THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE DIVISION, CAPE TOWN)

Appeal Case No: A391/2012

Trial Case No: 3541/2012

In the matter between:

WOOLWORTHS (PTY) LTD **APPELLANT**

and

P CHRISTODOULOU & SONS TEXTILES CC **FIRST RESPONDENT**

PAULOS CHRISTOUDOULOU **SECOND RESPONDENT**

Coram: HLOPHE JP & SAMELA & ROGERS JJ

Heard: **31 JANUARY 2014**

Delivered: **10 FEBRUARY 2014**

JUDGMENT

ROGERS J:

Introduction

[1] The appellant, the well-known retailer Woolworths, was the defendant in the court below. The respondents were the plaintiffs. The first respondent ('PCS') operated a Woolworths franchise store in Kokstad. The second respondent ('Christodoulou') is the sole member of PCS. Woolworths asserted that the franchise agreement would expire on 23 September 2013. The respondents, relying on various alternative causes of action, sought relief in the court below in terms of which PCS would be entitled to continue operating the franchise store until 30 April 2019.

[2] On 12 June 2013 the trial judge found for the respondents on the basis of rectification. Woolworths appeals to a full bench with the leave of the trial judge. On appeal Mr Fagan SC, leading Ms E van Huyssteen, appeared for Woolworths and Mr Pillemer SC, leading Mr A Christison, appeared for the respondents.

[3] The respondents' counsel, in their heads of argument, addressed only the cause of action based on rectification (the ground upheld by the trial judge), and this was the only ground that Mr Pillemer developed at the hearing. The ultimate question on appeal is whether PCS, as the first plaintiff in the court below, discharged the onus of proving its entitlement to rectification. The only witnesses at the trial were Christodoulou and his wife (for the plaintiffs) and Ms Dawn Pottier for Woolworths.

The facts

[4] On 21 August 1998 a franchise agreement in respect of a Woolworths store in Kokstad was concluded between Woolworths, PCS and Christodoulou (the latter as surety for PCS). The commencement date of the agreement was 23 September 1998. The agreement had an initial period of 10 years (ie until 23 September 2008).

PCS had an option to extend the franchise for a further five years (ie until 23 September 2013), such option to be exercised not later than 12 months prior to the expiry of the initial period (ie by 23 September 2007). Although the franchise agreement was formulated in terms which would ostensibly have permitted PCS to sell both textiles and food, it seems to have been understood that the store would initially be confined to textiles, and that food would only be introduced with Woolworths' further approval.

[5] By the time the franchise agreement was concluded the premises from which the store was to operate had been identified and they were identified in the franchise agreement. Clause 33 of the franchise agreement stipulated that Woolworths would, in collaboration with PCS, negotiate the lease of the premises with the landlord but that PCS would conclude the lease entirely at its own risk.

[6] Clause 34.2 contained a standard non-variation clause. In terms of clause 34.4 the parties undertook, in the implementation of the agreement, to observe the utmost good faith and they warranted that in their dealings with each other they would neither do anything nor refrain from doing anything which might prejudice or detract from the rights, assets or interest of the other of them.

[7] The lease agreement had a commencement date of 1 October 1998 although it was only signed on 27 September 1999. The lease had an initial period of 10 years. PCS had options to extend the lease for three further periods of five years each. Woolworths negotiated the lease with the landlord and was also a party in respect of certain rights and obligations pertaining to Woolworths.

[8] The Kokstad store was a success. During 2006 or 2007 Christodoulou began to give thought to introducing food into the store and had discussions with Woolworths in that regard. On 11 October 2007 Mr Barnard, Woolworths' head of franchise operations, informed PCS that Woolworths agreed in principle to the introduction of food into the Kokstad store. In the meanwhile, the date by which the option to extend the franchise agreement for five years should have been exercised (23 September 2007) came and went. This seems to have been overlooked on both sides.

[9] On 30 October 2007 an addendum was concluded to the lease agreement. In terms of the addendum the ground floor area of the leased premises was extended by 300 m^2. The landlord agreed to contribute R1,5 million towards the alterations. The addendum set out revised terms as to the basic monthly rent and additional turnover rent. The parties also agreed, by way of the addendum, that the period of the lease would be extended for a 10-year period as from 1 March 2008 (ie until 1 March 2018) and that PCS would have the right to extend the lease for a further five-year period (ie until 1 March 2023). This was only a modest adjustment to the original lease terms, under which PCS would have had the right, by way of its three options, to extend the lease until 1 October 2023.

[10] Pursuant to clause 33 of the franchise agreement, Woolworths was involved in negotiating the addendum to the lease and co-signed it in regard to the rights and obligations pertaining to Woolworths.

[11] Woolworths had not yet given final approval for the introduction of food into the Kokstad store by the time the first lease addendum was signed. Christodoulou's evidence was that the area of the premises would have been extended by way of the addendum, regardless of whether or not food was introduced.

[12] The fact that PCS had failed timeously to extend the franchise agreement seems to have come to light in about August 2008. On 28 August 2008 PCS formally resolved to exercise the option and delivered written notification in that regard to Woolworths. On 8 September 2008 Woolworths replied, noting that the exercise of the option was late but advising that after due consideration Woolworths agreed to extend the franchise agreement for a further period of five years on the same terms and conditions as the current franchise agreement. PCS was advised that the agreement would thus expire on 23 September 2013.

[13] Various viability studies were undertaken by PCS to demonstrate to Woolworths that the introduction of food into the store would be viable. The evidence as to when that was done and as to the evolving content of the viability studies was vague. It appears that at one stage Woolworths regarded PCS' projections as unreasonable. In April 2009 Christodoulou sent Woolworths' Mr N

Acker various figures which Acker apparently thought were too optimistic. On 21 April 2009 Acker sent an internal email to his seniors Messrs Susman and Thomson to which he attached a revised viability in which he adjusted certain figures. He expressed the view that Christodoulou 'can make money from this venture – projected IRR of 14.7%'. Thomson responded to Acker and Susman on 24 April 2009, saying that he was happy with the proposal, adding: 'Can you get him [Christodoulou] to accept these numbers as his best estimates? Please keep these viability numbers close at hand in case we ever get into a profitability debate.' There was no evidence as to whether Acker's revised figures were subsequently shared with Christodoulou. (The email exchange in question was evidently not in the plaintiffs' possession, since it was the subject of late discovery by Woolworths.)

[14] On 12 May 2009 Woolworths' real estate committee resolved to approve the introduction of food into the Kokstad store.

[15] According to Christodoulou, PCS invested about R5 million in the expansion of the Kokstad store. He did not say over what precise period the capital expenditure was incurred and how much of the expenditure related to the introduction of food and how much would have been incurred in any event in relation to the extension of the area of the store. Documentation relating to the expenditure was not produced at the trial. The viability study of April 2009 seems to have envisaged capital expenditure of R1,29 million, of which the greater part (R1,15 million) related to the introduction of food.

[16] The latter part of 2009 was a busy period in which the extension and refurbishment of the store was undertaken with a view to a grand opening which in the event occurred on Thursday 3 December 2009.

[17] On 2 October 2009 a second lease addendum was concluded. The commencement date of the second addendum was 1 May 2009. The main purpose of the addendum seems to have been to modify the period of the lease, presumably to accommodate delays in the opening of the new store. The lease term was extended for a 10-year period as from 1 May 2009 (ie until 30 April 2019), with an

option to extend for a further five years (ie until 30 April 2024). There was a slight alteration to the basic rent and turnover rent.

[18] According to Christodoulou, the days immediately preceding the official opening on 3 December 2009 were hectic and stressful, particularly as he and his wife needed to oversee the proper ordering and delivery of perishable goods, something in which they did not yet have much experience. A team from Woolworths arrived on 1 and 2 December 2009 to provide assistance. Among the Woolworths team were Zoe Rylands (divisional manager of the franchise team) and Pottier (who was responsible for providing support to franchisees in respect of systems, finance and administration).

[19] Rylands brought with her from Cape Town a draft addendum to the franchise agreement. There was no evidence as to who within Woolworths prepared this document. Rylands' mandate was to procure the signatures of PCS and Christodoulou and to take the document back to Cape Town for signature on behalf of Woolworths. There was a factual dispute at the trial as to when the draft was handed to Christodoulou and whether he read it prior to signing. I shall return to that dispute presently. It is common cause that he signed the document on his own behalf and on behalf of PCS on the morning on Friday 4 December 2009 in the presence of Pottier and the latter's colleague Mike Hargreaves. Pottier then took the document with her back to Cape Town, where it was signed on behalf of Woolworths by Susman and Thomson.

[20] The addendum to the franchise agreement dealt mainly with the introduction of food into the store. There were detailed provisions regarding the fees payable by PCS to Woolworths on food turnover and regarding the sale of food stock by Woolworths to PCS. However, the addendum also dealt with the period of the franchise. The preamble to the addendum recorded, among other things, that Woolworths had agreed that food stock could be sold by the franchise business, that Woolworths had agreed that the franchise agreement would be extended for a period of five years beyond the initial 10-year period, and that the parties wished to amend the franchise agreement in order to reflect the terms and conditions upon which food stock would be sold and to record the five-year renewal. In regard to

duration, clause 3 of the addendum provided that the commencement date of the franchise agreement in respect of food would be 3 December 2009; that the franchise agreement would endure until 23 September 2013; and that the right of renewal contained in clause 7.2 of the original agreement was deleted. (The plaintiffs could thus not succeed in the relief they sought in the court below unless they could escape from the provisions of the addendum regarding duration.)

[21] The full correspondence between the parties during 2010 and 2011 which led to the issuing of summons on 24 August 2011 was not placed before the trial court. It appears that Woolworths adopted a policy at that time of bringing franchise arrangements to an end and operating such stores as so-called corporate stores (ie stores owned and operated by Woolworths itself). Reference is made in other documentation to a letter sent by Woolworths to franchisees in that regard on 21 September 2010 in which it expressed its wish to buy back the businesses of the franchisees in question. According to Christodoulou, he did not have a copy of the franchise addendum he had signed and he thus asked Woolworths to let him have a copy. He thought this was in about November 2010.[1]

[22] Correspondence then took place between Woolworths and Coastal Accounting, a firm of accountants appointed by Christodoulou to assist him in valuing the Kokstad business. Only the Coastal Accounting letters were adduced as exhibits. Reference was made in a Coastal Accounting letter to an earlier letter sent by Woolworths to Christodoulou on 29 March 2011. On 11 May 2011 Coastal Accounting replied on Christodoulou's behalf, requesting Woolworths to submit an offer for the purchase of the Kokstad business, apparently as foreshadowed in the Woolworth's letter of 21 September 2010. Coastal Accounting said that Christodoulou was anxious to finalise negotiations on the sale of the business 'to meet the offer deadline of 30 June 2011'. Coastal Accounting recorded Christodoulou's view as being that the Kokstad store offered excellent value for

[1] The trial judge said in her judgment that Christodoulou called for a copy of the addendum after receipt of Woolworths' letter of 20 September 2011. That is erroneous. The summons was issued on 24 August 2011, by which stage the plaintiffs clearly already had the franchise addendum. Christodoulou's evidence was that he called for a copy of the franchise addendum after receipt of Woolworths' letter of 21 September 2010 and thought he had done so towards the end of 2010, in about November.

money and that Christodoulou would give serious consideration to an offer in the vicinity of R40 million plus stock.

[23] Woolworths apparently replied on 15 June 2011, offering only R9,1 million. Coastal Accounting responded to that offer on 24 June 2011. The writer said that Christodoulou's main concern with the offer of R9,1 million was that the settlement value of finance raised by Christodoulou for the food department amounted to R5,2 million, so that acceptance of the Woolworths offer would leave PCS with only R3,9 million. Coastal Accounting set out various criticisms of Woolworths' methodology for valuing the Kokstad business. A counter-proposal was made. The writer said that if he did not hear from Woolworths 'I will have no option but to advise my client to instruct his attorney to institute rectification procedures as indicated'. This suggests that some mention had been made prior to 24 June 2011 of rectification though it is unclear on the evidence when this was. (In the light of this uncertainty, I am hesitant to place reliance on Mr Fagan's submission that an adverse inference should be drawn from Christodoulou's supposed failure to complain about the terms of the addendum when he was supplied with a copy during November 2010.)

[24] On 22 July 2011 Woolworths apparently wrote a letter to Coastal Accounting in which its offer remained at R9,1 million but the date for accepting the offer was extended to 29 July 2011. On 28 July 2011 Coastal Accounting replied, stating that Christodoulou wanted to continue trading in the store. It was noted that the current franchise agreement ended in September 2013 but that there were disputes about the termination date. It was recorded that Christodoulou would be seeking rectification: 'An addendum to the franchise agreement was entered into instead of a new franchise agreement with a termination date coinciding with the extended lease for the store.'

[25] Negotiations broke down at this point, and on 11 August 2011 Woolworths' real estate committee resolved that the Kokstad store would operate as a corporate store as from 23 September 2013.

[26] The plaintiffs issued summons on 24 August 2011. The plaintiffs' particulars of claim were amended from time to time. The version on which the case was ultimately tried was the fourth iteration of the particulars of claim.

The signing of the franchise addendum

[27] The plaintiffs' case for rectification was based on the inferences which they claimed were properly to be drawn from the facts I have briefly summarised above. There was only one area of significant factual dispute, namely the circumstances in which Christodoulou came to sign the franchise addendum. It is convenient to deal with that question now.

[28] Christodoulou's version in chief was that Rylands handed him the addendum on Thursday 3 December 2009 and said he needed to sign it. He was too busy (because of the opening) to deal with it and he thus left it on his desk.[2] On the Friday morning Pottier insisted that he sign the document before she left, otherwise Woolworths would not permit the store to continue operating. She told him that the addendum contained terms relating to the introduction of food. He tried to telephone his attorney but could not reach him. He then signed the document without reading it. He added that he was dyslexic.

[29] In cross-examination he changed his version in one respect, claiming that Rylands had not given him the document on 3 December 2009 but had handed it to Pottier because he was too busy to deal with it, and that Pottier had given him the document on 4 December 2009 when she required him to sign it.[3]

[30] Mrs Christodoulou confirmed that the run-up to the official opening 3 December 2009 was a hectic period for her husband and her and that they were getting very little sleep. She recalled that after the opening on 3 December 2009 Rylands said to Pottier before she left that Pottier needed to get the contract signed by Christodoulou. She was also present when her husband signed the addendum on 4 December 2009. She claimed that the document was handed to Christodoulou

[2] Record 5/437.
[3] Record 6/553-555.

by Pottier, that her husband asked what it was, that Pottier said that it was a contract, that her husband tried to contact his lawyer without success, that he asked Pottier what was in the document and she told him it concerned food commissions, and that he then signed it without reading it. Although she said in chief that the document was handed to her husband by Pottier, she agreed in cross-examination that she could not say whether Rylands had handed him the document previously.

[31] Rylands was not called to testify on behalf of Woolworths. Pottier's evidence was that her understanding from Rylands was that the latter had given the draft to Christodoulou on Wednesday 2 December 2009. Rylands left Kokstad after the opening of the store on Thursday 3 December 2009. Pottier testified that she was instructed by Rylands to ensure that she (Pottier) did not leave Kokstad without getting the signed document from Christodoulou. Pottier eventually pinned Christodoulou down during the morning of Friday 4 December 2009, and he signed the document in his office at the store in her presence. Her evidence was that she did not give the document to Christodoulou that morning; he already had it. It was in an open envelope on his desk. He did not ask for an opportunity to read through it with his attorney. He signed the document without any indication of anger or unhappiness. She confirmed that he did not read through the document on that occasion (though he did initial each page). She had not said that the store would be closed down if he did not sign it but she did tell him that she was under instructions to bring the signed addendum back to Cape Town.

[32] Despite various criticisms advanced on behalf Woolworths as to Christodoulou's credibility, the trial judge thought that he and his wife were honest witnesses. She accepted that he signed the agreement without reading it and that he would not have signed it if he had been aware that it recorded an expiry date of 23 September 2013. She did not make any specific finding as to when Christodoulou received the document, though if she found Christodoulou and his wife to be honest witnesses she must have rejected Pottier's testimony that Christodoulou already had the document by the time she (Pottier) pressed him to sign it.

[33] I do not understand Woolworths to have claimed that Rylands or Pottier specifically told Christodoulou that the franchise addendum dealt, among other things, with the period of the franchise or that it had an expiry date of 23 September 2013. There is no indication that either Rylands or Pottier had any responsibility for the preparation of the document. They were in essence messengers. Furthermore, on Woolworths' version there was no particular reason to make the period of the franchise agreement a point of discussion. According to Woolworths, PCS had in August 2008 belatedly exercised the option contained in the original franchise agreement, thus extending the initial period by five years. Woolworths had on 8 September 2008 notified PCS that it agreed to the belated extension. According to Woolworths, the addendum – insofar as it dealt with duration – was simply recording the effect of the agreed extension. From Woolworths' side, therefore, the important aspects of the addendum were those dealing with the franchise fees payable in respect of food and the terms governing the supply of food by Woolworths to the franchisee.

[34] Although Rylands was not called as a witness, there was an important passage in Pottier's cross-examination on which the trial judge did not remark and which concerns a matter on which Pottier was able to give direct evidence. Pottier had earlier testified that she had been told by Rylands that Christodoulou had told her (Rylands) on 3 December 2009 (when she was pressing him for the signed document) that he was halfway through reading it. Mr Gordon SC (who appeared for the plaintiffs at the trial) was attempting to establish that what Rylands told Pottier was hearsay. Her reply was that on the evening of Wednesday 3 December 2009 Rylands and she had dinner with Christodoulou at their guesthouse. On that occasion, so she testified, and as they were parting at the end of evening, Rylands reminded Christodoulou to ensure that he signed the addendum before the next morning, to which he replied that he was halfway through the document. Mr Gordon asked whether she heard that conversation, to which she replied; 'Yes, because Zoe – it was a loud conversation'. Her evidence that such a conversation took place at the guesthouse was not challenged; it was not put to her that she was fabricating. If this evidence was truthful, it is important not only to establish that Christodoulou had the document for several days but also that he had read enough of it to see what it said concerning duration.

[35] The trial judge did not specifically find that Pottier was an unsatisfactory witness. She and Christodoulou apparently discovered during the visit that they had a family connection, and the interaction between them was friendly. Pottier had no reason to bamboozle Christodoulou nor was it suggested to her that she had done so. Since nothing adverse was said by the trial judge regarding Pottier's demeanour, a factual finding required an assessment of other matters bearing on credibility, including inconsistencies, contradictions and inherent probabilities (*Stellenbosch Farmers' Winery Group Ltd & Another v Martell et Cie & Others* 2003 (1) SA 11 (SCA) para 5).

[36] As to inherent probabilities, it was Rylands who had the primary mandate to obtain signature of the addendum. It is inherently probable that if she arrived at Kokstad on 2 December 2009 (as Pottier, who arrived the previous day, testified) she would have given the document to Christodoulou on that day or at very least on 3 December 2009. After all, Woolworths wanted the addendum signed before the new store opened. Even if Christodoulou was very busy and did not have time immediately to read the document, it would have been natural for Rylands to hand it to him so that he could look at it in his own time. There was no suggestion that Rylands was reluctant that he should have time to consider it. Pottier's evidence, that Christodoulou was already in possession of the document when she pressed him to sign it on 4 December 2009, thus accords with the inherent probabilities.

[37] There was also an important contradiction between Christodoulou's oral evidence and the further particulars furnished on the plaintiffs' behalf. In a request for trial particulars Woolworths asked why Christodoulou had not read the addendum before signing it. I doubt that this was a permissible question to ask by way of trial particulars but that is neither here nor there because the plaintiffs chose to reply fully. The reply was that Woolworths had sent a team of employees to Kokstad to assist with and attend the official opening on 3 December 2009; that on 2 December 2009 Rylands had handed a copy of the addendum to Christodoulou; that he had not seen it prior to that time; that he was unable to attend to the addendum either on 2 or 3 December 2009 because he was preoccupied with final preparations for the opening; that on 4 December 2009 Pottier had insisted that he sign the addendum before her departure and had intimated that if he did not do so PCS

would not be entitled to continue with its new food and groceries line; that Christodoulou was exhausted from preparing for the opening and asked for an opportunity to read the addendum with his attorney; that Pottier refused such opportunity; and that Christodoulou then signed the addendum without having read it.

[38] The version given in trial particulars, namely that Rylands gave Christodoulou the draft addendum 2 December 2009, accords with the inherent probabilities and is consistent with Pottier's version but not with the evidence Christodoulou gave at the trial. Christodoulou accepted that he had consulted with his legal representatives and could not provide a satisfactory explanation for the discrepancy between the trial particulars and his oral testimony. When the contradiction was put to Mrs Christodoulou, she said that her husband was the sort of person who got 'very confused … he's almost like a stunned mullet'.

[39] Then there is the contradiction between the evidence which Christodoulou gave in chief and in cross-examination as to when the document was handed to him. In chief he said Rylands gave it to him on 3 December 2009 and that he put it on his desk whereas in cross-examination he changed his version and said that Pottier had given him the document on 4 December 2009. There was an overnight adjournment between his evidence in chief and this part of his cross-examination. The changed version accorded with the version to which his wife subsequently testified.

[40] The trial particulars are relevant to another contradiction in Christodoulou's version. He accepted under cross-examination that Pottier had not refused him an opportunity to read the addendum in conjunction with his attorney. His evidence was that when she pressed him for signature on the morning of 4 December 2009 he telephoned his attorney on several occasions but the latter was not available. It was certainly not the case that Pottier insisted that he sign the document without reading it. Pottier conveyed to Christodoulou that her instructions were to bring the signed document back to Cape Town and that the signing of the addendum was necessary in order for PCS to sell food from the Kokstad store. She testified that if Christodoulou had refused to sign the document on the Friday because of the

absence of his attorney, she would not have had authority to close the store. That would have been a matter for senior management in Cape Town. It strikes me as somewhat implausible that the store would or could have been shut down merely because Christodoulou wanted a day or two more to discuss the draft with his attorney. Pottier thought that closure would have been most unlikely because it would have damaged the Woolworths brand to close a store which had just opened.

[41] Whether Christodoulou in fact sought an opportunity to telephone his attorney before signing the document is not altogether clear. That was certainly the evidence of Christodoulou and his wife. However, in cross-examination Mr Fagan put to Christodoulou that Pottier would testify *inter alia* that he had not asked her for an opportunity to read over the addendum with his attorney and that she had not refused any such request. He put, further, that Pottier had been under the impression that he had already read the document. Christodoulou's response was that he had indeed asked for an opportunity to read through the document with his attorney. In chief Pottier confirmed that Christodoulou had not requested an opportunity to read through the document with his attorney, and she made no mention of his leaving the office to telephone his attorney. This aspect was not taken up with her in cross-examination. In the circumstances, and although it is possible that at some stage Christodoulou tried to phone his attorney, the evidence does not satisfactorily establish that this occurred with Pottier's knowledge during the course of her meeting with Christodoulou.

[42] There are other aspects of the matter on which Christodoulou's credibility was called into account. He testified at one point in cross-examination that he had consulted on numerous occasions with Mr Dickson SC, the senior counsel who drafted the first particulars of claim. However, when, after the overnight adjournment, he was tested on the differing versions advanced in the various particulars of claim version, he said that he had only consulted with Mr Dickson once for half an hour. His explanation for the contradiction was that he 'wasn't thinking clear yesterday'. When asked in cross-examination about the allegations contained in the second particulars of claim, he confirmed that he had consulted with Mr Seggie SC and Mr Christison, the new counsel who drafted those particulars. He was then shown the affidavit he had made in support of an amendment application

to introduce the third particulars of claim, in which affidavit he confirmed an averment by his new attorney that he had not consulted directly with the counsel who drafted the previous particulars of claim. (His new attorney could only have made that allegation on Christodoulou's instructions.) When asked why he had not told the truth in the affidavit, he said he could not remember whether he had even read it before signing.

[43] It was for the plaintiffs to prove their case on a balance of probabilities. Insofar as it is germane to the outcome of the case, I do not think the plaintiffs proved on a balance of probability that Christodoulou only received a copy of the addendum on the morning of Friday 4 December 2009 when Pottier pressed him to sign it. I think it more probable than not that he received the document from Rylands on Tuesday 2 December 2009. If that is the more probable version, one would have to conclude that Christodoulou's evidence, that he only received the document 4 December 2009, was a discreditable attempt to strengthen his claim for rectification. And if his evidence lacked credibility on that point, it also calls into question his claim that he did not read the document (or did not read enough of it to know what it said regarding duration). It is important to emphasise, in that regard, that the fact that he read the document or some of it is not merely an inference from the fact that he had it in his possession and later signed it; there is also Pottier's direct evidence as to what Christodoulou said to Rylands in her presence on the evening of 2 December 2009.

The rectification claim

The pleadings

[44] In the first particulars of claim the plaintiffs referred to the franchise agreement and the addendum to the franchise agreement, and to the lease agreement and to the first lease addendum. The plaintiffs then alleged that prior to the conclusion of the franchise addendum it was the parties' common intention that the duration of the franchise would correspond with the duration of the lease as amended by the lease addendum, namely to 28 February 2018, and that PCS would have a right (as in the lease agreement) to extend the franchise agreement by a

further five years (ie to 28 February 2023). The plaintiffs claimed rectification of the franchise addendum to reflect this alleged common intention. The first particulars of claim did not mention the second lease addendum – Christodoulou had either overlooked it or failed to instruct his legal team as to its existence.

[45] After the issue of summons, the plaintiffs' attorneys asked Woolworths' attorneys not to file a plea until the plaintiffs' legal team had had an opportunity to review the particulars of claim. In November 2011 the plaintiffs filed amended (second) particulars of claim, authored by new counsel. These particulars, which still did not refer to the second lease addendum, advanced two causes of action in the alternative. The first cause of action was that, upon the execution of the first lease addendum on 30 October 2007, a tacit option contract came into existence between Woolworths and PCS in terms of which the latter would have an option to extend the franchise agreement to 28 February 2018, such option to be exercised no later than 12 months prior to 23 September 2013; that the plaintiffs had believed, when signing the franchise addendum, that they were exercising this tacit option; and that the franchise addendum should thus be rectified in the manner alleged in the first particulars of claim. The alternative cause of action repeated the allegation of a tacit option contract but sought to get around the franchise addendum not through its rectification but by alleging that, due to a reasonable unilateral error on the part of the plaintiffs, the franchise addendum was not binding on them, and by giving notice in the amended particulars of claim that PCS now exercised the tacit option.

[46] The probable explanation for the change of tack is this. PCS on 28 August 2008 had belatedly exercised the five-year option contained in the original franchise agreement and Woolworths had on 8 September 2008 agreed to that extension. PCS had belatedly exercised this option nearly 11 months after the conclusion of the first lease addendum, which was evidently the event to which the plaintiffs, in their first particulars of claim, linked the coming into existence of the alleged common intention that the franchise should be extended to 28 February 2018. The existence of the alleged common intention in October 2007 did not sit comfortably with the belated exercise by PCS in August 2008 of its option to extend the franchise only until 23 September 2013 (and not 28 February 2018). The second particulars of claim thus introduced the notion of a tacit option (which allegedly came into

existence on 30 October 2007) to extend the franchise beyond 23 September 2013, with the signing of the franchise addendum allegedly being the act whereby the plaintiffs had intended to exercise the tacit option.

[47] By the time the third particulars of claim were filed in May 2012 the plaintiffs' legal team had become aware of the existence of the second lease addendum. The third particulars followed the same pattern as the second, save for the refinement that, with the conclusion of the second lease addendum on 2 October 2009, the terms of the tacit option allegedly concluded on 30 October 2007 were said to have been varied so as to allow PCS to extend the franchise agreement to 30 April 2019 and so as to afford a further option to extend the franchise agreement to 30 April 2024.

[48] The fourth and final particulars of claim were delivered in April 2013, shortly before the commencement of the trial. These particulars of claim retained the main cause of action and the alternative cause of action contained in the third particulars of claim. However, a further alternative cause of action was added which asserted, with reference to various alleged facts, that an 'independent tacit agreement' had come into force that the franchise agreement would be extended to 28 February 2018, alternatively that the franchise agreement was (or became) subject to an implied term that it would be so extended. In a supplementary request for trial particulars Woolworths enquired when the independent tacit agreement had allegedly been concluded. The reply was 1 March 2008 (being the commencement date of the first lease addendum concluded on 30 October 2007).

[49] As noted, the plaintiffs' counsel in the appeal relied only on rectification. No argument was advanced in support of an alleged tacit option contract or an alleged independent tacit agreement. This in itself represents something of a departure from the primary case advanced in the particulars of claim, because in the particulars of claim the main cause of action (which was the one by which rectification was claimed) linked the claim for rectification to the alleged tacit option contract and alleged that the plaintiffs had intended to exercise the tacit option when signing the franchise addendum. However, there was an allegation that 'regardless of the option' it was the parties' common intention, prior to the conclusion of the franchise

addendum, that its duration would be identified with the duration of the lease (namely 30 April 2019 with a right of further extension to 30 April 2024), so as a matter of pleading I accept that the plaintiffs could rely on rectification independently of the alleged tacit option contract. Nevertheless, it is not without significance that the plaintiffs' primary allegation was that a tacit option contract was concluded on 30 October 2007 and varied on 2 October 2009 and that in signing the franchise addendum the plaintiffs intended to exercise the tacit option as varied. Mr Pillemer did not seek to support that primary case. From Christodoulou's evidence it is plain that he subjectively never thought in terms of a tacit option nor did he believe when he signed the franchise addendum that he was exercising an option.

The legal test

[50] In order to obtain rectification it was necessary for the plaintiffs to establish on a balance of probability that the parties had a common intention, when they executed the franchise addendum, that the addendum should record the alleged extension of the franchise agreement but that because of a common error it failed to do so. (Rectification is also possible where one party fraudulently tricks the other into signing a document which does not reflect the ostensible common intention but the plaintiffs' counsel disavowed any allegation of fraud on Woolworths' part.)

[51] Although it is not necessary for a plaintiff to allege and prove an antecedent agreement to which the written recordal failed to give effect, De Wet CJ observed in *Meyer v Merchants' Trust Ltd* 1942 AD 244 that 'proof of an antecedent agreement may be the best proof of the common intention which the parties intended to express in their written contract, and in many cases would be the only proof available' (at 253). I understand the distinction to be this. Parties may reach an antecedent agreement (whether or not, on its own, it would be enforceable, having regard to any applicable statutory or contractual formalities), and then record it in writing. The antecedent agreement would then be the evidence of the common intention as to what the document was meant to contain. However, parties may through a process of negotiation work their way towards the conclusion of a written contract, with the signing of the contract being the only act by which either of them intended to signify assent. In such a case there would not be an antecedent

agreement, but one of the parties might nevertheless be able to prove the common intention of the parties as to the terms to which they meant to assent.

[52] In the present case, so it seems to me, the plaintiffs need to rely on an antecedent agreement in order to establish the alleged common intention. There was no negotiation surrounding the franchise addendum in December 2009 (or at all). The plaintiffs' own case placed the coming into existence of a common intention on 30 October 2007/1 May 2008 (when the first lease addendum was concluded or came into effect) and the variation of that common intention on 2 October 2009 (when the second lease addendum was concluded). In essence, the plaintiffs' case is that the parties tacitly agreed at these times that the franchise agreement should be extended to correspond with the varied periods of the lease agreement. The plaintiffs saw the need to claim rectification of the franchise addendum not so much because the addendum was the only source of an extended franchise period but rather because the terms of the addendum stood in the way of what they claim had already been tacitly agreed. Put differently, if no franchise addendum had been concluded in December 2009, the plaintiffs would simply have relied either on the alleged tacit option contract or the alleged independent tacit agreement.

[53] The question is thus whether the antecedent tacit agreement was proved (though it would not make much difference whether one referred to an antecedent tacit common intention rather than an antecedent tacit agreement).

[54] Where a party who seeks rectification claims that the common intention (whether by antecedent agreement or otherwise) was tacitly formed, there is no reason not to apply the same test as is used to infer a tacit contract. The test for a tacit contract has been stated in slightly different ways in leading cases. In *Standard Bank of South Africa Ltd v Ocean Commodities Inc* 1983 (1) SA 276 (A) Corbett JA said that in order to establish a contract 'it is necessary to show, by a preponderance of probabilities, unequivocal conduct which is capable of no other reasonable interpretation than that the parties intended to, and did in fact, contract on the terms alleged', ie it must be proved 'that there was in fact consensus *ad idem*' (292B-D). In his later judgment in *Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd* 1984 (3) SA 155 (A) the learned judge of appeal, after describing

this as 'the traditional statement of the principle', referred to another possible test, namely that a court may hold that a tacit contract has been established 'where, by a process of inference, it concludes that the most plausible probable conclusion from all the relevant proved facts and circumstances is that a contract came into existence' (at 165B). Corbett JA did not find it necessary to resolve the question but in an *obiter dictum* said the following:

'While it is perfectly true that in finding facts or making inferences of fact in a civil case the court may, by balancing probabilities, select a conclusion which seems to be the more natural or plausible one from several conceivable ones, even though that conclusion is not the only reasonable one, nevertheless it may be argued that the inference as to the conclusion of a tacit contract is partly, at any rate, a matter of law, involving questions of legal policy. It appears to be generally accepted that a term may not be tacitly imported into a contract unless the implication is a necessary one in the business sense to give efficacy to the contract (see *Van den Berg v Tenner* 1975 (2) SA 268 (A) at 276H-277B and the cases there cited). By analogy it could be said that a tacit contract should not be inferred unless there was proved unequivocal conduct capable of no other reasonable interpretation that the parties intended to, and did in fact, contract on the terms alleged.'

[55] In Christie *The Law of Contract in South Africa* 6th Ed the learned author suggests a synthesis of these two tests, drawing on three relevant principles, namely [i] that the general rules for reasoning by inference in civil cases ought to be applied as far as possible to maintain consistency; [ii] that offer and acceptance should be 'unequivocal, ie positive and unambiguous'; and [iii] that the test for finding a tacit contract should not differ materially from the test for finding a tacit term in a contract, because the question in each case is whether agreement can be inferred from the proved facts and circumstances. His synthesis is that in order to establish a tacit contract 'it is necessary to prove, by the preponderance of probabilities, conduct and circumstances which are so unequivocal that the parties must have been satisfied that they were in agreement. If the court concludes on a preponderance of probabilities that the parties reached agreement in that manner it may find the tacit contract established' (at 87-89). This test has been adopted in several cases (see, for example, *Landmark Real Estate Pty Ltd v Brand* 1992 (2) SA 983 (W) at 985I-J and *Sewpersadh & another v Dookie* 2008 (2) SA 526 (D) para 27). On the other hand, in *Muller v Pam Snyman Eiendomskonsultante (Edms) Bpk*

[2000] 4 All SA 412 (C) Comrie J expressed a preference for the traditional test (at 419a-c).

[56] In *Residents of Joe Slovo Community, Western Cape v Thubelisha Homes & Others (Centre on Housing Rights and Evictions and another, amici curiae)* 2010 (3) SA 454 (CC) the Constitutional Court applied the preponderance of probability test mentioned by Corbett JA in *Joel Melamed supra* in answering the question whether a person was occupying land with the 'consent' of the owner but the two competing tests were not discussed and I doubt in the circumstances that the Constitutional Court intended to resolve the point . In *Konsult One CC v Strategy Partners (Pty) Ltd* [2013] ZAWCHC 55 Davis AJ made the following observation (para 128):

'The preponderance of probabilities test, as formulated in *Joel Melamed*, does not refer to unequivocal conduct which indicates *consensus ad idem*. This omission should not, in my view, be allowed to obscure the fact that tacit contracts, like any other, require proof of an unequivocal offer and acceptance, and that the parties reached consensus. This appears clearly from the following pithy summary by Heher JA of the Court's task in determining whether or not a tacit contract has been proved, which neatly synthesizes and encapsulates both tests:[4]

"'This appeal is about an alleged tacit agreement. As in all such cases, the court searches for the evidence of manifestations of conduct by the parties that are unequivocally consistent with consensus on the issue that is the crux of the agreement and, *per contram*, any indication which cannot be reconciled with it. At the end of the exercise, if the party placing reliance on such an agreement is to succeed, the court must be satisfied, on a conspectus of all the evidence, that it is more probable than not that the parties were in agreement, and that a contract between them came into being in consequence of their agreement. Despite the different formulations of the onus that exist (see the discussion in [*Joel Melamed*] at 164 G – 165G; and RH Christie & V McFarlane *The Law of Contract in South Africa* 6 ed at 88 – 9) this is the essence of the matter."'

The judgment of Heher JA from which Davis AJ quoted (*Butters v Mncora* 2012 (4) SA 1 (SCA)) was a minority judgment though the point of difference between the minority and the majority concerned the facts rather than the law.

[57] Be that as it may, we were not fully addressed on the matter and I do not think, for purposes of the present case, that it is either necessary or desirable to

[4] *Butters v Mncora* 2012 (4) SA 1 (SCA) at para 34.

express a final opinion on the correct test. What is apparent, in my view, is that the courts have always appreciated the special difficulty which arises when a person asserts the existence of a tacit contract. Where a contract is said to have come into existence through proven express exchanges (whether oral or written), it is usually not difficult to decide whether in law the exchanges evidence an unequivocal offer and acceptance and thus the existence of contract. Where the contract is said to have come into existence tacitly, it is generally more difficult to draw that conclusion. One needs to guard against a finding that, because it would have been reasonable and fair for the parties to have reached the alleged agreement if the matter had been specifically discussed, they therefore were in fact tacitly in agreement. The question is not even whether they would probably have reached agreement if the matter had been raised but whether they were in fact in agreement though they did not express it. The same applies, in my view, to the question whether there was the requisite common intention to found a claim for rectification.

Assessment

[58] Mr Pillemer put at the forefront of his argument the fact that, prior to Woolworths' giving its final approval for the introduction of food into the store, viability studies were done which projected costs, income and profit over a 10-year period. This, taken together with Woolworths' conduct in negotiating the lease addendums, was said to give rise to the inference that both parties intended the franchise agreement to be extended in line with the lease addendums.

[59] As previously mentioned, the only viability study adduced as an exhibit was the modified study prepared by Acker in the latter part of April 2009, which reflected capital expenditure of R1,29 million, not the figure of +R5 million which Christodoulou in his evidence said had been spent. The precise import of the viability study was not explained in the evidence. It is not clear to me that the viability study shows that it would take 10 years for the capital expenditure to be recovered. In general terms, though, both parties seem to have accepted that the expansion of the store and introduction of food would only have made commercial sense if there was an opportunity to operate it for a period of about 10 years.

[60] It would thus not have been unreasonable for Christodoulou, before embarking on that expenditure, to secure an extended period for the franchise. One does not know when he embarked on the expenditure. It seems likely to have been in the period as from May 2009, after Woolworths formally approved the introduction of food into the store. The fact of the matter is that he did not raise with Woolworths an extension of the franchise at that time. There is no indication that he thought about it at all. If he had raised the matter, I do not think it is possible to be confident about how Woolworths would have responded. Woolworths might have agreed at that point (say, May 2009) to extend the franchise agreement to correspond with the lease as amended by the first addendum (ie to 28 February 2018) or to match the 10-year period of the viability study (ie to May 2019) or to some other date.

[61] On the other hand, Woolworths might have said that, while it was not in principle against extending the franchise agreement, it was unwilling at that stage to commit itself. Christodoulou would then have needed to make a judgement call as to whether to undertake the expenditure in the hope that in 2012/2013 he could negotiate an extension of the franchise. In considering that question, he may have had regard to his own projections rather than those of Acker (which it is not clear he ever saw). His own projections were apparently more bullish. The existing franchise as extended gave him just under four years from the projected opening date of the new store on December 2009. Furthermore, Woolworths would presumably only have declined in 2012/2013 to extend the franchise agreement if it wished to take back the store itself. In that event, clause 28.1 of the franchise agreement read with clauses 25.1 to 25.3 required Woolworths to pay for fixed assets, stock, liquid assets and goodwill in accordance with a prescribed methodology. (It seems that Woolworths' offer of R9,1 million in 2011 represented its proposed payment for goodwill, representing, according to Christodoulou, 3,6 times the business' annual profit at that time. Woolworths would additionally have been required to pay for stock at cost plus fixed assets at market value.)

[62] It must also be remembered that, if the question of an extension of the franchise agreement had been raised in 2009, the parties would have needed to agree a good deal more than merely an extended date. I have indicated that there are various possible contenders as to what the extended date might have been.

Additionally, Woolworths would almost certainly have wanted to review other terms, including terms of the kind it later included in the franchise addendum. In the absence of agreement on these other matters, I find it difficult to conclude that Woolworths tacitly bound itself to an extended period for the franchise.

[63] There are other objective facts to which regard must be had in assessing whether a tacit consensus on the extension of the franchise agreement was reached. The first is that if this was the parties' consensus, one would have expected them to commit it to writing, yet it is common cause that this was not done at either of the times the plaintiffs identified as being the occasions on which the tacit consensus came into existence (October 2007/March 2008 and October 2009) nor at the time PCS presumably embarked on the capital expenditure (around May 2009). Woolworths conducted its contractual relations with franchisees on a formal basis. The franchise agreement was a very detailed document. No variation to the franchise agreement was valid unless committed to writing. Even if an extension of the franchise agreement beyond its original term was not hit by the non-variation clause (a proposition for which *BLP Investments (Pty) Ltd v Angel's Precision Works (Pty) Ltd & others* 1987 (4) SA 308 (C) might provide some support), it seems most unlikely that Woolworths would have left such an important matter to tacit consensus. In regard to the lease agreement, the extensions and other alterations were formally negotiated by way of addendums. That would have been the obvious time to conclude an addendum to the franchise agreement if there was consensus on amended terms.

[64] Another objective fact is that when the extended and refurbished store was ready to open in December 2009, Woolworths prepared an addendum to regulate the introduction of food, in which Woolworths stated that the franchise agreement had been extended from 23 September 2008 to 23 September 2013 and would terminate on the latter date. Of course, this did not necessarily mean that Woolworths would refuse in 2012/2013 to negotiate a renewal but it does indicate *prima facie* that Woolworths did not in 2009 regard itself as committed to the franchise beyond 23 September 2013. The plaintiffs in argument disavowed a contention that Woolworths deliberately inserted a wrong date. The wording of the addendum in regard to duration would thus, on the plaintiffs' argument, have to be

attributed to a *bona fide* mistake on Woolworths' part. However, the wording of the addendum does not readily lend itself to that explanation. One is not dealing with a single date which might have been erroneously inserted. The preamble recorded the factual basis for the changes relating to duration, namely that Woolworths had already agreed to extend the franchise for a period of five years beyond its initial term. Clause 3 of the addendum gave effect to this by making certain changes to clause 7 of the original agreement, among which were the revised expiry date of 23 September 2013 and the deletion of clause 7.2 (which, if it had remained, would have given PCS an option to extend the franchise for five years as from 23 September 2013). It is clear that the draftsman of the addendum was deliberately giving effect to the agreement between the parties, by way of exchange of correspondence in August/September 2008, that the period of the franchise would be extended for five years from 23 September 2008 to 23 September 2013.

[65] Another important consideration is the exchange of correspondence just mentioned. The plaintiffs' primary pleaded case was that the tacit understanding for the extension of the franchise (whether framed as a tacit option, a tacit extension or a common intention) came into existence with the conclusion of the first addendum on 30 October 2007. It was an important part of the plaintiffs' case at the trial that the understanding between the parties was that the period of the franchise would mirror the period of the lease agreement. Reference was made in that regard to a Woolworths mission statement which Christodoulou had received in advance of signing the original franchise agreement and to certain discussions he had with Woolworths' representatives when he expressed an interest in taking up the franchise. This explains why, in formulating the tacit understanding, the plaintiffs alleged in the particulars of claim that the understanding was initially for an extension to 28 February 2018 and then to 30 April 2019, and why they alleged that the understanding incorporated options to extend the franchise in a way which mirrored the options in the first and second lease addendums. PCS' conduct, in August 2008, in belatedly exercising the option contained in the original franchise agreement is plainly inconsistent with the primary understanding alleged by the plaintiffs. Christodoulou would not in August 2008 have exercised an option to extend the franchise to 23 September 2013 if by then (as the plaintiffs alleged in the particulars of claim) the tacit understanding was that the lease would be extended to

(say) 28 of February 2018. If anything was to be recorded by an exchange of correspondence, it would have been the prior tacit understanding rather than the original option which had been rendered irrelevant.

[66] The plaintiffs attempted, in their second particulars of claim, to get around this difficulty by re-formulating the tacit understanding as a tacit option contract. However, and apart from the fact that Christodoulou's evidence did not support that alternative construction, it is not simply a matter of legal formulation. The question is what was actually intended. The advancing of materially different formulations of what was alleged to have been tacitly agreed, even in the alternative, calls into question whether anything can be said, with the requisite degree of confidence, to have been tacitly agreed at all (cf *Wilkins NO v Voges* 1994 (3) SA 130 (A) at 143C-E, where a similar point was made in regard to tacit terms).

[67] Mr Pillemer did not press the argument that the period of the franchise agreement necessarily had to mirror that of the lease agreement. As a fact, the periods of the franchise and lease agreements as initially concluded did not coincide exactly. Importantly, clause 23.2 of the franchise agreement specifically contemplated that the franchise agreement might expire by the effluxion of time prior to the lease agreement. Clause 23.2 provided that if that happened PCS would, if so required by Woolworths, cede and delegate its rights and obligations under the lease to Woolworths or sublet the premises to Woolworths on the same terms as contained in the lease.

[68] I have not thus far taken into account the events of 2-4 December 2009. Even if my conclusions on the factual disputes concerning those events were disregarded, and even if one assumed in favour of the plaintiffs that Christodoulou only received the franchise addendum on Friday 4 December 2009 and signed it without reading it, I do not think it was proved that there was a tacit understanding at that time that the duration of the franchise agreement would be amended to accord with the lease agreement as varied. That could only have been the tacit understanding if such an understanding had come into existence some time previously, and for the reasons I have explained I do not think that was proved. In particular, I do not think it was proved that Woolworths had the intention alleged. It is doubtful, to my mind, whether

even Christodoulou on 4 December 2009 expected the addendum to contain revised terms as to duration. His version was that he signed it after being told that it dealt with food, turnover, commission structures and so forth. His evidence was somewhat equivocal as to whether he thought the addendum would say anything about duration. If he actually thought about that question, it would not have taken him a moment to check what the addendum said on duration. That would not have required the advice of his attorney.

[69] However, and if my earlier conclusion is right that Christodoulou probably had read enough of the franchise addendum to see what it said as to duration, that would on its own be fatal to the plaintiffs' case. In support of that particular conclusion, and in addition to what I have already said, it seems somewhat unlikely that Christodoulou would have signed, sight unseen, an addendum which he knew dealt with important commercial matters such as franchise fees and the terms on which PCS was to purchase food stock from Woolworths. The trial judge thought that Christodoulou would not have signed the addendum if he had been aware what had said on duration. If that were correct, one would have to conclude that Christodoulou did not read the addendum at all. But I am less confident than the trial judge was on the question as to how Christodoulou would have reacted if he read what the addendum said on duration. I do not find it implausible that he assumed, incorrectly as it turned out, that Woolworths would in due course agree to an extension of the franchise. It must be remembered, in that regard, that the formulation of the addendum did not mean that the franchise would not be renewed; that would simply be a matter for later agreement.

Good faith and Ubuntu

[70] Mr Pillemer did not spend much time on the good faith clause or on the concept of Ubuntu as applied to the law of contract. He accepted that neither the good faith clause nor Ubuntu provided a basis for holding a party bound to terms which might seem fair and reasonable but to which such party had not in fact agreed.

Conclusion

[71] For all the reasons stated above, I would uphold the appeal with costs and replace the trial judge's order with one dismissing the plaintiffs' action with costs, including those attendant on the employment of two counsel.

HLOPHE JP:

[72] I concur. The appeal is upheld with costs, including those attendant on the employment of two counsel. The order made by the trial court on 12 June 2013 is set aside and replaced with the following order: 'The action is dismissed with costs, including those attendant on the employment of two counsel.'

SAMELA J

[73] I concur.

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HLOPHE JP

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SAMELA J

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ROGERS J

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