IN THE HIGH COURT OF SOUTH AFRICA

SOUTH GAUTENG HIGH COURT

JOHANNESBURG

CASE No. 41748/09

REPORTABLE

DELETE WHICHEVER IS NOT APPLICABLE	
(1) REPORTABLE: YES / NO	
(2) OF INTEREST TO OTHER JUDGES: YES / NO	
(3) REVISED.	
..... DATE	..... SIGNATURE

In the matter between:

BEDFORD SQUARE PROPERTIES (PTY LTD

Applicant

and

BEDFORD SQUARE PROPERTIES (PTY LTD

Applicant

and

LIBERTY GROUP LIMITED First Respondent

ERF 179 BEDFORDVIEW (PTY) LIMITED

Second Respondent

WOOLWORTHS LIMITED Third Respondent

SUPER GROUP LIMITED t/a MICA HARDWARE

Fourth Respondent

BODY CORPORATE BEDFORD Fifth Respondent

BODY CORPORATE VILLA ABROSIA

APARTMENTS Sixth Respondent

BODY CORPORATE VILLA ABROSIA

Seventh Respondent

THE REGISTRAR OF DEEDS, JOHANNESBURG

Eighth Respondent

JUDGMENT

WILLIS J:

[1] This is an application for a declaratory order that the enforcement of a servitude created by contract, is contrary to public policy and unenforceable and for consequential cancellation of the registration of the servitude.

[2] The applicant and the first and second respondent entered into a "notarial deed of restraint" on or about 21 June 2001. At that time, the applicant was the registered owner of erf 39 Bedford gardens Township, Registration Division IR, Gauteng Province, the first respondent the owner of several properties on which, collectively, the Eastgate shopping centre is situated, and the second respondent the owner of several properties on which, collectively, the shopping centre known as Village View is situated. In terms of this "deed of restraint" the applicant undertook that it and its successors in title and assigns would not, for a period of 11 years from 4 November 2003, conclude a lease agreement in terms of which the rental space of the applicant's property would be let to "Woolworths or Mica Hardware". The deed provided that the restraint was enforceable by the first and second respondents and their successors and assigns. The deed provided that this restraint could be registered as a servitude on all the properties concerned. These servitudes were registered on or about 12 December 2004.

[3] Since then there has been no change in the ownership of the properties owned by the second and the third respondents. Erf 39 has, however, been divided into portions 3 and 4, leaving a remaining extent. Portions 3 and 4 have been sold to third party developers who established sectional title schemes thereon. The bodies corporate of those schemes have been joined as the sixth and seventh respondents respectively. The applicant developed the remaining extent and established thereon a "mixed use" sectional title scheme, the body corporate of which is the fifth respondent. The applicant retained ownership of all the retail and commercial sections of this scheme. It

is the registered owner of five sections therein: sections 48, 49, 50, 51 and 52. In respect of these sections the applicant conducts the business of a landlord of retail shopping centre and commercial and office space. The applicant now wishes to conclude a lease agreement with Woolworths as a tenant in its shopping centre. This gives rise to the present application. The only opposition comes from the second respondent. The rest of the respondents agree to abide the decision of the court provided there is no costs order made against them.

[4] The applicant has fairly and correctly conceded that it has to straddle the first hurdle of the a notarial deed being found to be contrary to public policy before there can be any consideration of the second aspect of the relief sought, *viz*. the cancellation of the servitudes which restrict leases being entered into with Woolworths and Mica Hardware respectively. In other words, whether or not it is apprpriate for servitudes to be registered in such terms does not arise for purposes of this application if it is found that the applicant remains contractually bound by the terms of the notarial deed.

[5] The second respondent has raised the following points in opposition to the application:

(i) the applicant has no *locus standi* to bring the application because of the subsequent subdivision of erf 39, Bedford Gardens Township;

(ii) No cause of action has been disclosed because the law of restraint of trade does not apply to agreements of this nature (i.e. it applies between employers and employees and between business partners but not between property owners);

(iii) The proper *fora* for disputes of this nature are the Competition Tribunal and the Competition Appeal Court established in terms of the Competition Act, No. 89 of 1998;

(iv) The agreement was not and is not contrary to public policy.

[6] Counsel for the contending parties both relied on *Venter v Minister of Railways*,[1] *Strathsomars Estate Co Ltd v Nel*,[2] *Magna Alloys and Research (SA) Pty) Ltd v Ellis*,[3] *Sunshine Records (Pty) Ltd v Frohling*,[4] *Basson v Chilwan*,[5] and *Reddy v Siemens Telecommunications (Pty) Ltd*[6] to advance their respective positions. The starting point, it seems to me, is *pacta sunt servanda*.[7] This maxim is generally translated into English as meaning "agreements must be observed". As a general rule, the courts will hold parties to their contractual obligations. The applicant and the second respondent entered into this agreement. Mr *Peter*, who appears for the applicant, accepted that the applicant is bound by it, unless, in this case, the court can find that it is contrary to public policy. Even if the ordinary rules in regard to agreements in restraint of trade were to apply where two or more property developers enter into such an agreement, in order for the applicant to be successful, this would entail a finding that:

> (i) the second respondent does not have an interest deserving of protection; and/or
>
> (ii) a weighing of the respective interests of the parties cannot justify it; and/or
>
> (iii) the agreement is inherently unreasonable; and/or
>
> (iv) the imbalance in the respective bargaining position of the parties raises a cause for concern akin to the oppression of one by the other.[8]

[7] None of these considerations appears inherent in the fact-complex before me. Instead, it has been alleged, in broad terms, in the applicant's founding affidavit, that the public have been denied the freedom of choice, that "the restraint provisions would serve merely to

---

[1] 1949 (2) SA 178 (E)
[2] 1953 (2) SA 254 (E)
[3] 1984 (4) SA 874 (A).
[4] 1990 (4) SA 782 (A)
[5] 1993 (3) SA 742 (A)
[6] 2007 (2) SA 486 (SCA)
[7] *Reddy v Siemens* (*supra*) at para [15]
[8] *Basson v Chilwan* (*supra*) at 767G-H; *Reddy v Siemens* (*supra*) at para [16]

protect a monopolistic interest" of the second respondent, that the "restraint does not serve to protect any legitimate, commercial or other interest", and is a "naked restraint inhibiting free and fair competition". Mr *Unterhalter* who, together with Mr *Wilson*, appears for the second respondents, sought to educate me about the design and tenancy of shopping centres being a science as well as an art. He stressed that there are important concepts such as "anchor tenancy agreements" and so on which are well-recognised as being a legitimate part of commercial life in this country. He need not have taken so much trouble. It is indeed well-known that it is a regular feature of commercial life that, when it comes to shopping centres, there are restrictions as to who may or may not be tenants in particular buildings. It is also well-known that certain tenants are attracted by the presence or absence of other tenants. These are legitimate concerns for a landlord such as the second respondent. It has a legitimate interest in taking steps to protect these concerns. I do not profess any skills in the fascinating world of the marketing commercial buildings and, in any event, it would be wrong for me to take too much judicial notice of the intricacies of this world. Nevertheless, in broad outline, the practice of carefully crafted commercial tenancy agreements is a well-established feature of our commercial landscape. I do not intend to upset the apple-cart. The parties to the agreement were both landlords and not, in their relationship with one another, employers or employees or business partners. The applicant, as a landlord, is not, in general terms, restricted in its business of leasing out it premises. It is free to do so. It is restricted merely in leasing its premises to certain named tenants for a limited period of time. Besides, the well-established principle, of general application, set out in *Sasfin (Pty) Ltd v Beukes* must surely apply:[9]

[9] 1989 (1) SA 1 (A) at 9B-F

> The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one's individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12:…
>
> > "the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable and does not depend upon the idiosyncratic inferences of a few judicial minds…".
>
> In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.

As the Supreme Court of Appeal ("the SCA") has noted in *Afrox Healthcare Bpk v Strydom*,[10] this principle has repeatedly been confirmed in the SCA over recent years. As it is quite clear that the court cannot set aside the agreement on the grounds that it is contrary to public policy, I need not consider the other points raised by counsel for the respective parties.

[8] Mr *Unterhalter* submitted that, by reason of the huge potential commercial importance of this case, it would be appropriate to allow the costs of two counsel. I agree.

[10] 2002 (6) SA 21 (A) at para [8]

[9] The following is the order of the court:

> The application is dismissed with costs, which costs are to include the costs of two counsel.

DATED AT JOHANNESBURG THIS 10th DAY OF DECEMBER, 2009

N.P. WILLIS

JUDGE OF THE HIGH COURT

Counsel for the Applicant: Adv. *J. Peter*

Counsel for the Second Respondent: Adv. *D.N. Unterhalter* SC (with him, *J. Wilson*)

Attorneys for the Applicant: Vining Camerer Inc

Attorneys for the Second Respondent: Rothbart Inc

Date of hearing: 04 December 2009

Date of judgment: 10 December 2009