



EXCLUSIVITY CLAUSES: COMMERCIAL LEASES

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South Africa's retail industry has evolved over many years in that national retailers – in particular, the large supermarket groups, but also other national retailers, would only conclude a lease agreement (“Lease”) – whether in respect of an existing shopping centre, or new development or strip mall, provided same contains long term exclusivity provisions. Particularly with respect to a new development, the prospective tenant will also include in the Lease, in addition to an exclusivity provision, a set of restrictive provisions (often referred to as “waterfall” provisions).

The waterfall provisions are predominantly of a contractual nature in terms of which the relevant tenant commits to the Lease on the basis that the landlord/developer will ensure that specified other businesses will be tenants in the centre (and often in an agreed location), e.g. national clothing stores, banks, a health club, restaurants, etc. – the objective being to ensure adequate footfall and patronage in the centre by virtue of a diverse tenant offering. The failure by the landlord to meet these waterfall provisions/conditions is more often than not coupled with a reducing rental, depending on the percentage of required Gross Lettable Area (“GLA”) coverage with often a further fallback to a turnover rental or the right of the tenant of the National tenant to exit the Lease.

It is accordingly important that landlords clearly consider the wording of these waterfall provisions – and in particular as in the initial stages of development, the prospective tenants may only have provided Letters of Intent, and if, e.g., a particular clothing retailer or health group elects not to conclude a formal Lease, flexibility should be provided to ensure that the underlying principle which

the tenant seeks to ensure compliance with, is upheld in terms of any similar business with a similar national profile and patronage.

Insofar as the exclusivity leases are concerned, exclusivity provisions restrict the landlord/developer from letting any other premises in the relevant shopping centre to a competing supermarket, and often with respect to a liquor store. It would often also contain other exclusivity provisions limiting the landlord/developer to installing any business such as a butchery, bakery, general dealer, either *in toto* or restricted to a defined maximum GLA. (For convenience these are referred to as secondary exclusivity provisions).

The Grocery Retail Market Inquiry (“**GRMI**”) (which was established on during October 2015) investigated the impact of long-term exclusive lease agreements on local competition, which led to the final report of the GRMI (published on 17 December 2019) wherein it was recommended that the

Competition Commission (“**Commission**”) must seek to secure voluntary compliance by the national supermarket chains of the recommendations made, including, but not limited to the following:

- 1) the undertakings by the supermarkets not to enforce exclusive provisions in certain instances;
- 2) new lease agreements may not contain any exclusivity provisions; and
- 3) exclusive lease agreements must be phased out over a period of time.

The Commission have ruled that the secondary exclusivity provisions are unenforceable and prevents and discourages competition by small, medium and micro enterprises (“**SMME’s**”), and that the principal exclusionary provisions with regard to grocery supermarkets must be finally dispensed with by close of 2026.

During October 2020, the Competition Tribunal confirmed the first consent agreement between the Commission and Shoprite Checkers Proprietary Limited, one of the major grocery retailers in South Africa, which essentially implemented the recommendations by the GRMI, a further consent agreement was concluded in June 2021 between the Commission and Pick n Pay Retailers (Pty) Ltd, and a third consent agreement concluded during August 2023 between the Commission and the SPAR Group Ltd (“**SPAR**”) in terms of which SPAR will not enforce any remaining exclusivity provisions (or provisions that have substantially the same effect) in long-term exclusive lease agreements after 31 December 2026.

Whilst many landlord/developers will rely on in-house counsel, it is to be recommended that prospective leases and offers to rent (where often the National concerned will insist on using its own templates), are scrutinised by someone who has experience in drawing and reviewing leases to ensure, in addition to the other commercial variables, that adequate attention is given to any exclusivity provisions and waterfall provisions.



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