

# Pick n Pay fails in bid to block Game trading

Retail giant Massmart staved off an attempt by rival retailer Pick n Pay to prevent one of its subsidiaries, Game, from operating as a supermarket at a Western Cape shopping centre.

By [Alistair Anderson](#) 28 Nov 2016



Picture: [BDive/Kevin Sutherland](#)

The Constitutional Court on Friday declined to give Pick n Pay Retailers an interdict to stop Game from operating as a supermarket under its Foodco brand at the CapeGate shopping centre in Brackenfell.

This was regardless of a deal between the centre's owners, Hyprop Investments, and Pick n Pay giving the retailer an exclusive right to trade as a supermarket in the centre.

"As a general proposition, however, there is no legal duty on third parties not to infringe contractually derived exclusive right to trade because exclusive trading rights make the competitive field uneven," the Constitutional Court's majority judgment said on Friday.

"No infringement of a right to goodwill or in the legal duty to respect the right to goodwill was established in this case."

The ruling should give momentum to retailers such as Game who want to compete in various retail subsectors but cannot do so because exclusivity clauses prevent them from opening stores in certain malls.

Game began selling groceries at the centre from late 2010 and was told by Pick n Pay and Hyprop in 2014 to stop.

Pick n Pay, which is also a tenant at many shopping centres owned by Hyprop, such as Hyde Park Corner and The Mall at Rosebank, did not sue the JSE-listed Massmart.

It instead brought an interdict successfully in the courts to stop application against Masstores, saying it had "interfered with its contractual relations".

There was no contract between Pick n Pay and Masstores, but Pick n Pay said its Masstores was nevertheless liable under the law of noncontractual damages.

In his judgment, Justice Johan Froneman said: "Masstore's trading as a general supermarket did not deprive Pick n Pay of its entitlement to continue trading as a supermarket".

The victory for Massmart has been hard fought, with the case previously having been heard in the High Court in Pretoria and the Supreme Court of Appeal.

"This outcome represents an important victory in our on-going effort to undo the historical reliance that entrenched grocer retailers place on lease exclusivity clauses to limit competition in shopping malls," said Massmart spokesperson Annaleigh Vallie.

"More specifically, we believe that the judgment will also significantly degrade the ability of the entrenched grocery retailer to rely on contractual and delictual arguments as a means to protect their lease exclusivity arrangements. The ruling creates a compelling context and momentum as we take our fight for free and fair competition in the grocery sector to the Competition Tribunal for the benefit of all new entrants regardless of size," she said.

Hyprop said it was considering the Constitutional Court's judgment.

**Source:** Business Day

For more, visit: <https://www.bizcommunity.com>