IN THE HIGH COURT OF SOUTH AFRICA

KWAZULU-NATAL HIGH COURT, DURBAN CASE NO. 1994/2013

In the matter between:

DULA INVESTMENTS (PTY) LTD Applicant

and

WOOLWORTHS (PTY) LTD Respondent

JUDGMENT

H A DE BEER, A J

[1] The Respondent in this matter is Woolworths (Pty) Ltd ("Woolworths" or "the Respondent"). Woolworths is a well-known retailer specialising in the food and clothing sectors of the market throughout the Republic of South Africa. Woolworths has positioned itself as a supplier of quality goods and strives to provide and maintain high quality

standards of service and retail quality products through the Woolworths brand.

[2] The Applicant is Dula Investments (Pty) Ltd ("Dula" or "the Applicant"). The sole member of the Applicant is Mr Haresh Ouderajh ("Ouderajh"). The Applicant is the franchise holder of three franchised Woolworths stores in KZN. Two of the stores are situated on the KwaZulu-Natal North Coast at Ballito, such stores being the Ballito Lifestyle Centre Store ("the Lifestyle Centre store") and the Ballito Bay Mall Store ("the Ballito Bay store"). The third store is situated at Stanger (Kwa Dukuza) ("the Stanger Store"). This application pertains only to the Stanger Store.

[3] The Applicant and the Respondent concluded a written franchise agreement in relation to the Stanger Store. The Stanger store franchise agreement is comprehensive and endures for a 10 year period ("the initial period") commencing on 1 March 2003 and terminating on 28 February 2013. The dispute between the parties pertains to whether or not the Applicant has acquired the right to extend the Stanger store franchise agreement for a further 5 year period from 1 March 2013 to 28 February 2018. In this regard clause 7.2 of the franchise agreement provides as follows:-

"7.2 The franchisee shall have the right to extend this agreement for a period of 5 (five) years reckoned from the effluxion of the period in clause 7.1.2 ("the initial period"), provided that the franchisee shall:

7.2.1 have given Woolworths written notice of its intention to extend this agreement not less than 12 (twelve) months prior to the effluxion of the initial period; and

7.2.2 not have committed any breach of any of the provisions of this agreement at any time during the initial period (regardless of whether or not Woolworths shall have given the franchisee notice to remedy such breach, whether under clause 28 or otherwise)." –
("the extension clause").

[4] For the purpose of this application, the Respondent accepts that the Applicant gave timeous notice of its intention to extend the agreement in terms of clause 7.2.1 of the extension clause. What remains in issue is the interpretation and implementation of sub clause 7.2.2 of the extension clause in the light of the background and surrounding circumstances[1] and the history of the matter – that is to say. "the context" or "factual matrix".

APPLICATION FOR REFERRAL TO ORAL EVIDENCE

[1] There is no longer any legal distinction between "background" and "surrounding" circumstances – KPMG Chartered Accountants SA vs Securefin Limited 2009 (4) SA 399 (SCA); paragraph 39.

[5] The papers in this matter are voluminous running to 1287 pages. When the matter was called Mr A K Kissoon-Singh SC, who appeared for the Applicant applied for the matter to be referred for the hearing of oral evidence, alternatively, to trial on pleadings. Ms Annandale SC, who appeared on behalf of the Respondent, opposed the application. After hearing argument I directed that the application be argued on the papers and my reasons for this ruling follow.

[6] Mr Kissoon-Singh SC in support of the application for a referral submitted that oral evidence was relevant in relation to the various standards audits conducted by the Respondent and to the Respondent's failure to notify the Applicant timeously of any alleged breaches of the agreement thereby prejudicing the Applicant. He submitted further that there were no objective standards against which the Applicant's performance could be measured and that oral evidence in this regard was necessary. He furthermore submitted that oral evidence was necessary to deal with the Woolworths signage at the Stanger store and that such evidence was both necessary and relevant in relation to the duty of good faith owed by the parties to the other both in terms of the agreement and in terms of "Ubuntu".

[7] The decision in this matter turns on the interpretation to be placed on the extension clause in the context of the background circumstances and the various alleged breaches of the agreement relied on by the Respondent. The material facts are largely common cause and, to the extent that they are not, oral evidence will not take the matter any further. In any event, evidence of how the Applicant interpreted the extension clause is inadmissible in that interpretation is a matter for the court and not for the parties.[2] In the light of the aforegoing, the court directed that the matter be argued on the papers.

BACKGROUND HISTORY OF THE STANGER STORE

[8] Prior to the conclusion of the franchise agreement, Resandri Investments CC was the franchisee of the Stanger store. Resandri Investments CC was finally liquidated during 2002 and during the liquidation process, Ouderajh expressed an interest in acquiring the Stanger franchise. Negotiations between the parties, culminated in the conclusion of the franchise agreement on 26 March 2003. Prior to the conclusion of the franchise agreement, the Applicant submitted a business plan to the Respondent. The business plan was handed by Ouderajh to Mr Conelly, the Respondent's regional manager and Mr

[2] KPMG Chartered Accountants SA vs Securefin Limited 2009 (4) SA 399 SCA; para 40.

Antonio Enrico, the Respondent's franchise manager at the time at a meeting in Cape Town.

[9] It is apparent that the Applicant experienced difficulty in paying the Respondent's account from time to time - for example on 17 February 2004 the Respondent sent an e-mail to the Applicant recording receipt of R590 000,00 and stating that an amount of R1 300 000,00 was 60 days overdue for the Stanger store which opened in May 2003. On 20 February 2004 demand for payment was made.

[10] On 18 March 2004 the Lifestyle Centre store was opened by the Applicant and this store forms the subject matter of an application brought by the Respondent in the Western Cape High Court under case number 25682/2011 to which reference will later be made.

[11] Cash flow problems persisted at the Stanger store, however, the Applicant paid the arrears during July 2004.

[12] In the latter part of 2005 Woolworths conducted a human resources and social compliance audit in relation to all three of the Applicant's stores. The report revealed a number of areas of non-compliance with labour legislation and Woolworths operating policy at

the Stanger store which the Applicant was requested to rectify. In a letter dated 10 October 2005 the Applicant, while disputing certain of the breaches, accused Woolworths of bad faith and suggested that Woolworths was on a campaign to drive the Applicant out of business. In this letter the Applicant did however concede that it was in arrears with account payments; that not all the employment contracts were in place and sought to blame an ex-Woolworths employee, one Malong, now working for the Applicant; that three of the employees at the Stanger store were not being paid the minimum statutory wage and that in the case of payment for night work, the Applicant's pay administrator was ignorant of the provision which affected approximately 5 employees who would now be paid back pay and an allowance. The Applicant further states that the Respondent's human resources manager, one Irma Robinson tore up the 2005 audit report and apologised to Ouderajh for its erroneous conclusions. Even if this is accepted as true, it does not affect the aforementioned concessions made by the Applicant.

[13] Woolworths conducted audits to monitor and ensure compliance with standards, operating procedures and legislation from time to time. The food audits are sometimes outsourced to and conducted by an independent concern, International Britannia Limited ("IBL"). The Woolworths outlets comprise both corporate stores (that is to say owned

and operated by Woolworths) as well as franchised outlets such as those conducted by the Applicant. In 2008 Woolworths decided to extend the internal audits to include all stores and the Stanger store was statistically selected for an audit in 2008. When the Woolworths auditor, one Lorraine Blyth contacted Ouderajh to arrange a date for the audit, he (Ouderajh) stated that he would not allow the Woolworths audit team into the Stanger store and contended that Woolworths had no right to conduct the audit which he viewed as an interference in his business. This conduct is a clear breach of clauses 10.11 and 10.16 of the franchise agreement which provide Woolworths unfettered access to the store for the purpose of inspecting the premises; the method of conduct of the franchise business; the fulfilment by the franchisee of its obligations under the agreement and generally to determine whether the provisions of the agreement are being properly implemented. The legal department of Woolworths intervened whereafter the Applicant relented and the audit took place. The audit revealed numerous areas of non-compliance - 22 out of 42 compliance requirements were met at the Stanger store, however, on 11 key evaluations the Stanger store scored 55%, any score under 75% being considered unsatisfactory. In clause 10.18 of the franchise agreement, the Applicant was required to submit an initial three-year business plan and an initial one-year operating plan and annually thereafter submit a revised three-year business plan and a

one-year operating plan. No such plans were submitted. In terms of clause 10.9 of the franchise agreement the Applicant was obliged to take out and maintain policies of insurance in relation to such risks and for such amount as the business may be exposed to from time to time. The insurance policy provided by the Applicant did not provide confirmational details for cover in respect of deterioration of stock; theft of stock; the loss of money; money in transit and other damages. There were breaches of clause 10.8.2 of the franchise agreement which require the Applicant to comply with applicable labour legislation such breaches including no designated officer to ensure compliance with the Occupational Health and Safety Act; no trained first aid staff available across all shifts; the first aid kit did not contain minimum content requirements; there were no trained fire-fighters in the store; quarterly emergency evacuations and training were not being held for all staff; there were no emergency exits in the back of the store; staff leave records were non-existent or inadequate; overtime was not dealt with consistently; no staff attendance register was kept; the store lighting required maintenance in that numerous fluorescent tubes throughout the store were not working. These facts are not seriously in dispute.

[14] The Applicant contends that a 55% score is not a failure and that the Woolworths benchmark of 75% is arbitrary. The Applicant contends

further that the audit is unfair, incorrect and inaccurate and states that during several visits to Cape Town to the Respondent's head office the aforementioned matters were not raised. Moreover the Applicant employed a former Woolworths employee, one Malong, who had previously been trained by and who had worked for Woolworths to take responsibility for the Stanger store as its branch manager. The Applicant sought to blame Malong for any alleged shortcomings and, by extension, Woolworths for not training him properly. The Applicant further contended that subsequent correspondence dealing with the alleged shortcomings highlighted by the 2008 audit report were not brought to Ouderajh's attention in that the correspondence was with Malong.

[15] During September 2009 the parties concluded a franchise agreement in relation to the Ballito Bay store. The Applicant contends that the Respondent would not have concluded this agreement had it been so desperately unhappy with the Applicant's performance at the Stanger store.

[16] During January 2010 Woolworths took a policy decision not to open any new franchise outlets and not to extend current contracts once the franchise agreements reached the end of their duration. Woolworths sought to purchase the businesses of the various franchisees on a

commercial basis, however, the parties could not reach agreement as to the price to be paid. In the view of the court, the change in Woolworths' policy to wind down its franchise operations cannot affect the existing franchise agreements and any rights to an extension thereof which the franchisee may have acquired and the matter must be approached on the aforegoing basis.

[17] During June 2010 an external audit was conducted by IBL. The Stanger store failed the audit in several respects.

[18] The audit records a failure in respect temperature records - to ensure that foods are cooked to the correct safe temperature and are safe for consumption, the core temperature of foods to be sold at the interactive counter must be checked prior to their removal from the ovens as well as during display. Records must be kept of those temperatures in pro forma documents supplied to all Woolworths outlets. The purpose of the records is to ensure that there is proof that the readings are being taken and to enable management to check on and ensure compliance. The IBL audit revealed a failure in that there were no records of various temperature readings, however, the Stanger store management had nonetheless signed off the documentation. Apart from the aforegoing, overall compliance was good at the Stanger store.

[19] During July 2010 a further audit was conducted at the Stanger store. The report indicates that an improvement had taken place but there were certain critical issues that needed to be addressed to ensure compliance and the Applicant was requested to ensure compliance by the end of July 2010.

[20] At a follow-up meeting on 12 August 2010, one Hargreaves, the Woolworths area manager South Region Franchise Division met Malong at the Stanger store and various areas of concern were identified and documented. These items included store layout; the provision of first aid and fire-fighting training and attention to the exterior of the building.

[21] During August 2010 Woolworths conducted an internal food hygiene audit at the Stanger store as part of the follow-up to the failed external IBL audit. The results were unsatisfactory to the extent that the store manager, Malong, conceded that had the audit been an external IBL audit, it would have resulted in "critical failure" and closure of the food counter.

[22] In February 2011 the Respondent took up the question of the dilapidated state of the exterior of the Stanger store with the Applicant.

The evidence in the form of photographs depict a dilapidated building which has extensive paint peeling and bubbling and the sign lacks the blocked "Woolworths" logo. The undisputed evidence is that the sign was never rectified and, indeed, deteriorated further.

[23] On 15 April 2011 the Respondent again addressed the Applicant with regard to the condition of the exterior of the building and the signage and Malong undertook to attend to the necessary. At this point it will be recalled that one of the Applicant's complaints is that the Respondent dealt with the store manager, Malong, and that Ouderajh was not aware or fully aware of what was going on. This was incorrect in as much as the e-mail of 15 April 2011 was copied to Ouderajh. Furthermore at a level of probabilities, it is highly unlikely that Malong did not report the shortcomings to Ouderajh.

[24] On 16 May 2011 Hargreaves conducted another routine visit at the Stanger store. This visit identified the following problems - the outside of the building had not been attended to; the blocked in "Woolworths" logo of the sign was missing; stock levels in the clothing department were low; there were numerous problems in the food area with poor stock levels; ice cream, prawns, fish and frozen vegetables were stored in a

single freezer; numerous shelf pricing labels were missing and the pricing labels did not correlate to the products on the shelves.

[25] On 19 May 2011 the Applicant gave written notice of its intention to extend the franchise period in respect of all three franchise stores. As previously mentioned, the validity of this notice is not in dispute for present purposes.

[26] On 23 June 2011 Woolworths conducted a hygiene audit at the Stanger store. The audit score was 96 which yielded a green rating.

[27] During February 2012, John Fraser, the Respondent's regional franchise manager contended that the Applicant had breached the Woolworths code of ethics in relation to the physical layout of the food market at the Lifestyle Centre store. Woolworths stated that there would be a fee attaching to the change, however, as it transpired, Woolworth was incorrect. In e-mail correspondence dated 23 February 2012 Ouderajh made certain intemperate remarks such as -

> "As for your other remarks I will treat it as a sick joke coming from a privileged Anglo-Saxon who has no sensitivity. You want to lecture me on running my business when your asset-base is nothing to brag about considering your privileged background."

Frazer apologised for his mistake but recorded his astonishment at the ill-tempered nature of Ouderajh's communication.

[28] During December 2011 Ourderajh sent an SMS to Mr Susman, the chairman of Woolworths Holdings Limited in which he accused Fraser and one Ian Moir of allegedly hacking his telephone. Susman informed Ouderajh that Woolworths took these allegations very seriously and suggested an independent investigation be concluded on receipt of a formal written complaint. Susman also informed Ourderajh that should Ouderajh not wish to pursue the allegations he should withdraw them in writing and apologise. Ourderajh didn't make any formal complaint nor did he apologise.

[29] On 2 October 2012 an Imperial Logistics delivery truck damaged the Woolworths sign. Imperial Logistics undertook to pay for the repair of the sign and requested the Applicant for quotations. The Applicant advised Imperial Logistics that the signage had to be authorised by Woolworths. Despite requests for a quotation to repair the sign, the Applicant did not take it upon itself to request a quotation until 4 February 2013. The sign was never repaired.

[30] Woolworths brought an application in the Western Cape High Court in relation to the Lifestyle Centre store and obtained a declaratory order that the Applicant did not have the right to renew the franchise agreement pertaining to that store after the effluxion of the period of that agreement (9 December 2013). The extension clause in the Lifestyle Centre franchise agreement is identical to the extension clause in the present matter. Her Ladyship the Honourable Deputy Judge President Traverso granted the Applicant leave to appeal to the Supreme Court of Appeal and the appeal is pending.

[31] In January 2013 Ourderajh was contemplating selling all three franchises, that is to say the Stanger store, the Lifestyle Centre store and the Ballito Bay store. He was obliged to afford Woolworths a right of first refusal, however, Woolworths declined to purchase the store. Ouderajh contemplated selling a 40% interest in each of the franchises to the prospective buyer and would remain a working partner, it being contemplated that all three franchises would be put into a new entity. In January 2013 Woolworths recorded that the agreements did not cater for a situation in which one franchise entity was substituted for another and would consider the position. Woolworths recorded that it would not in all likelihood approve the sale of the Lifestyle Centre store having regard to the litigation between the parties.

[32] In early February 2013 one du Plessis attended the Stanger store and identified numerous problems including no ticketing for weekly active promotions; shelf edge labels were improperly affixed to shelves; hygiene standards were poor; fluorescent bowl lights were not working; 22 spotlights were not working on the sales floor and 12 spotlights in the windows were not working; there were at least 6 damaged floor tiles on the sales floor constituting a hazard to customers; occupational and safety health issues had not been addressed.

[33] On 11 February 2013 Woolworths advised the Applicant that it would not renew the franchise and that the franchise agreement terminated on 28 February 2013.

[34] Correspondence ensued between the parties' attorneys and the Applicant launched the present application as a matter of urgency on 25 February 2013 seeking, in the first instance, a rule *nisi* with interim relief interdicting the Respondent from interfering with its trading activities at the Stanger store and requiring the Respondent to fulfil its obligations under the franchise agreement with effect from 28 February 2013 onwards. The Applicant went on to claim by way of a second order prayed a declaratory order that it had given proper notice of its intention

to extend the franchise agreement and that the franchise agreement had been validly extended for a period of 5 years from 1 March 2013 together with an order that the Respondent pay the costs of the application. When the matter was called it was approached on the basis that the Applicant was seeking final declaratory relief.

THE INTERPRETATION OF THE EXTENSION CLAUSE

[35] In interpreting a contractual provision the starting point is the frequently quoted dictum of Wessels C J in Scottish Union and National Insurance Company Limited vs Native Recruiting Corporation Limited 1934 A.D. 458 to the following effect: –

> "It has been repeatedly decided in our courts that in construing every kind of written contract the court must give effect to the grammatical and ordinary meaning of the words used therein. In ascertaining this meaning, we must give to the words used by the parties their plain, ordinary and popular meaning, unless it appears clearly from the context that both the parties intended them to bear a different meaning. If, therefore, there is no ambiguity in the words of the contract, there is no room for a more reasonable interpretation than the words themselves convey. If, however, the ordinary sense of the words necessarily leads to some absurdity or to some repugnance or inconsistency with the rest of the contract, then the court may modify the words just so much as to avoid that absurdity or inconsistency but no more."[3]

[3] Scottish Union and National Insurance Company Limited vs Native Recruiting Corporation Limited 1934 A.D. 358 at 465; S vs Zuma and Others 1995 (2) SA (CC), paragraphs 17 - 18

[36] In Natal Joint Municipal Pension Fund vs Endumeni Municipality 2012 (4) SA 593 (SCA) it was stated at paragraph 18 –

> "The inevitable point of departure is the language of the provision of itself, read in context and having regard to the purpose of the provision and the background to the preparation and production of the document."

[37] Furthermore, a contractual provision can only be regarded as enforceable if it makes commercial sense or has business efficacy. [4] The purpose of the provision has to be reconciled with the words chosen to express that purpose in order to arrive at the meaning which the contracting parties must be taken to have intended.[5] In this process, the context is everything.[6]

[38] In interpreting the extension clause it is necessary to have regard to the nature of the contract and, in particular, to the relationship between the Applicant as franchisee and the Respondent as franchisor. The franchise agreement includes the Woolworths code of ethics; the Woolworths code of business principles and the operating manual. The code of ethics requires that efforts must be made to build and maintain

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[4] ABSA Bank Limited vs Swanepoel N O 2004 (6) SA 178 (SCA) paragraphs 6 to 8; cf Siyepu and Others vs Premier; Eastern Cape 2013 (2) SA 425 ECB, paragraphs 23 and 35

[5] Commissioner for SARS vs Airworld CC and Another 2008 (3) SA 335 (SCA) Paragraphs 10 and 25; Mittal Steel South Africa Limited vs Harmony Gold Mining Company Limited and Another [2009] ZACAC 1; Paragraph 28

[6] Standard General Insurance Company Limited vs Commissioner for Customs and Excise 2005 (2) SA 166 (SCA); Paragraphs 25 and 37

mutually beneficial relationships with all stakeholders, staff (employees), customers, suppliers, shareholders, community and franchisees. The code of business principles emphasises the necessity to comply with legislation including occupational health and safety legislation, the need for on-site inspections and the need to retain records to demonstrate compliance.

[39] Guy Triton writing in "Intellectual Property in Europe"; Third Edition describes the relationship between the franchisor and franchisee in general terms as comprising four features namely the independence of the franchisor and franchisee; the existence of a contractual licence for the use of the franchisors trade name, trademark, emblems, symbols and the like; the provision of continuing assistance to the franchisee by the franchisor and a contractual control by the franchisor over the way in which the franchisee conducts the business so that there is uniform presentation by all franchisees. He goes on to say: –

> "Contractual controls, which ensure the quality and uniformity of the network and thus maintain the reputation and goodwill of the franchise's trading name, are necessary ancillary restraints because it is precisely the attraction of setting up business under a name which possesses a substantial reputation that encourages persons to take out franchises. If such controls were held to be anti-competitive and hence illegal, then the franchisees reputation would fragment because of the inability of the franchisor to impose

> effective quality-control measures and other control measures to maintain the identity and reputation of the franchise network."[7]

[40] In "The Franchise Relationship under South African Law" Professor Woker writes -

> "The parties in a franchise relationship are regarded as independent entrepreneurs but the nature of this relationship is categorised by a degree of intimacy not found in other business relationships. This closeness is the result of the franchisors and franchisees being partners in one another's business ventures such that the success or failure of one individual partner has a direct effect upon the well-being of the other members of the partnership. Of course the franchise relationship is not a partnership in the strict legal sense of the term but it has some of that business model's characteristics, including the notion of shared responsibility."[8]

[41] It is thus clear that in order to succeed the franchisor and franchisee must be prepared to co-operate and work together towards the attainment of a common goal including the maintenance and promotion of the brand in question.

[42] On the face of it, the extension clause is unequivocal - any breach of any of the provisions of this agreement at any time during the initial period (regardless of whether or not Woolworths shall have given the

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[7] Pages 961 - 962
[8] The Franchise Relationship under South African Law; Tanya Woker 2012; Page 231.

franchisee notice to remedy such breach, whether under clause 28 or otherwise) disqualifies the Applicant from extending the franchise agreement. The word "any" has a wide ambit. Albeit in a different context, the following was said in Commissioner of Inland Revenue vs NST Ferrochrome (Pty) Limited: –

> "The word "any" is a word of wide and unqualified generality. It may be restricted by the subject matter of the context, but *prima facie* it is unlimited. R vs Hugo 1926 A.D. 268 at 271; Commission of Inland Revenue vs Ocean Manufacturing Limited 1990 (3) SA 610 (A) at 618H."[9]

[43] Clause 28 of the franchise agreement headed "Early Termination" is the breach clause which entitles Woolworths to cancel the franchise agreement in the event of Dula breaching the agreement. Various breaches are identified and, depending upon the type of breach, Woolworths is required to give various periods of notice within which Dula is required to remedy the identified breach in question or, in relation to certain other breaches, no notice is necessary before Woolworths is entitled to cancel the agreement.

[44] Although clause 28 is referred to in the extension clause, the two clauses are totally separate and distinct and deal with entirely different

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[9] Commissioner of Inland Revenue vs NST Ferrochrome (Pty) Limited References 1999 (2) SA 228 (T) at Page 232 D - E

situations. Clause 28 deals with material breaches whereas the extension clause is wide in ambit and refers to any breach. Furthermore, the breaches under clause 28 generally require Woolworths to give notice to remedy the breach whereas no such notice is required under the extension clause. The underlying purpose of the two clauses is likewise totally different in as much as clause 28 provides a basis for early termination of the franchise agreement by Woolworths in the event of breach by Dula, whereas the extension clause (in the absence of breach by Dula) provides for the continuation and extension of the franchise agreement for a further 5 years at the instance of Dula on giving the requisite notice.

[45] The real question is whether or not the Applicant has acquired the right to extend the agreement for a further 5 years. This concept was summarised by the Appellate division (as it was then called) in the context of a right to renew a lease where it was held -

> "The issue here is not whether the Appellant "forfeited" or "lost" a right to renewal. The simple question is whether the Appellant ever required it. It was for the Appellant, as the party claiming something from the Respondent, to satisfy the court that it was entitled to what it claimed. .... In this connection the Appellant was unaided by any presumption in his favour and, in my opinion, he was clearly

> saddled with the onus of establishing that the prerequisite to the exercise of the option had been satisfied. "[10]

[46] Applying the Ok Bazaars case, the onus of establishing the jurisdictional facts, that is to say the giving of notice to extend the franchise (which is not in dispute) and proof that the Applicant has not committed any breach of the agreement is on the Applicant. Once these jurisdictional requirements are established, the Applicant is entitled to an extension of the franchise agreement and there is nothing that Woolworths is obliged or entitled to do.

[47] Analysing the phrase "at <u>any</u> time during the initial period" the court is of the view that, at face value, any breach at any time either prior to the giving of the notice to extend or thereafter is to be taken into account up until the last day of the initial period. Even if the Applicant were to breach the agreement on the last day of the initial period, this would disqualify the Applicant to an extension of the agreement. As was held in Seaborne vs Smith: –

> "Hence the right to a renewal cannot come into existence until the end of the lease, and the lessee's conduct is to be under review right up to the end, and not merely up to the date of the giving of the notice."[11]

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[10] Ok Bazaars (1929) Limited vs Cash-In CC 1994 (2) SA 347 (A) at 361 I
[11] Seaborne vs Smith 1955 (4) SA 339 at 343 H

[48] The Applicant argues that it would be unfair to permit Woolworths to rely on a trivial breach at an early stage of the contractual relationship thereby precluding the Applicant from extending the franchise agreement. The Applicant argues that both in terms of the agreement and on the principles of Ubuntu, Woolworths is required to act in good faith. In the opinion of the court, concepts of "good faith" and Ubuntu constitute a two-way street and are not unilateral obligations owed by one party to the other. In order to give business efficacy in a commercial sense to the extension clause, it is quite conceivable that Woolworths would be prepared to countenance minor breaches of the agreement from time to time without invoking its right to cancel the agreement under clause 28 whereas it might not be prepared to continue to do business with the Applicant beyond the termination date of the franchise agreement. In this regard I am in complete and respectful agreement with the reasoning and remarks of Traverso, DJP in the matter between the parties in the Western Cape High Court where it was stated: –

> "The clause under consideration (referring to the extension clause) must be interpreted in a manner to get a business efficacy and is clearly inserted by the Applicant (Woolworths) in order to avoid being saddled, after the expiry of the franchise agreement, with the

franchisee whose performance of its obligations during the currency of the agreement has been unsatisfactory."[12]

[49] In deciding the parties' competing interests the court has to decide whether, on a proper interpretation of the extension clause and having regard to the background circumstances and history of the matter, the Applicant has acquired the right to benefit from trading as a Woolworths franchisee for a further 5 years at the Stanger store or whether the situation is such that Woolworths should not be contractually shackled to the Applicant for a further period of five years.

[50] The history of the matter demonstrates that the relationship between the parties has not been a happy one. Non-compliance with the agreement and the Woolworths standards are protracted and extend over a long period of time. The question of the Woolworths sign is a case in point. In terms of the Applicant's lease, the landlord is obliged to maintain the exterior of the premises and if the landlord fails to do so, the Applicant is entitled to effect the necessary work itself and claim the cost from the landlord and should the landlord fail to pay, the Applicant is entitled to set off the amounts spent against the rental due. The problem with the Woolworths sign first manifested itself in February 2011 in that the blocked in "W" of the Woolworths corporate logo was missing.

[12] Woolworths (Pty) Limited vs Dula Investments (Pty) Limited [2012] ZAWCHC 183 paragraph 19

Malong, the Applicant's store manager was requested to address the issue. The sign was further damaged on 2 October 2012 by a truck and despite correspondence the sign has still not been repaired. The condition of the sign is lamentable. A photograph of the sign demonstrates that the first "O" and the "T" in the name "Woolworths" is completely missing. The wall on which the sign is mounted is cracking and has paint peeling. In short, the sign is shoddy, downmarket and is manifestly not in keeping with the required standards. In the view of the court the Applicant's failure to address the question of the sign since at least February 2011 demonstrates an apathy or an unwillingness on the part of the Applicant to adhere to Woolworths standards and branding. In the opinion of the court this alone is sufficient justification for Woolworths not to wish to continue the franchise relationship with the Applicant beyond the expiry of the initial period.

UBUNTU

[51] The concept of Ubuntu includes "fairness" and informs public policy in the sphere of contract.[13] The constitutional court has sought to infuse the common law contract with the constitutional value of Ubuntu, however, the constitutional court has affirmed "the age-old contractual doctrine that agreements solemnly made should be honoured and

[13] Barkhuizen vs Napier 2007 (5) 323 CC; paragraph 51

enforced - pacta sunt servanda".[14] Development of the common law in the light of Ubuntu does not endorse the notion that judges may decide cases on the basis of what they regard as reasonable and fair.[15] To do so would lead to intolerable legal uncertainty.[16]

[52] The Applicant is seeking to contend that by relying on allegedly non-material breaches Woolworths is not acting in good faith according to the principle of Ubuntu. As previously mentioned, Ubuntu is a two way street and the Applicant's conduct bears scrutiny. Ouderajh has accused Woolworths of being unethical, racist and monopolistic. He has expressed the view that Woolworths is pursuing a hidden agenda in respect of audits in order to drive Ouderajh out of business. Ouderajh has referred to a Woolworths manager, Fraser, as a "privileged Anglo Saxon with a privileged background"; Ouderajh has accused Woolworths employees of "hacking his phone" but did not persist with the allegation or withdraw it or tender an apology. The aforementioned instances are not exhaustive. These are factors which weigh against the Applicant in asserting and claiming a right to extend the franchise agreement.

THE APPLICANT'S VARIOUS SUBMISSIONS

[14] Everfresh Market Virgina (Pty) Limited vs Shoprite Checkers (Pty) Ltd 2012 (1) SA 256 CC at Paragraphs 70 and 72
[15] Potgieter and Another vs Potgieter N O and Others 2012 (1) SA 637; paragraph 34
[16] Potgieter at paragraph 34

[53] It is necessary to deal with various submissions made by the Applicant to the extent that they have not already been covered in this judgment.

[54] The general submission is that the Applicant did not breach the agreement at all, alternatively, did not breach it to the extent that it precludes the Applicant from extending the franchise agreement and that the Respondent's alleged complaints about breaches are trivial.

[55] The Applicant contends that the Respondent should have immediately informed the Applicant of the breaches relied on and of its intention not to extend the franchise agreement on receipt of the notice of extension on 19 May 2011. The court is of the view that there is no merit in this submission. Firstly, there is no onus or duty on Woolworths to do so. Secondly, the agreement still had another 22 months to run until 28 February 2013 and any breaches occurring after the giving of notice on 19 May 2011 would have disqualified the Applicant from an extension of the agreement.

[56] The Applicant submits that it was unfair of Woolworths to notify the Applicant in February 2013 of its decision not to permit an extension of the franchise agreement. Again in the court's view, there is no merit in

this submission because there is no duty on Woolworths to notify the Applicant any sooner.

[57] The Applicant submits that the Respondent by not also bringing an application in relation to the Stanger store in the Western Cape High Court thereby "waived" it's right to rely on any breaches and misled the Applicant into believing that the Stanger store franchise would be extended. In the courts view there is no foundation to this submission. In this regard there is the usual "non waiver" clause (clause 36.1) which precludes the Applicant from relying on this argument. Different considerations may well have pertained to the Lifestyle Centre store not the least of which was that the period of the Lifestyle Centre store franchise agreement expired on 10 December 2013 (with the potential for a further 5 years renewal thereof) as opposed to the Stanger store franchise agreement which expired on 28 February 2013.

[58] The Applicant argues that Woolworths did not send any breach notices as such and, so it is argued, the Applicant was not breach or the Respondent did not regard such breaches as sufficiently serious as a ground for not agreeing to extend the franchise agreement. This argument overlooks the differentiation between clause 28 of the franchise agreement and extension clause which has been dealt with in

this judgment in paragraphs 43 and 44. Furthermore, the various audit reports and e-mails were sent to the Applicant and such demonstrate non-compliance with and breaches of the franchise agreement and the operating manual.

[59] The Applicant submits that during the discussions pertaining to the sale of the three franchises to third parties, Woolworths did not mention a possible contestation of the renewal at the Stanger store. The argument is effectively that Woolworths was under a "duty to speak" and to inform the Applicant that it would not renew the franchise agreement in relation to the Stanger store having regard to the fact that that store was to be sold as a going concern. In the view of the court this cannot affect the interpretation of the extension clause more specifically having regard to the fact that the focus of the discussion was on the sale of all the three franchises and was not specific to the Stanger store or any extension of the franchise agreement.

[60] The Applicant submits that should it be held that the Applicant has not validly extended the period of the franchise at the Stanger store, the Applicant will incur stock losses for stock purchased in anticipation of renewal and its staff will lose jobs. As far as the stock is concerned, the Applicant should not have ordered stock beyond the expiry of the initial

period and can, in any event, relocate such stock to its other franchise stores and the stock will not be wasted. As far as the employees are concerned, Woolworths has tendered to procure alternative suitable employment for any employees who may be dismissed. In any event, the aforegoing considerations cannot affect the meaning of the extension clause.

DECLARATORY RELIEF SOUGHT

[61] As previously indicated, the Applicant is seeking declaratory relief in final form. In this regard the court has a discretion as to whether or not to make a declaration of rights.[17]

[62] Having regard to the history of the matter and, in particular, Ouderajh's conduct, the court is not prepared to exercise its discretion in the Applicant's favour and grant the declaratory relief sought. To the extent that the Applicant may have a remedy in law, which has not been demonstrated on the evidence before this court, it is open to the Applicant to pursue a claim for damages against Woolworths for any losses suffered in consequence of the franchise of the Stanger store not being extended for a further period of 5 years. I am not persuaded by Mr Kissoon-Singh SC's argument that the proof of such damages would be

[17] Cordiant Trading CC vs Daimler Chrysler Financial Services (Pty) Ltd 2005 (6) SA 205 SCA; paragraph 17

"impossible". The claim would (presumably) be a claim for loss of nett profit based on historical figures and projections over the ensuing 5 year period and this is an exercise which is frequently undertaken.

[63] Having regard to a proper interpretation of the extension clause and the history of this matter, I am not satisfied that the Applicant has discharged the onus of proving that it has acquired the right to trade from the Stanger store for a further period of 5 years.

ORDER

[64] In the result, the application is dismissed with costs, such costs to include the costs of two Counsel where so employed. For the guidance of the taxing official, the employment of Senior Counsel was justified having regard to the nature of the matter.

3/5/13.

H A DE BEER, AJ

Appearances

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Instructed by	:	Krish Naidoo, Govender & Company Tongaat Ref: Mr R Govender Tel: 032 944 4181
For the Respondents	:	Ms A M Annandale SC A J Boulle
Instructed by	:	Edward Nathan Sonnenbergs Inc Durban Ref: Mr C Jones Tel: 031 301 9340
Date of Hearing	:	12 April 2013
Date of Filing of Judgment:		8 May 2013.