IN THE HIGH COURT OF SOUTH AFRICA

EASTERN CAPE DIVISION, MAKHANDA

Case No. : 752/2022

Date Heard: 28 April 2022

Date Delivered: 17 May 2022

In the matter between:

PINZON TRADERS 8 (PTY) LTD

First Applicant

MARK WILLIAM SHELTON Second Applicant

and

CLUBLINK (PTY) LTD First Respondent

ROBERT JOHN BEER Second Respondent

CLICKS RETAILERS (PTY) LTD Third Respondent

MAKANA MUNICIPALITY Fourth Respondent

JUDGMENT

RONAASEN AJ:

Introduction

[1] Erf 9651 Makhanda ("the property") houses a substantial shopping complex known as Peppergrove Mall ("the mall"). The property is owned by the first respondent. The second respondent is the first respondent's only director.

[2] The first applicant occupies a number of premises in the mall pursuant to lease agreements it concluded with the first respondent. In one of these premises it conducts the business of a supermarket under the well-known brand name of Pick 'n Pay.

[3] On 14 May 2009 the first and second applicants, on the one hand, and the first and second respondents on the other hand, contracted in writing with each other ("the 2009 agreement") as part of an overall settlement of various disputes between them arising from two separate applications, in which they were on opposing sides, and which, at the time, served before this court.

[4] In terms of the 2009 agreement the first and second respondents are contractually bound to the first and second applicants that while the first applicant remains a tenant in the mall neither of them will directly or indirectly hold an interest in land within a defined area (which uincludes the property) upon which a supermarket is developed or to be developed.

[5] The 2009 agreement is at the heart of this application and I shall refer to its terms in greater detail, below. Suffice it to say at this stage that the relief the applicants seek in this application is underpinned by an alleged breach of of the 2009 agreement by the first and second respondents in that the first respondent is currently in the process of constructing a building on the portion the property previously described as erf 9617, Makhanda, and on an adjoining immovable property known as the remainder of erf 2074, Makhanda ("the building").

[6] It is the stated intention of the first respondent to give the third respondent occupation of a portion of the building, for it to operate a Clicks Store with effect from 1 April 2022 and thereafter occupation of the entire building with effect from 1 July 2022. The applicants contend that the third respondent will be conducting the business of a supermarket in the building. Therein, say the applicants, lies the breach of the 2009 agreement.

[7] The applicants contend, further, that the building plans in terms of which the building is being constructed have not been approved by the fourth respondent and that therefore the construction of the building is proceeding unlawfully. In addition it is contended that even if the building plans have been approved the plans are not in compliance with the fourth respondent's Integrated Land Use Scheme ("the scheme") and that, thus, such approval would be unlawful. The

non-compliance, according to the applicants, relates in particular to the scheme's requirements in respect of parking at shopping centres.

The relief sought by the applicants

[8] Against the abovementioned background the applicants seek the following relief, on an urgent basis, namely that:

8.1. the first and second respondents be interdicted from:

8.1.1. leasing premises to the third respondent or permitting the occupation of premises by the third respondent on any other basis, on the property, for the purpose of operating in such premises a Clicks Store; and

8.1.2. constructing or continuing to construct the building on the immovable properties referred to in paragraph [5], above;

8.2. the abovementioned orders operate as interim interdicts pending the final outcome of an action to be instituted by the applicants within 30 days of the granting of the orders in which action the declaratory and reviewer relief foreshadowed in paragraph 3 of the notice of motion will be pursued by the applicants;

8.3. the first and second respondents, jointly and severally with any of the remaining respondents who oppose this application, pay the costs of the application.

[9] The first, second and third respondents oppose the application.

Summary of the defences raised by the first, second and third respondents

[10] In short, the first, second and third respondents have raised the following defences to the application:

10.1. the application is not urgent;

10.2. the applicants do not satisfy the requirements for interim relief. In particular it is contended that the applicants have not established the existence of a right which would entitle them to such relief. The principal contention being that the first and second respondents have not breached the 2009 agreement as the business which the fourth respondent will conduct in the building is not that of a supermarket;

10.3. the 2009 agreement is anti-competitive and as such falls foul of relevant legislation in this regard and for this reason it is void and unenforceable;

10.4. the failure by the applicants to join Wallace Pharmacy as a party in these proceedings is fatal to the application. Wallace

Pharmacy, which has hitherto conducted a pharmacy business in the mall, has sold its pharmacy license to the third respondent;

10.5. the building plans in respect of the building have been validly approved by the fourth respondent and the construction of the building is taking place in accordance with the scheme, particularly as regards parking.

[11] I shall deal with these defences, individually, below.

Salient terms of the 2009 agreement

[12] Clause 7 of the 2009 agreement is in the following terms:

7. **DEVELOPMENT OF A SUPERMARKET**

"Clublink and Beer undertake in favour of Pinzon and Shelton that for so long as Pinzon remains a tenant of Peppergrove Mall, neither Clublink nor Beer (nor Beer's family member/s nor any entity in which Beer or family member/s of Beer hold a direct or indirect interest) shall within the area designated in the diagram (attached as "DS 3") acquire or hold an interest (whether direct or indirect) in land upon which a supermarket is developed or to be developed or in such development itself. Clublink and Beer acknowledged that the expression "interest" shall bear the widest meaning including the holding of an interest through ownership, lease (whether as a landlord or tenant), any real or personal right (whether registrable or not), guarantor, financier, funder or beneficiary or director or trustee of an entity

and irrespective of whether such interest is held personally or through a nominee/s."

[13] In clause 1.18 of the agreement a "supermarket" is defined as meaning "*a self-service shop selling foods and household goods*".

[14] Clause 11.2 provides that:

"No indulgence, which either party may grant to the other, shall constitute a waiver of rights and a party shall not thereby be precluded from exercising any rights under this agreement which may have arisen in the past or may arise in the future."

[15] The applicants maintain that they are entitled to the relief sought in terms of the notice of motion as the first and second respondents, by allowing the development of a Clicks Store in the building would be allowing the development of a supermarket in the building and hence would be in breach of the 2009 agreement. The first, second and third respondents, in turn, argue that a Clicks Store is not a supermarket as defined in the agreement.

Urgency

Introduction

[16] The question as to whether or not this application was urgent to the extent that I could dispense with the forms and service provided for in the Uniform Rules and dispose of this matter out of the ordinary course was hotly contested.

[17] It is trite that the degree of relaxation of the rules must be commensurate with the exigencies of the matter. In this regard, as a starting point, I must take into account the following objective and undisputed facts, namely:

17.1. it is the stated intention of the first respondent to accommodate a Clicks Store in the building;

17.2. to this end the third respondent has acquired the pharmacy license of Wallace Pharmacy;

17.3. the proposed Clicks Store will occupy substantial floorspace in the building;

17.4. the construction of the building is well underway; and

17.5. the existence of the 2009 agreement and the rights it affords the applicants.

[18] In *IL&B Marcow Caterers (Pty) Ltd v Greatermans SA Ltd and Another; Aroma Inn (Pty) Ltd v Hypermarket (Pty) Ltd and Another* 1981 (4) SA 108 (C) at 112H – 113A it was held that the Court's power to abridge the time periods prescribed and to accelerate the hearing of the

matters should be exercised with judicial discretion and upon sufficient and satisfactory grounds being shown by the applicants. The principal considerations in this regard are the following:

18.1. the prejudice the applicants might suffer by having to wait for a hearing in the ordinary course;

18.2. the prejudice that other litigants might suffer if the applicant is given preference; and

18.3. the prejudice that the respondents might suffer by the abridgement of the prescribed time periods and an early hearing.

[19] The first, second and third respondents say that the stated intention to locate a Clicks Store in the building was conveyed to the applicants by November 2021, by which time they had sufficient facts at their disposal to launch proceedings if they were so advised. The applicants, in turn, argue that the facts placed at their disposal in November 2021 by the first respondent showed only that a Clicks Store was intended be accommodated in the premises hitherto occupied by Wallace Pharmacy, but that no lease had as yet been concluded with the third respondent. Thus, at that time there were not sufficient facts available to them to bring an application which would satisfy the requirements of a temporary interdict.

[20] It only later (in February 2022) became clear to the applicants, so they contend, that it was the intention of the first respondent to accommodate a Clicks Store in substantially larger premises than those accommodating Wallace Pharmacy to the extent that there would be a breach of the 2009 agreement.

Relevant correspondence

[21] I analyse, below, relevant correspondence exchanged between the parties and their attorneys only insofar as this correspondence relates to the question of urgency.

[22] During the latter half of 2021 there was a regular exchange of correspondence between the first applicant and the first respondent regarding the possible establishment of a Clicks Store in the mall.

[23] On 23 July 2021 first respondent wrote to the first applicant and said that there was no further need to discuss the "*Clicks extension*" as "*we have put this plan to bed*".

[24] On 30 October 2021 the first applicant, in an email to the first respondent, recorded the first applicant's rights in terms of the 2009 agreement and contended that a Clicks Store established in the mall would be a supermarket as contemplated in the 2009 agreement and that such establishment would accordingly be an infringement of the first applicant's rights in terms of the agreement.

[25] The abovementioned email prompted a response from the first respondent's attorney on 9 November 2021 in which, this time, it was contended that, first, that a Clicks Store in the mall would not be a supermarket and would not infringe the terms of the 2009 agreement and, second, in any event the relevant provisions of the agreement were anti-competitive. The letter included a threat to refer the matter to the competition authorities. This threat has never been carried out.

[26] This letter was responded to, at length, in a letter from the first applicant's attorneys of 11 November 2021 in which the first applicant's stance was reiterated, namely that the establishment of a Clicks Store in the mall would infringe the first applicant's rights in terms of the 2009 agreement. The letter elicited an equally lengthy response from the first respondent's attorney on 15 November 2021 in which the first respondent's stance that the establishment of a Clicks Store in the mall would not infringe the first applicant's rights in terms of the agreement.

[27] On 16 November 2021, in a letter to the first respondent's attorney, the applicants sought to be advised whether the first respondent or any entity in which the second respondent had a direct or indirect interested had entered into a lease or other agreement in terms whereof the third respondent would take occupation of premises in the mall and, if so, when the first respondent would commence work

in order to make the intended premises "fit for purpose", or, otherwise, when the third respondent would take occupation of any such premises.

[28] Some 10 days later, on 26 November 2021, the first respondent's attorney wrote to the first applicant's attorney, *inter-alia* confirming that "*Clicks will open a subsidiary store in the present Wallace's building as the main store will remain in High Street where it is presently situated*".

[29] On 14 December 2021 refer the letter was addressed by the applicants' attorney to the first respondent's attorney, the gist of which was to the following effect:

29.1. the applicants had reliably learnt that the first respondent had submitted building plans to the fourth respondent for the further development of the mall;

29.2. the further development would encompass the relocation of a number of existing tenants in the mall and would provide trading space for a Clicks Store of at least 400 square metres;

29.3. thus, the statement that the third respondent would only establish a subsidiary store in the Wallace Pharmacy building was designed to mislead.

[30] The first respondent's attorney responded to this on 15 December 2021. The response is in fact a non-response it simply states that the first respondent had not concluded a lease agreement and that it was in the process of negotiating a lease agreement with, presumably, the third respondent. Significantly this letter did not deny or respond to the very clear allegation that the first respondent's previous advices as to the extent of the presence of the fourth respondent in the mall had up to then been misleading.

[31] On 1 February 2022 the applicants' attorney again wrote to the first respondent's attorney largely repeating what was set out in the letter discussed in paragraph [29], above. The letter extended an invitation to the first respondent to disclose its true intentions with regard to the accommodation of a Clicks Store in the mall. The letter again called into question the veracity of the first respondent's previous disclosures as to its intentions in this regard. Suggested timeframes for the exchange of papers in an urgent application were raised.

[32] In his responding letter of 10 February 2022 the first respondent's attorney stated that its client "*denies that it has misled your client in any way, and we confirm that Clicks, which will operate from Wallace's is a subsidiary store as the main store is double in size and remains in High Street, where it is presently situated*". Contradictorily, later in the letter, it is stated that the third respondent would be temporarily accommodated from 1 April 2022 in

the old Capellini building and have full occupation by 1 July 2022. The Capellini building is in a different location in the mall to the location of the Wallace Pharmacy.

[33] On 2 March 2022 the applicants' attorney wrote in response to the abovementioned letter, recording the discrepancies and confusion regarding the floorspace a Clicks Store would occupy in the mall, which is now apparent would be in excess of 600 square metres which was substantially more than half the floor space occupied by the third respondent's main branch in High Street as had been consistently held out by the first respondent. The letter also requested that the applicants be furnished with approved building plans for the extension to the mall to accommodate the Clicks Store.

[34] In an answering letter of 4 March 2022 it was disclosed for the first time by the first and second respondents' attorney that:

34.1. "*it was initially intended that Clicks would temporarily operate from the old premises of Wallace and anticipated that Clicks would then move to the area where the old Capellini business was conducted*". As stated this assertion did not feature in any prior correspondence;

34.2. the proposed Clicks Store would, in fact, occupy some 670 square metres in the mall.

The first and second respondents' opposing affidavit

[35] The following paragraphs in the opposing affidavit of the first and second respondents are relevant to the question of urgency:

"165. I admit that WRC responded on 26 November 2021 ("annexure 14") and that the quoted portion is a true reflection of what is contained in the WRC response.

166. I deny that the response is misleading.

167. I should explain that the plan to accommodate Clicks in the Peppergrove Mall was a staged process and certainly in November 2021 was still being finalised. It was always accepted that the floorspace in the premises currently occupied by Wallace's Pharmacy was too small (313 square metres) to accommodate Clicks indefinitely.

168. However, at that stage it was envisaged that Clicks, after Wallace's Pharmacy's licence was transferred to it, would move into and trade from those premises. It was always contemplated that Clicks would need to move elsewhere, but no firm plan had been decided at that time.

169. The plan, which was only formulated later, was that Clicks would then move into the shop space from which Capellini's operated, which was bigger than Wallace's Pharmacy then only once the Crazy Store had been renovated for purpose, would the Capellini's and Crazy Store shop space be combined to allow Clicks a total of 670 square metres of lettable area."

[36] In paragraph 174 of the opposing affidavit the first and second respondents stated that they had no obligation to discuss their intended arrangements regarding Clicks with the applicants given that it was the first respondent's view that Clicks is not a supermarket. They then say the following in paragraph 175 of the opposing affidavit:

> "175. In any event, as I have said above, it was clear to the applicants from 26 November 2021 that Clicks was moving into Peppergrove Mall. The size of the premises into which Clicks was purported to be moving can have had no relevance to the fact that on their version, Clicks is a supermarket. Either Clicks constitutes competition, or it does not; the applicants cannot have their cake and eat it."

Discussion

[37] The letter of 26 November 2021 emanating from the first and second respondents' attorney was unequivocal in the following respects:

37.1. the first respondent had at that stage not yet entered into a lease agreement with the third respondent; and

37.2. the third respondent would open a subsidiary store in the building then occupied by the Wallace Pharmacy.

[38] The applicants, in my view, quite correctly state that on the facts set out in the preceding paragraph they would not have been successful at that time in seeking a temporary interdict. On the first and second

respondents' version the third respondent, in November 2021, had not acquired any rights to occupy space in the mall.

[39] The explanation offered by the first and second respondents in the portions of their opposing affidavit referred to above is to the effect that it was always the intention that a Clicks Store would be accommodated in larger premises in the mall to the extent of almost 700 square metres was not conveyed in the November 2021 correspondence and was only conveyed in correspondence in February 2022.

[40] Thus, only in February 2022 did the applicants become aware that it was the stated intention of the first respondent that a Clicks Store would occupy substantial retail space in the mall. Clearly therefore the contentions advanced in paragraph 175 of the first and second respondents' opposing affidavit, quoted above, do not hold water, as:

40.1. on their version, the third respondent, in November 2021, had acquired no rights to occupy premises in the mall;

40.2. the size of the retail operation to be conducted by the third respondent in the mall, in terms of floorspace, would have been a crucial consideration for the applicants. The larger floorspace to be occupied by a Clicks Store is indicative of the fact that the third respondent did not intend only conducting a

pharmacy business in the mall, but rather an extended retail business.

[41] Once the applicant became aware of the first, second and third respondents' true intentions they proceeded with alacrity to launch this application. The prejudice the first applicant might suffer by having to wait for a hearing in the ordinary course is obvious. That would allow sufficient time for a Clicks Store to become established in the mall and, at best, the first applicant would be left with a damages claim which would be difficult to quantify. Irs ability to enforce its rights in terms of the 2009 agreement would be compromised if not eliminated.

[42] I am therefore satisfied that this application is one of sufficient urgency to warrant the truncation of the time periods prescribed in the Uniform Rules. The first, second and third respondents responded comprehensively to the application and any prejudice they may have suffered as result of the truncated time periods is outweighed by the consequences which would have ensued if the applicants had to wait for a hearing in the ordinary course.

Have the applicants made out a case for a temporary interdict

General

[43] In *Eriksen Ltd v Protea Motors and Another* 1973 (3) SA 685 (A) at 691C-G the following was stated in respect of the requirements for a temporary or interim interdict:

"The granting of an interim interdict pending an action is an extraordinary remedy within the discretion of the Court. When the right which it is sought to protect is not clear, the Court's approach in the matter of an interim interdict was lucidly laid down by Innes JA in *Setlogelo v Setlegelo* 1914 AD 221 at 227. In general, the requisites are:

a) a right which, 'though *prima facie* established, is open to some doubt';

b) a well-grounded apprehension of irreparable injury;

c) the absence of an ordinary remedy.

In exercising its discretion, the Court weighs, *inter-alia*, the prejudice to the applicant if an interdict is withheld against the prejudice to the respondent if it is granted. This is sometimes called the balance of convenience. The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less the need to rely on prejudice. Conversely the more the development of 'some doubt', the greater the need for the other factors to favour him. The Court considers the affidavits as a whole, and the interrelation of the foregoing considerations, according to the facts and probabilities. Viewed in that light the reference to a right which, 'though *prima facie* established, is open to some doubt' is apt, flexible and practical, and needs no further elaboration."

[44] The *Setlogelo* requirements for an interim interdict were reaffirmed by the Constitutional Court in *National Treasury and Others v Opposition to Urban Tolling Alliance and Others* 2012 (6) SA 2 to 3 (CC) at [50].

[45] Clause 7 of the 2009 agreement affords the applicants a clear right in terms of which it may by way of specific performance prevent the first and second respondents from allowing a supermarket to be developed in the mall. The question which then remains is whether the proposed Clicks Store to be operated by the third respondent satisfies the definition of a supermarket in clause 1.18 of the agreement. Obviously this is not something which I have to decide definitively at this stage. I only need to consider whether, *prima facie*, the applicants have shown this to be the case.

[46] In considering whether or not the proposed Clicks Store would be a supermarket I am mindful of the approach formulated in *Spur Steak Ranches Ltd and Others v Saddles Steak Ranch, Claremont and Another* 1996 (3) SA 706 (C) at 714E-F, as follows:

> "The proper approach is to take the facts set out by the applicants together with any facts set out by the respondents, which the applicants cannot dispute and to consider whether having regard to the inherent probabilities the applicants should not on these facts obtain final relief at the trial."

[47] The applicants have in some detail set out and described the products sold by the third respondent, other than products sold in the

context of a pharmacy, which products they contend are foods or household goods.

[48] In response the first and second respondents persist with a general denial that a Clicks Store would be a supermarket. They further contend that almost all the goods referred to by the applicants are sold also by other vendors in the mall. Quite what the relevance of this is, is not clear. No detail is however furnished as to the size or extent of the operations of the other vendors mentioned.

[49] The third respondent in a bald denial disputes that the products listed by the applicants as being foods or household goods are in fact such. There is further an admission by the third respondent that it sells foods and household goods but that these account for a small portion of the third respondent's business. For the purposes of detreminig this application that admission is telling.

[50] In my view the applicants have established on a *prima facie* basis that the proposed Clicks Store will be engaged in the sale of foods and household goods and would thus be a supermarket as defined in the 2009 agreement.

The first respondent's building plans

[51] In terms of a supplementary affidavit filed by the first respondent it is contended that the two immovable properties on which the construction of the building was proceeding have now been

consolidated. I shall proceed from the assumption that this is indeed so.

[52] To support the contentions of the first respondent that the building plans in respect of the building had been approved by the fourth respondent, a further affidavit was handed up, during the course of argument, emanating from a Ms Gcobisa Mfeti, to the following effect:

52.1. she describes herself as being the building control officer of the fourth respondent, appointed as such in terms of section 5 of the National Building Regulations and Building Standards Act, 103 of 1977 ("the Act");

52.2. she has the delegated authority to approve building plans;

52.3. her signature appears on the building plans in respect of the building, annexed to the opposing affidavit of the first and second respondents;

52.4. her signature on the plans evidences her approval, in her official capacity, of the building plans in respect of what she describes as the "*Clicks Building*".

[53] Section 4(1) of the Act states in mandatory terms that no person shall without the prior approval in writing of the local authority in question,

erect any building in respect of which plans and specifications are to be drawn and submitted in terms of the Act

[54] Section 6 of the Act sets out the functions of building control officers, which, in terms of section 6(1)(a), are to:

54.1. make recommendations to the local authority in question, regarding any plans, specifications, documents and information submitted to such local authority in accordance with section 4(3) of the Act;

54.2. ensure that any instructions given in terms of the Act by the local authority question are carried out;

54.3. inspect the erection of a building, and any activities or matters connected therewith, in respect of which approval referred to in section 4(1) of the Act was granted;

54.4. report to the local authority in question, regarding non-compliance with any condition on which approval referred to in section 4(1) of the Act was granted.

[55] Section 7 of the Act provides that a local authority, having considered a recommendation of a building control officer in terms of section 6(1)(a) in respect of an application for the approval of building plans and having satisfied itself that the application in question complies

with the requirements of the Act and any other applicable law, shall grant approval in respect of such plans.

[56] The provisions of the Act are clear. In respect of building plans the sole function of the building control officer is to make recommendations to the local authority concerned. Construction of buildings can only proceed in terms of plans approved by the local authority which approval is to be furnished by the local authority in writing. These functions fall within the sole purview of the local authority and the Act contains no provisions which allow for the delegation of these functions to the building control officer. If one considers the clearly delineated functions of building control officers on the one hand and local authorities on the other hand in the Act it is impossible to conceive that a local authority could delegate its functions in terms of the Act to the building control officer. If that were to happen one would find the anomalous situation where a building control officer would be acting on his/her own recommendations.

[57] No written approval of the plans by the fourth respondent appears in the papers.

[58] Thus, I am satisfied that at the very least the applicants have demonstrated on a *prima facie* basis that the construction of the building is proceeding in the absence of a valid written approval of the required building plans by the fourth respondent. The applicants

would have good prospects of setting aside, on review the alleged approval of the plans by the building control officer.

Compliance/non-compliance with the scheme

[59] The applicants contend that the construction of the building is not in accordance with the scheme and will result in the mall, which is a shopping centre as referred to in the scheme, being non-compliant with the requirements of the scheme in particular with regard to parking.

[60] Even on the version of the first and second respondents it would appear that the parking arrangements at the mall are inadequate and deficient and thus not in accordance with the scheme. This position is not addressed or will not be improved by the construction of the building. Therefore the building plans in respect of the building, if approved, have not validly been approved in the absence of compliance with the scheme. If not yet approved they cannot be approved until there is compliance with the scheme.

[61] Here also I am satisfied that the applicants have established the requirement of a *prima facie* right.

Do the applicants have a reasonable apprehension of irreparable and imminent harm

[62] Clause 7 of the 2009 agreement seeks to avoid a certain kind of harm for the first applicant. If the first and second respondents are allowed to avoid their obligations in terms of this clause the harm the clause was intended to avoid would ensue and may be irreversible.

[63] Clause 7 creates rights for the applicants which they are entitled to enforce by way of an action for specific performance. If they were not allowed to preserve their position by way of an interim interdict pending the determination of such an action the ability to obtain specific performance, which is a discretionary remedy, would in all likelihood fall away if the third respondent, pending the conclusion of an action, were allowed by the first and second respondents to establish itself in the mall contrary to the terms of the 2009 agreement.

[64] The applicants have in great detail set out the harm the first applicant would suffer if an interim interdict is not granted. Generally their assertions in this regard have been met with vague denials by the first, second and third respondent Considering these facts and on an objective basis the applicants have established that they have an apprehension of irreparable harm.

Do the applicants have an alternative remedy

[65] It is difficult to conceive of an alternative remedy available to the applicants. As stated the harm which the 2009 agreement seeks to

avoid is best prevented by an action for specific performance. That right could be lost in the absence of an interim interdict. I have already held that the applicant should be allowed to preserve their position by way of an interim interdict pending an action for specific performance.

[66] An action for damages in due course is unlikely to address the harm the applicants seek to avoid. The computation of damages would be extremely difficult in this case.

The balance of convenience

[67] The requirements for an interim interdict are interrelated. What I have said above about these requirements also applies to the question of the balance of convenience.

[68] The first and second respondents bound themselves to the terms of the 2009 agreement. It is clear that they are now disgruntled with the strictures placed on them by the provisions to which they freely agreed.

[69] In my view the balance of convenience favours the preservation of the position created by the 2009 agreement by way of an interim interdict. The rights enjoyed by the applicants in terms of the 2009 agreement pre-date any rights which the third respondent may in the meantime have obtained and are therefore stronger rights in law.

[70] In the absence of the preservation of the rights created by the 2009 agreement the applicants may lose, irreversibly, the ability to enforce those rights. Thus, the balance of convenience favours the applicants.

The allegations that the 2009 agreement falls foul of competition legislation

[71] The assertions in respect of the alleged anti-competitive nature of the 2009 agreement were not pressed in argument before me. During argument I put it to counsel for the parties that this issue could in due course be raised as a defence to any action instituted by the applicants by the first and second respondents and would best be determined by the hearing of evidence. Counsel did not disagree with my proposition in this regard.

Is the failure by the applicants to join Wallace Pharmacy fatal to this application

[72] The third respondent has chosen not to enlighten me as to the terms of its agreement with Wallace Pharmacy. All I really know is that the third respondent has purchased its pharmacy license.

[73] On the facts available to me Wallace Pharmacy has relinquished its right to trade in the mall, in favour of the third respondent. There is nothing before me which shows how Wallace Pharmacy will be affected in the event of my granting an interim interdict. It has not

been demonstrated to me that Wallace Pharmacy has a direct and substantial interest in the subject matter of the present proceedings.

[74] Thus, the failure by the applicants to join Wallace Pharmacy ass a party in these proceedings is not fatal to their application.

Costs

[75] In terms of the order I intend to make the applicants will have achieved success in respect of the relief they sought in terms of this application. In terms of prayer 4 of the notice of motion the applicants ask that I direct the first, second and third respondents to pay the costs of this application, jointly and severally.

[76] The Full Bench of this Division in *EMS Belting Co of SA (Pty) Ltd and Others v Lloyd and Another* 1983 (1) SA 641 (ECD) at 644H held that the costs of an interim interdict should only be granted to a successful applicant in exceptional circumstances. The success achieved by a successful applicant for a temporary interdict is of a limited and temporary nature, often based on the balance of convenience and obtained even despite a serious dispute of facts on the papers. It is implicit in an order granting a temporary interdict that such order and the relief consequent thereon will fall away should the applicant be unsuccessful in the trial. It would, in such a case, be unjust to compel the defendant in the trial to pay the costs

of an interdict to which the applicant/plaintiff may subsequently be shown to have been not entitled.

[77] No case was made as to to the existence of exceptional circumstances which would allow me to depart from the general rule established by the Full Bench and by which I am bound.

Conclusion

[78] Thus, I make the following order:

1. The first and second respondents are interdicted from:

    1.1 leasing premises to the third respondent or permitting the occupation of premises by the third respondent on any other basis, on erf 9651 Makhanda for the purposes of operating a Clicks Store in such premises; and

    1.2 constructing (or continuing to construct) the building on that portion of the immovable property which was formally designated as erf 9617 Makhanda and/or the remainder of erf 2074 Makhanda.

2. The orders in terms of 1, above shall operate as an interim interdict pending the determination of an action to be instituted by the applicants within 30 days of this order for the relief foreshadowed in paragraph 3 of the notice of motion.

3. The costs of this application will stand over for determination by the court hearing the trial contemplated in 2, above.

O H RONAASEN

ACTING JUDGE OF THE HIGH COURT

Appearances:

Counsel for Applicants: Adv EAS Ford SC

Adv JG Richards

Instructed by: Rushmere Noach Attorneys

c/o Netteltons Attorneys

Counsel for First and Second Respondents: Adv A Beyleveld SC

Adv G Brown

Instructed by: Wheeldon Rushmere & Cole Inc.

Counsel for Third Respondent: Adv SH Cole SC

Instructed by: Werksman Attorneys

c/o De Jager and Lordan Inc.

Date heard: 28 April 2022

Date delivered: 17 May 2022