



IN THE KWAZULU-NATAL HIGH COURT, PIETERMARITZBURG

REPUBLIC OF SOUTH AFRICA

CASE NO: 1342/13

In the matter of:

D & E TRADING (PTY) LTD (Reg. No 2000/023909/07)

APPLICANT

AND

HILTON VILLAGE CENTRE CC (CK 2009/ 084080/23)

FIRST RESPONDENT

MAGNACORP 629 CC (CK 2011/063297/23)

SECOND RESPONDENT

SHOPRITE CHECKERS (PTY) LTD (Reg. No 1929/001817/07)

THIRD RESPONDENT

SHOPRITE HOLDINGS LTD (Reg. No 1936/007721/06)

FOURTH RESPONDENT

JUDGMENT

Date of hearing: 21 February 2013

Judgement delivered on: 19 March 2013

D. PILLAY J

[1] The applicant and first respondent agreed to cancel a lease on the following terms:

‘The lessor undertakes not to lease the premises to an opposition supermarket group during the period of time which begins on signature hereof and ends on 31 July 2014

[2] This dispute turns on the interpretation of the words ‘an opposition supermarket group’ in the restraint clause above. The agreement constitutes the whole agreement. Matters extraneous to it raised in the affidavits do not count for purposes of interpreting the phrase.

[3] The applicant occupied shops one and two (the premises) to trade under franchise agreements with KwikSpar General Dealer/Supermarket and Tops Liquor Store. The leases were for four years and eleven months starting from 1 September 2009. The applicant wanted to discontinue these businesses prematurely due to their underperformance. The cancellation agreement was concluded on 1 March 2011.

[4] The first respondent re-let the premises to the second respondent effective from 1 December 2012. The second respondent conducts the business of a supermarket/liquor store. The applicant alleges that the first respondent has breached the cancellation agreement. On an urgent basis the applicant seeks an order interdicting and restraining the first respondent from letting and providing occupation of the premises to the second respondent for the purposes of conducting the business of a supermarket as a franchisee or buying partner of OK Franchise Division, a division of the third respondent, Shoprite Checkers (Pty) Ltd or the Fourth Respondent Shoprite Holdings (Pty) Ltd. The third and fourth respondents abide the decision of the court.

[5] The applicant’s director, Mr Downs, initially held the view that the agreement precluded all competition. In the founding affidavit he interpreted the cancellation agreement to preclude the first respondent from letting the premises to anyone conducting a supermarket business. This emerges from the following extracts from the founding affidavit:

'It was clearly understood between Mr Kershaw [representing the first respondent] and myself that,until the expiry of the initial period of the leases, Shops 1 and 2 would not be occupied by another supermarket which would trade in opposition to the SuperSpar and its Tops Liquor Store'

[6] The applicant fortified this interpretation in his affidavit to mean that the first respondent was precluded from letting the premises

'to anybody who would conduct the business of a supermarket which was a competitor of the Super Spar business of the applicant conducted at the Quarry Centre.'

[7] The applicant narrowed its initial interpretation in the following extract to include a franchise:

'(It) was also intended to protect the applicant against competition arising from the letting of the premises... to a competing supermarket group, which includes a franchise supermarket business and liquor store...'

[8] In its replying affidavit the applicant clarifies:

'The applicant does not contend that the restraint precludes the first respondent from letting the premises to any tenant who competed with the applicant...

The letting of the premises by the First Respondent to the Second Respondent,who has a franchise agreement with the Third Respondent, to conduct the business of a supermarket at the premises...falls within the ambit of the restraint.'

[9] Effectively, the applicant now seeks to read in the words 'or franchise of such group'afterthe phrase'an opposition supermarket group'in the restraint clause in thethe agreement.

[10] Mr Hartzenberg SC for the applicant acknowledged that the agreement does not preclude all competition but only competition from 'an opposition supermarket group'. In addressing the court he elaborated that the restraint was against groups of which there were four or so in the country. That the word 'group' includes the third and fourth respondents is common cause. The applicant contends that the second

respondent is a member of the third or fourth respondents' group because their relationship is determined by a franchise agreement. If this is the case, does the restraint prohibit a lease to a franchisee of a group?

[11] Six questions arise: What is the current law on restraints in contracts? How do they apply in interpreting the restraint in this case? Is the second respondent a member of an opposition supermarket group? If yes, did Mr Kershaw know this when he leased the premises to the second respondent? Lastly, was the matter urgent? If so, what should the remedy be?

[12] Restraints of trade impact on constitutionally protected rights and values. In this instance the right of freedom of trade, occupation and profession in s 22 of the Constitution of the Republic of South Africa 1996 provides:

'Every citizen has the right to choose their trade, occupation or profession freely. The practice of a trade, occupation or profession may be regulated by law.'

[13] The parties alerted me to the controversy relating to the interpretation and application of s 22 in the field of private contracts.¹ Mr Dickson SC for the first respondent correctly pointed out that the appellate courts have settled the issues. The position is summarised as follows in the headnote in *Reddy v Siemens Telecommunications* 2007 (2) SA 486 (SCA):

'...a restraint is enforceable unless it is shown to be unreasonable, which places the burden of proof on the person who seeks to escape it.'²

A court must make a value judgment with two principal policy considerations in mind in determining the reasonableness of a restraint. The first is that the public interest requires that parties should comply with their contractual obligations, a notion expressed by the maxim *pacta servanda sunt*. The second is that all persons should in the interests of society be productive and be permitted to engage in trade and commerce or the professions.³

¹*Canon KwaZulu-Natal (Pty) Ltd t/a Canon Office Automation v Booth* 2004 (1) BCLR 39 (N); *Rectron (Pty) Ltd v Govender and another* (2006) 2 ALL SA 301 (D) para 1-16; *Den Braven SA (Pty) (Ltd) v Pillay and another* 2008 (6) SA 229 D&CLD; *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel v Kuhn and another* 2008 (2) SA 375(C) ([2007]) 4 All SA 1368

²*Reddy v Siemens* para 14

³*Reddy v Siemens* para 15

A restraint would be unenforceable if it prevents a party after termination of his employment from partaking in trade or commerce without a corresponding interest of the other party deserving of protection.’⁴

[14] On the question of onus, the SCA found that on the facts of *Reddy* it did not have to decide whether it conflicted with s 22 to cast the onus upon a party seeking to avoid a restraint, to have to allege and prove that the restraint is unreasonable, as was done in *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A).⁵ Instead the SCA concluded:

‘What that calls for is a value judgment, rather than a determination of what facts have been proved, and the incidence of the onus accordingly plays no role.’

[15] About the application of constitutional rights to restraints *Reddy* was unequivocal in the following extract:

‘[11] All agreements including agreements in restraint of trade are subject to constitutional rights obliging courts to consider fundamental constitutional values when applying and developing the law of contract in accordance with the Constitution of the Republic of South Africa, 1996. Section 8 of the Constitution is imperative. The Bill of Rights applies to all law, also private law, and binds, *inter alia*, the Judiciary (section 8(1)). Its provisions bind natural and juristic persons if, and to the extent that they are applicable, taking into account the nature of the right and the nature of any duty imposed by the right (section 8(2)). In their application to natural and juristic persons a court must apply or, if necessary, develop the common law to give effect to the right when legislation does not do so (section 8(3)(a)). A court may also develop the common law to limit the right in accordance with section 36 (section 8(3)(b)). Section 39(2) requires a court when interpreting and developing the common law to promote the spirit, purport and objects of the Bill of Rights.’ (footnotes omitted)

[16] Notwithstanding *Reddy* para 11 above *Den Braven SA (Pty) (Ltd) v Pillay and another* 2008 (6) SA 229 D&CLD relied on by the applicant expressly disagreed with

⁴*Reddy v Siemens* para 16

⁵*Reddy v Siemens Telecommunications* 2007 (2) SA 486 (SCA) para 13-14

the interpretation that s 22 has direct application to restraint of trade agreements.⁶ Although *Den Braven* applied para 10 and 15 of *Reddy* it omitted to refer to para 11 above. Instead it applied the Constitutional Court's (CC) majority decision of Ngcobo J in *Barkhuizen v Napier* 2007 (7) BCLR 691 (CC) para 23-26; 28-30; 57 regarding the horizontal application of the Constitution in the sphere of private contracts. *Den Braven* concludes:

'Once it is recognised that the right embodied in the first sentence of s22(1) cannot be separated from the entitlement to regulate by law the practice of a trade, occupation or profession, in terms of the second sentence it is I think apparent that the nature of the right embodied in s 22 and the nature of the duties imposed by the right are not appropriate to be rendered applicable to natural or juristic persons in the context of contractual relationships.' (sic) (footnotes omitted)

[17] Mr Dickson proffered *First National Bank of SA v Commissioner, SARS* 2002 (4) SA 768 CC para 41-45, as authority for applying the Bill of Rights to juristic persons. Although in that case the CC was interpreting the property rights clause under s 25 of the Constitution, its general observations about the proliferation of companies as a universal phenomenon indispensable for the conduct of business, large and small, is apposite. It reiterated:

'(D)enying companies entitlement to property rights would "...lead to grave disruptions and would undermine the very fabric of our democratic State." It would have a disastrous impact on the business world generally, on creditors of companies and, more especially, on shareholders in companies.'

[18] Woolman *et al*⁷ add:

'Whether a juristic person may benefit from a right in the Final Constitution is *not* an issue of application, but an issue of interpretation.'

[19] In my respectful opinion, the SCA settled the question of horizontality in *Reddy* at para 11 above. In so far as the SCA did not consider s 22 from the angle of *Den Braven* para 30 then *First National Bank* para 43-45 settles the horizontality issue. However, in so far as *Reddy* did not consider the *Den Braven* angle and *First*

⁶*Den Braven* para 30 D-E

⁷Constitutional Law of SA second edition revision 4: 2012 31-39

National Bank dealt with s 25, not s 22, the SCA and CC may yet pronounce on the horizontal application of s 22 specifically. If this is still an open question then in my view whether a provision in the Bill of Rights applies horizontally is a matter of interpretation, depending on the circumstances of each case. To interpret s 22 to be of such a nature as to be inapplicable to natural and juristic persons, would amount to declaring private contracts to be no-go zones for constitutional scrutiny. Post apartheid, very little of public and private life escapes constitutional scrutiny.

[20] Constitutional scrutiny is most needed in restraints in contracts. Interpreting restraint clauses divides judicial opinion along philosophical fault lines as *Den Braven's* criticism of *Advtech Resourcing (Pty) Ltd t/a Communicate Personnel v Kuhn and another* 2008 (2) SA 375 (C) shows. *Advtech* para 30 rejected the notion of 'contractual autonomy as part of freedom in forming the constitutional value of dignity' as a 'libertarian view of the world'. In contrast, *Den Braven* suggests that 'libertarianism seems consonant with the underlying spirit of the Constitution'. If the Constitution is a version of libertarianism because of the freedoms it protects, a social democrat may ask rhetorically where socio-economic rights e.g. to housing, health and education fall?

[21] In *Everfresh Market Virginia (Pty) Ltd v Shoprite Checkers (Pty) Ltd* 2012 (3) BCLR 219 (CC) the CC was unanimous about developing the common law in the field of contract. The minority put it as highly as amounting to a misdirection to fail to investigate '...the question whether the common law [falls]...to be developed in accordance with the spirit, purport and objects of the Constitution'.⁸

The majority concurred:

'Indeed, it is highly desirable and in fact necessary to infuse the law of contract with constitutional values, including values of *ubuntu*, which inspire much of our constitutional compact.'⁹

And

'It is not good enough to ask the court *a quo* whether the common law needs to be developed. That hypothetical question arises in every single case involving the common law.'¹⁰

⁸*Everfresh* para 38

⁹*Everfresh* para 71

[22] These exhortations of the CC eliminate any doubt that s 22 must be interpreted to apply to restraints in contracts, whatever one's world view or philosophical outlook. Notwithstanding the diversity of world views of the members of the CC, *Everfresh* is synthesis of these views distilled through disciplined constitutional interpretation. To demarcate some freedoms as libertarian, and other substantive rights as something else, defeats the very essence and coherence needed for the constitutional project. Ultimately, what counts is disciplined constitutional interpretation. For the purposes of this case it suffices to apply *Everfresh*, *Reddy* and *First National Bank* to hold that the restraint is open to constitutional scrutiny. As a restraint is a limitation on s 22, it must be reasonable. Whether the restraint is reasonable and not against public policy depends on its interpretation.

[23] On the facts of this case the applicant provided the wording of the restraint.¹¹ If it wanted to exclude franchises as lessees, then it should have expressly included them in its wording of the restraint. The wording Mr Downs settled on seems to have been informed by the applicant's own relationship with the Spar Group Ltd. It describes the Spar Group as an international retail group which operates through a network of franchised stores. The Spar Group Ltd leases premises and sub-lets to its franchises. Furthermore, Mr Hartzenberg confirmed that the relationship with Spar Group Ltd is precisely the sort of relationship the applicant intended to restrain when he mentioned that there were about four in the country. Whether this is the relationship the second respondent has with the third and fourth respondent remains to be seen.

[24] *Natal Joint Municipal Pension Fund v Endumeni Municipality* [2012] 2 All SA 262 (SCA) relied on by the first respondent helpfully explains at length:

'Interpretation is the process of attributing meaning to the words used in a document, be it legislation, some other statutory instrument, or contract, having regard to the context provided by reading the particular provision or provisions in the light of the document as a whole and the circumstances attendant upon its coming into existence. Whatever the nature of the

¹⁰*Everfresh* para 79

¹¹*Pito v Deeb* 1967 (1) SA 166 (O) at 170; *MacPhail v Janse van Rensburg* 1996 (1) SA 594 (T) at 600

document, consideration must be given to the language used in the light of the ordinary rules of grammar and syntax; the context in which the provision appears; the apparent purpose to which it is directed and the material known to those responsible for its production. Where more than one meaning is possible each possibility must be weighed in the light of all these factors. The process is objective not subjective. A sensible meaning is to be preferred to one that leads to insensible or unbusinesslike results or undermines the apparent purpose of the document. Judges must be alert to, and guard against, the temptation to substitute what they regard as reasonable, sensible or businesslike for the words actually used. To do so in regard to a statute or statutory instrument is to cross the divide between interpretation and legislation. In a contractual context it is to make a contract for the parties other than the one they in fact made. The “inevitable point of departure is the language of the provision itself”, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.¹², (sic)(my underlining)

[25] In contrast to the more recent offering from the SCA above, the applicant relied on *Capnoriszas v Webber Road Mansions (Pty) Ltd* 1967 (2) AD 425 at 430C, 434A for the proposition that the restraint must be interpreted in the context by adopting a common sense approach to give effect to it in order to protect the party in whose favour it was imposed, even if that means also departing from the literal meaning of the words where that is justified, as when the parties intended a different meaning. This is not my understanding of that case in which Steyn CJ cited the following extract from *Randall Ltd v Summers* 1919 SC 396 at 406:

‘Every case of this sort must depend for its decision, first, on the terms of the particular covenant that it is founded on, and second, on the facts and circumstances which are said to constitute a breach of that covenant, and much assistance, therefore, cannot be obtained from other decided cases.’

On the facts *Capnoriszas* favoured an interpretation of a lease that enforced a restraint. On principle it reinforces *Endumeni Municipality* and does not assist the applicant.

¹²*Endumeni Municipality* para 18

[26] At its simplest, most literal interpretation, 'group' means 'more than one'. Encarta defines it as:

'A set of people or things: a number of people sharing something in common such as an interest, belief, or political aim;

In this context, the meaning of 'group' is narrowed by 'an opposition supermarket'. It is not necessary to determine the scope of the restraint but only whether the second respondent falls within its ambit.

[27] With the context being corporate law, most persuasive is the interpretation that company law attributes to the word 'group'. A group is a holding company linked to a subsidiary or subsidiaries to form larger, more complex economic units. Characteristics of the group include independence but co-ordination and unity of the holding and subsidiary companies. Central control of the companies weakens their economic independence but enables them to be managed as an economic unit.¹³ As this was a corporate transaction concerning companies the parties cannot avoid this meaning being attributed to the word 'group'. *Dickinson Holdings (Group) (Pty) Ltd v Du Plessis* 2008(4) SA 214(N) fortifies my interpretation of 'group'. The full bench interpreted 'group' to mean a group of companies or a family of companies headed by a managing director and sharing directorships. In that case the two appellants were holding companies with many subsidiaries. A franchise is a licence, permit or agreement to sell a company's products or to operate a business that carries that company's name. Conceptually a group is not a franchise.¹⁴

[28] Was the second respondent a member of the third or fourth respondents' group? The second respondent's member, Mr Daryl Lourens, denies that it is a member of the third and fourth respondents' group. The second respondent concluded a franchise agreement with the third respondent on 14 January 2013. The material terms are that the second respondent and not the third respondent would run the business. The second respondent would decorate the store as it wants. A provision typical of a franchise agreement is the buying arrangement in terms of which the second respondent buys the third respondent's branded goods. The second respondent also buys from other suppliers. The franchise fee the second

¹³ Cilliers HS et al *Corporate Law* 2nd edition para 25.01

¹⁴ Encarta

respondent pays the third respondent is based on a percentage of the purchases the second respondent makes from the third respondent and not on the second respondent's turnover. Furthermore, the second respondent does not carry the third respondent's promotional material.

[29] Named 'The Village Grocer' the second respondent's business is positioned as an upmarket, unique supermarket fashioned as the Food Lovers Market which is a mini supermarket stocking general groceries. Unlike the applicant which is a sub-tenant of the Spar Group which is the principal lessee, the same arrangement does not apply to the second respondent which holds the lease with the first respondent in its own name. Mr Lourens was not aware until he signed the agreement with the third respondent that the second respondent would be a franchise. He had assumed that the second respondent would be merely a buying partner of the third respondent.

[30] The second respondent admits that the opening of an opposition supermarket group would have negative financial consequences for the applicant. It denies that as a lessee merely connected with an opposition group it is in breach of the restraint. Although the second respondent appears as a franchisee of the third respondent on the latter's website and enjoys the cost and other benefits of the buying arrangement, I find that it is not a member of the third or fourth respondents' group.

[31] The applicant has no evidence to support its assertion that the first respondent knew that it was leasing the premises to a supermarket group. Mr Hartzenburg asks the court to draw this inference. As the respondents dispute the facts he relies on, the court must accept the respondents' version in this application for a final interdict.¹⁵

[32] The first respondent's representative, Mr Kershaw disclosed the restraint clause to Mr Lourens who assured Mr Kershaw that the second respondent was not an opposition supermarket group. Mr Kershaw knew Mr Lourens who had worked for him previously. Mr Lourens was also negotiating to operate a farm stall at Rotunda, Hilton. Initially, he wanted the premises or some part of it to set up an Everfresh styled fruit and vegetable produce store. Eventually the second respondent styled

¹⁵ *Plascon-Evan Paints (EDMS) BPK v Van Riebeeck Paints (PTY) Ltd*, 184 (3) SA 623 (A)

itself as The Village Grocer. It sourced some of its merchandise from the OK Grocer buying group.

[33] The nature of the second respondent's business is described as a supermarket/liquor store in the lease agreement with the first respondent which they signed in October 2012. Mr Kershaw saw the agreement dated 14 January 2013 between the second respondent and the third respondent on 14 February 2013, after this litigation started. Accordingly, when the first respondent granted the lease to the second respondent in October 2012 Mr Kershaw was not aware of any agreement between the second respondent and the third respondent. As stated above, the second respondent was also not aware in October that it would be a franchisee of the third respondent.

[34] The person who designed Everfresh also designed the second respondent as the Village Grocer. It is not styled as the first or second respondent. From Mr Kershaw's observations and conversations he knew nothing of a franchise agreement between the second respondent on the one hand and the third or fourth respondent on the other hand. Consequently, he cannot be in breach of the agreement, even if the second respondent is a member of the third or fourth respondents' group.

[35] If I am wrong in these findings, the applicant is still not entitled to the relief it seeks. It has not established a clear right to the interdict. As for urgency, although the parties were ready at short notice to be heard, it was inconvenient for the respondents and the court. Urgent applications are an extraordinary process reserved for circumstances when no other process can produce an adequate remedy. The urgency in this case was self-created.

[36] Mr Downs, Mr Kershaw and Mr Lourens have businesses in Hilton. Some or all of them live in this little village. They knew each other well enough to discuss what business Mr Lourens would be conducting from the premises. Mr Downs could have asked Mr Lourens personally. Instead, he watched as the second respondent was set up. He investigated and drew his own conclusions from his findings without checking them out first with Mr Lourens. If he had he might not have launched this application at all or timed it better.

[37] Launching it after the second respondent spent more than R6m to establish itself and opened for business on 31 January 2013 results in not only the urgency abating but also the balance of convenience shifting to favour the respondents. Besides, the applicant has an alternative remedy in the form of damages arising from an alleged breach of the contract. Furthermore, any remedy the applicant has lies against the first respondent.

[38] In summary, the second respondent is not part of the second and third respondents' group. It is not a subsidiary or member of their family of companies, which are public companies. I find that the restraint does not apply to a franchise. In any case a franchise on the terms between the second respondent and the third respondent does not make the second respondent a member of the third or fourth respondents' group. Lastly, even if it did, the first respondent was not aware of their relationship when it leased the premises to the second respondent.

[39] The application is dismissed with costs

D.Pillay J

Appearances: //

Appearances

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