protection by way of an interdict.

[78] In my view the same approach should be followed here. There can be no doubt that Hyprop has granted Pick n Pay the right to operate a general food supermarket on its property, to the exclusion of other traders, including Masstores. This right has been sufficiently established on a balance of probabilities. In addition, Masstores has voluntarily agreed in the lease between it and Hyprop that it will not carry on the business of a general food supermarket on the relevant premises. Therefore, the question of undermining competition does not arise in relation to Masstores. Nor are we here concerned with the case of competing rights because Masstores has waived its right to operate a general food supermarket in the Capegate Shopping Centre.

[79] But the question that arises for consideration is whether the clear right on which the applicant for an interdict relies may be sourced from a contract. None of the authorities say this may not be done. However, what emerges from cases like *Setlogelo* and *De Villiers* is the fact that a two-stage enquiry is followed. At the first stage, it must be determined whether the right sought to be protected exists in law. If it does, then the enquiry moves to the second stage which is about whether on the facts that right has

[87] *De Villiers v Soetsane* 1975 (1) SA 360 (E) at 360H-361B.

been established on a balance of probabilities. If both questions are answered in the affirmative, then a clear right is taken to have been established.

[80] In *V&A Waterfront Properties*,[88] both the High Court and the Supreme Court of Appeal had no difficulty in holding that a lessor had proved a clear right for purposes of an interdict, by showing that the lessee was in breach of the lease. There, in breach of the lease, the lessee had declared that it would continue operating its business from the leased premises, despite an order issued by the relevant authority prohibiting it.

[81] On the question whether an applicant for an interdict may rely on contract the Supreme Court of Appeal in *V&A Waterfront Properties* said:

> "It remains to mention that a good deal of time was devoted in the appeal to the question whether the appellants were, by interdict proceedings, really seeking contractual relief in the form of specific performance and, if so, whether they needed to fulfil the requirements for a final interdict. In reliance on the views of Professor R H Christie *The Law of Contract* 4th ed at 618 - 9, they argued that there was no such need. One may indeed say that had the prayer been expressly for specific performance many of the same issues may have arisen as have arisen. However, an interdict having been sought, and the requirements for it having been met, it is unnecessary to decide whether the appellants' argument was right."[89]

[82] This conclusion illustrates clearly that the fact that the applicant for an interdict in cases like *Taylor & Horne*[90] and *Atlas Organic Fertilizers*[91] relied on the delict of unlawful competition, does not mean that a claim for an interdict cannot be grounded in contract. It seems that the source of the right sought to be protected by an interdict is immaterial to the question whether an interdict should be granted. If the applicant

[88] *V&A Waterfront Properties (Pty) Ltd v Helicopter Marine Service* [2005] ZASCA 87; 2006 (1) SA 252 (SCA) (*V&A Waterfront Properties*).

[89] Id at para 25.

[90] *Taylor & Horne* above n 50.

[91] *Atlas Organic Fertilizers* above n 1.

has established all the requisites of an interdict, a court may grant the remedy, regardless of whether the applicant relied on contract, delict or legislation.

[83] As mentioned, here Pick n Pay did not label the right it sought to protect as a delictual right or a contractual right. It merely pleaded and advanced evidence showing the exclusive right to trade and that Masstores, having waived its own right, interfered with Pick n Pay's exclusive right. It was the High Court which labelled the right as delictual and the Supreme Court of Appeal approached the matter on the same footing. There appears to have been a mistaken assumption because a delictual right was not available against Hyprop which was also cited as a respondent. There is nothing on the record showing that Pick n Pay invoked different rights against Masstores and Hyprop. As against Hyprop, Pick n Pay could only seek an interdict to protect a contractual right.

[84] The question is whether Pick n Pay could obtain an interdict to protect the same contractual right against Masstores. The issue being that Masstores was not a party to the lease between Pick n Pay and Hyprop. I am not aware of any authority that says Pick n Pay could not. *V&A Waterfront Properties* is distinguishable on the basis that the applicant and the respondent were parties to the lease.

[85] But I can think of no reason in principle that militates against the granting of an interdict to a party like Pick n Pay to restrain conduct of a third party like Masstores from interfering with its contractual rights. Take for an example a case of someone who has a problem of people entering a farm he leases to erect illegally residential structures. It can hardly be argued that the lessee in those circumstances cannot seek an interdict against the invaders because they were not parties to the lease between him and the farmowner. It would be odd to recognise his right to claim an interdict based on a delictual cause of action but deny him an interdict based on the lease.

[86] The proposition that a contract may not be enforced against a person who was not a party to it finds no application here. This is because the relief sought is an interdict and not specific performance or enforcement of the contract. There is a clear difference

between the two remedies. Specific performance requires the respondent to perform a positive act in terms of an obligation arising from the contract. This is not what a prohibitory interdict like the one sought by Pick n Pay seeks to achieve. On the contrary, the prohibitory interdict is designed to put a stop to actions of a third party which interfere with the contractual rights of the applicant.

[87] If the conduct complained of is illegal or is not justified in law, then the interdict may be granted to protect the applicant's rights. Nobody is entitled to violate another person's rights if the law does not authorise the breach.

[88] The sole difference between this and the first judgment lies in whether, for purposes of a prohibitory interdict, Pick n Pay had to show that the contractual right it relied on was enforceable against Masstores which was not a party to the agreement. And whether as a third party, Masstores had unlawfully infringed or threatened to infringe that right. The first judgment says Pick n Pay must have established that the contractual right was enforceable against Masstores.[92] But the first judgment cited no authority for this novel requirement for an interdict. No authority exists in our law which supports the proposition that if the applicant for an interdict against a third party relies on a contractual right, it must in addition to establishing a clear right, show that the right was enforceable against the third party.

[89] Central to the reasoning of the first judgment is the distinction between real and personal rights derived from the Roman procedural distinction between actions *in rem* and actions *in personam*.[93] The central pillar of the distinction is that the real rights are absolute in the sense that they are enforceable against the whole world whereas a personal right is relative in that it can be enforced against a particular person. However, this distinction is irrelevant to the claim for an interdict. It makes no difference whether

[92] First judgment at [8].

[93] See Van der Merwe "Theoretical distinction between real and personal rights" in *LAWSA* (2014) vol 27(2) at para 60 and Van der Merwe *The Law of Things* (Butterworths, Durban 1987) at para 42.

the right is real or personal. All that is required is proof of a clear right, in order to satisfy one of the three requirements for the granting of a final interdict.

[90] The fact that a personal right is relative in the sense that only a particular person is directly bound by it does not mean that third parties may violate the right with impunity. This is not a controversial proposition. It is also not disputed that a personal right may be relied on for purposes of seeking an interdict. *V&A Waterfront* has settled that. What is in dispute between this judgment and the first one is whether the same right may be used in seeking an interdict against a third party. Apart from the irrelevant distinction between the real and personal rights, the first judgment advances no reason for holding that the interdict may not be granted.[94]

[91] While I accept that an intentional interference with contractual rights by a third party may give rise to a delictual claim, I do not support the view that a prohibitory interdict may only be granted if the applicant establishes the essential elements of a delict. Our law on interdicts does not require this and there is no legal basis for introducing this additional requirement.

[92] In the instance where a third party deliberately interferes with contractual rights, two remedies are available to the party whose right is violated. That party may pursue a delictual claim or seek an interdict, if the violation continues. If the claim for an interdict is preferred, the applicant is not restricted to grounding the claim in delict. He may base it in contract. If the interdict is founded on delict, it is necessary to show that the conduct sought to be interdicted amounts to a delict. But if reliance is placed on contract, this is not necessary. In this instance, the applicant need only show that the requirements for issuing an interdict are established.

[93] This choice was affirmed in *Godongwana* where van Coller J stated:

[94] First judgment at [10].

> "Apart from the delictual remedy, the interdict can also be invoked to protect both real and personal rights. The interdict is 'allowed where a person requires protection against an unlawful interference, or threatened interference, with his rights'. Baker, Erasmus and Farlam *The Civil Practice of the Magistrate's Courts in South Africa* 7th ed at 67. In order to succeed with an interdict it is not necessary to prove that the respondent acted intentionally or negligently. See *Setlogelo v Setlogelo* 1914 AD 221 at 227 and *Regal v African Superslate (Pty) Ltd* 1963 (1) SA 102 (A) at 106. If respondent had not taken actual occupation of the site, but had threatened to do so, it seems to me that appellant would have been entitled to an interdict to prevent him from doing so. All the requisites for the right to claim an interdict, namely a clear right, an injury reasonably apprehended and the absence of similar protection by any other ordinary remedy, would be present. It is often stated that a real right is enforceable against the world at large and that a personal right is enforceable only against a particular individual on the basis of a special legal relationship such as contract, delict or some other cause. Appellant can consequently only claim possession against the authorities who granted the certificate, and not from the respondent. In bringing an interdict against the respondent, under the hypothetical circumstances referred to, he would, however, not be claiming possession from respondent, but only protection against a threatened unlawful invasion of his rights."[95]

[94] It is apparent from *Godongwana* that the appellant had relied on a contractual right that was not enforceable against the respondent. Yet the Court concluded that the appellant could obtain an interdict to prevent the respondent from taking occupation of the site. The Court said:

> "In the present case it is alleged that the respondent is already in unlawful occupation of the property. Appellant should likewise be entitled to protect his personal right with an interdict against the respondent. I can see no reason why the fact that appellant is entitled to claim from the grantor of the certificate compliance with his obligations should preclude him from interdicting respondent against violating and interfering with his rights. In a claim against the grantor, appellant would be enforcing his contractual rights, and in interdicting respondent, appellant would be protecting those rights."[96]

[95] *Godongwana* above n 14 at 817C-G.

[96] Id at 817H.

[95] Similarly, here Pick n Pay sought to enforce its contractual right against Hyprop but later abandoned the claim. But in interdicting Masstores, Pick n Pay sought to protect its right to exclusive trading as a supermarket. On the strength of this statement and the authorities cited in it, I conclude that Pick n Pay was entitled to rely on its contractual right for an interdict against Masstores and that it was not necessary for it to prove that Masstores committed a delict.

[96] The first judgment concludes that *Godongwana* was wrongly decided only on the ground that it was not followed in *Motloung*[97] and *Reddy*[98] without furnishing any reasons why it was not followed. A judicial decision does not become wrong purely because it was not followed by the courts on which it is not binding. In that instance there may be many reasons which motivate a different approach. For example in *Motloung* the Court granted ejectment in favour of the applicant on the basis that the certificate of occupation had created a real right that passed from the seller to him in terms of contract. Therefore, it was not necessary for him to base the claim for ejectment on the contractual right.

[97] In *Reddy* the issue was whether the applicant, an ordinary lessee without possession of the leased property, had *locus standi* to seek ejectment of a trespasser. The Court held that such a lessee had no *locus standi* and declined to follow *Godongwana*. The reason advanced was not that *Godongwana* was wrongly decided but that the Court was bound by two Full Bench decisions of the same division.[99] Both these decisions held that a lessee to whom possession has not yet been given cannot sue a trespasser for ejectment.

[98] *Bodasingh* was criticised by Cooper in these terms:

[97] *Motloung* above n 15.

[98] *Reddy* above n 16.

[99] *Bodasingh's Estate v Suleman* 1960 (1) SA 288 (N); *Jadwat and Moola v Seedat* 1956 (4) SA 273 (N).

> "Because the Court in *Bodasingh*'s case made both the lessor-owner's and the lessee's right to eject a trespasser dependent upon possession, it fell into the further error of accepting that the lessor-owner and the lessee could not both have a right to eject a trespasser. Had the Court adopted the correct approach to the problem before it, it would have held that both the lessor-owner and the lessee had the right to eject a trespasser from the property."[100]

[99] It is apparent that the decisions in *Motloung* and *Reddy* were not based on the proposition that the distinction between real and personal rights be preserved. As mentioned, this distinction is immaterial to the granting of an interdict because an interdict may be issued to protect both the real and personal right. It is also plain that both judgments did not address the requirements for granting an interdict.

[100] *Godongwana* was cited with approval in *Lanco*[101] which is a decision of the same Court that later decided *Reddy*. In *Reddy*, the Court did not hold that *Lanco* was wrongly decided but merely distinguished *Reddy* from it.[102] Therefore, it can hardly be correct to say only because *Godongwana* was not followed in *Reddy* and *Motloung*, it was wrongly decided. This brings me to the second requisite for an interdict.

Injury actually committed or reasonably apprehended

[101] In the context of interdicts, the word "injury" carries a meaning wider than physical harm contemplated in delicts. It includes any infringement, invasion or interference with a right.

[102] In *V&A Waterfront Properties* Howie P defined the injury requisite in the following terms:

> "The argument is founded on neither authority nor principle. The leading common-law writer on the subject of interdict relief used the words 'eene gepleegde feitelijkheid'

[100] Cooper *Landlord and Tenant* 2 ed (Juta & Co Ltd, Cape Town 1973) at 251-2.

[101] *Lanco* above n 19 at 384 A-D.

[102] *Reddy* above n 16 at 626.

> to designate what is now in the present context, loosely referred to as 'injury'. The Dutch expression has been construed as something actually done which is prejudicial to or interferes with, the applicant's right. Subsequent judicial pronouncements have variously used 'infringement' of right and 'invasion of right'. Indeed, the leading case, *Setlogelo*, was itself one involving the invasion of the right of possession. Of course it is hard to imagine that a rights invasion will not be effected most often by way of physical conduct but to prove the necessary injury or harm it is enough to show that a right has been invaded. The fact that physical means were employed or physical consequences sustained is incidental."[103]

[103] With regard to unlawfulness, Pick n Pay has sufficiently shown that its contractual right was violated by Masstores in circumstances where the latter was not legally entitled to do so. It will be recalled that in its lease, Masstores had agreed to a term that prohibited it from trading as a supermarket. Therefore, it had no right to trade as a supermarket on the leased premises. It was its prohibited trading which violated Pick n Pay's rights to exclusive trading. On all accounts this was unlawful conduct which warranted an interdict.

Other satisfactory remedy

[104] Since a final interdict is taken to be a drastic remedy, our law affords courts a discretion to grant or refuse it. A court is likely to refuse an interdict if there is an ordinary remedy which may give the applicant adequate protection.[104] The mere existence of other remedies is not enough to tilt the scale against the granting of an interdict. The other remedy which must be ordinary, should afford protection that is equally or more effective to the one provided by an interdict. On this topic the Supreme Court of Appeal in *V&A Waterfront Properties* said:

> "Coming to the third and final requirement, the respondents submitted that an interdict was not the only appropriate remedy. It was said that the first appellant could sue for damages or cancel the lease. This argument cannot prevail. The first appellant is

[103] *V&A Waterfront Properties* above n 88 at para 21.

[104] *Peri-Urban Health Board v Sandhurst Gardens (Pty) Ltd* 1965 (1) SA 682 (T) at 684.

> entitled to enforce its bargain: to obtain the lessee's promised rental while preventing the latter from conducting itself in a manner that involves breaking the law. The only ordinary remedy which provides it with the necessary protection is an interdict. Cancellation would be quite the opposite of that to which the first appellant is entitled. And damages would be difficult to prove, if possible to prove at all. Lessors of commercial complexes stipulate for provisions like those in issue because they want, understandably, to maintain the standing or repute or safety or appeal of their properties. However, whether a particular lessee's contraventions of the law, and consequent breaches of its lease, have led to financial loss because aspirant or even existing tenants do not want, in view of the contraventions, to be involved in the complex, could be exceedingly problematic to prove."[105]

[105] Similarly here too a claim for delictual damages may be almost impossible to prove. This much is plain from the first judgment which holds that a delictual claim of unlawful competition is not available to Pick n Pay.

[106] In the circumstances an interdict proves to be the only satisfactory remedy for Pick n Pay. Accordingly, I hold that Pick n Pay has established all the requirements for an interdict and this entitled it to the interdict granted by the High Court. In the result I would dismiss the application for leave either for the reason that jurisdiction of this Court is not engaged or for lack of prospects of success.

[105] *V&A Waterfront Properties* above n 88 at para 23.

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