THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 20711/14

In the matter between Reportable

MASSTORES (PTY) LIMITED **APPELLANT**

and

PICK N PAY RETAILERS (PTY) LIMITED **FIRST RESPONDENT**

HYPROP INVESTMENTS LIMITED **SECOND RESPONDENT**

Neutral citation: *Masstores (Pty) Ltd v Pick n Pay Retailers (Pty) Ltd* (20711/14) [2015] ZASCA 164 (25 November 2015)

Coram: Maya DP, Leach, Theron, Majiedt and Zondi JJA

Heard: 13 November 2015

Delivered: 25 November 2015

Summary: Delict – trading in competition with a contracting party in contravention of a restraint clause in a lease agreement constitutes unlawful interference in the contractual relationship between the contracting party and the landlord – an exclusivity clause in a lease agreement is an integral part of that lease and not a collateral right.

ORDER

On appeal from: Gauteng Division of the High Court, Pretoria, (J W Louw J sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

Majiedt JA (Maya DP, Leach, Theron and Zondi JJA concurring):

Introduction

[1] This case concerns the alleged unlawful interference with a contractual relationship. In the Gauteng Division of the High Court, Pretoria, J W Louw J granted a final interdict restraining the appellant, Masstores (Pty) Ltd (Masstores), from unlawfully interfering in the contractual relationship between the first respondent, Pick n Pay Retailers (Pty) Ltd (Pick n Pay), and the second respondent, Hyprop Investments Limited (Hyprop). The interference was alleged to relate to Masstores' operating a general food supermarket at the Capegate shopping centre in Brackenfell, Western Cape (Capegate). This appeal is with the leave of the court a quo. Although Pick n Pay had joined Hyprop as a second respondent, and notwithstanding the fact that the latter had filed answering papers, no relief was sought in the court a quo against Hyprop.

Factual Matrix

[2] The salient facts are largely common cause or not seriously disputed and can be summarized as follows. Hyprop is the successor-in-title to the Capegate Regional Centre Joint Venture (the JV), the owner of Capegate. On 20 February 2006 Masstores entered into a lease agreement with the JV in terms whereof it leased part of the shopping centre from the JV. The lease provision at the centre of the dispute is clause 12, which reads:

'**12. THE TENANT'S USE OF THE PREMISES**

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.

12.2 If, at any time during this 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] On 11 May 2006 Pick n Pay concluded a lease agreement with the JV in respect of premises situated at Capegate. The salient part of the lease agreement is clause 10.1 which contains the following provisions:

'**10. EXCLUSIVITIES AND LETTING RESTRICTIONS**

10.1 Save for the SUPERMARKET and Checkers, the LESSOR shall not permit the following businesses to be conducted in the SHOPPING CENTRE or on the PROPERTY:

10.1.1 a hypermarket or supermarket; or

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

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

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

[4] Masstores which, amongst others, trades as Game, traditionally conducted its business as a general merchandise retailer. I will refer to it herein interchangeably as ‘Masstores or ‘Game’. Its products excluded food, but just before 2010 it began selling on a limited scale non-perishable food and grocery items. During late 2010 or 2011 Masstores introduced the Foodco concept in some of its Game stores. This entailed the introduction of fresh fruit and vegetables and fresh pre-packed meat products, which complemented its existing non-perishable food and grocery lines. In the Western Cape, Foodco was first introduced in two large shopping malls, N1 City and Canal Walk.

[5] On 19 September 2013 Foodco was introduced in Masstores’ Game store at Capegate. Hyprop informed Checkers, which also traded at Capegate, of Masstores’ intentions about the Foodco introduction. But Pick n Pay was not afforded the same courtesy. In response Checkers, whose lease contained exclusivity provisions similar to that of Pick n Pay, obtained an interim interdict restraining Masstores from operating a Foodco at Capegate, pending the institution of an action for final relief. Pick n Pay became aware of the Checkers interdict but, in view of the interim restraining order obtained by Checkers, elected not to take any action to protect its right to exclusivity.

[6] On 15 April 2014, for reasons not germane here, the interim interdict granted to Checkers was discharged by agreement. From that time Game operated a Foodco at Capegate. This prompted Pick n Pay to launch the application in the court a quo. It sought a final interdict against Masstores, restraining it from interfering in the contractual relationship between Pick n Pay and Hyprop by carrying on a business exclusively granted to Pick n Pay in terms of the latter’s lease agreement. As alternative relief Pick n Pay sought an interdict in similar terms pending the outcome of an action to be instituted against Masstores. It is not necessary to deal with the relief sought in the alternative against Hyprop because, as stated, that relief was abandoned at the hearing in the court a quo. Some argument was addressed

concerning Pick n Pay's change in tack in its application papers – that aspect will be considered shortly.

[7] The court a quo upheld Pick n Pay's contentions that Game was trading as a general food supermarket at Capegate in breach of its obligations in clause 12.1 of its lease agreement. By intentionally continuing to do so after having been made aware of Pick n Pay's exclusive rights in terms of its lease agreement, held the learned judge, Game was unlawfully preventing Pick n Pay from obtaining the performance it was entitled to in terms of its contractual exclusivity right. A final interdict was consequently issued against Game.

The central issue

[8] Our law has recognised for more than a century that a delictual action lies in instances where an outside party knowingly deprives a person of his rights under a contract with another.[1] The outside party's conduct results in the contracting party not obtaining the performance to which it is entitled on the contract, or where a contracting party's obligations under the contract are increased. In the firstmentioned instance one is concerned with the infringement of a personal right.[2] These types of cases typically occur in instances where a former lessee holds-over the leased premises well knowing that the incumbent lessee is, in the process, being deprived of its contractual rights under the lease,[3] and in instances where employees are induced by a competitor to breach their employment restraint conditions contractually agreed with a former employer.[4] The somewhat novel question that arises here is whether the breach by an outside party of its lease obligations towards a contracting party can give rise to a delictual action by the other party to the

[1] *Howorth & Fox v Hart* 1906 20 EDC 276.
[2] See: N J van der Merwe and P J J Olivier *Die Onregmatige Daad in die Suid-Afrikaanse Reg* 6ed (1989) at 371 and 381, see footnote 6; Neethling et al *Law of Delict* 5 ed (2006) at 281 – 282, see footnote 247.
[3] As was recognized in *Dantex Investment Holdings (Pty) Ltd v Brenner & others NNO* (322/88) [1989] ZASCA 151; 1989 (1) SA 390 (A), provided that dolus (fault) was properly pleaded and proved (at 395 F-G).
[4] Compare: *Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd & others* 1981 (2) SA 173 (T).

contract in circumstances where the breach impacts directly on the latter and infringes upon its contractual rights. Before I consider the first question, namely whether the court a quo was correct in its finding that Game was in breach of its lease agreement with Hyprop by trading as a general food supermarket, I deal first with Masstores' contentions regarding the manner in which Pick n Pay has pleaded its case.

The pleadings

[9] Masstores' counsel argued strenuously that Pick n Pay had shifted its ground on the papers as far as the pleaded cause of action is concerned. While this is true, there is a sound explanation for the change. Pick n Pay had approached the court a quo on an urgent basis. It founded its case on the fact that Masstores was well aware that its conduct (operating a general food supermarket at Capegate) contravened clause 10 of the lease agreement between Pick n Pay and Hyprop. Pick n Pay pleaded further that '[n]otwithstanding this knowledge, Masstores has recklessly and intentionally continued [with its conduct]'. I accept the explanation given by Pick n Pay's counsel that, when Masstores' answering papers was received and Masstores' agreement's provisions became known, Pick n Pay had amended its notice of motion without objection and averred in its replying affidavit that Masstores was in breach of its own restraint which constituted unlawful interference in the contractual relationship between Pick n Pay and Hyprop. Quite apart from the fact that no objection had been raised by Masstores at that time (in fact it availed itself of the indulgence to file further affidavits) and no prejudice had been caused to it (nor has any been suggested), the point was not raised at all in Masstores' heads of argument. This argument is plainly an ill-considered afterthought.

Is Masstores operating a general food supermarket?

[10] On the evidence and on the plain ordinary grammatical meaning of the word 'supermarket' the answer to this question should be bereft of complexity. But on this aspect Masstores adduced expert evidence, maligned the

photographic evidence presented by Pick n Pay as 'misleading' and produced photographs of its own which purported to present a more accurate and balanced picture. And its counsel went to great lengths to dispel any initial view one may have had regarding the uncomplicated nature of the word. In the process more obfuscation than enlightenment ensued.

[11] As always, regard must first be had to the word itself. Masstores' counsel contended that the word 'supermarket' is complex and bears an indeterminate meaning. Dictionary meanings must, so contended counsel, be treated circumspectly since dictionaries are mostly non-South African and we are required to interpret the word in a South African context. The word has a specialized meaning, ie it must be interpreted in the specialised field of commerce and industry, argued counsel. I see the matter rather differently. I am in agreement with the argument advanced on behalf of Pick n Pay that the exercise is far less complicated than suggested by Masstores' counsel. It is an ordinary, well-known and oft used word with an ordinary meaning. I start first with the dictionary meaning. I can find no fault with the dictionary meaning relied upon by the court a quo. It cited the meaning set forth in the Oxford English Dictionary: 'a large self-service store, freq. one of a chain, selling a wide range of foods, household goods, etc.' The Concise Oxford English Dictionary[5] defines the word 'supermarket' as 'a large self-service shop selling foods and household goods'. In *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer,*[6] Hefer JA adopted the following approach to dictionary meanings:

'As a rule every word or expression must be given its ordinary meaning and in this regard lexical research is useful and at times indispensable. Occasionally, however, it is not.'[7]

This is one of the cases where the dictionary meaning is of considerable importance.

[12] It seems to me plain that, as the court a quo found, not any store would qualify as a supermarket – it must be large and it must carry a wide range of

[5] 12 ed (2011).
[6] *Fundstrust (Pty) Ltd (in liquidation) v Van Deventer* (365/95) [1996] ZASCA 125;1997 (1) SA 710 (A).
[7] Id at 727A-B.

products. Again, one must immediately acknowledge that the concepts ‘large’ and ‘wide range’ are relative. But they are closely connected to each other – a wide range of products can conceivably only be traded from a large area. In my view, once a store of sufficient carries a wide variety food and household products which can meet the usual requirements of an average family, it qualifies as a supermarket. I consider next the expert evidence adduced on behalf of Masstores.

[13] The court a quo had no regard to the evidence of the experts, correctly so. But I would go even further – their evidence was inadmissible and irrelevant. In answer to the urgent application, Masstores filed, amongst others, an affidavit by Mr D N Prinsloo, a research manager employed by Urban Solutions CC, a corporation involved in specialist market feasibility studies and property market research. This witness failed altogether to endeavour to qualify himself as an expert. He was clearly not qualified to express any expert opinion on the issues in this matter. His evidence was consequently inadmissible. This fact appears to have dawned on Masstores who deemed it necessary to file a supplementary affidavit by Mr Prinsloo’s father, Dr D A Prinsloo, the managing member of the aforementioned close corporation. His evidence suffered from the same shortcomings as that of the younger Prinsloo – he too failed to qualify himself as an expert. His evidence was therefore also inadmissible.

[14] But the Prinsloos’ evidence was also irrelevant. It is well established that interpretation is a matter for the court, not for experts. This court has in a long line of cases laid down the approach to be adopted in this regard, most notably in *Coopers & Lybrand & others v Bryant*[8] and in *KPMG Chartered Accountants (SA) v Securefin Ltd & another.*[9] More recently, these principles were again confirmed in *Natal Joint Municipal Pension Fund v Endumeni*

[8] *Coopers & Lybrand and others v Bryant* (459/93) [1995] ZASCA 64; 1995 (3) SA 761 (A) at 768 A-E.
[9] *KPMG Chartered Accountants (SA) v Securefin Ltd and another* (644/07) [2009] ZASCA 7; 2009 (4) SA 399 (SCA) para 39-40; see also *International Business Machines SA Ltd v Commissioner for Customs and Excise* (468/83) [1985] ZASCA 87; 1985 (4) SA 852 (A) at 874B.

Municipality[10] and in *Bothma-Batho Transport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk.*[11] In *KPMG* Harms DP reiterated that an expert ought not to be asked, either in evidence in chief or in cross-examination, what a document (or in the present instance, a word or a phrase) means to him or her.[12] The court a quo had no need for experts to explain to it the meaning of an ordinary word. And so it rightly disregarded the evidence. The Prinsloos could moreover not assist the court in ascertaining what would have been known to the parties and what was in their minds at the time when they contracted.[13]

[15] Lastly, the expert evidence lacked any reasoning. An expert's opinion must be underpinned by proper reasoning in order for a court to assess the cogency of that opinion.[14] Absent any reasoning, the opinion is inadmissible since it cannot be said to be an expert opinion. For all these reasons, the Prinsloos' evidence was correctly disregarded by the court a quo.

[16] Pick n Pay attached to its founding papers a number of photographs of the food section of the Game store at Capegate. These photographs depict a wide range of perishable and non-perishable food products. The overwhelming initial impression is that this is a supermarket as ordinarily understood. Masstores' response was to attach even more photographs in its answering papers, depicting the inside of the store in its entirety. But this misses the point altogether. I cannot agree with the submission on behalf of Masstores that the Pick n Pay photographs are 'misleading'. One is mindful of the fact that Game is primarily a general merchandise retailer. But that does not mean that its main business cannot exist cheek by jowl with a general food supermarket. In *Capnorizas v Webber Road Mansions (Pty) Ltd*[15] this court was confronted with a similar situation. A lease agreement entitled the

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[10] *Natal Joint Municipal Pension Fund v Endumeni Municipality* (920/2010) [2012] ZASCA 13; 2012 (4) SA 593 (SCA).
[11] *Bothma-BathoTransport (Edms) Bpk v S Bothma & Seun Transport (Edms) Bpk* (802/2012) [2013] ZASCA 176; 2014 (2) SA 494 (SCA).
[12] *KPMG Chartered Accountants (SA) v Securefin Ltd and another* supra, para 40.
[13] *Coopers & Lybrand and others v Bryant* supra, at 768 B-C; *Natal Joint Municipal Fund v Endumeni Municipality,* supra, para 18.
[14] *Buthelezi v Ndaba* (575/2012) [2013] ZASCA 72; 2013 (5) SA 437 (SCA) para 14.
[15] *Capnorizas v Webber Road Mansions (Pty) Ltd* 1967 (2) SA 425 (A).

appellant to carry on a wide range of businesses, including the sale of milk, but it precluded him from selling fruit and vegetables as well as crockery and glassware in the event of any other lessee selling those products in the building. The landlord (the respondent) undertook not to let any other shop in the building to a person carrying on substantially the same business as that conducted by the appellant. Thereafter a dairy firm commenced business in the building under a lease agreement selling milk and other dairy products. The appellant consequently sought a temporary interdict *pendente lite* in the Local Division to restrain the respondent from permitting the dairy firm to remain in occupation of the shop. It obtained the interdict, but that decision was reversed on appeal by the majority in the Provincial Division. On further appeal to it this court found for the appellant on the basis that the dairy firm was trading, contrary to the contractual undertaking by the respondent in its lease agreement with the appellant, in products which were substantially the same as one of the appellant's 'congeries of separate businesses'. The position is no different here – Game is trading in the supermarket section of its store in the same food products and groceries as Pick n Pay.

[17] The proverbial final straw is the view that Masstores itself took of its new, expanded business. First, on its Foodco website,[16] Masstores describes itself thus:

'For 40 years, South Africans have trusted Game for our great value and savings, and now we're introducing Foodco: *a supermarket* inside Game that makes shopping, and saving, faster and easier. We have just what you need, with a smaller, but more focussed choice of products, conveniently pre-packed to make shopping easy. To add to the great food brands that you love and trust, we're introducing *an extensive range of FoodCo products to* offer big discounts on qualify food, and great value to our customers. We're all about giving you everyday great value in a unique no-frills, easy to shop store' (own emphasis).

We were told by Masstores' counsel that this was merely a 'marketing blurb'. The explanation is singularly unpersuasive. The website entry was produced in a non-litigious environment and it lacks exaggerated praise. Second, in proceedings before the Competition Tribunal during the Massmart / Walmart

[16] http://www.FoodCo.mobi/aboutus.php

merger application (from which Masstores came into being), the then Chief Executive Officer of Massmart, Mr Grant Pattison, declared in his witness statement that 'Massmart has also begun to convert its current General Merchandise discounter format, Game, into a Super Store format "Game Foodco", *by adding a full range of groceries*' (own emphasis). I might add that this evidence, adduced in reply by Mr Izak Joubert, Pick n Pay's property director, was left unanswered in Masstores' further affidavit (ie the fourth set of affidavits). And lastly, there is the evidence of Mr Leon Braam Robbertze, the store manager at Game, Capegate. Mr Robbertze went to great lengths to draw a distinction between Game and Pick n Pay as far as aspects such as floor size, range of products and stock keeping units are concerned. But ultimately, the only food items not sold by his store (and sold by Pick n Pay) are fresh food items such as butchery and bakery products prepared on site (these were pre-packaged), wine (although it sells sparkling wine) and newspapers. On its own version therefore, Masstores sells an extensive range of perishable and non-perishable food as well as groceries at Game, Capegate.

[18] In summary on this first aspect: It is plain on the photographic evidence that Game conducts a general food supermarket at its Capegate store. That evidence accords with the ordinary dictionary meaning of a supermarket. And, importantly, Masstores itself regards the food section of that store as a supermarket. It is therefore trading in competition with Pick n Pay in breach of its (Masstores') lease obligations. But does that conduct constitute a delict as against Pick n Pay?

Is Masstores, through its conduct, unlawfully interfering in Pick n Pay's contract with Hyprop?

[19] Three requirements must be met for a successful claim based on the unlawful interference in a contractual relationship. They are:

(a) An unlawful act;

(b) which constitutes an interference in the contractual relationship; and

(c) which is committed with some form of dolus.[17]

[20] As far as the unlawful act is concerned, it is plain on my finding above that Game is acting in breach of the restraint clause in the lease. The restraint clause was inserted at Masstores' suggestion, for very good reason. It became common cause on the papers that, typically, the presence of an anchor tenant such as Pick n Pay in this case, would be the primary or one of the major attractions for shoppers at a shopping centre. The guarantee of footfall (and potential customers) is the prime motivation for other lessees (such as Masstores in the present instance) to take up the remainder of a shopping centre's premises on extended leases. The anchor tenant, on the other hand, generally requires exclusivity in respect of its particular business at that shopping centre, in order to protect itself against the risk which it assumes in respect of its substantial capital expenditure in respect of the establishment and continual refurbishment of its store. Almost invariably an anchor tenant must commit to that particular shopping centre for extended lease periods. This explains the presence of clauses 10 and 12 in the lease agreements of Pick n Pay and Masstores respectively. They are closely related to each other and each clause benefits in its own way the particular lessee – Masstores' restraint in clause 12 is inextricably linked with Pick n Pay's exclusivity in clause 10. This much was conceded, albeit in general terms only, by Masstores' property manager at that time, Ms Diane Bolton, in her answering affidavit. She stated as follows in respect of the origin of and rationale for the restraint clause (clause 12) in Masstores' agreement:

'Lessees, such as Masstores, preferred to lease premises where there was already, or would be, an anchor tenant, such as a supermarket. It was not uncommon for anchor tenants, such as supermarkets, to require some form of exclusivity from the lessor. In a general sense I was aware of this. Masstores did not intend to become a general food supermarket. Because some form of exclusivity was commonly required

[17] In *Union Government v Ocean Accident and Guarantee Corporation Ltd* 1956 (1) SA 577 (A) this court held that negligent interference with a contractual relationship is not actionable. This decision has been subjected to fierce criticism by a number of writers, see eg Van der Merwe and Olivier at 375; Neethling et al at 284. It is, however, not necessary to engage in this debate given the facts and the outcome in the present matter.

by supermarkets, Masstores offered to accept, and incorporated into its proposed lease terms, the term that it would not trade as a general food supermarket. That is the origin of this term in the lease concluded by Masstores and referred to below.' Ms Bolton claimed ignorance of the fact that Pick n Pay and Checkers had been granted exclusivity in respect of the conducting of a supermarket at the time when she had negotiated and concluded the relevant lease agreements during 2005/6 and 2008. This is rather peculiar, since Ms Bolton was aware of the general practice (as quoted above) and she knew at the time, on her own version, that Pick n Pay and Checkers had been accommodated at Capegate. But this aspect is immaterial, because at the very latest Masstores was made aware of Pick n Pay's right to exclusivity on 9 May 2014 when a letter of demand was sent by Hyprop to Masstores, calling upon it to cease trading as a supermarket at Game, Capegate. In trading in competition with Pick n Pay, contrary to its contractual restraint, after it was made aware of Pick n Pay's right to exclusivity, Masstores acted unlawfully.

[21] I discuss next the issue of wrongfulness in more detail, with particular reference to the argument advanced on behalf of Masstores that inducement is a requirement for the claim, which Pick n Pay had failed to prove. Our law of delict has developed significantly over the last three decades or so as far as liability for pure economic loss is concerned. It has its genesis in *Administrateur, Natal v Trust Bank van Afrika Bpk.*[18] In that matter Aquilian liability was extended to liability for pure economic loss. But, at the same time, the requirement of wrongfulness assumed a far more prominent role than had previously been the case. This was necessary to counter the spectre of limitless liability, an ever present threat in cases of liability for pure economic loss. In the context of delictual liability, wrongfulness is determined by legal and public policy considerations.[19] Wrongfulness is determined by ascertaining whether there has been a breach of a legal duty. Conversely, it involves a determination of whether a subjective right has been infringed.[20]

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[18] *Administrateur, Natal v Trust Bank van Afrika Bpk* 1979 (3) SA 824 (A).
[19] *Le Roux & others v Dey (Freedom of Expression Institute and Restorative Justice Centre as Amici Curiae)* (CCT 45/10) [2011] ZACC 4; 2011 (3) SA 274 (CC) para 122.
[20] P Q R Boberg, *The Law of Delict*: Vol 1, Aquilian Liability, 1984 at 32: '[A] finding that the [subjective] right existed implies that the defendant had a legal duty not to infringe it.'

This entails a determination of the objective reasonableness of the conduct of the person who acted in light of the prejudice he caused to another. Objective reasonableness is determined by the general legal convictions of society, which is a value judgment.[21]

[22] Turning from the general to the specific – in the present instance the claim is based on the intentional deprivation of a benefit a contract party would otherwise have obtained from performance under a contract. Such a cause of action has again been confirmed recently in *Country Cloud Trading CC v MEC, Department of Infrastructure Development.*[22] Pick n Pay's case is that Masstores has intentionally infringed upon its subjective right to exclusivity to operate a supermarket at Capegate. The contention that Pick n Pay had to prove an inducement by Hyprop to Masstores in this regard is devoid of merit. In *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd*[23] Galgut J held that inducement or enticement is not a requirement in a claim based on the unlawful interference in a contractual relationship. The learned judge stated as follows:

'It is perfectly true that most of the cases, and in particular the earlier ones, are cases where the contract concerned was breached as a result of an inducement by the defendant to do so . . . The cases concerned must however be seen in proper context. Firstly, they related to contracts of service, where the most common form of interference is doubtless enticing an employee away from his employer or inducing him to leave. Secondly, it was the influence of the English law on the question which led to the enticement or inducement being regarded as yardsticks in cases of that kind. The development of our law on the subject, as I see it however, shows that, while an enticement or inducement constitutes an interference, conduct other than enticement or inducement may well constitute an interference for the purposes of the *lex Aquilia.'*[24]

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[21] *Indac Electronics (Pty) Ltd v Volkskas Bank* (173/90) [1991] ZASCA 190; 1992 (1) SA 783 (A) at 797 E-J.
[22] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* (751/12) [2013] ZASCA 161*;* 2014 (2) SA 214 (SCA) para 26.
[23] *Lanco Engineering CC v Aris Box Manufacturers (Pty) Ltd* 1993 (4) SA 378 (D).
[24] Id, at 381H – 328A.

This was confirmed in *Country Cloud Trading CC v MEC, Department of Infrastructure Development*[25] where the Constitutional Court referred to it as a 'usurpation of [a] right'. Masstores' counsel relied heavily on the following passage in *Country Cloud*: '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.'[26] 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 recognized those cases where a 'right is usurped', or what this court referred to as the 'deprivation of a benefit'.[27] There are therefore two types of delictual actions 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. As stated above, Masstores became aware of Pick n Pay's rights to exclusivity, by the latest on 9 May 2014. It however continued to trade as a supermarket, contrary to the restraint contained in its lease and in defiance of the demand to cease trading as a supermarket. In doing so it acted wrongfully in preventing Pick n Pay from obtaining the performance to which it is entitled by virtue of its contractual right of exclusivity. I agree with the conclusion of the court a quo that the community's legal convictions would not countenance such conduct. The next aspect for consideration is intent.

[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.[28] In the present instance

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[25] *Country Cloud Trading CC v MEC, Department of Infrastructure Development* (CCT 185/13) [2014] ZACC 28; 2015 (1) SA 1 (CC) para 31.
[26] Id, para 30.
[27] See footnote 19 above. See also: Neethling et al at 282, where the authors state that '[i]nterference with a contractual relationship is also present where a contracting party does not obtain the performance to which he is entitled *ex contractu*, but without breach of contract taking place or the conduct amounting to enticement (inducement)'.
[28] *Country Cloud Trading CC v MEC Department of Infrastructure Development (CC)* para 36.

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' 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.

Is the right to exclusivity a collateral right?

[24] There is one last aspect to consider, namely the argument on behalf of Massstores that the restricting rights in favour of Pick n Pay had never been transferred to Hyprop from its predecessor-in-title (the JV) with whom Pick n Pay had negotiated the rights. It was contended in this regard that the operation of the rule 'huur gaat voor koop' does not assist Pick n Pay. Any rights and obligations which went beyond a lessor's obligation to give possession and a lessee's concomitant obligation to pay rental fall outside that rule and are 'collateral rights unconnected with the lease,'[29] so it was submitted. The extent of the maxim 'huur gaat voor koop' is well established in our law. In *Mignoel Properties (Pty) Ltd v Kneebone*, after giving a detailed exposition of the origin and development of the maxim, Friedman AJA concluded thus:

'From the aforegoing it follows, in my view, that once the lessee elects to remain in the leased premises after a sale, the seller *ex lege* falls out of the picture and his place as lessor is taken by the purchaser. . . On being so substituted for the seller, the purchaser acquires all the rights which the seller had in terms of the lease, except of course, collateral rights unconnected with the lease.'[30]

But the restraint in the present instance is not a collateral right at all. As explained above, it became common cause that Pick n Pay as anchor tenant required exclusivity in its lease agreement. It is indisputable that such exclusivity was a *sine qua non* for its tenancy. Thus understood, the right to

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[29] Per Friedman AJA in *Mignoel Properties (Pty) Ltd v Kneebone* (219/88) [1989] ZASCA 110*;* 1989 (4) SA 1042 (A) at 1051A-B.

[30] Id, at 1050J - 1051A. See also generally *Genna-Wae Properties (Pty) Ltd v Medio-Tronics (Natal) (Pty) Ltd* (435/93) [1995] ZASCA 42;1995 (2) SA 926 (A); *Spearhead Property Holdings Ltd v E&D Motors (Pty) Ltd* (214/2008) [2009] ZASCA 70; 2010 (2) SA 1 (SCA).

exclusivity is integral to the right of occupancy and cannot be regarded as a collateral right. The argument that Pick n Pay's personal right did not become binding upon the successive owners of Capegate and that, therefore, there were no restraining rights between Pick n Pay and Hyprop, is unsustainable and falls to be rejected.

[25] The court a quo was therefore correct in holding that the prerequisites for a final interdict had been met by Pick n Pay. The appeal ought therefore to be dismissed with the usual concomitant cost order.

[26] The following order is issued:

The appeal is dismissed with costs, including the costs of two counsel.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES

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For Respondents:	D A Unterhalter SC (with G D Marriot)
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