IN THE HIGH COURT OF SOUTH AFRICA,

GAUTENG DIVISION, PRETORIA

CASE NO: B682/2024

(1) REPORTABLE: YES/ NO
(2) OF INTEREST TO OTHER JUDGES: YES/ NO
(3) REVISED: YES/ NO

25 March 2024

DATE SIGNATURE

In the matter between:

SAFARI INVESTMENTS (RSA) LTD Applicant

(Registration number: 2000/015002/06)

and

KIT KAT GROUP (PTY) LTD Respondent

(Registration number: 1996/002415/07)

JUDGMENT

COWEN J

1. The applicant is Safari Investments (RSA) Ltd, the registered owner of two erven in Atteridgeville, Pretoria, where it has developed the Mnandi Shopping Centre (the centre). The respondent is Kit Kat Group (Pty) Ltd, one of the tenants in the centre. The parties concluded a lease agreement pursuant to which the respondent occupies Shop B01, which is approximately 461m^2 in extent.

2. The applicant has approached the court urgently for an order for specific performance under the lease agreement in circumstances where the respondent has, on 5 March 2024, stopped trading at the centre and started removing its stock. The order is sought on an interim basis pending an arbitration to be instituted within ten days of the order.

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3. The applicant explains that when a shopping centre is developed, it is important to ensure that it is occupied by an appropriate tenant mix for the area and centre size. When the applicant procured tenants, it initially had to procure anchor tenants to occupy the larger shops. The respondent, it says, is one such tenant. Once the anchor tenants are secured, it says, that will inform the mix of the remaining tenants to occupy the smaller shops. Smaller tenants are apparently comfortable concluding lease agreements only once anchor tenants are secured

as their viability in some instances is dependent on the anchor tenants' trade. Thus, the occupation of the larger shops is of utmost importance.

4. The lease agreement between the applicant and the respondent was signed by the respondent on 11 May 2023 and concluded on 13 August 2023 when the applicant signed it. It endures for a fixed term period of three years commencing on 1 March 2023. It thus expires on 28 February 2026. The gross rental is R120 per $m^{2.}$. Under Clause 8 of the lease agreement the respondent must ensure that the shop is open for business at specified hours throughout the week.

5. Clause 17 of the lease agreement is titled 'Trading from the leased premises' and provides, in relevant part:

> '17.1 The Tenant shall keep the Leased Premises open for business, with its full range of merchandise, on all trading days and during such trading hours as are specified by the Landlord in the schedule, and are amended from time to time. In this regard it is recorded that the Landlord shall in its sole discretion be entitled to change the trading days and trading times, within reason and based on good business competitive considerations. Any deviation from the prescribed business hours by the Tenant, may only be agreed to in writing.
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> 17.2 The Tenant shall –
>
> 17.2.1 Install and maintain suitable merchandise in the display windows of the Leased Premises, provided always that the Tenant shall not by the display of merchandise or other objects, spoilt, impair or detract from the architectural form or style or appearance of the leased premises, the common areas or the complex generally. It is recorded that the purpose of the display window/s is/are for the display of products and not for storage of products. The Landlord shall, in its sole

> discretion, determine whether the display window/s of the Leased Premises, complies / comply with this clause 17.2.1.
> 17.2.2 keep the shop fronts of the Leased Premises fully illuminated 7 days per week from 08h00 until midnight.
> …
> 17.2.4 ensure that the Leased Premises are both adequately stocked with merchandise and properly staffed with personnel;'

6. On 30 December 2023, the respondent addressed a letter to the applicant which records the following:

> 'We kindly bring it to your notice that owing to the expansion of our business and the size restrictions at the current store we are unable to accommodate our full range of products at the said store. We are therefore unable to continue our operations at the current store.
> We therefore kindly notify you that we will be vacating the store by end of February 2024. We wish to part in good spirit as we will be considering an option to engage your company to introduce our franchisees, to take up premises for our new Kit Kat franchise model that we intend launching soon.
> We request you to kindly arrange the necessary takeover from your side. …'

7. On 9 January 2024, the applicant's leasing manager wrote to the respondent to advise that the lease remains in place until 28 February 2026 and that the respondent 'remains liable for all obligations until such time that a suitable franchisee / replacement tenant, that must be approved by the Landlord, has signed a new lease / cession with the Landlord.' The parties thereafter sought to arrange a meeting to resolve matters, but this did not immediately take place. On 29 January 2024, the respondent sought to remove some of its fixtures and fittings but the centre management stopped it. On 30 January 2024, the applicant reiterated in correspondence that the lease 'remains in place with a continuous trade clause where the store must remain open for business, with its

full range of merchandise on all trading days. …' Moreover, the applicant emphasized that no agreement has been reached regarding vacation of the premises.

8. The parties held a meeting on 1 February 2024 during which the respondent advised that it would indeed be vacating at the end of February 2024, in response to which the applicant indicated that any repudiation of the agreement would not be accepted, the applicant would not release the respondent from its lease and the respondent must continue to trade. This stance was reiterated in a letter dated 5 February 2024 sent by the applicant through its erstwhile attorneys. In that letter, the applicant emphasized that it would hold the respondent to its lease agreement (at least until another tenant was secured) and that it would be liable for any damages that may be caused should it breach the contract. On 7 February 2024, the respondent's attorney responded advising that the respondent would be vacating at the end of February and 'it will, if possible, install a franchisee tenant in the premises, if such franchisee can be secured by then.' In the meantime, it was said, 'our client will vacate and the rent is up to date and there is no bar to our client doing so.'

9. On 19 February 2024, a further letter was addressed by the applicant's erstwhile attorneys again demanding compliance with the lease agreement for its duration and advising that damages would be sought should any repudiation in fact ensue. During the last week of February 2024, it was, according to the applicant, business as usual and the respondent did not act on its threat to vacate at the

end of February 2024. At that stage, the applicant assumed that the respondent would not vacate until an agreement had been reached regarding the way forward.

10. However, on Tuesday 5 March 2024, the centre manager advised that the respondent had ceased trading and had commenced packing up its stock. On 6 March 2024, the applicant's attorneys wrote to the respondent and, in accordance with its stance to date, confirmed that it would be holding the respondent to the lease and its obligation to continually trade. It then advised that it would claim specific performance reserving its rights in respect of other contractual or common law remedies. An undertaking was sought to continue trading. The respondent did not give the undertaking, failed to recommence trading and continued to pack up the stock.

11. The application was then instituted on 8 March 2024. The respondent was afforded until 13 March 2024 to deliver an opposing affidavit. The replying affidavit, dated 14 March 2024, attracted an application to strike out, alternatively leave to deliver a supplementary affidavit. One issue traversed at that stage is whether after proceedings were instituted, the respondent undertook to recommence trading until a replacement tenant had been sourced, as the applicant alleged in its replying affidavit. That is disputed. In my view, the issues raised in the replying affidavit for the most part constitute permissible material in reply, but in any event, the applicant has delivered a response, and there is no objection to its reception. In these circumstances, I admit the supplementary affidavit and do not deal with the application to strike.

12. The matter was set down on 19 March 2024 when it came before me. The respondent sought to persuade the Court that the matter is not urgent in that any urgency has been self-created as the respondent advised the applicant that it would be vacating the premises as far back as 30 December 2024.

13. While that advice was indeed given, this submission does not factor in the events that followed, through which the parties sought to meet with each other and find common ground, and trading continued. During this period the respondent repeatedly advised it sought open communication and an amicable solution, and there were various discussions detailed on the papers. Given the nature of the communications between the parties, at least until 7 February 2024, it is unsurprising that the applicant did not act upon receipt of the letter of 30 December 2024.

14. It may well be that with the benefit of hindsight, the respondent's conduct in fact demonstrates a party at all times intending to vacate. However, I do not consider the applicant's ongoing belief through the January and February period that the lease would be honoured at least until the parties could reach an agreement regarding early termination to be unreasonable. On the contrary, it shows a fair assumption that engagements were ensuing in good faith and a genuine belief, when trading did not cease at the end February 2024, that 'reason had prevailed'.

15. I am also satisfied that the applicant cannot obtain substantial redress in due course. I accept that the impact of vacancy on the shopping centre will be

immediate and damaging, not only to the applicant but to the other tenants including small tenants and that the applicant should not be summarily deprived of its right to demand specific performance in this case. I accept too that the applicant is hoping to sell the shopping mall and that that process will be adversely affected if tenants are able to breach their leases by prematurely vacating the premises with impunity. Moreover, the lease agreement, while providing for arbitration of disputes, expressly contemplates recourse to court for interim or urgent relief. The respondent's suggestion that the applicant should merely claim damages and mitigate its loss by finding a new tenant does not, in my view, persuasively answer this case. Indeed, that is not an election for the respondent to make, it is for the applicant.

16. Turning to the merits, it is common cause that there is a lease agreement concluded between the parties. There is also no dispute that the respondent has breached the agreement by vacating the premises during the currency of its fixed term. The only issue for decision is whether this court should order specific performance on an interim basis pending the determination of its entitlement to specific performance by way of arbitration.

17. It is trite that in general, an aggrieved party has a right to an order of specific performance.[1] In *Farmer's Co-operative Society v Berry*[2], Innes JA held:

> '*Prima facie* every party to a binding agreement who is ready to carry out his own obligation under it has a right to demand from the other party, as far as is possible, a

[1] AJ Kerr *The Principles of the Law of Contract* 6 ed 677
[2] 1912 AD 343 at 350

> performance of his undertaking in terms of the contract. … It is true that Court's will exercise a discretion in determining whether or not decrees of specific performance will be made. They will not, of course, be issued where it is impossible for the defendant to comply with them. And there are many cases in which justice between the parties can be fully and conveniently done by an award of damages. But that is a different thing from saying that a defendant who has broken his undertaking has the option to purge his default by the payment of money. For in the words of *Storey (Equity Jurisprudence, sec 717(a)), 'it is against conscience that a party should have a right of election whether he would perform his contract or only pay damages for the breach of it.*' The election is rather with the injured party, subject to the discretion of the Court.'

18. The discretion is not confined to specific types of cases and is not subject to rigid rules. Each case must be judges on its own circumstances.[3] In *Benson v SA Mutual Life Assurance Society*,[4] the then Appellate Division held that the discretion, while not governed by rules, is not completely unfettered:

> 'It remains, after all, a judicial discretion and from its very nature arises the requirement that it be not exercised capriciously, nor upon a wrong principle … I tis aimed at preventing an injustice – for cases do arise where justice demands that a plaintiff be denied his right to performance – and the basic principle thus is that the order which the court makes should not produce an unjust result which will be the case, eg, if, in the particular circumstances, the order will operate unduly harshly on the defendant.'

19. The respondent contends that specific performance should not be ordered because of the financial hardship that it will cause to it. Indeed, it was submitted that performance is not possible because it means that the respondent will be forced to trade at a loss. Both undue hardship and impossibility of compliance

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[3] *Haynes v Kingwilliamstown Municipality* 1951(2) SA 371 (A) 378G
[4] 1986(1 SA 776 (A) at 782H-J.

constitute circumstances in which a court may exercise its discretion in a respondent's favour.[5]

20. The respondent sets out its position in the answering affidavit through its director, Mr Gani. Mr Gani explains that the lease agreement is in fact a second lease agreement and that the first agreement, concluded in 2017, terminated with the effluxion of time in February 2023. During the first lease, the respondent's business was profitable, he says, but towards the end of the lease period, the respondent noticed a decline in sales and in consequence a decline in profitability. Nevertheless, the business relationship continued and a new lease was concluded, signed in May 2011 by the respondent. The respondent refers to a sales drive at the beginning of 2023 which led to an increase in sales but that was apparently short-lived and there was again a decline in sales during March / April 2023. The decision to stop trading was made in December 2023 because of the decline in sales and profitability. The respondent explains that it has had to advance monies from its other operations to pay rental. It has paid rental for March 2024. The respondent contends that it cannot be forced to trade in circumstances where it cannot meet its expenditure and trade in non-viable circumstances. This, they say, can lead to it incurring debt beyond its control and ultimately its liquidation. That would have an adverse impact also on its suppliers. A financial report is supplied to the Court without elaboration, although its content is not difficult to discern.

[5] See generally, RH Christie 5 ed *The Law of South Africa in SA* p 524-6.

21. The applicant points out that the claim that the reason now proffered for the vacation of the premises does not stand scrutiny when compared with the advice given in the letter of 30 December 2024 which refers to its business expanding. In this regard, the respondent, in its supplementary affidavit sought to alleviate the pinch in this argument by seeking to reconcile the December advice with the version in answer. What is said is that the current business model was not proving to be profitable. What it now seeks to do is to move to a different business model at new premises 'that will see the respondent expand in a viable location and to enable the respondent to increase its lines to attract more feet and compete with competitors.' The applicant also contends that it is factually untrue that the respondent's sales have declined pointing out *inter alia* that the turnover is materially higher than in the previous year.

22. The applicant is only persisting with interim relief at this stage and accordingly, this Court must determine the facts applying the principles articulated in *Erikson Motors Ltd v Protea Motors and another* 1973(3) 685 (A) at 691. What must be established is a right, which, though *prima facie* established, is open to some doubt, a well-grounded apprehension of irreparable injury, the absence of an alternative remedy and the balance of convenience must favour the applicant. As held in that case, at 691F:

> 'The foregoing considerations are not individually decisive, but are interrelated; for example, the stronger the applicant's prospects of success the less his need to rely on prejudice to himself. Conversely, the more the element 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.'

23. In *Simon NO v Air Operations of Europe AB and others* 1999(1) SA 217 (SCA), the Supreme Court of Appeal restated the accepted approach to a *prima facie* right:

> 'The accepted test for a prima facie right in the context of an interim interdict is to take the facts averred by the applicant, together with such facts set out by the respondent that are not or cannot be disputed, and to consider whether having regard to the inherent probabilities the applicant should non those facts obtain final relief at the trial. The facts set up in contradiction by the respondent should then be considered, and if serious doubt is thrown upon the case of the applicant he cannot succeed.'

24. This case requires careful balancing of the parties' interests under the applicable tests. I have come to the view that the applicant is entitled to interim relief provided it is not in place for an indefinite period or a potentially lengthy arbitration. That is what the arbitration clause in the agreement contemplates but it is well known by any practitioner that arbitration proceedings can easily and needlessly be protracted and this cannot be allowed to ensue in this case. In short, I am satisfied that the applicant is entitled to interim relief directing the respondent to perform under the contract provided the applicant institutes arbitration proceedings within ten days and the arbitration proceedings are finalized in six months.

25. There is no dispute that the agreement is valid and has been breached. In my view, on a proper consideration of the correspondence between the parties, the applicant at no stage elected to accept repudiation, cancel the contract and claim

damages. At all times the applicant made it quite clear that it intended to hold the respondent to the agreement at least until an agreement had been reached regarding early termination. It is true that reference was made in correspondence in February to an intention to claim damages, but in context, what is suggested is damages supplementary to performance.[6] There is no suggestion of any intention to accept the repudiation and cancel the contract. Furthermore, at least on the information before me, and applying the accepted test, the applicant reasonably understood throughout the period until March 2024 that the respondent had not displayed any *unequivocal* intention no longer to be bound by the lease agreement. On its version, that only happened on 5 March 2024.

26. On the face of it, the applicant is entitled to claim specific performance, subject to the exercise of the Court's discretion. It is not open to the respondent to elect, on its behalf, that damages should suffice. The question is whether, on the evidence before me, the applicant's claim for specific performance can be regarded as *prima facie* established, though open to some doubt. In my view, it can. The plea of impossibility of performance or undue hardship on the part of the respondent is, on the scant evidence supplied, unpersuasive. The respondent signed the agreement in May 2024 in circumstances where it was fully alive to its alleged challenges. This is not its only operation. The document allegedly evidencing the financial hardship is not explained on affidavit, and while simple to follow, on examination it raises more questions than it answers not least in respect of prior business and business since December 2023. Furthermore, the applicant's reply, comparing the prior years' turnover, is compelling and no serious doubt is cast on that version. I also accept the submission on behalf of

[6] See generally AJ Kerr *The Principles of the Law of Contract* 6 ed 697.

the applicant that the version in answer is not readily reconcilable with the version for closure advanced in December 2023, which refers to expansion, additional lines, and makes no mention of any financial predicament. That is even accepting that there is some plausibility in the suggestion that the business model that is sought to be pursued will be more profitable than the one currently pursued.

27. I am also satisfied on the remaining requirements for an interim interdict. The fact that damages can be claimed cannot – at the respondent's election – be used to defeat the applicant's right to claim specific performance. Furthermore, the impact is on all the tenants in the shopping centre, especially the smaller tenants, not only the applicant. And as the applicant explains, save for rental, proof of loss will not be a simple matter. The alleged harm, in my view, flows logically from the breach and I am satisfied that the applicant has said enough to explain what it will be. In context of this case, I am unable in this regard to accept the respondent's complaints that the evidence is insufficiently corroborated or confirmed or that the applicant should have disclosed the identity of a potential buyer with whom a non-disclosure agreement has been concluded. On the balance of convenience, I accept that there is inconvenience to the respondent, if the relief is granted, but it is not such as sways the balance in its favour on the evidence before me. That is especially so given how I limit the duration of the interim order.

28. I would have preferred to have more time to prepare my reasons for this judgment and to address a series of other contentions advanced either in the papers or in argument. These being urgent proceedings, the demands of a speedy judgment are, however, compelling. Nonetheless, a brief comment must be made about the conduct of these proceedings, which was not at all times done in a helpful manner. The respondent has leveled multiple adverse accusations against the applicant, and during argument, its counsel. At least for the most part, these were unfounded and apart from generating unnecessary hostility, only served to distract the Court from the real issues on the papers. This is not to say that the applicant and its team conducted itself without error or overstep. The urgent Court places immense pressure on the judicial officers entrusted with the roll and in my view practitioners and parties alike must conduct themselves accordingly and take care to present facts correctly and not to level unnecessary and unfounded adverse claims against their opponents.

29. As the interim relief operates pending an arbitration, it falls on me to determine costs. In my view, costs should be in the cause in the arbitration.

30. I make the following order:

    30.1. The respondent is ordered immediately to perform in terms of Clause 17.1 of the lease agreement concluded between the parties on 13 August 2023 by keeping the leased premises (as defined in the lease agreement) open for business hours with its full range of merchandise.

30.2. The above order operates as an interim order, with immediate effect, pending the final adjudication of an arbitration to be instituted within 10 (ten) days of the date of this order, by the applicant against the respondent, claiming specific performance of the above-mentioned terms of the lease agreement.

30.3. The above interim order lapses if the arbitration is not concluded within a period of six months of the date of this order.

30.4. Costs are costs in the cause in the arbitration.

S J COWEN
JUDGE OF THE HIGH COURT OF SOUTH AFRICA
GAUTENG DIVISION
PRETORIA

Date of hearing: 22 March 2024

Date of decision: 25 March 2024

Appearances:

Applicant: Adv A Venter instructed by Kally & Co Inc.

Respondent: Adv Z Kara instructed by Ayoob Kaka Attorneys Inc