

SOUTH AFRICA / JUDGMENT

First Pharmacy CC v Shoprite and Checkers (Pty) Ltd and Another (17682/2008) [2008]

ZAWCHC 93 (11 December 2008)

[2008] ZAWCHC 93

COURT

Western Cape High Court, Cape Town

BEFORE

Moosa

CASE / FILE NUMBER

17682/2008

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IN THE HIGH COURT OF SOUTH AFRICA(CAPE OF GOOD HOPE PROVINCIAL DIVISION)CASE NO: 17682/2008 DATE: 11 DECEMBER 2008 In the matter between FIRST PHARMACY CC APPLICANT versus SHOPRITE and CHECKERS (PTY) LTD 1st RESPONDENT ZININGI PROPERTIES (PTY) LTD 2nd RESPONDENT

JUDGMENT

MOOSA, J: This is an application for an interim interdict in the form of rule nisi in terms of which the applicant seeks against first respondent an order interdicting and restraining first respondent from operating a pharmacy or dispensing schedule 20 medicines or conducting the business of a dispensary of pharmaceutical or health products upon the premises of Shoprite Centre, corner Vryburger and Tafelberg Streets, Bothasig, Western Cape, (hereinafter referred to as "Shoprite Shopping Centre")

and it also seeks other ancillary relief. The following facts are either common cause or not disputed. (a) On 8 December 2003, first respondent concluded a written lease with Jean A de Klerk CC ("De Klerk CC"), in terms of which it leased the premises known as Shops 8 to 11, Shoprite Centre (hereinafter referred to as the leased premises) for a period of three years commencing on 1 November 2003 and terminating on 31 December 2006. De Klerk CC had the right to renew the lease for a further period of five years. De Klerk CC established and conducted a pharmacy under the name and style of Bothasig Apteek/Pharmacy from the leased premises. (b) The lease contained a special condition, namely:- "There shall, for the duration of the lease, be no other pharmacy in the shopping centre, nor will any other person, excluding medical doctors, be entitled to dispense schedule medicine as defined in the Medicines Control Act 1965. Bothasig Apteek shall have the sole right to operate as a pharmacy."

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MOOSA. J:

This is an application for an interim interdict in the form of rule nisi in terms of which the applicant seeks against first respondent an order interdicting and restraining first respondent from operating a pharmacy or dispensing schedule 20 medicines or conducting the business of a dispensary of pharmaceutical or health products upon the premises of Shoprite Centre, corner Vryburger and Tafelberg Streets, Bothasig, Western Cape, (hereinafter referred to as "Shoprite Shopping Centre")

and it also seeks other ancillary relief.

The following facts are either common cause or not disputed.

(a) On 8 December 2003, first respondent concluded a written lease with Jean A de Klerk CC ("De Klerk CC"), in terms of which it leased the premises known as Shops 8 to 11, Shoprite Centre (hereinafter referred to as the leased premises) for a period of three years commencing on 1 November 2003 and terminating on 31 December 2006. De Klerk CC had the right to renew the lease for a further period of five years. De Klerk CC established and conducted a pharmacy under the name and style of Bothasig Apteek/Pharmacy from the leased premises.

(b) The lease contained a special condition, namely:-

"There shall, for the duration of the lease, be no other pharmacy in the shopping centre, nor will any other person, excluding medical doctors, be entitled to dispense schedule medicine as defined in the

Medicines Control Act 1965. Bothasig Apteek shall have the sole right to operate as a pharmacy."

(c) During the currency of the said lease, first respondent sold the shopping centre to second respondent and a reciprocal lease was concluded between them in respect of the premises from which first respondent conducted its supermarket business. The said lease was for a period of 12 years with effect as from 1 November 2005. (d) The supermarket premises were

let for the purpose of the lessee carrying on the business of a supermarket, as well as allied and ancillary business thereto, including but not limited to the business of a dispensary in pharmaceutical and health products. The said lease contained an exclusion to the effect that:- "All current tenants and their successors in title at the shopping centre who are in contravention of the lessee's rights to exclusivity shall be permitted to continue trading and doing business as they currently are." (e) On 7 June 2006 and during the currency of the aforesaid lease agreement in respect of the leased premises, De Klerk CC sold the business of Bothasig Apteek/ Pharmacy to applicant as a going concern, together with goodwill, fixtures, fittings and movables, as at the effective date of 10 September 2006, in terms of a written agreement of sale. The value of goodwill paid by applicant to De Klerk CC was R200 000,00. The agreement of sale contained a suspensive condition that the sale was subject firstly to a new lease agreement in respect of the premises being concluded between the applicant and second respondent for a period of five years from the effective date of the sale on no more onerous terms as that in force in respect of De Klerk CC, and secondly to the simultaneous cancellation of the existing lease in respect of the leased

premises. (f) On 26 September 2006 applicant and second respondent concluded a written lease agreement in respect of the premises for a period of five years with effect from 11 September 2006 and expiring on 21 August 2011, subject to the right of applicant to renew the lease for a further period of five years. An agreement of cancellation of the existing lease was concluded between second respondent and De Klerk CC which only became effective with the signing of the new lease between second respondent and applicant.

- (c) During the currency of the said lease, first respondent sold the shopping centre to second respondent and a reciprocal lease was concluded between them in respect of the premises from which first respondent conducted its supermarket business. The said lease was for a period of 12 years with effect as from 1 November 2005.
- (d) The supermarket premises were let for the purpose of the lessee carrying on the business of a supermarket, as well as allied and ancillary business thereto, including but not limited to the business of a dispensary in pharmaceutical and health products. The said lease contained an exclusion to the effect that:-

"All current tenants and their successors in title at the shopping centre who are in contravention of the lessee's rights to exclusivity shall be permitted to continue trading and doing business as they currently are."

- (e) On 7 June 2006 and during the currency of the aforesaid lease agreement in respect of the leased premises, De Klerk CC sold the business of Bothasig Apteek/ Pharmacy to applicant as a going concern, together with goodwill, fixtures, fittings and movables, as at the effective date of 10 September 2006, in terms of a written agreement of sale. The value of goodwill paid by applicant to De Klerk CC was R200 000,00. The agreement of sale contained a suspensive condition that the sale was subject firstly to a new lease agreement in respect of the premises being concluded between the

applicant and second respondent for a period of five years from the effective date of the sale on no more onerous terms as that in force in respect of De Klerk CC, and secondly to the simultaneous cancellation of the existing lease in respect of the leased premises.

- (f) On 26 September 2006 applicant and second respondent concluded a written lease agreement in respect of the premises for a period of five years with effect from 11 September 2006 and expiring on 21 August 2011, subject to the right of applicant to renew the lease for a further period of five years. An agreement of cancellation of the existing lease was concluded between second respondent and De Klerk CC which only became effective with the signing of the new lease between second respondent and applicant.
- (g) The same special condition relating to the exclusive right to operate a pharmacy in the shopping complex as was contained in the original lease of De Klerk CC was replicated in the new lease of applicant. It was quite clear from both the new lease agreement and the cancellation of the existing lease agreement that the enforcement of the two agreements were inter-dependent on each other. With that background I turn to discuss the merits of the application. In order to obtain the necessary relief, applicant ought to establish; firstly, that it has a prima facie right; secondly, that it has a well-grounded apprehension of irreparable harm if the interim relief is not granted; thirdly, the balance of convenience is in favour of the granting of the interim relief; and fourthly, the absence of any other satisfactory remedy. I will deal with each of these requirements. 1. PRIMA FACIE RIGHT It is common cause that up to the time applicant's rights were allegedly infringed, it conducted the exclusive business of a pharmacy at the shopping centre. Such right was conferred on it in terms of a lease concluded between second respondent and applicant. Such exclusive business was conducted by applicant's

predecessor, namely De Klerk CC, from whom applicant acquired the business which was conducted under the name and style of Bothasig

Pharmacy. The cancellation of the old lease concluded between first respondent and De Klerk CC was dependent on the conclusion of a new lease between applicant and second respondent. The same terms granting De Klerk CC exclusive rights to conduct a pharmacy at the shopping complex was replicated in the new lease. In my view first and second respondents colluded with each other when they allocated unto themselves the right for second respondent to grant and first respondent to receive the exclusive right to conduct the business of a pharmacy in the shopping complex in the face of such right being vested in De

Klerk CC. Such unilateral conduct on the part of first and second respondent was not only illegal and irregular, but was morally and legally indefensible. I therefore conclude that applicant has a prima facie right to the relief sought. 2. APPREHENSION OF IRREPARABLE HARM The applicant purchased the pharmacy business from its predecessor and paid a substantial goodwill amounting to R200 000,00. The sale was conditional on the applicant obtaining a lease with

similar rights enjoyed by De Klerk CC. Applicant enjoyed such right when he took the business over from its predecessor. When applicant learnt that first respondent intended opening a pharmacy, it approached first respondent, but first respondent denied such intention. When first respondent had a change of heart, it failed to inform applicant of its change of heart. First respondent had knowledge, in my view, that De Klerk CC and applicant had exclusive rights to conduct a pharmacy at the shopping centre. First respondent merely informed second respondent of its intention to open a pharmacy business in the supermarket and advised second respondent to inform applicant accordingly. Second respondent failed to inform applicant of such intention. A few days prior to first respondent opening the pharmacy in the supermarket, the present application was brought by the applicant. I am satisfied that the applicant brought the application as soon as reasonably possible, after it became aware of the fact that first respondent intended opening a pharmacy in the supermarket. First respondent is a national chain of supermarkets with considerable economic power and muscle. Applicant is a small business enterprise. I am of the view that should first respondent be allowed to continue operating the pharmacy within the supermarket, it will cause irreparable harm to the applicant. With its economic muscle and power it could squeeze applicant out of business. In my view applicant has well-grounded apprehension of irreparable harm if the interim relief is not granted. 3. BALANCE OF CONVENIENCE I now turn to the question of the balance of convenience. Applicant was conducting the pharmacy business for many years and it

predecessor for many years before that. The first respondent, by opening a pharmacy in the supermarket, has infringed the right of applicant to conduct a pharmacy business exclusively in the shopping complex. First applicant was aware that applicant was conducting a pharmacy business from the shopping complex. It had knowledge that De Klerk CC had exclusive rights to conduct the pharmacy as it conferred such rights on De Klerk CC. It ought to have known that applicant had similar rights as clause 7 of the lease between it and second respondent as same provided for the right of De Klerk CC and its successors to be protected. I conclude that balance of convenience favours the granting of the interim relief. 4. ABSENCE OF OTHER SATISFACTORY RELIEF I do not believe that applicant has any other satisfactory relief. A claim for damages is not a realistic and practical alternative,

firstly because it will be difficult to quantify such damages, and 20 secondly, applicant might be squeezed out of business by first respondent, that it would not be in a financial position to take first respondent to court for a damages claim. In my view there are no other satisfactory remedies available to applicant than to grant the interim relief.

- (9) The same special condition relating to the exclusive right to operate a pharmacy in the shopping complex as was contained in the original lease of De Klerk CC was replicated in the new lease of applicant. It was quite clear from both the new lease agreement and the cancellation of the existing lease agreement that the enforcement of the two agreements were inter-dependent on each other.

With that background I turn to discuss the merits of the application. In order to obtain the necessary relief, applicant ought to establish; firstly, that it has a prima facie right; secondly, that it has a well-grounded apprehension of irreparable harm if the interim relief is not granted; thirdly, the balance of convenience is in favour of the granting of the interim relief; and fourthly, the absence of any othersatisfactory remedy.I will deal with each of these requirements.

1. PRIMA FACIE RIGHT

It is common cause that up to the time applicant's rights were allegedly infringed, it conducted the exclusive business of a pharmacy at the shopping centre. Such right was conferred on it in terms of a lease concluded between second respondent and applicant. Such exclusive business was conducted by applicant's

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second respondent as same provided for the right of De Klerk CC and its successors to be protected. I conclude that balance of convenience favours the granting of the interim relief.

4. ABSENCE OF OTHER SATISFACTORY RELIEF

I do not believe that applicant has any other satisfactory relief. A claim for damages is not a realistic and practical alternative,

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Ms Le Roux, SC argued strongly that this matter should be referred to the semi-urgent roll, because first respondent has already opened the

pharmacy and conducting such business from the shopping complex. It would suffer harm because it has engaged staff which it has to lay off in the event of the first respondent being prevented from conducting the pharmacy business from the supermarket. It is quite clear from the facts that first respondent deliberately and at its peril went ahead to open a pharmacy, being well aware that an existing pharmacy with exclusive right was operating a pharmacy business in the complex. In my view far greater harm could be caused to the applicant with an established pharmacy business of many years standing. This, in my view, makes the matter one of extreme urgency and I am not inclined to refer the matter to the semi-urgent roll for it to be heard.

Second respondent decided not to oppose the application and correctly so. It is aware of the collusion between it and first respondent to illegally and unilateral deprive De Klerk CC and its successors in title, being the applicant, of the sole right to conduct a pharmacy at the shopping

complex. In the premises I grant the following orders: (a) prayer 1 of the notice of motion; (b) prayer 2 of the notice of motion, which shall be returnable on or before 5 February 2009 and 25 such order shall include prayers 2.1, 2.2, and 2.3; (c) prayer 2.4 is amended by [excluding that portion contained in the brackets to the effect that if the application is opposed by second respondent, then first and second respondent shall jointly and severally be liable for payment of the costs] 5 ordering first defendant to pay the costs of the application; (d) prayers 3 of the notice of motion; and prayers 5 of the notice of motion [except that the portion in brackets which does not form part of the order as that relates to second respondent]. MOOSA, J

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