Anticompetitive Consequences of Exclusivity Clauses Contained in Shopping Centres' Lease Agreements

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Abstract

This article discusses the impact of commercial lease agreements concluded in shopping centres that contain exclusivity clauses on competition. It assesses whether these clauses restrict equitable retailer participation in shopping centres, thereby denying consumers competitive prices and product choices. It also demonstrates that the South African Competition Commission has classified lease agreements' exclusivity clauses as problematic and persuaded the major grocery retailers to phase them out. While this is a positive step, this article argues that there should be some regulatory framework that can ensure that none of these retailers continue to restrict competition in shopping centres by enforcing exclusivity clauses. The Commission should play a prominent role in ensuring that the terms of the consent orders signed by some of these retailers are respected to ensure that competition is promoted in shopping centres in South Africa.

Keywords

Lease agreements; exclusivity clauses; anchor tenants; landlords; competition.

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1 Introduction

Commercial lease agreements that empower major retailers in the grocery sector to force landlords of shopping centres to prevent their competitors from accessing shopping centres are yet to receive adequate judicial and academic attention in South Africa. This is despite these agreements' potential impact on competition and consumer welfare. In South Africa, no decided case has seriously evaluated the impact of exclusivity clauses contained in shopping centre lease agreements on competition. There has not been a judicial assessment of whether the economic advantages that justify these lease agreements being concluded outweigh their actual or potential limitation on competition. Given the importance of shopping centres as economic zones, there is a need to evaluate how exclusivity clauses impact small and medium traders who desire to access shopping centres. There is also a need to evaluate the impact of these agreements on consumers.

This article seeks to examine the impact of commercial lease agreements that contain exclusivity clauses on competition in shopping centres. It assesses whether these clauses restrict equitable retailer participation in shopping centres, thereby denying consumers competitive prices and product choices.[1] Most significantly, an assessment of whether exclusivity clauses are anti-competitive in the light of the constitutional ideal of addressing historical economic disadvantages and promoting the democratisation of the economy will be conducted. First this article discusses the relationship between shopping centres' landlords and major grocery retailers who operate as anchor stores in these shopping centres. It will reflect on how these parties negotiate their lease agreements and the nature of the power provided to anchor stores through exclusivity clauses. Secondly, the competition implications of these clauses and how the *Competition Act* (the CA) regulates agreements that promote exclusive dealings, particularly between firms operating in a vertical chain, will be discussed. Herein the experience of the European Union will be discussed to demonstrate that exclusivity clauses are anti-competitive because they have the effect of restricting competition in shopping centres.

Thirdly, this article will demonstrate that the South African Competition Commission (hereafter the Commission) identified challenges with exclusivity clauses in shopping centres, which necessitates the effect of these agreements on competition in shopping centres being investigated.

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1 See s 2(*b*) and (*e*) of the *Competition Act* 89 of 1999 (hereafter the CA).

Fourthly, it will be shown that while there is a dearth of judicial pronouncements on exclusivity clauses in shopping centre lease agreements, the Competition Tribunal and the Constitutional Court have attempted to provide clarity on how disputes that arise through the enforcement of these clauses should be approached. The approaches of these two forums will be discussed. Unfortunately, the Competition Appeal Court (hereafter CAC) has not yet had an opportunity to adjudicate disputes relating to these clauses. The article argues that while the rule of reason should remain the legal doctrine used to assess exclusivity clauses contained in shopping centre lease agreements, the market should be assumed and not be subjected to section 7 of the CA inquiry. The assessment should be the determination of the effect on competition in a particular shopping centre of these clauses, and the power granted to anchor tenants to restrict competition through these clauses.

2 Conceptual framework

2.1 Shopping centres

Depending on their size and locations, shopping centres have been referred to differently as centres, shopping complexes, shopping malls, plazas, shops, strips, squares, super centres, or town centres. For the purposes of this article, despite their inherent differences, sizes or characteristics,[2] all these descriptors will be taken to mean shopping centres. According to Pitt and Musa, a shopping centre could simply be described as a "building that contains many units of shops but is managed as a single property."[3] Shopping centres create a shopping and business experience where retailers make products and services available to consumers under a single roof with consumers easily accessing transport services, parking facilities, food courts, entertainment and recreation facilities.[4]

Apart from location and focussed marketing, the success of a shopping centre depends on the existence of a balanced tenancy where "stores in the centre complement one another with respect to quality and variety, making the centre an attractive one-stop shopping experience for patrons."[5] A balanced tenancy refers to a good tenant mix with a variety of stores in the shopping centre to attract customers who will be able to do their shopping

2 See Ceccato and Tcacencu "Perceived Safety in a Shopping Centre" 215, where it is stated that "Shopping centres' size and design vary enormously regardless of where they are in the world, from small regional malls made up of a cluster of ordinary retail stores to megamalls offering a combination of shopping and recreation."

3 Pitt and Musa 2009 *Journal of Retail and Leisure Property* 40.

4 Sivaraman and Vijayan 2020 *International Research Journal of Management and Commerce* 15.

5 North and Kotze 2004 *Southern African Business Review* 30.

in the same centre without the need to go to another shopping centre.[6] A balanced tenancy not only encourages competition between shopping centres but is also an important factor in the amount of customer traffic a shopping centre can generate. Over and above a balanced tenancy, it is generally accepted that shopping centres should have anchor tenants, as these play important roles in ensuring that the centres are retail destinations.

It has been argued that "[t]he stronger—and traditionally the bigger—the anchor store is, the better the chance that a shopping centre will attract consumers."[7] An anchor tenant is usually a well-known and reputable store that has taken tenancy in the shopping centre, which through its goodwill and reputation can attract the traffic of customers at or near its location with the potential to increase the nearby stores' sales and profits.[8] Basically, an anchor tenant has a pull effect and draws customers not just to its own store but also to other stores in the shopping centre. According to Ndebele, the acquisition of the right anchor tenant will lead smaller retailers to feel reassured that a certain type of consumer will definitely be visiting the shopping centre and probably visiting their stores.[9]

Shopping centres can have more than one anchor tenant. An appropriate mix of anchor tenants and new-age tenants with different target groups would better attract customers to shopping centres.[10] Generally, supermarkets play the role of anchor tenants in shopping centres and draw customers who spend their money not only on their groceries but also in other shops in these shopping centres.[11] In South Africa, Pick 'n Pay, Shoprite (including Checkers), Spar and Woolworths are usually regarded

6 See Bruwer 1997 *Property Management* 160, who states that "[t]enant mix refers to the combination of business establishments occupying space in a shopping centre to form an assemblage that produces optimum sales, rents, service to the community and financiability of the shopping centre venture." Also see Rajagopal 2009 *Journal of Retail and Leisure Property* 115, who argues that "[a] categorically planned assortment of stores in a mall would provide diversity and arousal, and would encourage a propensity to shop around the mall. Accordingly, mall managers may develop appropriate tenancy policies for retailing firms with regard to the socio-demographic factors of customers in order to satisfy different segments."

7 Braam-Mesken 2016 https://www.across-magazine.com/changing-role-anchor-tenants/.

8 Damian *Impact of the Anchor Store* 14. Also see Kiriri 2019 *Journal of Language, Technology and Entrepreneurship in Africa* 151, where it is stated that "an anchor tenant, usually a large department store or supermarket in a shopping centre that attract traffic to the mall. This is because a key anchor tenant will draw both human and vehicular traffic to the shopping mall and thus ensure vibrancy of the mall. The anchor client also can influence the rental rates of a mall based on their drawing powers."

9 Ndebele 2016 https://www.bizcommunity.com/Article/196/460/157193.html.

10 Rajagopal 2009 *Journal of Retail and Leisure Property* 115.

11 MacKenzie 2014 https://www.competitionchronicle.com/2014/06/exclusive-leases-with-anchor-tenants-in-south-africa/.

as anchor tenants. It is possible to find one or two of these stores in any shopping centre surrounded by several smaller retailers. Where there are two of them, you are likely to find them at either end of the shopping centre.

2.2 Lease agreements

Generally shopping centres are organised through the leasing of trading space.[12] Once tenants have been secured, including anchor tenants, lease agreements that provide the terms and conditions of the tenancy will be signed. In the context of shopping centres, lease agreements are commercial contracts that regulate the relationship between the shopping centres' landlords and tenants that rent space in shopping centres. Generally shopping centres' lease agreements are comprehensive and detail the rights and duties of both the landlords and tenants. Tenants and landlords may negotiate terms relating to the duration of the lease, options to renew, conditions of occupancy, obligations of the landlord and the amount of rental that should be paid periodically.

In practice, unlike anchor tenants, most other tenants do not have the necessary bargaining power to twist landlords' arms when negotiating lease agreements.[13] These tenants may be locked into somewhat unfavourable lease terms and conditions because their occupancy may be subject to approval by anchor tenants.[14] Concerning rent, larger shopping centres' landlords can charge higher rent than the landlords of smaller shopping centres due to their bargaining power.[15] Some landlords may insist on inserting clauses in lease agreements that require tenants to pay rent and a percentage of their gross income.[16] Apart from rent, it is possible through lease agreement negotiations for anchor tenants to limit competition by preventing landlords from entering into leases in the shopping centres with other tenants that have uses or purposes similar to their own.[17] In other words, these clauses seek to grant anchor tenants the right to trade in shopping centres while dictating how landlords should deal with their competitors.[18] These clauses are generally referred to as exclusive or exclusivity clauses in South Africa and non-compete clauses in other

12 Merrill 2020 *JLA* 30.

13 Dewey Mclean Levy Inc. 2022 https://dmlinc.co.za/2022/01/26/shopping-centre-tenants-in-distress/.

14 McAndrews 1972 *Real Property, Probate and Trust Journal* 815.

15 Tay, Lau and Leung 1999 *Journal of Real Estate Literature* 189.

16 See Colwell and Munneke 1998 *Journal of Real Estate Research* 240, where it is argued that "[a] landlord acting in much the same way as an insurance company may add value to a portfolio of leases by bringing together tenants with different prospects, if the income of the tenants are not perfectly positively correlated. The tenants are attracted by the risk reduction associated with percentage leases when compared to flat rent contracts."

17 Wolfson 1969 *Law Notes for the Young Lawyer* 28.

18 Schapiro 1986 *Alta L Rev* 510.

jurisdictions.[19] On the one hand, this kind of clause is lauded for benefitting landlords and anchor tenants.[20] On the other hand, there have been serious concerns that such clauses are potentially anti-competitive.[21]

3 Anchor tenants and landlords

3.1 Value of anchor tenants

Anchor tenants' ability to attract traffic to the shopping centres leads to the financial sustainability of the shopping centres.[22] Even though shoppers originally come to the shopping centres to do their shopping in anchor tenants' stores, they will find themselves walking past ancillary stores that have taken occupancy of these shopping centres. Anchor tenants have a direct impact on the financial performance of shopping centres. They provide landlords with the bargaining power to dictate high rental rates from ancillary tenants that will directly benefit from the presence of anchor tenants.[23]

Available research demonstrates that anchor tenants are central to the performance of shopping centres.[24] They can facilitate traffic leading to landlords being able to attract other tenants.[25] In return, anchor tenants are usually provided preferential rates concerning rental.[26] As a result, smaller tenants usually pay a much higher leasing fee per square metre than anchor tenants.[27] Apart from this, other concerns arise regarding these agreements. While lease agreements signed between landlords and anchor tenants are mutually beneficial, they have the potential to dictate how third parties who are not involved in those agreements should conduct their businesses. Third parties can be denied access to the mall or where they are granted access, restrictions can be placed on how they should operate their businesses in favour of the anchor tenants. For instance, the lease agreements of such third parties can include clauses that ensure that they do not compete with anchor tenants.

19 For instance, for the position in the United States of America state of Massachusetts see Perl 2018 https://www.perlattorney.com/blog/are-non-compete-clauses-in-commercial-lease-agreements-enforceable.
20 See generally ABA 1984 *Real Property, Probate and Trust Journal* 903.
21 See generally Coetzee 2020 *Without Prejudice* 6.
22 Kemei *Effect of Anchor Tenants* 3.
23 See Joshi and Gupta 2017 *Journal of Business and Management* 5.
24 See generally Kiriri 2019 *Journal of Language, Technology and Entrepreneurship in Africa* 151.
25 You *et al* "Management of Positive Inter-Store Externalities" 19.
26 You *et al* "Management of Positive Inter-Store Externalities" 19.
27 Harmse *Service Quality in a Landlord-Small Business Relationship* 130.

3.2 Exclusivity clauses

Exclusivity "clauses are common provisions in commercial leases that define the permitted and prohibited activities of tenants in a property. They can help landlords create a balanced and attractive tenant mix that enhances the value and appeal of their property."[28] These clauses grant certain trading advantages to anchor tenants that are not granted to ordinary tenants in shopping centres. Anchor tenants are usually allowed to negotiate long-term lease agreements that contain exclusivity clauses, which landlords generally impose on other tenants in shopping centres. Once these lease agreements have been signed, anchor tenants would want to enforce them to protect their businesses.

The desire to promote commercial certainty dictates that the sanctity of contracts should prevail, and the terms of the agreement must be respected. In *FFS Finance South Africa (RF) (Pty) t/a Ford Credit v Lamola,* it was pointed out that "one of the parties to the contract is usually in a more powerful position than the other, which can lead to the abuse of that power in certain instances".[29] In this case the court further held that "[w]hile it is important that all clauses of commercial agreements should be respected and where necessary enforced, it is also important to understand the circumstances under which these agreements are concluded."[30] Shopping centre lease agreements are aimed at ensuring that shopping centres are commercially viable. It is for this reason that landlords rely on anchor tenants to attract customers. Anchor tenants are then rewarded with extensive power to facilitate trade relations in shopping centres. From a contractual point of view, these contracts must be enforced. The challenge, however, is that the power granted to the anchor tenants through these clauses directly impacts the business of other tenants. Such power can also be exercised in a way that prevents those who wish to trade in these shopping centres from being provided space to do so.

In other words, through these clauses anchor tenants can be afforded the entitlement to dictate to landlords not to lease space to other tenants, thereby preventing competition.[31] These clauses may also grant anchor tenants exclusive rights to sell certain products or offer certain services in these shopping centres and require landlords to deny other tenants the right

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28 Anon 2024 https://www.linkedin.com/advice/0/how-do-you-leverage-use-exclusivity-clauses.

29 *FFS Finance South Africa (RF) (Pty) t/a Ford Credit v Lamola* 2024 2 SA 427 (GP) para 21.

30 *FFS Finance South Africa (RF) (Pty) t/a Ford Credit v Lamola* 2024 2 SA 427 (GP) para 36.

31 Popova and Koeva 2016 https://cms.law/en/bgr/publication/right-of-the-anchor-tenant-to-prevent-the-lessor-from-letting-commercial-premises-to-third-parties-the-competition-law-test.

to sell or offer certain goods and services in shopping centres.[32] Anchor tenants can negotiate for the inclusion of clauses that allow them to effectively conduct their business while preventing their potential competitors from competing with them in these shopping centres.[33]

Once exclusivity clauses have been inserted into the lease agreements and such agreements have been signed by both the landlords and anchor tenants, the landlords may be obliged to ensure that these lease agreements are not infringed by other tenants. Landlords may be required to confirm to the anchor tenants that other tenants are not engaging in the prohibited use of the shopping centre spaces. Landlords may also be required to ensure that the modifications that other tenants effect in their respective stores do not violate the anchor tenants' exclusive use provision.[34] Anchor tenants can dictate the terms of their lease agreements to operate in shopping centres because for the developers of these shopping centres to secure finance from the commercial banks they are required to have secured anchor tenants and concluded lease agreements with them of at least ten years.[35] Through this requirement, anchor tenants are placed in a stronger position to negotiate for the inclusion of long-term exclusivity clauses because developers need them to secure financing.[36]

Exclusivity clauses are often justified on the basis that anchor tenants take risks and increase their expenses to support shopping centres, and exclusivity is required to enable them to recoup their investments.[37] Anchor tenants are compensated through these clauses for agreeing to sign long-term lease agreements before the shopping centres are built. By so doing, they bind themselves to trade in these shopping centres and regularly pay rentals regardless of the profitability of their stores. there is a growing number of shopping centres in both urban and rural areas of South Africa. This automatically leads to an intense desire to access trading space, which necessitates an evaluation not only of the impact of exclusivity clauses but also of how the law regulates them.

While there is a commercial rationale for the insertion of exclusivity clauses in lease agreements from both the anchor tenants' and landlords' perspectives, there are certain challenges that arise when these clauses

32 Morgan 2018 https://www.law.com/njlawjournal/almID/1205775582338/. See also Pisegna 2017 https://www.kb-law.com/articles/documents/article-2017-05-26-Exclusive-Use-and-Related-Use-Restrictions-for-Commercial-Lease-Contracts.pdf.

33 Duberman 2022 https://www.outsidegc.com/blog/exclusive-use-provisions-in-commercial-leases.

34 Duberman 2022 https://www.outsidegc.com/blog/exclusive-use-provisions-in-commercial-leases.

35 Mandiriza 2015 *Competition News* 2.

36 Mandiriza 2015 Competition News 2.

37 Mandiriza 2015 *Competition News* 3.

are implemented. Generally, even though exclusivity clauses benefit anchor tenants, they may do so at the expense of the entire shopping centre by reducing the market for prospective replacement tenants.[38] Even more concerning, these clauses raise important "questions regarding their compliance with competition law, which prohibits agreements between undertakings that aim or effect the prevention, restriction or distortion of competition on the relevant market."[39]

4 Exclusive dealings

4.1 Vertical restraints

Both the anchor tenants and their competitors are in, or desire to enter into, a vertical relationship with shopping centre landlords. Generally restraints between upstream firms and their downstream retailers are controversial by nature. Shopping centres' landlords and retailers such as supermarkets operate in different but complementary levels of production. Any restriction imposed by any party to a vertical relationship on the other party to that relationship amounts to a vertical restraint. "Vertical restraints most often arise in retail settings, with the upstream firm or manufacturer typically restricting its downstream retailers' choices."[40] These vertical relationships can create exclusive territories and insulate retailers from competing by eliminating competitors and making access to these territories almost impossible for new entrants.[41] This practice has the effect of foreclosing entry by competitors at some level of the vertical chain.

Usually vertical restraints that lead to exclusive dealings are justified based on the link between exclusionary provisions and the beneficiary's investment incentive.[42] Further, they can be used to prevent the free ride of the competitors on non-relationship-specific investments.[43] Exclusive contracts benefit both parties to the vertical relationship at the expense of parties whose businesses are affected by the decisions taken without participating in the contracting process. Available research demonstrates that

> exclusive contract between a mall owner and a retailer will be adopted only if it effectively limits the competition between downstream retailers, enabling the mall owner to extract higher rents from the restaurant that operates under an exclusivity contract. In other words, if the exclusive contract does not affect

38 Morgan 2008 https://www.law.com/njlawjournal/almID/1205775582338/.
39 Popova and Koeva 2016 https://cms.law/en/bgr/publication/right-of-the-anchor-tenant-to-prevent-the-lessor-from-letting-commercial-premises-to-third-parties-the-competition-law-test.
40 Lafontaine and Slade "Exclusive Contracts and Vertical Restraints" 392.
41 Lafontaine and Slade "Exclusive Contracts and Vertical Restraints" 392.
42 Fadairo and Yu 2014 https://core.ac.uk/reader/52308440 8.
43 Fadairo and Yu 2014 https://core.ac.uk/reader/52308440 9.

> competition in the downstream market, then retailers have no reason to pay for it.[44]

When arrangements entered into by firms operating in a vertical chain directly affect competition in the downstream market, this will attract the attention of the Competition Authorities. According to Bertarelli, "the restrictive nature of these agreements may reduce retailers' choice in terms of quality and quantity of supply, foreclose competitors, and increase in the risk of abuse of a dominant position."[45] It is important to determine whether the conduct of anchor tenants through these agreements, when tested against the relevant provisions of the CA, can be classified as anti-competitive. In terms of section 5(1) of the *Competition Act*

> [a]n 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.

Since anchor tenants and landlords are in a vertical relationship, the focus is not fully on their relationship or the benefits that they derive thereon. For competition purposes, the effect of their agreements is instrumental. Generally, commercial lease agreements do not raise competition concerns. However, when they contain clauses that grant exclusive rights to trade in shopping centres and power to anchor tenants to dictate how the landlords should deal with other tenants, such agreements will raise competition concerns. This will require an assessment of their effect to determine whether they substantially prevent or lessen competition. Anchor tenants are legislatively entitled to demonstrate that such agreements lead to some pro-competitive benefits that outweigh their effects.

In a country like South Africa where a certain portion of the population has been economically marginalised, it would be difficult to demonstrate that their exclusion from trading in shopping centres through exclusionary clauses has pro-competitive gains that outweigh the effects of the agreements that prevent them from accessing shopping centres. It is submitted that exclusivity clauses in shopping centre lease agreements are potentially anti-competitive in that they prevent and lessen competition in shopping centres. It is worth noting, however, that there is no provision in the CA that specifically deals with the potential exclusionary conduct that may arise from the enforcement of exclusivity clauses. To the extent that the insertion of exclusivity clauses in shopping centres' lease agreements

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44 Ater 2015 *Journal of Economics and Management Strategy* 627.

45 Bertarelli 2024 *European Scientific Journal* 2. Also see Mandiriza 2015 *Competition News* 2, who argues that "[t]hese restrictions tend to mostly affect small businesses that are not in a position to attract a lot of customers if located outside the mall. The idea of operating in shopping centres remains a dream for most small businesses that are in direct competition with the large food retailers."

may raise anti-competitive concerns, these clauses will require to be interpreted and analysed under the relevant provisions of section 8 of the CA.

4.2 Exclusionary practices

Exclusionary practices allow dominant firms to prevent their competitors either from entering into certain markets or from expanding their businesses in defined markets.[46] Exclusionary practices are prohibited only when committed by a dominant firm and when they result in an anti-competitive effect that cannot be justified on efficiency or pro-competitive grounds. An exclusionary practice is defined as conduct by a dominant firm that impedes or prevents a rival from entering or expanding in a market. In terms of section 8(1)*(c)* of the *Competition Act* "[i]t is prohibited for a dominant firm to engage in an exclusionary act, other than an act listed in paragraph (d), if the anti-competitive effect of that act outweighs its technological, efficiency or other pro-competitive gain." The Competition Tribunal (hereafter the Tribunal) made it clear that even if the conduct complained of was to be established as an impediment to entry into the market, that conduct's anticompetitive effect must still be demonstrated.[47] Further, even where anti-competitive effects have been established, it must also be demonstrated that these outweigh any pro-competitive gains.[48] In shopping centres, anchor tenants agree with landlords to protect the anchor tenants' businesses by preventing competition. This is done by denying certain firms access to the shopping centres while the business activities of other firms are restricted.

Firms that are denied access or whose business activities are restricted by exclusivity clauses are burdened with the onus to prove that the conduct of anchor tenants is exclusionary.[49] Should these firms rely on section 8(1)(*c*) of the CA, they will have to provide evidence that demonstrates that the anti-competitive effect of exclusivity clauses outweighs their technological efficiency or other pro-competitive gains. This can be demonstrated by the ease with which anchor tenants, as a result of their market power, can dictate to the landlords that they must place prejudicial restrictions on the businesses of competitors in shopping centres. In terms of section 8(1)(*d*) of the *Competition Act*, dominant firms are prohibited from engaging in exclusionary conduct such as requiring or inducing suppliers or customers not to deal with competitors; refusing to supply scarce goods or services to

46 Mncube, Federico and Motta 2022 *Review of Industrial Organization* 404.

47 *York Timbers Ltd and SA Forestry Company Ltd* (15/IR/Feb01) [2001] ZACT 19 (9 May 2001) para 100.

48 *York Timbers Ltd and SA Forestry Company Ltd* (15/IR/Feb01) [2001] ZACT 19 (9 May 2001) para 100.

49 *Competition Commission and South African Airways (Pty) Ltd (Final)* 2005 2 CPLR 303 (CT); 2020 2 CPLR 821 (CT) para 102.

competitors or customers when supplying those goods or services is economically feasible; forcing buyers to accept conditions unrelated to the objects of the contracts; or selling goods or services at predatory prices. Dominant firms can engage in these activities only if they can demonstrate technological, efficiency or other pro-competitive gains that outweigh the anti-competitive effect of such conduct.

As a matter of law, if it is established that anchor stores committed any of the acts mentioned in section 8(1)(*a*) of the CA, an exclusionary act would be proven.[50] The Tribunal has held that it is not enough to merely establish that there is an exclusionary conduct; it must also be proven that such conduct has an anti-competitive effect.[51] This can arise when conduct impedes the growth of competitors in a defined market and allows a dominant firm to exercise market power to the extent that consumer welfare is affected by output-limiting decisions.[52] This is conduct that generally empowers anchor tenants to foreclose the market by ensuring their businesses thrive while adopting strategies that inhibit the growth of their competitors' businesses.

In *Computicket (Pty) Ltd v Competition Commission of South Africa* the CAC held that "[t]he act is exclusionary if it falls within the conduct described in section 8(*d*)(i)".[53] The exclusionary conduct that arises in the context of exclusivity clauses contained in shopping centre lease agreements is not listed as one of the legislative conducts that can be justified under section 8(1)(*d*)(i) of the *Competition Act*. An assessment of the anti-competitive effect of exclusivity clauses is necessary to determine whether it outweighs the technological, efficiency or other pro-competitive gain that can be derived by providing anchor tenants exclusive rights to trade as supermarkets in shopping centres. Exclusivity clauses contained in lease agreements may be regarded as anti-competitive only if they lead to actual harm to consumer welfare or substantially foreclose the shopping centre grocery retail market for competitors who desire to trade as supermarkets in shopping centres.[54]

Section 8 of the CA generally applies when the exclusionary act is substantially significant and its effect leads to the foreclosure of the relevant

50 *Competition Commission and South African Airways (Pty) Ltd (Final)* 2005 2 CPLR 303 (CT); 2020 2 CPLR 821 (CT) para 105.

51 *Competition Commission and South African Airways (Pty) Ltd (Final)* 2005 2 CPLR 303 (CT); 2020 2 CPLR 821 (CT) para 111.

52 *Competition Commission and South African Airways (Pty) Ltd (Final)* 2005 2 CPLR 303 (CT); 2020 2 CPLR 821 (CT) para 115.

53 *Computicket (Pty) Ltd v Competition Commission of South Africa* (170/CAC/Feb19) 2019 ZACAC 4 (23 October 2019) para 17.

54 *Computicket (Pty) Ltd v Competition Commission of South Africa* (170/CAC/Feb19) 2019 ZACAC 4 (23 October 2019) para 19.

market for rival firms.[55] In most shopping centres, other stores that desire to trade as supermarkets are restricted from doing so because of exclusivity clauses. This effectively means that shopping centres are foreclosed for these stores, which demonstrates the anti-competitive nature of these agreements. The next inquiry is to determine whether exclusivity clauses can be justified on technological, efficiency or other pro-competitive gains.

As discussed above, these clauses operate in favour of anchor tenants due to the role they play in shopping centres. It is trite that the theory of harm must consider the unique and peculiar features of the relevant market.[56] The harm to competition should be weighed against the benefits that will be gained from competition. Exclusivity clauses will be prohibited only when the harm that results from their implementation outweighs the benefits they bring. In *Uniplate Group (Pty) Ltd v The Competition Commission of South Africa*, it was held that "[t]here must be a causal relationship between the exclusionary act and its anti-competitive effect."[57] The harm is generally measured with reference to the anti-competitive effect of the exclusionary act while gains are measured with reference to technological, efficiency or other pro-competitive gains.[58] It does not appear as if there are real pro-competitive gains for foreclosing other tenants from operating as supermarkets. What is clear, however, is that the inquiry will require a rule of reason analysis.

4.3 Approach of the European Union

The Treaty on the Functioning of the European Union (hereafter TFEU) seeks, among other things, to regulate competition in that region. In terms of Article 101(1) of the TFEU, agreements between and decisions by firms that may affect trade between member states and "which have as their object or effect the prevention, restriction or distortion of competition within the internal market" are prohibited as incompatible with the internal market. In the case of *Maxima Latvija' v Konkurences Padome*[59] (hereafter *Latvija*) the Court of Justice of the European Union, in a purely internal dispute

55 *South African Airways (Pty) Ltd v Comair Ltd* 2012 1 SA 20 (CAC) para 112.

56 *Computicket (Pty) Ltd v Competition Commission of South Africa* (170/CAC/Feb19) 2019 ZACAC 4 (23 October 2019) para 21.

57 *Uniplate Group (Pty) Ltd v The Competition Commission of South Africa* (176/CAC/Jul19) 2020 ZACAC 10 (25 February 2020) para 23.

58 *Computicket (Pty) Ltd v Competition Commission of South Africa* (170/CAC/Feb19) 2019 ZACAC 4 (23 October 2019) para 23. In para 26 the court held that "[t]he exclusionary act must be shown to have effects of a kind that engage the evaluation required by section 8(d). If an exclusionary act gives rise to no anti-competitive effects, then the exclusionary act is not prohibited. So too, if an exclusionary act, though having anti-competitive effect, gives rise to no pro-competitive gains, then the exclusionary act is prohibited. As the text of section 8(d) makes plain, the effects that are relevant to the evaluation are the effects of 'its act'".

59 *Maxima Latvija' v Konkurences Padome* C-345/14 ECLI:EU:C:2015 (hereafter *Latvija*).

where the agreement subject to the complaint did not affect trade between European Union member states, applied and interpreted Article 101(1) of the TFEU to provide guidance on whether exclusive agreements in the context of shopping centres are anti-competitive.[60]

In this case a major food retailer which operated large shops concluded a series of commercial lease agreements with shopping centres for the rental of commercial premises. It was an anchor store in all the identified shopping centres. The Competition Council found that twelve of these lease agreements contained a clause granting this food retailer the right to veto the landlord's letting commercial premises to particular third parties. The Court of Justice of the European Union was asked to clarify whether a lease agreement between the anchor tenant and the landlord that requires the landlord to seek prior consent from the anchor tenant before leasing space in the shopping centre to the anchor tenant's potential competitors should be prohibited in terms of Article 101(1) of the TFEU.[61]

In essence, this court was required to determine whether the object of such an agreement is to restrict competition within the meaning of that provision. In answering this question, the court first held that it is not necessary to evaluate the effects of the agreement on competition where the anticompetitive object thereof has been established. But where a sufficient degree of harm to competition was not revealed, the effects of the agreement on competition should be considered. For the agreement to be prohibited, factors that illustrate that competition was prevented, restricted or distorted to an appreciable extent must be present.[62]

The court noted that the major retailer was not competing with the shopping centres where it was an anchor store. The court held that the lease agreements it concluded "are not among the agreements which it is accepted may be considered, by their very nature, to be harmful to the proper functioning of competition."[63] The court reasoned that

> Even if the clause at issue in the main proceedings could potentially have the effect of restricting the access of Maxima Latvija's competitors to some shopping centres in which that company operates a large shop or hypermarket, such a fact, if established, does not imply clearly that the agreements containing that clause prevent, restrict or distort, by the very

60 *Latvija* para 12, the court further held that "it has jurisdiction to give preliminary rulings on questions concerning EU law in situations in which the facts in the main proceedings fell outside the direct scope of that law, provided always that those provisions had been rendered applicable by the national law, which adopted, for solutions applied to purely internal situations, the same approach as that for solutions provided for under EU law."

61 *Latvija* para 10.1.

62 *Latvija* para 17.

63 *Latvija* para 21.

> nature of the latter, competition on the relevant market, namely the local market for the retail food trade.[64]

It is not clear from the judgment whether evidence of foreclosure was presented by the Competition Council. The court did not evaluate how these agreements were implemented and how they ultimately impacted major retailer's competitors who desired to trade in these shopping centres. Based on the information provided by the referring court, the Court of Justice of the European Union held that these agreements do not indicate "a degree of harm with regard to competition sufficient for those agreements to be considered to constitute a restriction of competition 'by object' within the meaning of Article 101(1) TFEU".[65]

The Court of Justice of the European Union was also asked to clarify the conditions under which commercial lease agreements which contain exclusivity clauses "may be considered to be an integral part of an agreement having the 'effect' of preventing, restricting or distorting competition within the meaning of Article 101(1) TFEU."[66] To determine the effect of the agreement on competition, the court held that all the factors which determine access to the relevant market must be considered to establish whether there are real concrete possibilities for a new competitor to establish itself by either seeking to rent space from close-by shopping centres or other commercial spaces outside shopping centres.[67] The court reasoned that "the availability and accessibility of commercial land in the catchment areas concerned and the existence of economic, administrative or regulatory barriers to entry of new competitors in those areas" must be considered.[68]

The court also held that the number and size of competitors on the market must be established as well as "the degree of concentration of that market and customer fidelity to existing brands and consumer habits."[69] It was held that it would be necessary to analyse the extent to which exclusivity clauses close off the market only once a thorough analysis of the economic and legal context in which these lease agreements has been conducted, particularly when it is found that access to the market in question is made

64 *Latvija* para 22.

65 *Latvija* para 23, the court held "that Article 101(1) TFEU must be interpreted as meaning that the mere fact that a commercial lease agreement for the letting of a large shop or hypermarket located in a shopping centre contains a clause granting the lessee the right to oppose the letting by the lessor, in that centre, of commercial premises to other tenants, does not mean that the object of that agreement is to restrict competition within the meaning of that provision."

66 *Latvija* para 25.

67 *Latvija* para 27.

68 *Latvija* para 27.

69 *Latvija* para 28.

difficult by all the similar agreements found on the market.[70] Further, that "the position of the contracting parties on the market in question and the duration of the agreements must be taken into consideration."[71]

The court further held that the assessment is not restricted to actual effects, but that the potential effects of the agreement or practice in question on competition must also be considered.[72] The court concluded that shopping centre lease agreements which contain exclusivity clauses in favour of anchor tenants may be considered as having the effect of preventing, restricting or distorting competition.[73] Most significantly, the court held that

> after a thorough analysis of the economic and legal context in which the agreements occur and the specificities of the relevant market, that they make an appreciable contribution to the closing-off of that market. The extent of the contribution of each agreement to that closing-off effect depends, in particular, on the position of the contracting parties on that market and the duration of that agreement.[74]

This decision illustrates the need to undertake a comprehensive analysis of whether shopping centre lease agreements restrict competition. The impression created by the reasoning of this court is that the relevant market cannot be assumed. This judgment mandates the need to reflect on all the possible factors that may point to whether the lease agreement has the effect of restricting competition. It requires the assessment of the availability of competing malls in the same area or space that can be leased outside the shopping centre. It also seems to be raising the bar too high by requiring that the unlawfulness of the lease agreement be demonstrated by proving that it makes an appreciable contribution to the market foreclosure, having regard to the market positions of the parties and the duration of the agreement.[75]

The analysis of the effects of the agreement provides useful lessons for South Africa. It is important to evaluate the actual and potential effects of the agreement on competition. However, the suggestion that the relevant market must first be defined and not be assumed in the context of shopping centres is not convincing. While exclusivity clauses do not themselves establish dominance, they provide anchor stores with market power which these stores can abuse to the prejudice of their competitors. Exclusivity clauses can be used to prevent or distort competition in shopping centres. This, in my view, justifies individual shopping centres being assumed and

70 *Latvija* para 29.
71 *Latvija* para 29.
72 *Latvija* para 29.
73 *Latvija* para 31.
74 *Latvija* para 31.
75 O'Regan 2015 https://competitionlawblog.kluwercompetitionlaw.com/2015/12/17/european-court-of-justice-provides-guidance-on-when-provisions-of-property-leases-may-be-anti-competitive/.

treated as the relevant markets because the dynamics may differ from one shopping centre to the next. Lease agreements that contain exclusivity clauses identify an existing market which can be assumed when an anticompetitive complaint is lodged against the anchor store. The ability to sign and enforce this agreement as well as to impose conditions on third parties demonstrates the power exercised by anchor stores in shopping centres. This justifies the assessment of the effect of these agreements on competition without the need to undertake an inquiry in terms of section 7 of the *Competition Act*.

4.4 Competition Commission's investigation

In June 2009 the Competition Commission instituted an investigation into the grocery retail sector after having received allegations of anti-competitive practices by established national supermarkets. In 2011 the Commission published its findings where several concerns such as information exchange, category management, the abuse of buyer power and the prevalent use of exclusivity clauses were identified.[76] The Commission found that exclusivity clauses lead to anti-competitive outcomes and exclude independent and small retailers from entering certain shopping centres where the main supermarket chains are anchor tenants.[77] However, the Commission was of the view that it had not obtained sufficient evidence to successfully prosecute and prove that exclusivity clauses had the effect of substantially lessening competition.[78] The Commission wanted to engage the relevant stakeholders further with the possibility of a wider inquiry at a later stage if the deliberations did not yield any positive outcomes.[79]

Despite its efforts to engage relevant stakeholders, the Commission continued receiving complaints relating to exclusivity clauses in the context of shopping centres. On 12 June 2015 the Commission announced that it was going to conduct a market inquiry into the grocery retail sector to examine whether there are aspects in this sector that lessen, prevent or distort competition.[80] Among other matters, this inquiry was undertaken on

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76 Competition Commission 2011 https://www.compcom.co.za/wp-content/uploads/2014/09/Supermarket-Investigation-Release.pdf.

77 Competition Commission 2011 https://www.compcom.co.za/wp-content/uploads/2014/09/Supermarket-Investigation-Release.pdf.

78 See Das Nair and Chisoro 2015 https://www.wider.unu.edu/sites/default/files/WP2015-114-.pdf 18, where it is argued that "the Commission instead engaged in softer, ongoing advocacy measures to deal with exclusive leases. The Commission took part in discussions with supermarkets, property developers, and banks, recommending the use of long-term exclusive lease agreements only in cases where the supermarkets can prove that they undertook substantial investments in certain shopping centres." Also see Blumenthal *Competition Commission's Non-Referral of Exclusivity Clauses* 18.

79 Competition Commission 2011 https://www.compcom.co.za/wp-content/uploads/2014/09/Supermarket-Investigation-Release.pdf.

80 GN 580 in GG 38863 of 12 June 2015 93.

the basis of the complaints that the Commission had received where shopping centre lease agreements that contain exclusivity clauses were alleged to create barriers to entry and expansion in the shopping centre grocery retail market.[81] The complaints were that these clauses "excluded small businesses and competitors from entering shopping centres."[82] In particular, small independent businesses that are involved in butchery, bakery and liquor businesses informed the Commission that exclusivity lease agreements prevented them from opening stores in shopping centres.[83] It was also noted that these exclusivity clauses limited the product range of other tenants in shopping centres and might potentially lead to consumers paying higher prices.[84]

On 25 November 2019 the Commission released its final report on its inquiry into the grocery retail market.[85] The Commission's inquiry revealed that "other players within the grocery retail sector have been precluded from opening stores in shopping centres."[86] Further, these clauses also led to the closure of some of the stores, especially those trading in liquor.[87] According to the Commission, this had an impact on consumer choice, which is an important dimension to competition.[88] The enforcement of exclusivity clauses in shopping centres denied consumers the advantage of different products of varied quality at different prices.[89] The Commission stated that "[e]liminating this choice alone is a significant harm to consumer welfare and hence to competition."[90] The investigation also revealed that exclusivity clauses perpetuated concentration in the grocery retail market to the extent that they impacted negatively on price competition.[91]

The Commission established that exclusivity clauses substantially limited the growth and competitive ability of tenants that are prevented from trading in the goods that are offered by anchor tenants.[92] Most interestingly, the

81 Competition Commission 2019 https://www.compcom.co.za/wp-content/uploads/2019/12/GRMI-Non-Confidential-Report.pdf (hereafter Competition Commission *Final Report*) 126.
82 Competition Commission *Final Report* 135.
83 Competition Commission *Final Report* 135.
84 Competition Commission *Final Report* 139.
85 Competition Commission *Final Report*.
86 Competition Commission *Final Report* 143. The Commission noted that "[d]enying independent retail stores the opportunity to trade in shopping centres could potentially result in their failure as they are not able to attract as much foot traffic in their isolated location as a stand-alone store. This has the direct effect of reducing the number of independent retail traders and reducing their ability to compete with national supermarket chains in shopping centres."
87 Competition Commission *Final Report* 153.
88 Competition Commission *Final Report* 143.
89 Competition Commission *Final Report* 143.
90 Competition Commission *Final Report* 143.
91 Competition Commission *Final Report* 144.
92 Competition Commission *Final Report* 148.

Commission also observed that generally these clauses negatively impact smaller tenants and not these anchor tenants' direct competitors. Anchor tenants can tolerate each other to some degree. Hence most shopping centres are likely to have at least two of the major supermarkets, each with a lease agreement that prevents landlords from providing occupancy to other supermarkets or restricting the business activities of other tenants. Through exclusivity clauses anchor tenants can waive exclusivity for other recognised anchor stores and enforce exclusivity on all the smaller tenants or those that are not recognised as anchor tenants.[93] The Commission found that these contracts result in the exclusion of competing retailers, limit consumer choice and distort competition in the grocery retail sector.[94] Further, by excluding specialist tenants who are trading in some of the goods offered by anchor tenants, some of whom are firms owned by historically disadvantaged persons, exclusivity clauses negatively affect competition.[95]

This is even more concerning in shopping centres that are situated in per-urban, township and rural areas where historically disadvantaged persons are largely located and may desire to trade in shopping centres that are established in their areas. This is seriously concerning, more particularly in the context of rural and township economies. This means that small traders who specialise in daily consumable goods such as bread, meat and fresh fruits and vegetables who are members of communities where shopping centres are built will not be allowed to take occupancy of shopping centres because they will compete in the sale of these defined products with anchor tenants. They are basically prevented from accessing a well-structured and safe working space where they can have easy access to customers and grow their businesses. Through these exclusivity clauses, these traders have no chance of entering this market. In this respect, exclusivity clauses have a negative impact on competition.

Based on its inquiry, the Commission recommended that national supermarkets that usually occupy shopping centres as anchor tenants must immediately stop enforcing the exclusivity provisions contained in their lease agreements.[96] Further, new leases entered by anchor tenants may not incorporate exclusivity clauses.[97] The Commission undertook to seek voluntary compliance by those who own these anchor stores within six

93 Competition Commission *Final Report* 155.
94 Competition Commission *Final Report* 161.
95 Competition Commission *Final Report* 161.
96 Competition Commission 2019 https://www.compcom.co.za/wp-content/uploads/2019/12/Grocery-Retail-Market-Inquiry-SUMMARY_.pdf (hereafter Competition Commission *Summary of the Findings and Recommendations*) 16.
97 Competition Commission *Summary of the Findings and Recommendations* 16.

months of the date of publication of its final report.[98] This led to Shoprite, Pick 'n Pay and Spar, as the major national supermarkets that ordinarily take tenancy of shopping centres as anchor stores, entering separate consent agreements with the commission to stop enforcing their exclusivity clauses.[99] Some of these consent agreements have been confirmed as orders of the Competition Tribunal.[100] The Commission noted that there are currently certain landlords who refuse to insert exclusivity clauses in the lease agreements entered into with anchor tenants.[101] The Commission's investigation and intervention fortifies the view that exclusivity clauses have the effect of preventing and lessening competition and are potentially anti-competitive. It is hoped that the Commission will start prosecuting anchor tenants and landlords that conclude commercial lease agreements which contain exclusivity clauses.

5 Defining a market

The market share allocated to anchor tenants through exclusivity clauses necessitates an investigation of whether these tenants can be described as dominant firms.[102] A firm is regarded as dominant when its annual turnover exceeds a threshold determined by the Minister in terms of section 6 of the *Competition Act* and it meets the market share criteria provided for in section 7 of this Act.[103] In other words, to be dominant, a firm must have a sizeable share of the market that it can use to dictate how business should be conducted in that market. Such a firm should not only have a significant share of the identified market, but its market share should be significantly larger than that of its competitors. In the context of shopping centres, exclusivity clauses often allow one or two supermarkets to trade as anchor

98 Competition Commission *Summary of the Findings and Recommendations* 16.

99 See Competition Commission 2023 https://www.compcom.co.za/wp-content/uploads/2023/08/Media-Statement-Commission-and-Spar-Group-reaches-settlement-agreement-30-August-2023.pdf.

100 See Competition Commission 2020 https://www.comptrib.co.za/info-library/case-press-releases/tribunal-confirms-commission-shoprite-checkers-consent-agreement-concerning-long-term-exclusive-lease-agreements; Competition Commission 2021 https://www.comptrib.co.za/info-library/case-press-releases/tribunal-confirms-consent-agreement-pick-n-pay-exclusivity-provisions-in-lease-agreements-immediately-scrapped-against-privately-black-owned-supermarkets-small-businesses-and-speciality-stores.

101 Competition Commission *Final Report* 152.

102 See Boshoff 2013 https://www.ekon.sun.ac.za/wpapers/2013/wp102013/wp-10-2013.pdf 2, who argues that “[t]he definition of the relevant market is a key first step in most competition investigations in South Africa and in other jurisdictions. Market definition involves judging which substitutes belong in the market with the product under investigation. Traditionally, market definition is seen as a means to an end: a properly defined market is necessary for the calculation of market shares, which are used as proxies for market power."

103 *Tsutsumani Business Enterprises CC v Competition Tribunal* 2023 3 CPLR 34 (CAC) para 16.

stores while denying access to other stores, or where such stores are granted access their business activities are restricted, thereby fundamentally reducing their market share.

The cases heard by both the Tribunal and the CAC illustrate that the first step in assessing anti-competitive complaints is the definition of the relevant market.[104] Boshoff and van Jaarsveld state that "[m]arket definition in competition cases relies on empirical evidence of substitution patterns."[105] The process of defining a market is important because it creates a platform for the calculation of the market share, which can be used to demonstrate market power.[106] According to the Commission, some of the stakeholders who responded to its inquiry argued that the relevant product and geographical markets ought to be defined for the proper competition assessment in the retail grocery industry.[107] This exercise usually assists with the identification and defining of the boundaries of competition between firms.[108]

The Commission's response to this observation was that "in instances of differentiated product and service markets … a strict and traditional approach to market definition is not always possible due to the difficulty of determining how close a potential substitute must be to be included in the market."[109] This is a correct approach, particularly in the shopping centres context with localised markets. The market is localised and market power is directly established by exclusivity clauses in the lease agreements. Through these clauses anchor tenants dictate how landlords should relate with other tenants and the trading restrictions that should be placed on those tenants. The process of defining a market is aimed at establishing market power to identify the firm's dominance.[110] The structure of trade in shopping centres already establishes market power and there is no need for a formal process of trying to define a market.

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104 See *Competition Commission v Interaction Market Services Holdings (Pty) Ltd In re: Interaction Market Services v Competition Commission* 2022 1 CPLR 1 (CAC) para 1; *Mittal Steel South Africa Limited v Harmony Gold Mining Company Limited* (70/CAC/Apr07) 2009 ZACAC 1 (29 May 2009) para 41; *Trident Steel (Proprietary) Limited and Dorbyl Limited* (89/LM/Oct00) 2001 ZACT 2 (30 January 2001) para 30.

105 Boshoff and Van Jaarsveld 2019 *South African Journal of Economics* 302. These authors further state that "When defining a market, the analyst identifies potential substitutes for the product sold by the firm(s) under investigation. The analyst then ranks these substitutes in terms of their degree of substitutability and includes higher-ranked substitutes in the relevant market based on a selection criterion."

106 Boshoff 2013 https://www.ekon.sun.ac.za/wpapers/2013/wp102013/wp-10-2013.pdf 2.

107 Competition Commission *Summary of the Findings and Recommendations* 2.

108 Kelly *et al Principles of Competition Law* 27.

109 Competition Commission *Summary of the Findings and Recommendations* 16.

110 See generally Massey 2000 *Economic and Social Review* 309.

According to the OECD, "[t]he main goal of market definition is to assess the existence, creation or strengthening of market power."[111] If indeed the role of defining a market is to establish the power that a firm has in a particular market, it seems purely academic to define a market in the context of shopping centres where exclusivity clauses have already allocated such power to anchor tenants to restrict competition and dictate their own prices. There is no need for an artificial and technical calculation of market power while national chain supermarkets have placed themselves in a powerful position of dominance in shopping centres.

Boshoff correctly argues that "[a]n assessment of the relevance of market definition should be sensitive to the type of competition investigation involved."[112] While there might be a need to plead a detailed market definition and adequately define the geographical markets where the alleged contravention of the *Competition Act* occurred,[113] it does not appear as if that should necessarily be the case where anchor tenants that operate in shopping centres are accused of engaging in anticompetitive exclusionary conduct. Even though lease conditions may be different from one shopping centre to the next having regard to factors such as location, size, and accessibility, the relevant market remains the shopping centre environment, where anchor tenants seek to preserve their competitive advantage. It is in that context that there is no need to define the relevant market but generally to assess the effects of exclusivity clauses in the context of shopping centres on both competition and consumer welfare. The ability of anchor tenants to unilaterally force landlords through exclusivity clauses to deny their competitors space to trade in shopping centres demonstrates their dominance in shopping centres. A dominant firm can unilaterally act in such a way that restricts or lessens competition to the prejudice of its competitors or those who wish to compete with them.

6 Judicial and quasi-judicial interpretation of exclusivity clauses

6.1 The approach of the Competition Tribunal

There is a need to assess whether the implementation of exclusivity clauses in the context of shopping centre lease agreements has the effect of seriously preventing or reducing competition in the supply of shopping centre rental space. In *Shoprite Checkers Proprietary Limited v Massmart*

111 OECD 2016 https://one.oecd.org/document/DAF/COMP/WP3(2016)5/en/pdf 4.

112 Boshoff 2013 https://www.ekon.sun.ac.za/wpapers/2013/wp102013/wp-10-2013.pdf 9.

113 *Competition Commission v Interaction Market Services Holdings (Pty) Ltd In re: Interaction Market Services v Competition Commission* 2022 1 CPLR 1 (CAC) para 1.

Holdings Limited[114] the Tribunal had an opportunity to interpret exclusivity clauses. In this case Massmart, which owns the Game stores, among others, complained to the Commission that the three different firms that own Shoprite, Pick 'n Pay and Spar stores respectively were engaged in the anti-competitive enforcement of exclusivity provisions with landlords of various shopping centres which prevented its Game stores from trading in fresh food and groceries in these shopping centres.[115] The Commission decided not to investigate the merits of the complaint or to refer it to the Tribunal but instead to conduct a market inquiry.[116]

Massmart decided to refer the complaint directly to the Tribunal in terms of section 51(1) of the *Competition Act*.[117] Shoprite, Pick 'n Pay and Spar made an application to the Tribunal and raised exceptions where they contended that Massmart's referral lacked the necessary particulars to sustain its complaint relating to the contravention of sections 5(1), 8(*c*) and 8(*d*) of the *Competition Act* and that its complaint was vague and embarrassing.[118] Spar requested the Tribunal to stay Massmart's referral until the Commission's investigation into the retail grocery sector was concluded.[119] The Tribunal dismissed the application to stay the referral.

Concerning the exceptions raised, Shoprite, Pick 'n Pay and Spar argued, among other things, that Massmart failed to define the relevant markets; to establish their dominance; to establish harm to competition; and to establish anti-competitive vertical conduct.[120] The Tribunal had to determine whether Massmart's referral could be dealt with in terms of section 5(1) of the *Competition Act*.[121] Massmart argued that its Game stores in shopping centres nationally were prevented from selling fresh grocery products by lease agreements that contained exclusivity clauses entered into by landlords with Shoprite, Pick 'n Pay and Spar.[122]

In determining this matter the Tribunal found that Massmart's theory of harm was not adequately pleaded. Massmart failed to demonstrate why it considered it important to access shopping centres and sell fresh grocery products. It further failed to provide information relating to why, if it had been

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114 *Shoprite Checkers Proprietary Limited v Massmart Holdings Limited* (CRP034Jun15, EXC088Jul15, EXC107AUG15, EXC109AUG15, STA204DEC15) [2016] ZACT 74 (1 September 2016) (hereafter *Shoprite Checkers v Massmart*).

115 *Shoprite Checkers v Massmart* para 3.

116 *Shoprite Checkers v Massmart* para 3.

117 This provision states that "[i]f the Competition Commission issues a notice of non-referral in response to a complaint, the complainant may refer the complaint directly to the Competition Tribunal, subject to its rules of procedure."

118 *Shoprite Checkers v Massmart* para 10.

119 *Shoprite Checkers v Massmart* para 12.

120 *Shoprite Checkers v Massmart* para 24.

121 *Shoprite Checkers v Massmart* para 33.

122 *Shoprite Checkers v Massmart* para 34.

excluded from identified shopping centres, it could not go elsewhere. In its pleadings Massmart had failed to explain why it was not able to enter the market other than through the foreclosed shopping centres. The Tribunal was also of the view that Massmart failed to clarify the nature of the exclusivities alleged.[123] It was further found that in making its case Massmart also failed to provide with precision how much of the market had been foreclosed and by which firm.[124] This in my view, illustrates how insisting on the market definition can be used as a defence by anchor tenants that have the significant market power to foreclose their competitors in shopping centres.

The Tribunal rejected Shoprite's argument that section 5(1) of the CA can apply only to a single agreement as opposed to a class or category of agreements.[125] It is submitted that while this provision clearly refers to "an agreement" for practical purposes, it cannot be that firms that believe they have been foreclosed in different shopping centres by the same anchor tenants should bring separate complaints with respect to individual agreements that contain exclusivity clauses. The Tribunal upheld the exceptions in respect of Massmart's failure to define and allege the material facts concerning the definition of the relevant market and consequent anticompetitive effects. Thus Massmart was allowed to amend its referral to remedy this deficiency.[126] Even though the Tribunal did not engage the merits of the referral owing to insufficient information, this remains an important decision that indicates what is needed to succeed when challenging exclusivity clauses. It is submitted, however, that the traditional approach of insisting on the relevant market's being defined will allow anchor tenants to assert their dominance in shopping centres. A better approach is to assume that individual shopping centres are the relevant markets and to use exclusivity clauses to determine whether anchor stores have market power based on their conduct of dictating to landlords how to deal with other tenants in these shopping centres.

From the information the Tribunal indicated was lacking in this case, it appears that had Massmart been successful in demonstrating that the exclusivity clauses that were subject to the referral substantially prevented or lessened competition in the identified shopping centres, Shoprite, Pick 'n Pay and Spar would have been provided an opportunity to demonstrate that there were technological, efficiency or other pro-competitive gains that resulted from these exclusivity agreements that outweighed the alleged anticompetitive effect.

123 *Shoprite Checkers v Massmart* para 40.
124 *Shoprite Checkers v Massmart* para 41.
125 *Shoprite Checkers v Massmart* para 50.
126 *Shoprite Checkers v Massmart* para 50.

The lease agreements that contain exclusivity clauses are not *per se* illegal in South Africa. Such lease agreements are entered into between firms that are in a vertical relationship and the restraints that arise therefrom are considered in terms of the rule of reason inquiry, which will determine whether competition has been prevented or lessened. Both the negative and positive effects of these agreements would have to be determined to evaluate whether they violated the provisions of the *Competition Act*. Anchor tenants would be provided an opportunity to prove that there are technological, efficiency or other pro-competitive, gains resulting from the enforcement of these agreements that outweigh their alleged anti-competitive effects. The extent of the research conducted in this paper has not revealed the existence of any case before the CAC that specifically dealt with exclusivity clauses in the context of shopping centres. Nonetheless, the Constitutional Court had an opportunity to provide some clarity on how disputes relating to these lease agreements should be approached.

6.2 The approach of the Constitutional Court

6.2.1 Overview

In *Masstores (Pty) Limited v Pick 'n Pay Retailers (Pty) Limited* the Constitutional Court had an opportunity to provide clarity on how exclusivity clauses in shopping centre lease agreements should be interpreted.[127] In this case, Pick 'n Pay alleged that Masstores had interfered with its exclusive right to trade as a supermarket in a shopping centre. Pick 'n Pay did not seek to enforce its contractual exclusivity against the landlord, which was party to the lease agreement, but against another tenant in the shopping centre, despite there being no contractual agreement between the two tenants. The basis of Pick 'n Pay's claim was that Masstores breached its own lease agreement with the landlord and in the process interfered with Pick 'n Pay's exclusivity rights in the shopping centre.[128]

At the time Masstores took occupancy of the shopping centre, Shoprite was the anchor store in the shopping centre. Masstores' lease agreement contained clauses that limited its activities to protect Shoprite as the anchor tenant. In terms of these clauses, Masstores "undertook not to trade as a general food supermarket in the shopping complex except where there was no general food supermarket trading in the shopping centre for 90 consecutive days."[129] Pick 'n Pay took occupancy of the premises in the same shopping centre as an anchor tenant two months after Masstores. Pick 'n Pay's lease agreement also contained exclusivity clauses in its

127 *Masstores (Pty) Limited v Pick 'n Pay Retailers (Pty) Limited* 2017 1 SA 613 (CC) (hereafter *Masstores v Pick 'n Pay*).

128 *Masstores v Pick 'n Pay* para 3.

129 *Masstores v Pick 'n Pay* para 4.

favour with an exception for other existing anchor tenants, in this case, Shoprite. After seven years Masstores started operating as a general supermarket and Pick 'n Pay took exception to this. Pick 'n Pay obtained an interdict in the High Court that prevented Masstores from operating as a general supermarket at the shopping centre.[130] Masstores appealed to the Supreme Court of Appeal, which dismissed its case. It ultimately approached the Constitutional Court.

6.2.2 Majority decision

In his majority judgment, Froneman J held that for an interdict to be granted, Pick 'n Pay had to demonstrate that the contractual right it had obtained from the landlord protected an interest that was also enforceable against third parties outside its lease agreement, that a third party had infringed those rights and that there was no adequate alternative remedy.[131] The court had to determine whether there was a delictual interference with contractual relations. The starting point in the majority judgment was that there was no contract between Pick 'n Pay and Masstores; thus an unlawful interference by Masstores could not lie in a breach of contract with Pick 'n Pay.[132] The court held that Masstores' trading as a general supermarket did not deprive Pick 'n Pay of its entitlement to continue trading as a supermarket in the shopping centre.[133]

This was a strange case in that harm was not alleged by the third party, Masstores. It was an anchor tenant that alleged that the conduct of the third party to its lease agreement was wrongful. Pick 'n Pay did not approach the court to protect the general right to its goodwill, but its exclusive right to trade as a supermarket in the shopping centre. Froneman J authoritatively held that:

> [o]ur law does not usually recognise this kind of exclusive right as worthy of general protection. The reason lies in the fact that the underlying purpose of the law of unlawful competition is to protect free competition, not to undermine it by making it less free. Our courts have often acknowledged the need for protection of free competition as an important policy consideration when assessing the unlawfulness of competitive conduct by confirming the need for

130 *Masstores v Pick 'n Pay* para 4.

131 *Masstores v Pick 'n Pay* para 8.

132 *Masstores v Pick 'n Pay* para 10.

133 In *Masstores v Pick 'n Pay* para 25 the court reasoned that "[t]here may have been a deprivation of part of Pick n Pay's trading interest, namely its exclusivity, but Masstores has not 'usurped' that exclusivity. Masstores did not usurp any exclusive right of Pick 'n Pay and appropriate it as its own. It claims no entitlement to exclusivity. Nor did the Supreme Court of Appeal enquire whether Masstores's degree or intensity of fault played any role in the wrongfulness enquiry."

> free and active competition or by taking into account that by prohibiting competition an unlimited monopoly will be bestowed upon the complainant.[134]

Pick 'n Pay failed to demonstrate the harm that it had experienced as a result of Masstores operating as a supermarket in the shopping centre. Most importantly, it could not demonstrate how Masstores' conduct prohibited it from effectively competing in this market. Pick 'n Pay may have been entitled to enforce its contractual right against the landlord, but it did not have any right in law to sanction the conduct of Masstores because there was no contractual relationship between the two tenants. Most significantly, Pick 'n Pay's desire to enforce its exclusivity clause against Masstores raised serious competition concerns.

Pick 'n Pay's conduct had the effect of foreclosing competition in the shopping centre. In terms of section 5(1) of the *Competition Act*, its own conduct had to be assessed to determine whether the exclusivity clause had the effect of substantially preventing or lessening competition in the identified shopping centre. Pick 'n Pay should have been required to prove that there were any technological, efficiency or other pro-competitive gains that flew from the exclusivity clause that outweighed its anticompetitive effect.[135] The majority correctly relied on *Taylor & Horn* where the Appellate Division (as it then was) dismissed an appeal of a firm that sought to interdict a competitor from distributing a product that such a firm was granted an exclusive contractual right to market and distribute in South Africa.[136]

Generally, wrongfulness denotes conduct that is objectively unreasonable and cannot be justified legally. The wrongfulness of the conduct is legally established on the basis of whether the policy and legal convictions of the community consider such conduct acceptable owing to the general duty not to cause harm and whether liability is justified where harm has been caused.[137] The basis upon which Masstores' conduct when it set up a supermarket can be regarded as wrongful is not clear. Surely, public policy promotes competition that is consistent with the Constitution and the CA. Pick 'n Pay did not allege any competition law infringement on the part of Masstores. From a competition law perspective, it was Pick 'n Pay's conduct in enforcing its exclusivity clauses that raised competition concerns.

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134 *Masstores v Pick 'n Pay* para 33. Also see September-Van Huffel 2022 *SALJ* 296, who argues that "the Constitutional Court's majority changed the spotlight from the delict of unlawful interference in a contractual relationship to one of 'unlawful interference in competition' to address the public-policy part of the test'.'

135 *Cancun Trading No 24 CC and Seven-Eleven Corp SA (Pty) Ltd* (18/IR/Dec99) [2000] ZACT 10 (7 April 2000) para 26.

136 *Taylor & Horne (Pty) Ltd v Dentall (Pty) Ltd* 1991 1 SA 412 (A) 421. Also see *Masstores v Pick 'n Pay* para 34.

137 *Loureiro v iMvula Quality Protection (Pty) Ltd* 2014 5 BCLR 511 (CC) para 53.

Froneman J held that "[a]s a general proposition … there is no legal duty on third parties not to infringe contractually derived exclusive rights to trade."[138] Since Pick 'n Pay was in a contractual relationship with the landlord, it was not clear why it did not try to enforce its exclusivity right against the landlord based on the origin of the right, the lease agreement. Alternatively, to demonstrate that the landlord "breached the contract and that its breach could not be remedied by using ordinary contractual remedies."[139] The court was of the view that where there was no breach of a recognised contractual right, it would not be sufficient to establish wrongfulness in contractually created exclusive trade cases.[140] In upholding Masstores' appeal, Froneman J correctly held that there was no policy or other reason "to justify holding a third party liable for infringement of a right that arises solely from contract, if that right cannot be enforced contractually."[141] Froneman J's approach is supported.

It is worth noting that the court could not adequately deal with the concept of unlawful competition because it was not the third party that complained about the conduct of the anchor tenant. Had this been the case, the court may have seriously reflected on the effect of Pick 'n Pay's conduct as a party in a vertical relationship when enforcing its contractual right with the landlord regarding its exclusivity clause. This is because exclusivity clauses raise serious concerns of unfair or unlawful competition, which is generally against the South African competition policy.

The South African competition policy seeks to address high levels of economic concentration in different markets. It is also aimed at promoting "effective competition that supports industrialisation, builds dynamic firms, protects and creates jobs and promotes economic inclusion and transformation."[142] Most significantly, competition policy ensures that there are rules that should be observed by all the firms to ensure that they fairly compete in their respective markets. This ideal is underscored by the CA's preamble, which envisages a credible competition law that creates an efficient, competitive economic environment that provides all South Africans with equal opportunity to participate fairly in the national economy. Section 2*(e)* of the CA expressly provides that this Act seeks to "ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy."

138 *Masstores v Pick 'n Pay* para 36.
139 *Masstores v Pick 'n Pay* para 38.
140 *Masstores v Pick 'n Pay* para 41.
141 *Masstores v Pick 'n Pay* para 42.
142 Department of Trade, Industry and Competition 2019 http://www.thedtic.gov.za/wp-content/uploads/20210519_Competition_policy.pdf.

This transformative goal can easily be frustrated by conduct that leads to unfair and unlawful competition. South African competition policy is based on the notion that competition should remain within lawful bounds and not be conducted dishonestly and unfairly.[143] It is important, however, to note that unfair competition does not necessarily amount to unlawful competition and may well be lawful.[144] Nonetheless, an unfair competition that has the elements of dishonesty and amounts to wrongful interference with another's rights as a trader, that results in an injury for which the Aquilian action finds application, and that has directly resulted in loss, will be unlawful.[145] According to Parker, "[t]he law of unlawful competition entitles any person … to stop another person from conducting business or other activities in a way that harms the claimant illegally in the conduct of his own business or activities."[146]

However, a competitor cannot be stopped merely because it is outperforming the applicant in a specific market. Unlawful competition is a delictual claim.[147] To succeed with this claim, the applicant must prove wrongfulness based on the facts of the case after balancing all relevant factors considering the legal convictions of the community as tested against the values of the Constitution.[148] This means that any firm that is affected by the exclusivity clause of one of the supermarkets operating in the shopping centre can bring a claim for unlawful competition against such a supermarket.

6.2.3 Minority judgment

Jafta J was of the view that Masstores ought to be interdicted from interfering with Pick 'n Pay's exclusive right to trade as a supermarket in the shopping centre. He was of the view that the landlord was entitled to "determine the extent of trading rights to be exercised by each trader on its

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143 See *Waste Products Utilisation (Pty) Ltd v Wilkes* 2003 2 SA 515 (W) 570 and *Dun and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* 1968 1 SA 209 (C) 218, where it was held that "[f]airness and honesty are themselves somewhat vague and elastic terms but, while they may not provide a scientific or indeed infallible guide in all cases to the limits of lawful competition, they are relevant criteria which have been used in the past and which, in my view, may be used in the future in the development of the law relating to competition in trade."

144 *Union Wine Ltd v E Snell and Co Ltd* 1990 4 All SA 355 (C) 364.

145 *Geary & Son (Pty) Ltd v Gove* 1964 1 SA 434 (A) 440-441.

146 Parker 1996 *Juta's Business Law* 116.

147 *Titan Hospitality and Retail Services CC t/a Titan Pos v God's Power Chahuruvah* 2022 JOL 52260 (LC) para 5, where it was held that "[t]he term 'unlawful competition' refers to those rules, primarily of a common law origin, that govern the competitive process between traders. It is generally accepted that liability on the basis of unlawful competition is delictual in nature and that protection is based on the *lex Aquilia."*

148 *Phumelela Gaming and Leisure Limited v Grundlingh* 2007 6 SA 350 (CC) para 31. The court held that "[i]t is accordingly accepted that it is only when the competition is wrongful that it becomes actionable" (para 32).

property."[149] He stated that Masstores was in breach of its own lease agreement that prevented it from operating as a supermarket when other supermarkets were trading in the shopping centre. Based on this breach, Jafta J was of the view that the clear right on which Pick 'n Pay sought an interdict may be sourced from its lease agreement with the landlord.[150] Notwithstanding this, he held that the source of the right sought to be protected by an interdict is immaterial to the question of whether an interdict should be granted. Further, "[i]f the applicant has established all the requisites of an interdict, a court may grant the remedy, regardless of whether the applicant relied on contract, delict or legislation."[151] He emphasised that Pick 'n Pay had not characterised the right it sought to protect as delictual or contract but as the exclusive right to trade, with which Masstores interfered.

Jafta J saw this matter as a purely contractual issue wherein Pick 'n Pay was entitled to enforce its exclusive rights that arose from its lease agreement. He was not convinced that in addition to establishing a clear right it acquired from the lease agreements to obtain an interdict, Pick 'n Pay had to show that that right was enforceable against Masstores as the third party.[152] He was of the view that when a third party deliberately interferes with contractual rights, there will be two remedies available to the party whose right is violated, delictual claim or an interdict. Where the party who wishes to protect its rights pursues an interdict, such a party's cause of action will not be restricted to a claim in delict. A contractual claim may be pursued.[153] He concluded that Pick 'n Pay was entitled to rely on its contractual right for an interdict against Masstores and that it did not have to prove that Masstores committed a delict.[154] Jafta J held that Pick 'n Pay sufficiently demonstrated that its contractual right was violated by Masstores in circumstances where Masstores was not legally entitled to do so.[155]

At first sight, Jafta J's approach appears to be correct because he looked at the lease agreement that provided exclusive rights to Pick 'n Pay and its right to enforce such rights from a purely contractual point of view. However, there was no breach of contract to the lease agreement to which Pick 'n Pay was a party, and it did not sue the landlord as another party to that contract. By pursuing a case against Masstores, which was a third party that was not part of its lease agreement, Pick 'n Pay had not only sought to enforce its

149 *Masstores v Pick 'n Pay* para 62.
150 *Masstores v Pick 'n Pay* para 79.
151 *Masstores v Pick 'n Pay* para 82.
152 *Masstores v Pick 'n Pay* para 88.
153 *Masstores v Pick 'n Pay* para 92; he further held that "[i]f the interdict is founded on delict, it is necessary to show that the conduct sought to be interdicted amounts to a delict. But if reliance is placed on contract, this is not necessary."
154 *Masstores v Pick 'n Pay* para 95.
155 *Masstores v Pick 'n Pay* para 103.

exclusive right, but its conduct also had the effect of interfering with competition in the shopping centre.

It is in this context that the majority decision inquired whether by opening a supermarket, Masstores delictually interfered with Pick 'n Pay's contractual rights. The minority's approach seems to be to allow Pick 'n Pay to enforce its contractual rights against a third party without the need to demonstrate any breach of contract or delictual harm, at best. The minority's approach is incorrect and not supported. It is submitted that notwithstanding the vertical chain contractual arrangement, the competition concerns raised by the exclusivity rights provided to Pick 'n Pay cannot be ignored simply because Pick 'n Pay has a right to enforce its contractual rights. The fact that anchor stores such as Pick 'n Pay can force landlords to insist on clauses that restrict competition when the landlord concludes lease agreements with third parties raises serious competition concerns that demonstrate market power that is susceptible to abuse. This is not a purely contractual matter where the sanctity of contract must be observed and the obligations that arise from lease agreements must be honoured. The fact that shopping centre lease agreements between anchor tenants and landlords refer to third parties who are not parties to such agreements justifies such contracts not being honoured when their effect is to prevent or lessen competition. Most significantly, lease agreements that are discriminatory and are not in line with the transformative agenda of the CA cannot be enforced.

7 Conclusion

There is a need to promote and maintain competition to ensure that small and medium traders can participate equitably and meaningfully in the economy.[156] In *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* the Constitutional Court emphasised that the historic exclusion of some from meaningful participation in the mainstream economy should never be normalised.[157] This objective is frustrated when dominant firms arbitrarily foreclose markets through artificial barriers that prevent small and medium traders from entering the desired markets. This is exactly what owners of national supermarkets that operate as anchor stores have achieved through exclusivity clauses that are inserted in shopping centre lease agreements.

This paper has sought to demonstrate that the enforcement of exclusivity clauses leads to the exclusion of tenants who desire to compete with anchor tenants, behaviour which is potentially anti-competitive. This was confirmed in the inquiry conducted by the Commission, where it was recommended

156 See s 2(e) of the *Competition Act*.

157 *Competition Commission of South Africa v Mediclinic Southern Africa (Pty) Ltd* 2022 4 SA 323 (CC) para 4.

that exclusivity clauses should not be enforced. The national supermarket chains have committed to not enforcing these clauses. By agreeing to stop enforcing exclusivity clauses and inserting them in their lease agreements, national supermarket chains have illustrated that they realise the negative impact that these clauses have on competition. While this is a positive development, it will not be easy to monitor compliance with these consent orders, unless competitors report transgressions to the Commission. Should such complaints be lodged with the Commission, it must follow up and prosecute firms that perpetuate this anti-competitive conduct. The Commission should play a prominent role in ensuring that the terms of these consent orders are respected, and competition is encouraged in shopping centres in South Africa.

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List of Abbreviations

ABA	American Bar Association
Alta L Rev	Alberta Law Review
CA	Competition Act 89 of 1999
CAC	Competition Appeal Court
JLA	Journal of Legal Analysis
OECD	Organisation for Economic Co-operation and Development
SALJ	South African Law Journal
TFEU	Treaty on the Functioning of the European Union