



COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CO026MAY20/AME195MAR22

In the *application for modifying a consent agreement* between:

SHOPRITE CHECKERS PROPRIETARY LIMITED

Applicant

And

**THE COMPETITION COMMISSION SOUTH
AFRICA**

Respondent

In re: the consent order between:

Case No: CO026MAY20

**THE COMPETITION COMMISSION SOUTH
AFRICA**

Applicant

And

SHOPRITE CHECKERS PROPRIETARY LIMITED

Respondent

Panel:	Ms M Mazwai (Presiding Member) Mr AW Wessels (Tribunal Member) Prof. I Valodia (Tribunal Member)
Heard on:	15 December 2022
Order Issued on:	7 July 2023
Reasons Issued on:	7 July 2023

REASONS FOR DECISION AND ORDER

INTRODUCTION

1. This matter concerns an application to vary the terms of a consent agreement concluded between Shoprite Checkers Proprietary Limited (“Shoprite”) and the Competition Commission (“Commission”) on 28 September 2020 (“Shoprite consent agreement”) which was confirmed by this Tribunal on 9 October 2020.
2. In its application, Shoprite seeks an order in the following terms:
 - 2.1. granting leave for the amendment of the Shoprite consent agreement concluded between Shoprite and the Commission, and confirmed by the Tribunal under case number CO26MAY20;
 - 2.2. confirming the amendments to the Shoprite consent agreement concluded between Shoprite and the Commission, in accordance with annexure JP12 attached to the founding affidavit in the modification application; and
 - 2.3. granting further and/or alternative relief.
3. The application is brought in terms of section 27(1)(d) of the Competition Act 89 of 1998 as amended (“the Competition Act”) read with rule 42 of the Rules for the Conduct of Proceedings in the Competition Tribunal¹ (“Tribunal Rules”) and clause 6 of the Shoprite consent agreement.
4. Shoprite alleges that there is good cause to modify the Shoprite consent agreement because of changed circumstances and market developments which warrant granting the application. These alleged changed circumstances include:

¹ Competition Tribunal Rules published under GN2 in GG 22025 of 1 February 2001.

- 4.1. Alleged material differences between the Shoprite consent agreement and Pick n Pay's consent agreement dated 11 June 2021² ("the Pick n Pay consent agreement") which creates a market distortion between these two large retailers in South Africa;
 - 4.2. The impact of the Covid 19 pandemic on the market; and
 - 4.3. The impact of the July 2021 looting and vandalism that plagued the Gauteng and KwaZulu-Natal provinces of South Africa.
5. The application was opposed by the Commission on grounds that Shoprite has not established that the alleged "*changed circumstances and market developments*" constitute "*good cause*" to amend the Shoprite consent agreement³ and has not shown any basis (legal or factual) upon which the Tribunal may grant the relief sought in its application.
6. Pick n Pay filed submissions during the Tribunal's proceedings also challenging Shoprite's application. Pick n Pay, like the Commission, submitted that once a consent order or settlement agreement is made an order of the Tribunal, it may only be set aside on the grounds set out in section 66 of the Competition Act, which Shoprite does not rely on. Further, Pick n Pay alleged that in the event that the Tribunal entertains the variation application under section 27(1)(d) and/or the provisions of clause 6 in the Shoprite consent agreement, Shoprite has not demonstrated that there is good cause to grant the variation application.
7. After hearing the parties, we have decided to partly grant the variation application for the reasons set out below.

² Confirmed by the Tribunal on 11 June 2021.

³ Competition Commission 'Answering Affidavit' (25 April 2022) Hearing Bundle at p267, paras 11 to 11.2.

BACKGROUND

8. The Commission conducted a market inquiry into the South African grocery retail sector, the Grocery Retail Market Inquiry (“GRMI”), findings and recommendations of which are in the Grocery Retail Market Inquiry Report dated 25 November 2019 (“GRMI Report”).
9. The GRMI found that the practice of concluding long-term lease agreements that entrench exclusivity in shopping malls for incumbent large retailers *“fundamentally undermined the objectives of the Act and broader national economic policies aimed at facilitating transformation and economic inclusion.”*⁴
10. The GRMI states *inter alia* that the practice of long-term exclusive lease agreements with shopping centres sustained foreclosure of competing retailers, particularly small and independent retailers as well as emerging challenger retailers, over significantly long periods. It further finds that the pattern of long term exclusive lease agreements appears to have persisted with the initial lease generally being for a ten year period, and with the addition of renewal clauses, some of the lease agreements could endure for at least 30 years.⁵
11. The GRMI recommended remedial action in respect of long-term lease agreements, which included that:

“1100.1 National supermarket chains must, with immediate effect, cease from enforcing exclusivity provisions, or provisions that have a substantially similar effect, in their lease agreements against:

1100.1.1 SMME’s;

⁴ GRMI Report at para 58.

⁵ GRMI Report at para 45.

1100.1.2 *speciality stores; and*

1100.1.3 *at the grocery retailers (including the emerging challenger retailers) in shopping centres located in non-urban areas.*

1100.2 *No new leases or extensions to leases by grocery retailers may incorporate exclusivity clauses* (or clauses that have substantially the same effect) or clauses that may serve to restrict the product lines, store size and location of other stores selling grocery items within the shopping centre.

1100.3 *Subject to 1100.1 above, the enforcement of exclusivity by the national supermarket chains against other grocery retailers must be phased out by the next extension of the lease or within five years from the date of the publication of this Final Report, whichever is earlier.*⁶ (own emphasis)

12. The recommendations in the GRMI Report are not peremptory but are rather aimed at voluntary compliance.
13. In an effort to address the concerns identified in the GRMI Report, Shoprite proposed a draft consent agreement in a letter of 22 April 2020 for the Commission's consideration, which closely replicated the wording of the recommended remedial action in the GRMI Report.
14. After settlement discussions with the Commission, Shoprite and the Commission concluded a consent agreement which was signed on 29 September 2020 and confirmed by the Tribunal on 9 October 2020. The Shoprite consent agreement was the first consent agreement concluded in voluntary compliance with the recommendations of the GRMI Report.

⁶ Shoprite Checkers 'Founding Affidavit' Hearing Bundle at p9-11, para 12, with reference to the GRMI Report at para 1100.

15. In its answering affidavit, the Commission states that Shoprite was advised that the other consent agreements would comply with the GRMI Report's recommendations.⁷
16. To date, save for the Pick n Pay consent agreement, no other consent agreements have been concluded or confirmed by the Tribunal.

Differences between the Shoprite and Pick n Pay consent agreements

17. The Pick n Pay consent agreement was signed on 25 May 2021 and confirmed by the Tribunal on 11 June 2021. As with the Shoprite consent agreement, the Pick n Pay consent agreement was entered into as voluntary compliance and the result of negotiations between the Commission and Pick n Pay.
18. Shoprite, in this application, alleges that certain clauses (as set out below) which relate to: (i) the scope of the application of the Pick n Pay consent agreement; (ii) exclusivity provisions when renewing existing lease agreements; and (iii) the time period that Pick n Pay has to phase out the application of its exclusivity provisions in its lease agreements, are more advantageous than the terms in the Shoprite consent agreement.
19. The relevant differences between the Shoprite and Pick n Pay consent agreements, are the following:

- 19.1. **Non-Urban Areas versus HDP Supermarkets:** Shoprite agreed to cease enforcing exclusivity provisions⁸ (or provisions with a substantially similar effect) in its Long-Term Exclusive Lease

⁷ Answering Affidavit at p302, para 90.

⁸ "Exclusivity Provisions" as defined in the Pick n Pay consent agreement (but not the Shoprite consent agreement) refers to a provision in a Long-Term Lease Agreement that precludes the landlord from letting premises in the same Shopping Centre to potentially competing grocery retailers and Speciality Stores (Pick n Pay consent agreement (11 June 2021) Hearing Bundle at p84-85 clause 1.6).

Agreements⁹ against any other supermarkets¹⁰ in shopping centres located in specified Non-Urban Areas¹¹ whereas Pick n Pay's agreement to cease enforcing exclusivity provisions is in respect of HDP Supermarkets.¹²

19.2. *"HDP Supermarket"* is defined in the Pick n Pay consent agreement,¹³ as privately owned single or multiple store operations owned and controlled by historically disadvantaged persons as per section 3(2) of the Competition Act, including individual franchisees or buyer group members of other national retail brands but excluding corporate stores of those brands.

19.3. **Renewal of existing leases:** Shoprite agreed that it shall not incorporate exclusivity provisions (or provisions that have substantially the same effect), into any new supermarket leases in Shopping Centres.¹⁴ The Pick n Pay consent agreement also puts an end to exclusivity in new leases. However the Pick 'n Pay consent agreement allows Pick n Pay to incorporate exclusivity provisions when it renews existing leases (other than in relation to SMME's, speciality and limited line stores and HDP supermarkets).¹⁵

⁹ *"Long-Term Exclusive Lease Agreement"* refers to lease agreements entered into between property developers and supermarkets which include provisions that restrict the landlord from letting premises in the same shopping centre to potentially competing grocery retailers and specialty stores (Shoprite consent agreement (9 October 2020) Hearing Bundle at p40 clause 1.11).

¹⁰ *"Supermarket"* refers to a store devoted to the retail sale of groceries and household goods and which stocks a range of goods from more than 15 product categories (Shoprite consent agreement Hearing Bundle at p42 clause 1.21).

¹¹ *"Non-Urban Areas"* is defined in clause 1.12 of the Shoprite consent agreement as Peri-Urban Areas, Townships and Rural Areas, in which Shoprite has existing stores (specified in Annexure C to the consent agreement); clause 1.14 defines *"Peri-Urban Areas"* as locations adjoining an urban area between suburbs and the countryside; clause 1.15 defines *"Rural Areas"* as areas that are located outside towns and cities and without access to ordinary public services such as water and sanitation, especially areas of predominant agricultural production; and clause 1.22 defines *"Township"* as less formal an underdeveloped urban areas that were set aside during the period of a path aid for black population groups. (Shoprite consent agreement Hearing Bundle p41-42).

¹² Clause 4.1.1.3 of the respective Shoprite and Pick n Pay consent agreements.

¹³ Clause 1.11 of the Pick n Pay consent agreement.

¹⁴ Clause 1.16 of the Shoprite consent agreement defines *"Shopping Centre"* as a group of retail and other commercial establishments that are developed, owned and managed as a single property, typically with on-site parking provided (Shoprite consent agreement Hearing Bundle p41).

¹⁵ Clause 4.1.2 of the respective Shoprite and Pick n Pay consent agreements.

- 19.4. **No exclusivity after December 2024 versus December 2026:** Shoprite agreed not to enforce exclusivity provisions (or provisions that have substantially the same effect), against supermarkets in any extended (or renewed) long term exclusive lease agreement or after the elapse of five years reckoned from 17 December 2019 (that is until December 2024) whichever is the earlier. In the Pick n Pay consent agreement, the expiry date for enforcing exclusivity is 31 December 2026.¹⁶

Amendments sought by Shoprite

20. Shoprite alleges that the Pick n Pay consent agreement has the effect of creating uneven competitive playing fields which is not intended by the GRMI.
21. Shoprite seeks to change the scope of the application of its agreement to cease enforcing exclusivity in Non-Urban Areas as currently contained in the Shoprite consent agreement to HDP Supermarkets (as contained in the Pick n Pay consent agreement), enabling it to continue enforcing the exclusivity provisions in respect of renewals of existing leases until 31 December 2026, and expanding the phasing out period of exclusivity provisions in lease agreements to 31 December 2026 (as the Pick n Pay consent agreement provides).
22. Shoprite specifically seeks the following amendments to its consent agreement:
- 22.1. Insertion of a definition of “*HDP Supermarket*” (as defined in the Pick n Pay consent agreement) as “*privately owned single or multiple store operations owned and controlled by historically disadvantaged persons as per section 3(2) of the Act, including individual franchisees or buyer group members of other national retail brands but excluding corporate stores of those brands.*”;

¹⁶ Clause 4.1.3 of the respective Shoprite and Pick n Pay consent agreements.

- 22.2. An amendment to the effect that the immediate cessation of the enforcement of exclusivity provisions only applies in relation to HDP supermarkets and not supermarkets in shopping centres located in Non-Urban Areas;
- 22.3. An amendment to the effect that it may continue enforcing the exclusivity provisions in respect of renewals of existing leases until 31 December 2026;
- 22.4. Shoprite seeks to continue the enforcement of exclusivity provisions against supermarkets (save for SMME's, speciality and limited line stores, and HDP supermarkets) until 31 December 2026.
23. Shoprite submits that the differences in the consent agreements, has already had, and will continue to have, a significant impact on competition in the grocery retail market over a period of some six years.¹⁷

THE COMMISSION'S SUBMISSIONS

24. The Commission raised two preliminary points. First, the Commission alleged that an investigation and agreement from the Commission is a jurisdictional pre-requisite for a variation or an amendment of the consent order, and that this jurisdictional pre-requisite has not been met.¹⁸ Second, the Commission refers to the general principles of common law cited by the Constitutional Court in the *Ntuli* judgment¹⁹ where the Constitutional Court stated that once a court order has been pronounced upon, the court itself has no authority to correct, alter or supplement it.
25. We found neither of these arguments persuasive.

¹⁷ Shoprite 'Replying Affidavit' (16 May 2022) Hearing Bundle at p395, para 8.

¹⁸ *Answering Affidavit* Hearing Bundle at p268, para 13.

¹⁹ *The Minister of Justice v Nicko Ntuli* (CCT17/95-CCT15/97) [1997] ZACC 7 (5 June 1997) ("*Ntuli*") at para 22.

26. Section 27(1) of the Competition Act provides that the Tribunal may make any ruling or order necessary or incidental to the performance of its functions in terms of the Competition Act. The Constitutional Court in *Hosken Consolidated Investments*²⁰ confirmed that section 27(1)(d) has been “*formulated widely*” and “*confers wide powers*” on the Tribunal. In our view, section 27(1)(d) is wide enough to give the Tribunal jurisdiction – when warranted and under certain circumstances - to amend or vary consent orders as a necessary function of its regulatory mandate. In such cases, the Tribunal’s intervention must be in accordance with the principles of legality, transparency and fairness as set out in the Constitution of the Republic of South Africa, 1996 and required by the Competition Act.²¹
27. Regarding the Tribunal’s power to vary its own order, the Tribunal has read this power into the discretion conferred upon it in terms of section 27(1)(d) of the Competition Act.²²
28. Further, the Constitutional Court in *Ntuli* recognised that there are exceptions to the general principle that a court may not vary its own order and that the “*list of exceptions might not be exhaustive and that a court might have a discretionary power to vary its order in other appropriate cases*”²³ (own emphasis). The Constitutional Court’s judgment confirms that there may be circumstances where it is appropriate to vary an order if there is good cause for such variation.²⁴ On the principle enunciated in *Ntuli*, we conclude that the Tribunal is empowered under section 27(1)(d) of the Competition Act to vary its order in limited circumstances on good cause shown. We deal with good cause below.

²⁰ *Hosken Consolidated Investments Limited and Tsogo Sun Holdings Limited v Competition Commission* (CCT296/17) [2019] ZACC 2 (1 February 2019) (“*Hosken*”) at paras 76 – 77.

²¹ *Foskor (Pty) Ltd v Competition Commission and Others* (CO037Aug10/VAR240Feb16) [2019] ZANCT 181 (18 December 2019) (“*Foskor*”) at para 73. It bears mention that the Shoprite consent agreement differs from the Foskor consent agreement in that there was no variation clause in the Foskor consent agreement. The Tribunal, however confirmed that variation may be granted under section 27(1)(d). Further, the Foskor consent agreement was concluded pursuant to an investigation into anti-competitive conduct by a specific market player whereas the Shoprite consent agreement does not arise from a complaint investigation but rather from a market inquiry.

²² *Life Wise (Pty) Ltd t/a Eldan Auto Body v Competition Commission of South Africa* (197/CAC/Nov21) [2022] ZACAC 3; [2022] 1 CPLR 3 (CAC) (8 April 2022) at para 7.

²³ *Ntuli* at para 23.

²⁴ *Ntuli* at para 30.

29. Furthermore, the consent agreement itself provides for variation. Clause 6 of the Shoprite consent agreement makes provision for Shoprite to approach the Tribunal to vary the order “*on good cause shown*”. It provides:

“6.1 The Commission or Shoprite may bring any disputes regarding the terms of this consent order to the Tribunal for determination; and either party may upon good cause shown, apply to the Tribunal for the waiver, relaxation, modification and/or substitution of all or any part of this consent order.

...

6.3 in the event of the Commission withholding its consent to a waiver, relaxation or modification, Shoprite shall be entitled to apply to the Tribunal for an order waiving, relaxing or modifying this Settlement Agreement and the remedies provided herein. The Commission shall be entitled to oppose such application.”

30. It is clear from the language used in clause 6.1 of the Shoprite consent agreement, that Shoprite and the Commission made specific provision for a variation of the terms of the agreement in circumstances where there is “*good cause*” for such variation. This provision contemplates an application for variation in circumstances that are not provided for in terms of section 66 of the Competition Act that circumscribes the basis of variation.
31. Notably, the Commission itself submitted that “*the Tribunal has jurisdiction in terms of paragraph 6.1 of the Tribunal’s order to entertain the application*”.²⁵ There is accordingly no merit to the Commission’s point *in limine*.
32. The Commission, in its heads of argument, further contends that Shoprite is essentially requesting the Tribunal to make a new consent agreement through

²⁵ Answering Affidavit Hearing Bundle at p269, para 15.

the variation application which the Tribunal has no jurisdiction to do.²⁶ We do not agree with this contention. Clause 6.1 of the consent agreement clearly contemplates a dispute regarding the terms of the Shoprite consent order.

33. Given the above, we conclude that the Tribunal is empowered in terms of section 27(1)(d) read with clause 6 of the consent agreement, to vary the consent order provided that Shoprite can show good cause.

HAS SHOPRITE SHOWN GOOD CAUSE?

34. In its opposition to variation, the Commission alleges that:²⁷

- 34.1. The removal of the exclusivity provisions of Shoprite (and Pick n Pay's) lease agreements has created competition;
- 34.2. Shoprite has not suffered any harm as a result of the consent agreement;
- 34.3. Shoprite is not prevented from expanding;
- 34.4. Shoprite is not precluded from entering shopping centres where Pick n Pay's has retail space;
- 34.5. The differences between the two consent agreements are transient or transitional in nature and do not warrant a variation;
- 34.6. The interests of the public prevail over Shoprite's private interests; and
- 34.7. The Tribunal's order will set a dangerous precedent.

²⁶ Competition Commission 'Heads of Argument', Heads of Argument and Other Submissions Bundle at p62, para 28.

²⁷ *Answering Affidavit* Hearing Bundle at p285, para 49.

OUR ANALYSIS

35. It is important to note that this application is not a challenge to the validity of the two relevant consent agreements. The Tribunal has already considered and confirmed both the Shoprite and the Pick n Pay consent agreements.
36. There is no allegation that the Shoprite consent agreement in its current form, ought not to have been confirmed by the Tribunal because it does not promote the objectives of the Competition Act, is not in the public interest, is irrational or is shockingly inappropriate.
37. Shoprite is also not challenging the validity of the Pick n Pay agreement. There is no application before this Tribunal to set aside or vary that agreement.
38. This matter is about whether there is good cause shown to grant the application for a variation of the Shoprite consent agreement because of alleged changed circumstances.
39. We note that there is no one-size-fits all approach to consent agreements, including consent agreements emanating from market inquiries. Consent agreements are negotiated between the Commission and a party on a case-by-case basis, considering the individual circumstances of the party entering into the agreement with the Commission and the prevailing circumstances at the time of entering into the agreement. There may therefore be deviations from one consent agreement to another depending on the circumstances of each case. There is therefore no concern that this order will create dangerous precedent as alleged by the Commission since each matter is considered on its merits.
40. The Tribunal has the discretion to determine what constitutes good cause in the interests of justice based on the facts of the case.²⁸ In *Foskor*, the Tribunal

²⁸ *Competition Commission of South Africa v Pickfords Removals SA (Pty) Ltd* (CCT123/19) [2020] ZACC 14 (24 June 2020) at para 54.

noted that the Constitutional Court and Competition Appeal Court have held that the Tribunal “*should not adopt an over-technical approach to parties seeking relief when the subject matter of the dispute falls within the mandate of the Tribunal*” as this could result in a barrier to justice.²⁹

41. In this context, we must determine whether or not there is good cause to grant the variation application and allow the amendments to the Shoprite consent agreement.
42. Shoprite submits that the changed circumstances of the Covid pandemic and the July 2021 looting constitute good cause. We are not convinced that these events on their own constitute good cause to vary the Shoprite consent agreement in the context where the foreclosure of rivals was sustained over long periods, which in the words of the GRMI “*fundamentally undermined the objectives of the Act and broader national economic policies aimed at facilitating transformation and economic inclusion*”. The consent agreement is aimed at opening up the grocery retail market to competition to the benefit of consumers. We therefore focus our analysis on an assessment of each of the differences between the two consent agreements separately.

Removal of exclusivity in Non-Urban Areas versus HDP Supermarkets

43. It is common cause that clause 4.1.1.3 of the Pick n Pay consent agreement, does not have the reference to “Non-Urban Areas” as the Shoprite consent agreement does. The Pick n Pay consent agreement waives exclusivity against HDP Supermarkets nationally.
44. As indicated above, individual circumstances are considered when the Commission enters into consent agreements. Shoprite and Pick n Pay are both large retailers but have a different geographic footprint in terms of where the majority of their retail stores are located in South Africa.

²⁹ Foskor at paras 63 - 64, with reference to *Hosken Consolidated Investments Limited and Tsogo Sun Holdings Limited v Competition Commission* (CCT296/17) [2019] ZACC 2 (1 February 2019) at paras 76 – 77 and *Hosken Consolidated Investments Limited and Another v Competition Commission* (154/CAC/Sept17) [2017] ZACAC 5 (30 October 2017) at para 26.

45. Shoprite has a larger presence in rural and township areas relative to its national competitors. The term “Non-Urban Areas” was included in GRMI Report as a result of Shoprite’s own submissions during the GRMI.
46. In comparison to Shoprite, Pick n Pay has a relatively smaller presence and therefore a smaller number of stores with leases containing exclusivity provisions in Non-Urban Areas. In our view, to apply the Non-Urban Areas approach to Pick n Pay would accordingly not have achieved the objectives of removing barriers to entry into the retail market to the same extent as the abovementioned national HDP provision contained in the Pick n Pay agreement. Similarly, the requirement of Shoprite to remove exclusivity in relation to Non-Urban Areas achieves the objectives of the GRMI to open up these markets to competition to the benefit of South African consumers.
47. On the evidence before us, as at December 2019, Shoprite had a total number of 1053 leases containing exclusivity provisions (including both Urban and Non-Urban Areas). Following confirmation of the Shoprite consent agreement in October 2020, Shoprite began removing exclusivity provisions in lease agreements. By April 2022, Shoprite removed exclusivity provisions in 425 non-urban leases. We understand that Shoprite does not have any further leases with exclusivity provisions in Non-Urban Areas.³⁰
48. As at the date of this application, being 22 March 2022, there were 15 actual new entrants in shopping centres situated in Non-Urban Areas, where Shoprite waived exclusivity, 3 of which represent entry by HDP Supermarkets.³¹ Notably, Pick n Pay is not amongst these identified new entrants.

³⁰ *Replying Affidavit* Hearing Bundle at p387 and p398, paras 11-12.

³¹ *Founding Affidavit* Hearing Bundle at p24, para 41.

49. Shoprite's (national) competitors have indicated their intention to enter 16 shopping centres in Non-Urban Areas where Shoprite is operating or where Shoprite has removed exclusivity provisions from renewed leases. Pick n Pay has indicated its intention to enter into 6 of those 16 shopping centres.³² This indicates the level of increased competition in the grocery retail market in Non-Urban Areas following the Shoprite consent agreement. The increase in competition is undoubtedly to the benefit of consumers, specifically in Non-Urban Areas, who are generally lower income-earning consumers.
50. Furthermore, as mentioned, Shoprite has a relatively larger footprint in Non-Urban Areas where consumers, especially low income consumers have less choice. This affects the most vulnerable consumers by making entry possible in Non-Urban Areas.
51. It would not be in the public interest for the Tribunal to grant the application to amend clause 4.1.1.3 in circumstances where competition has increased between supermarkets in Non-Urban Areas and where there is no cogent evidence that Shoprite is substantially worse off given the differences in the two relevant retailers' footprint. Further, the HDP provision that applies to Pick n Pay is geographically wider, in that it is national.
52. Given the above, we conclude that Shoprite has not made out a convincing case for good cause to amend its consent agreement to mirror that of Pick n Pay in relation to the Non-Urban versus HDP issue.

Exclusivity provisions in renewals of existing leases

53. Shoprite agreed that it will not incorporate exclusivity provisions into any new supermarket lease agreements or into existing leases when renewed. However, Pick n Pay may incorporate exclusivity provisions when it renews existing leases until 31 December 2026.

³² *Founding Affidavit* Hearing Bundle at p25, para 42.

54. Shoprite submitted that it would like to enter 46 shopping centres, 41 of which are in Urban Areas, but it is prevented from doing so because its competitors (specifically Pick n Pay and Spar) continue to enforce their exclusivity provisions. Pick n Pay holds leases in 43 of these shopping centres.³³
55. In our view, the amendment sought is not warranted. This is because Shoprite is not precluded from entering shopping centres where Pick n Pay has a presence. Shoprite may enter any shopping centre nationally where Pick n Pay has exclusivity provisions provided that it does so with an HDP franchise.³⁴ Entry by Shoprite is thus not prevented as Shoprite alleges, but must be through an individual HDP franchisee. This is consistent with the objectives of the GRMI to enhance ownership transformation in the grocery retail sector. Further, while the consent agreement has removed barriers and made entry by rivals of Shoprite possible, evidence of actual entry by competitors appears to be limited and uncertain. For instance, the evidence shows that by April 2022, Shoprite had removed exclusivity provisions in 266 urban leases. Shoprite still has 362 urban lease agreements which contain exclusivity provisions.³⁵ Shoprite's national competitors have indicated their intention to enter 12 shopping centres in Urban Areas where Shoprite is operating or where Shoprite has removed exclusivity when renewing leases. Pick n Pay intends to enter 4 of the 12 shopping centres in Urban Areas.³⁶
56. In our view, the entry of these competitors in 12 of Shoprite's total of 628 shopping centres in Urban Areas where Shoprite previously held exclusivity, introduces further competition in the market but not of a scale that is likely to significantly distort competition between Shoprite and its national competitors.

³³ *Founding Affidavit* Hearing Bundle at p28, para 43.

³⁴ Clause 4.1.1.3 of the Pick n Pay consent agreement read with the definition of HDP Supermarkets, which includes individual franchisees or buyer group members of other national retail brands but excluding corporate stores of those brands.

³⁵ *Replying Affidavit* Hearing Bundle at p397, para 11.

³⁶ *Founding Affidavit* Hearing Bundle at p25, para 42.

57. We therefore conclude that Shoprite has not made out a sufficient case for good cause and we do not grant the application by Shoprite to amend clause 4.1.2 in the Shoprite consent agreement.

Extension of the phasing out period – 2024 versus 2026

58. Shoprite will not have any exclusivity provisions in lease agreements after the lapse of five years from 17 December 2019 (that is after December 2024). Pick n Pay's consent agreement on the other hand, extends the phasing out period by a further two years relative to that of Shoprite (all exclusivity ends after 31 December 2026).
59. The Commission contends that while the end date for exclusivity between the two consent agreements (the glide path) may differ, there is parity since the final outcome in both consent agreements result in the phasing out of exclusive lease agreements.³⁷
60. In a market inquiry, the Commission intervenes to ensure that a market is, becomes or remains competitive. The Commission contends that a "slight" divergence on the path to ending lease exclusivity may be equally onerous for Pick n Pay as the glide path faced by Shoprite because Pick n Pay allegedly is smaller and less profitable to Shoprite.³⁸ This is not a convincing argument. While we accept the Commission's justification for the differences in respect of Non-Urban Areas/HDP Supermarkets and the renewal provisions, we are of the view that the fact that Shoprite is allegedly more profitable does not hold as a justification for the significant difference (of approximately two years) between the respective phase-out dates.
61. In our discretion, it would be fair to grant the variation application allowing Shoprite to amend clause 4.1.3 giving it until 31 December 2026 to ultimately phase out all exclusivity provisions in lease agreements.

³⁷ Answering Affidavit Hearing Bundle at p296, para 71.

³⁸ Answering Affidavit Hearing Bundle at p290, para 62.

62. We therefore grant the application by Shoprite to amend clause 4.1.3 in the Shoprite consent agreement to extend the ultimate phase out date to December 2026.
63. We also caution the Commission to, in the future, carefully consider the potential implications for competition in markets of entering into disparate consent agreements with different market participants stemming from the same market inquiry. In addition to allegations of potential distortions of competition in the market, disparate consent agreements may lead to the undesirable situation where parties (specifically those that are first to contemplate settlement) are deterred from voluntarily entering into consent agreements. This may have a chilling effect on settlements which have the benefit of expedition in correcting markets and promoting competition, as well as saving costs and resources associated with litigation.

ORDER

1. Accordingly we make the following order:
 - 1.1. The application for leave to include the definition of “HDP Supermarket” in the Shoprite Consent Agreement is dismissed;
 - 1.2. The application for leave to amend clause 4.1.1.3 in the Shoprite Consent Agreement is dismissed;
 - 1.3. The application for leave to amend the provisions of clause 4.1.2 in the Shoprite Consent Agreement is dismissed.
 - 1.4. The application for leave to amend the provisions of clause 4.1.3 in the Shoprite Consent Agreement is granted by deleting the words “the lapse of five years reckoned from 17 December 2019” and replacing it with the words “31 December 2026”.
2. There is no order as to costs.


MS MONDO MAZWAI

Mr Andreas Wessels and Prof. Imraan Valodia concurring

Tribunal Case Manager:

Ms Mpumelelo Tshabalala

For the Applicant:

Adv Margaretha J Engelbrecht SC
Adv Claire F Avidon

For the Respondent/Commission:

Mr Bukhosibakhe Majenge

Ms Nelly Sakata

Mr Simphiwe Gumede