

**IN THE HIGH COURT OF SOUTH AFRICA
(GAUTENG DIVISION, PRETORIA)**



Case number: 23149/2020

- (1) REPORTABLE: **NO**
(2) OF INTEREST TO OTHER JUDGES: **NO**
(3) REVISED. **YES**

11 November 2022

DATE

SIGNATURE

THE SPAR GROUP LIMITED

APPLICANT

and

VRESTHENA (PTY) LIMITED

RESPONDENT

JUDGMENT

NEUKIRCHER J

[1] This is an application that is ancillary to the main proceedings between the parties instituted under the same case number in this division and which is presently still pending. The present application

is one in which a stay of the main proceedings is sought by that respondent (Vresthena) against that applicant (the Spar Group).

[2] The stay is sought pending 2 eventualities:

2.1 the first is the referral of certain competition law issues to the Competition Tribunal (the Tribunal) in terms of section 65(2)

(b) of the Competition Act 89 of 1998 (the Act); and

2.2 the second is pending the outcome of the review proceedings the Spar Group has instituted in the Gauteng Local Division (GLD).

[3] The suite of agreements that form the subject matter of the main dispute include Head Leases, Sub-Leases and options to lease, a Spar Guild Membership Agreement, applications for credit facilities and so forth. However, it is the Head Lease and Sub-Lease agreements that are at the heart of the dispute.

[4] The Spar Group operates as a voluntary trading group consisting of independent retailers¹ who trade under the Spar name pursuant to the above agreements which regulate the commercial relationship between them as well as the terms of membership to the Spar Guild of Southern Africa NPC (the Guild)². Within this voluntary trading model, the Spar Group acts as a wholesaler and distributor of groceries. There are six distribution centres throughout the country

¹ It is not a franchise

² Which is an association incorporated in terms of s21 of the Companies Act, 2008

and each operates independently from the Spar Group by purchasing their own products which they then on-sell to the independent retailers at recommended on-sell prices. Of the approximately 1031 Spar stores nationally, approximately 983 are owned by the independent retailers and 48 are owned by the Spar Group.

- [5] All the independent retailers are members of the Spar Group which entitles them to certain benefits eg access to certain support services such as wholesale and delivery services, marketing services, information technology services, retailing services and assistance with the setting up and management of stores. It also comes with certain obligations and control exercised by the Spar Group via the suite of agreements.
- [6] Vresthena is an entity that resides within the Giannacopoulos Group (the Group). The Group consists of 13 companies³ and through those, owns and operates a total of 45 Spar retail supermarkets and Tops Liquor Stores throughout South Africa.
- [7] Vresthena is primarily a holding company although it does own one Spar Store – Rietfontein Spar. It also owns several shopping centres⁴, including the Wierda Shopping Centre in Centurion, which it purchased on 17 March 2010.

³ All controlled by the Giannacopoulos Family Trust (the Trust)

⁴ In areas such as Hartebeespoort, Pretoria, Rustenburg, Roodepoort and Richards Bay.

[8] Mystra (Pty) Ltd is also an entity within the Group. It purchased the Spar Supermarket and Tops Stores at the Wierda Shopping Centre from an entity known as Jabundani Wierda CC. Jabundani, at the time of purchase, was a sub-tenant under a sub-lease concluded between it and the Spar Group.

[9] On 18 September 2009 the Spar Group had concluded a Head Lease Agreement with the then landlord - an entity called Highveld Syndication (Pty) Ltd. On 14 June 2010 a Deed of Assignment and sub-lease was concluded between Jabundani, Mystra and the Spar Group as a result of which the Giannacopiulous Group became the owner of both the Wierda Shopping Centre and the Spar Supermarket and Tops stores located in the Centre.

THE HEAD LEASE AGREEMENT

[10] It is not contentious that the Head Lease Agreement contains the following relevant clauses:

- 10.1 Clause 6.1 provides that the initial duration period of the Agreement is ten years;
- 10.2 Clauses 6.2 to 6.4 confer a right of renewal on the Spar Group as the tenant. In terms of clause 6.2, Spar has the right to renew the Head Lease Agreement for four successive periods of five years each in circumstances where each five-year renewal constitutes a separate option;

- 10.3 Clause 6.4 provides that the terms and conditions of the Head Lease Agreement shall apply to the renewable periods with the exception of the rental amount which shall be governed by clause 7 (Rental) of the Agreement;
- 10.4 Clause 8 (Renewal Period) governs the process that applies should the Spar Group exercise its option to renew the Head Lease;
- 10.5 Clause 12 (Limitation of Landlord's Letting Rights) is an exclusivity clause. It states the following:

"12.1 The LANDLORD [i.e. Vresthena] shall not during the period of this lease, or any renewal hereof, lease any other portion of the Shopping Centre or any extension or addition thereto, to a TENANT whose business in whole or in part comprises:

12.2 a bakery;

12.3 a butchery;

12.4 a superette, supermarket, greengrocer, trading store, hypermarket, wholesaler, cash and carry or any other like business:

12.5 a department store with a food department;

12.6 a liquor store, other than a TOPS liquor outlet;

*12.7 a delicatessen."*⁵

⁵ Which is allegedly a restrictive vertical practice per section 5 of the Competition Act, 1968 which states: 5(1) An agreement between parties in a vertical relationship is prohibited if it has the effect of substantially preventing or lessening competition in a market, unless a party to the agreement can prove that any technological, efficiency or other pro-competitive, gain resulting from that agreement outweighs that effect.

[11] The Head Lease Agreement was due to expire on 30 June 2019 and the Spar Group notified Vresthena of its intention to exercise its option to renew in terms of clause 8. The Addendum seeks to give effect to this renewal and when Vresthena refused to sign it, the Spar Group launched the main application on 27 May 2020 in which *inter alia* the following relief is sought:

- “1. THAT it be and is hereby declared that the agreement of lease concluded between the applicant and the respondent on 18 September 2009 has been renewed for a period of 5 years commencing on 1 June 2019;*
- 2. THAT it be and is hereby declared that during the renewal period:*

 - 2.1 the rental payable by the applicant to the respondent shall be R263 280.00 per month; and*
 - 2.2 the annual escalation on such rental shall be 6% per annum;*
- 3. THAT the respondent be and is hereby directed to cause the signature of the written addendum, annexed hereto marked “X”, on its behalf, within seven (7) days of the grant of this order;*
- 4. THAT, in the event of the respondent failing to comply with the order in paragraph 3 above, the Sheriff of the High Court be and is hereby authorised to sign the addendum for and on behalf of the respondent.”*

[12] In the answering affidavit, Vresthena bases its opposition on 8 main grounds the most notable of which are the following:

- 12.1 to the extent that the Spar/Highveld head lease is binding, Spar has waived and/or abandoned its rights in terms of such lease, alternatively, is estopped from enforcing the lease, further alternatively, Spar had repudiated the lease and Vresthena had cancelled it;
- 12.2 even if binding, the Spar/Highveld head lease was only binding on Vresthena for ten years and the ten-year period has expired;
- 12.3 the Spar/Highveld head lease is unenforceable because it is a simulated or fictitious transaction;
- 12.4 Spar's main application should be dismissed on grounds of public policy as it is part of a greater scheme by Spar to oppress the Giannacopoulos group of companies.

[13] In the Stay Application⁶ however, Vresthena bases its argument on the fact that on 28 November 2019 the Competition Commission (the Commission) published its final Report (the Report) to the "Grocery Retail Market Inquiry". This inquiry was aimed at the widespread use of long-term exclusive use lease agreements by national supermarket chains which appeared to restrict the participation of small, medium and micro enterprises within the South African grocery retail sector.

⁶ In *Mokone v Tassos Properties CC and Another* 2017 (5) SA 456 (CC) at para 67, it was found that a court had inherent jurisdiction to suspend proceedings before it pending determination of a material issue in other proceedings.

One of the objectives of the inquiry was to study (and make recommendations) on

“4.2 The impact of long-term exclusive lease agreements entered into between property developers and national supermarket chains and the role of financiers in these agreements on local competition in the grocery retail sector.”

[14] The recommendations made by the Commission are the following:

- 14.1 national supermarket chains must immediately cease enforcing exclusivity provisions or provisions that have a substantially similar effect in their lease agreements;
- 14.2 no new leases or extensions⁷ to leases by grocery retailers may incorporate exclusivity clauses (or clauses that have substantially the same effect); and
- 14.3 the enforcement of exclusivity by the national supermarket chains as 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 the Final Report, whichever is earlier.

[15] The Spar Group launched a review application on 25 August 2020 in which it *inter alia* seeks to review and set aside the Report. Alternative relief is also sought which is aimed at challenging the validity of the Commission’s findings and remedial action regarding the use of exclusivity provisions in lease agreements between

⁷ Which is the subject matter of the main application

landlords of shopping centres and their tenants⁸. As stated, this Review is still pending.

THE EXCLUSIVITY PROVISION

[16] This is set out in paragraph 10.5 supra and Vresthena contends that the main proceedings must be stayed as:

16.1 Section 65(2) of the Competition Act provides as follows:

“65(2) If in any action in a civil court a party raises any issue concerning conduct that is prohibited in terms of this Act, that court must consider the matter on its merits and –

(a) If the issue raised is one in respect of which the Competition Tribunal or Competition Appeal Court has made an order, the court must apply the determination of the Tribunal or Competition Appeal Court to the issue; or

(b) otherwise, the court must refer that issue to the Tribunal to be considered on its merits, if the Court is satisfied that –

(i) the issue has not been raised in a frivolous or vexatious manner; and

(ii) the resolution of that issue is required to determine the final outcome of the action.”

⁸ In essence, the alternative to the review is a declaratory order that the Report does not require Spar or independent Spar retailers to cease enforcing exclusivity provisions

16.2 it is in the interests of justice that the main proceedings be stayed pending the outcome of the review.

[17] It is Vresthena's argument that the outcome of the review proceedings will materially impact the main proceedings as, if the review is unsuccessful, and Vresthena has (in the meantime) been forced to continue with the main proceedings, one of the potential outcomes is that it may be compelled to renew the Head Lease on terms which are (potentially) unlawful.

[18] The Spar Group has taken issue with Vresthena's interpretation of the proceedings and has based much of its argument on Vresthena's incorrect interpretation of Section 65(2) of the Competition Act and the fact that, according to it, no Competition law issues were raised by Vresthena in its opposition to the main application. Thus says Spar Group where Section 65(2) is not a central, or even a peripheral, issue in the main application, Vresthena cannot raise it now.

WAS THE ISSUE RAISED IN THE MAIN PROCEEDINGS?

[19] It appears to me that this issue must be decided first as, if it is not an issue that is already before court, Vresthena cannot rely on it to found or bolster its stay application.

[20] As stated, the Spar Group argues that it has not: Section 65(2) of the Act is nowhere raised in the main application, nor are anti-competitiveness or the recommendations of the Commission raised. It argues that the high-water mark of Vresthena's defence is that the Head Lease is unlawful because it is a fictitious or simulated transaction.

[21] In its main application answering affidavit, Vresthena states, *inter alia*, the following:

"SPAR HEAD LEASE IS A SIMULATED OR FICTITIOUS TRANSACTION

77. *In general, the Spar Guild requires its retail members, as a pre-condition of membership, to enter into head lease and subtenant arrangements with Spar Group in respect of the retail premises. The purpose of this structure is to "reserve" the premises for Spar retailer and to ensure that the Spar Group's competitors cannot make use of the premises.*

78. *The "reservation" function of the head lease structure is achieved by including in the sub-lease a condition that the sub-lease will only be valid doe so long as the sub-tenant leaves the Spar Guild and wishes to trade as a "Pick 'n Pay", its sub-lease will terminate and it will not be able to trade from the sub-let premises as a "Pick 'n Pay. In that event, Spar Group would be entitled to evict that sub-tenant and replace it*

with a sub-tenant which is a Spar retail member and will trade under the Spar banner.

79. Some other benefits to Spar Group of the head lease structure include the following:

79.1 Spar is able to exert control over the retail member s. if the retail member does not comply with Spar Group's requirements, it faces the risk of having its Spar Guild membership terminated and consequently, the danger of having its sub-lease terminated and being evicted from its retail store premises. I refer to this aspect in further detail below.

79.2 Spar Group is able to exert some control over the state or condition of the premises, because it purports to have, at least on the face of it, the status of a tenant in the premises.

79.3 Spar Group is able to reflect the sub-leases as purported assets in its books because the sub-lease, on the face of it, represents a fixed income stream over a lengthy period of time.

79.4 The head lease enables Spar Group to assert that it holds a certain "market share" because it exerts control over a certain geographical location, and excludes its competitors from occupying that location and servicing shoppers within the geographical proximity of that store. For example, if Spar had a head lease in respect

of the Retail Spar/Tops Premises at Wierda Shopping Centre, it would be entitled to assume and to represent to its stakeholders that a majority of shoppers within a certain proximity of the Wierda Shopping Centre Spar and Tops fall within Spar Group's "market share".

80. *To the extent that the Spar/Highveld Head Lease was validly concluded - between Spar Group and Highveld (which is disputed), it is evident from what is set out above that it was not Spar Group's or Highveld's intention to enter into a head lease and to exercise the rights and obligations of a genuine landlord or head tenant of the Retail Spar/Tops Premises.*

81. ...

82. ...

83. *Under these circumstances, the real and only purpose of the conclusion of the Spar/Highveld Head Lease, at the time of its purported conclusion with Highveld, was to "reserve" the Retail Spar/Tops Premises for use exclusively by a Spar retailer, so as to ensure that Highveld did not lease those premises to a competing supermarket franchise. This also served the ancillary purposes of enabling Spar Group to reflect the Spar/Highveld Head Lease as an "asset" in its books and to enable Spar Group to assert that shoppers within the*

proximity of Wierda Shopping Centre fell within Spar's "market share".

84. *The Spar/Highveld Head Lease (if validly concluded – which remains denied) is therefore a simulated or fictitious transaction which was not intended to be given effect in accordance with its terms. Accordingly, I submit that, to the extent that the Spar/Highveld Head Lease is binding on Vresthena (which is denied), the Spar/Highveld Head Lease is unenforceable in accordance with its terms."*

[22] The Spar Group argues that it is clear from both the heading and the conclusion of the above, that section 65(2) has not been raised.

[23] Vresthena's argument is that the answering affidavit clearly references the Head Lease and its anti- competitive structure. It also argues that a *"simulated transaction is one that is unlawful because it seeks to cloak its true unlawful purpose and the Head Lease is cloaked with some semblance of lawfulness but because of the exclusivity component it is unlawful."*

[24] Vresthena conceded in argument before me that, whilst section 65(2) has not been overtly referenced in the answering papers, it has been raised as a matter of fact and this by referencing the fact that the

Head Lease itself excludes competition. As stated in paragraph 12.4 *supra*, the defence is further raised regarding the Spar Group's oppressive conduct towards Vresthena.

[25] The fact that Section 65(2) is not specifically raised in the main application is, in my view, not of itself sufficient to conclude that the jurisdiction of this court is ousted. In any event, the argument with regard to the unlawfulness of the exclusivity provisions and has been raised in the main proceedings, albeit in the manner mentioned *supra*, and has fully fleshed out in this application. In application proceedings the affidavits constitute not only the evidence, but also the pleadings and must contain all the evidence that would be necessary at trial for application to succeed.⁹

[26] In my view the challenge to the exclusivity provisions have been sufficiently raised and fleshed out and this being so, this court must refer that issue to the Tribunal if I am satisfied that a) the issue, has not been raised in a frivolous or vexatious manner, and b) the resolution of that issue is required to determine the final outcome of the action.

FRIVOLOUS OR VEXATIOUS

⁹ *Transnet Ltd v Rubenstein* 2006 (1) SA 591 (SCA) at 600; *In Hano Trading CC v JR 209 Investments (Pty) Ltd and Another* (650/11) [2012] ZASCA 127 (21 September 2012) at para 10 stated: "Unlike actions, in application proceedings the affidavits take the place not only of the pleadings, but also of the essential evidence that would be led at trial."

[27] The question is whether Vresthena's case is "hopeless" - if it is then it is frivolous and vexatious¹⁰:

"[26] As would have appeared from the discussion above, the appellants' case on the competition issues is hopeless. There is authority for the proposition which I endorse, that one who conducts a hopeless case acts frivolously. In S v Cooper 1977 (3) SA 475 (T) at 476D-G Boshoff J remarked in the context of an application for a special entry on the record that -

'...the word "frivolous" in its ordinary and natural meaning connotes an application characterized by lack of seriousness, as in the case of one which is manifestly insufficient, and the word "absurd" connotes an application which is inconsistent with reason or common sense and unworthy of serious consideration. These words have been used according to the decided cases in respect of pleadings and actions which were obviously unsustainable or manifestly groundless, or utterly hopeless and without foundation. ... In order to bring an application within this description, there should be present grounds upon which the Court could found an opinion that the application is clearly so groundless that no reasonable person can possibly expect to obtain relief from it. The Court should be slow in coming to such a conclusion, and this quality must therefore appear as a certainty and not merely on a preponderance of probability.'"

[28] In finding that the test is an objective one, the court then stated:

"... an issue can be said to have been raised in a frivolous and vexatious manner if it is clearly groundless or insufficient. No facts

¹⁰ Platinum Holdings (Pty) Ltd and Others v Victoria and Alfred Waterfront (Pty) Ltd and Another (428/2008) [2004] ZASCA 54 (28 May 2004) at para 26

have been alleged by the applicants that might have supported a referral to the Competition Tribunal: In the circumstances no reasonable person could possibly have expected to obtain any relief from that tribunal.”¹¹

[29] In the Notice of Motion, Vresthena asks that the following issue(s) be referred to the Tribunal: the lawfulness of the following conduct:

29.1 the Spar Group’s use of, and insistence upon, the exclusivity provisions in head lease agreements between the Spar Group and Landlords, alternatively in the Head Lease Agreement between the Spar Group and Vresthena which is the subject of the application proceedings; and

29.2 the head lease and sub-lease agreement structure, of the sort which is the subject of the application proceedings and which is imposed by the Spar Group on its independent retailers and on Landlords, alternatively on Vresthena.

[30] It is so that in the event that I find that Vresthena has raised an issue concerning conduct that is prohibited in terms of the Competition Act, I must refer that issue to the Tribunal to be considered on its merits provided that the conditions set out in Section 65(2)(b) are met.¹² Thus where the conduct may be such that it contravenes the Act, there must be a referral and I have no discretion to refuse to do so.

¹¹ Platinum Holdings supra at para 27

¹² American Soda Ash Corporation and Another v Competition Commission of South Africa and Others [2005] 1 CPLR 18 (CAC) – approved by the SCA at 2021 (5) SA 134 (SCA). Comair Limited v Minister of Public Enterprises and Others 2016 (1) SA 1 (GP)

[31] Whilst the Spar Group complains that the relief sought is too broad, the relief set out in the Notice of Motion confines the remedy to the parties themselves and in this way is curtailed. Thus, the formulation is competent and is clearly definable.

[32] In **Seagram Africa (Pty) Ltd v Stellenbosch Farmers' Winery Group Ltd and Others**¹³ the court stated:

"it is clear that the commission has already formed a view about the nature of this transaction entered into between the respondents. In their view it is not a merger as contemplated in Section 512. In the circumstances, I fail to understand the benefit which would be derived by the parties referring the matter back to the tribunal when the commission has already formed an opinion in this regard."

[33] But the difference between Seagram and this matter is that here the Commission has already made the following recommendations regarding long-term lease exclusivity:

"1102.1 national supermarket chains must immediately cease from enforcing exclusivity provisions or provisions that have a substantially similar effect in their lease agreements;

1102.2 no new leases or extensions to leases by grocery retailers may incorporate exclusivity clauses (or clauses that have substantially the same effect); and

¹³ 2001 (2) SA 1129 (C) at 1144 C-D

1102.3 *the enforcement by the national supermarket chains as against other grocery retailers must be phased out by the next extension of the lease or within five years of the publication of the Final Report, whichever is earlier.”*

[34] It thus appears that there is indeed conduct which may contravene the Act. This being so, I cannot find that the issue has been raised in a frivolous or vexatious manner and the requirements set out in Section 65(2)(b)(i) have been met.

THE RESOLUTION OF THE ISSUE IS REQUIRED TO DETERMINE THE FINAL OUTCOME OF THE ACTION

[35] The Spar Group argues that even if I find in favour of Vresthena under Section 65(2)(b)(i), the prerequisites of Section 65(2)(b)(ii) have not been satisfied as the Head Lease must be treated as being valid and enforceable and its terms enforced i.e the main application is directed at obtaining specific performance.

[36] It argues that even were the Tribunal to eventually determine that the exclusivity provision in the Head Lease is anti-competitive, the Tribunal has no authority to interfere with the actual agreement and cannot declare it (or any part of it) to be void unless the agreement or relevant provisions are an integral part of the prohibited practice, as is clearly articulated in **Astral Operations Ltd v Nambitha**

Distributors (Pty) Ltd¹⁴ where the plaintiff sued for goods sold and delivered pursuant to a written contract. In a counterclaim defendant alleged that plaintiff had engaged in practices prohibited under the Competition Act. In deciding an exception on this issue, Gorven J (as he then was) stated:

“Is the Tribunal empowered to declare the agreement void by virtue of the provisions of section 58(1)(a)(vi)? In Mike’s Chicken (Pty) Ltd and Others v Astral Foods Limited and another, the CAC held as follows:

“The only power that the Tribunal has to ‘void’ contracts is derived from section 58(1)(a)(vi) of the Ac, which permits the Tribunal to make an appropriate order in relation to a prohibited practice, including ‘declaring the whole or any part of an agreement to be void.’ The Tribunal can thus only ‘void’ a contract if it relates to a practice prohibited in terms of Chapter 2 of the Act (which concerns restrictive practices and the abuse of a dominant position.) A contract that does not offend the Act (and more particularly Chapter 2 thereof) is beyond the scope of the Tribunal to terminate.”

The last sentence may perhaps be too broadly stated if it is understood to mean that a contract must itself amount to a prohibited practice or have terms which do so. If, on the other hand, all that it means is that the contract or its terms must not have any relationship to a prohibited practice, it does not really assist in dealing with the nature and extent of that relationship. A helpful approach to this issue is articulated in the following dictum of the Tribunal with whose reasoning I respectfully agree:

“It is significant that the power mentioned in section 58(1)(a)(vi) to declare an agreement or part thereof void is not a power in the abstract but is constrained by being a power ‘in relation to a prohibited practice’. This means that it is not open to the Tribunal to declare an agreement or part

¹⁴ [2013] 4 All SA 598 (KZD) at para 17

thereof to be void unless the agreement or relevant provision(s) thereof is an integral element of the prohibited practice. Often there will be little more than the conclusion of an agreement and its implementation to constitute the prohibited practice, and it then in most cases will be struck down by an order under one of the sections mentioned above (ie sections 4, 5, 8 and 9). But it is conceivable that an agreement or part thereof may have a secondary or ancillary role in the broader scheme of a prohibited practice. An example of the latter would be an agreement between parties who engage in a prohibited practice to conceal or destroy evidence of the practice, or an agreement which seeks to extinguish a firm's rights of access to the fora in which competition disputes are resolved."

[37] It is the Spar Group's argument that the exclusivity clause is not an integral part of the Head Lease or, for that matter, even the sub-lease and it argues that, at best for Vresthena, the Tribunal would only declare the exclusivity provision void which would have the effect of severing that provision from the remainder of the Lease which would remain intact.

[38] But the point here is that the Spar Group does not ask for severance of any exclusivity clause - it seeks relief which would see the entirety of the agreement on its prevailing terms and conditions renewed until 31 May 2024. Thus, any order which a high court may grant in the main application may well fall foul to the Tribunal's decision and the putting the proverbial cart before the horse in the matter (in my view) makes no sense. We are not dealing with a situation akin to the one in **Platinum Holdings** where it was found that the final outcome of the action, and the relief, could only be determined by the high

court. In my view, in *casu*, if the Tribunal determines the clause to be anti-competitive, this is something that the court will have to consider in deciding whether or not to grant the relief in the main application.

[39] Thus I am of the view that the requirements set in section 65(2)(b)(ii) have been met.

THE REVIEW APPLICATION

[40] In the review, the Spar Group accepts that the Commission's recommendations constitute remedial action and are binding on all parties until set aside it is for this reason that the review is brought.¹⁵

[41] I am not called upon, nor do I consider it appropriate, to make any comment or finding as regards that application. Suffice it to say that the premise that the recommendation that leases may not be renewed with an exclusivity clause will certainly impact in the relief sought in the main application irrespective of whether the Spar Group's review succeeds.

[42] I am therefore of the view that the stay is in the interests of justice.

COSTS

¹⁵ *Economic Freedom Fighters v Speaker, National Assembly and Others* 2016 (3) SA 580 (CC) at para 71.

[43] I am not of a mind to grant costs at this stage. In my view Spar's opposition to these proceedings was not frivolous and contributed towards the court being placed in a position to meaningfully consider all the issues. I therefore intend to reserve these costs for ultimate determination by the court hearing the main application.

ORDER:

[44] The order I therefore make is the following:

1. The application proceedings instituted by the Applicant, The Spar Group Limited ("the Spar Group"), under case no: 23149/2020, are stayed pending:
 - 1.1 the referral to and determination by the Competition Tribunal of South Africa, in accordance with section 65(2)(b) of the Competition Act 89 of 1998, and in terms of that Act, of the lawfulness of the following conduct:
 - 1.1.1 the Spar Group's use of, and insistence upon, the exclusivity provisions in head lease agreements between the Spar Group and Vreshena which is the subject of the main application proceedings under case number 23149/2020; and
 - 1.1.2 the head lease and sub-lease agreement structure, of the sort which is the subject of

the application proceedings and which is imposed by the Spar Group on Vresthena;

- 1.2 the outcome of the review application instituted by the Spar Group in the Gauteng Local Division, High Court of South Africa, Johannesburg under case number 20/25368;
2. The lawfulness of the conduct referred to in 1 above is referred to the Competition Tribunal of South Africa in accordance with section 65(2)(b) of the Competition Act 89 of 1998.
3. The costs of this application are reserved for determination by the court hearing the main application.

B NEUKIRCHER
JUDGE OF THE HIGH COURT

Delivered: This judgment was prepared and authored by the Judges whose names are reflected and is handed down electronically by circulation to the Parties/their legal representatives by email and by uploading it to the electronic file of this matter on CaseLines. The date for hand-down is deemed to be 11 November 2022

Appearances:

For the Applicant : Advocate A Subel with S Hoar

Instructed by : Moss March & Georgiev

For the Respondents : Advocate A Gotz with A Cachalia

Instructed by : Fluxmans Incorporated

Heard on : 18 July 2022