THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 809/2010

In the matter between:

PICK 'N PAY RETAILERS (PTY) LTD	**First Appellant**
PICK 'N PAY FRANCHISEE FINANCING (PTY) LTD	**Second Appellant**
STEPHANUS JOHANNES STRYDOM N.O. DEAN ALAN HOLDSTOCK N.O. ADELE KATHLEEN HOLDSTOCK N.O. (in their capacities as Trustees of The Holdstock family Trust IT.1102/99)	**Third Appellant**
CARTER TRADING (PTY) LTD	**Fourth Appellant**
and	
MICHAEL BRADLEY EAYRS N.O. COLIN MARK DE VILLIERS N.O. and HOWARD HUGHES o.b.o. THE DAKU TRUST	**First Respondent**
BARRY NEIL CARTER N.O. LINDA CARTER N.O. and STEPHANUS JOHANNES STRYDOM N.O. (in their capacities as the Trustees for the time being of The Barry Carter Family Trust IT.1099/99)	**Second Respondent**
ALAN MELVILLE CARTER N.O. MARY PATRICIA CARTER N.O. (in their capacity as the Trustees for the time being of The Alan Carter Family Trust with Registration No TM.1913)	**Third Respondent**

Neutral citation: ***Pick 'n Pay v Eayrs & others NNO*** **(809/2010) [2011] ZASCA 147 (26 September 2011)**

Coram: Brand, Malan, Leach, Seriti and Wallis JJA

Heard: **6 September 2011**

Delivered: **26 September 2011**

Summary: Pre-emptive right in franchise agreement – subsequent sale of shares agreement – extension of pre-emptive right – operation of maxim *qui prior est tempore potior est iure*

ORDER

On appeal from: Eastern Cape High Court, Port Elizabeth (Eksteen J sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

MALAN JA (BRAND, LEACH, SERITI and WALLIS JJA concurring)

[1] This appeal concerns a dispute between the holder of a right of pre-emption and the purchaser of shares in and claims against a company. On 1 March 2004 the holder of the right of pre-emption, the first appellant, Pick 'n Pay Retailers (Pty) Ltd (the franchisor), concluded a franchise agreement with the third appellant, the Holdstock Family Trust (the seller), the fourth appellant, Carter Trading (Pty) Ltd (the franchisee company) and the second and third respondents. At that time the seller and the second and third respondents held all the issued shares in the franchisee company which operated a Pick 'n Pay franchise, the Pick 'n Pay Family Supermarket, in Port Elizabeth.

[2] In terms of a sale of shares agreement entered into on 22 April 2010 between the seller and the first respondent, the Daku Trust (the purchaser), the purchaser bought 50 per cent of the shares in and claims against the franchisee company from the seller. On the same day the seller entered into another agreement pursuant to which it purchased the shares in and claims against the franchisee company of the second and third respondents. The purpose of these transactions was to enable the seller and purchaser each to have 50 per cent of the shares in the franchisee company which they intended to operate, not as a Pick 'n Pay franchise, but as a Superspar franchise.

[3] In order to convert the business to a Superspar the Pick and Pay franchise had to be terminated. Clause 5 of the franchise agreement enabled either party to terminate it by giving at least one month's written notice of termination. Written notice was given by the franchisee company to the franchisor on 30 April 2010 terminating the franchise agreement with effect from 1 June 2010.

[4] The issue in this case arises because the franchise agreement also made provision for the franchisor to have a right of first refusal in terms of clause 25 in the event of the franchisee company wanting to sell, or otherwise dispose of or transfer the business or any part thereof. A right of pre-emption was further provided in clause 28 in the event of the seller or any other shareholder in the franchisee company intending to sell the shares held in the franchisee company. It was agreed that in such an event the franchisee 'shall deliver to the franchisor a written notice offering to sell the business or the relevant part thereof to the franchisor at a price which shall sound in money in South African currency and on such remaining terms as may be stipulated in the written offer' (clause 25.1.2.1). The franchisor was then entitled 'within 30 (thirty) days after receipt of the written offer (during which period the offer shall be irrevocable), to accept it, in whole but not in part, by giving written notice to that effect to the franchisee. If the franchisor accepts the offer, a sale of the business or the relevant part thereof, as the case may be, shall come about on the terms set forth in the offer' (clause 25.1.2.2).

[5] After conclusion of the sale agreement the seller and the purchaser applied for membership of the Spar Guild of South Africa, retail membership of Spar and credit facilities for the franchisee company.

[6] On 18 May 2010 the seller and the franchisee company notified the purchaser that the franchisee company would no longer be converting to a Spar franchise and that one of the conditions precedent, that is the condition that the business of the franchisee company be converted to a Superspar on or by the effective date (clause 4.3), for the sale of shares agreement would not be fulfilled. They also recorded that neither the seller nor its representatives were entitled to negotiate on behalf of the franchisee company with the Spar Group. This letter clearly constituted a breach of the seller's obligations and of the warranties contained in clauses 9.1.3 and 9.1.5 of the sale of shares agreement.

[7] The purchaser did not accept what it described as a 'unilateral repudiation' of the sale agreement and by letter dated 20 May 2010 informed the seller that the condition precedent to the sale of shares agreement had for 'all intents and purposes' already been fulfilled. The seller's conduct was characterised as the 'deliberate frustration' of the fulfilment of the condition and described as an act of bad faith and a breach of the sale of shares agreement. The seller was also notified that the purchaser intended waiving clauses 4.4 and 4.5 of the sale of shares agreement relating respectively to the extension of the lease and its obtaining finance for payment of the purchase price. It required the seller to confirm that it intended proceeding with the implementation of the sale agreement.

[8] In an about turn, on 25 May 2010 the seller confirmed that it would be proceeding with the sale of shares agreement. However, it stated that it could not guarantee that the condition precedent contained in clause 4.3 would be fulfilled because the franchisor, Pick and Pay, had indicated that should the parties proceed to implement the sale of shares agreement it would enforce its rights of pre-emption under the franchise agreement and its rights under a notarial bond passed over the franchisee company's business. Nor could it guarantee that the landlord would agree to a new lease where the franchisee company traded as a Superspar (one of the conditions precedent).

[9] The purchaser responded on 25 May 2010 by noting that it would appear that the seller had withdrawn its notice to terminate the franchise agreement and, in a follow-up letter the next day, requested the seller to confirm that the notice terminating the

franchise agreement had been reinstated. The seller's response of 27 May 2010 contained an undertaking to do all things necessary to effect transfer of 50 per cent of the shareholding in the franchisee company subject to payment of the purchase price. However, it reiterated that it could not guarantee conversion of the franchisee company's business into a Superspar and again referred to the franchisor's rights of pre-emption and its rights under the notarial bond. A copy of a new notice to the franchisor terminating the franchise agreement with effect from 26 June 2010 was annexed to the seller's response.

[10] On 2 June 2010 the seller's attorneys informed the purchaser that they had received an application by the franchisor for perfection of the notarial bond which was enrolled for hearing on 10 June 2010. They had advised their client that it had not complied with the terms of the franchise agreement in that it had not, as required by clause 28 read with clause 25, offered to the franchisor a 50 per cent shareholding in the franchisee company. Nor had the seller complied with the terms of the notarial bond requiring the seller to obtain the franchisor's written consent for the disposal of the shareholding. The seller's attorneys also noted that the seller was indebted to the franchisor in an amount of some R 5,9 million. In view of these circumstances the seller had resolved not to oppose the application for perfection of the notarial bond.

[11] On 7 June 2010 the seller, pursuant to clauses 25 and 28 of the franchise agreement, offered in writing to sell to the franchisor 50 per cent of the shareholding in the franchisee company at the price and on the applicable terms set out in the sale of shares agreement. In order to ensure that the time for the exercise of the pre-emptive right coincided with the time period stipulated in the notice of termination of the franchise agreement, the latter period was extended to 6 July 2010 so that both periods would expire on the same day.

[12] The purchaser questioned the decision made by the seller not to oppose the perfection application. It accordingly sought leave to intervene in the application to perfect the notarial bond and oppose that relief. The application was argued and judgment reserved on 10 August 2010. This led to the amendment of the franchise agreement on 5 July 2010 by the conclusion of an addendum reading as follows:

'1. The parties hereby amend the provisions of clause 28 of the Franchise Agreement read together with clause 25 in that period of 30 days referred to in clause 25.1.2.2 is interrupted from Thursday, 10 June 2010 until such time as the High Court of South Africa, South Eastern Cape Local Division delivers its judgment in respect of the urgent application which was argued on Thursday, 10 June 2010. Once the judgment is delivered and from the date of that judgment, the unexpired portion of the 30 day period will resume.

2. The parties also, for the same reason and period dealt with in paragraph 1 above, hereby amend clause 5 of the Franchise Agreement and more specifically the one month's written notice period referred to in that clause so that the one month's notice period is interrupted from 10 June 2010 until such time as the judgment is delivered in respect of the urgent application. Once judgment is delivered and from the date of that judgment, the unexpired portion of the one month's notice period will resume.'

[13] The addendum was brought to the attention of the purchaser shortly thereafter. It led to the purchaser's response on 8 July 2010 that it provided further evidence of the seller's deliberate frustration of the fulfilment of the condition precedent. The purchaser thereupon waived all the conditions precedent set out in clause 4 of the sale of shares agreement and insisted on transfer of the shareholding purchased against payment of the purchase price. The seller did not comply with this demand but stated on 12 July 2010 that it would do so only on the lapsing of the time period provided for in the addendum or the franchisor's decision not to exercise its pre-emptive right.

[14] Against this background of correspondence, allegations and counter-allegations the purchaser launched an urgent application for both interim and final relief. In view of certain undertakings given by the seller and the franchisee company, only the application for final relief was dealt with by the court below. Eksteen J granted the order sought and ordered the seller and the franchisee company to deliver 50 per cent of the shareholding in the franchisee company to the purchaser against payment of the purchase price. This appeal is with his leave.

[15] The case is therefore a somewhat unconventional one. It is not the usual dispute where the holder of the pre-emptive right after exercising the right claims specific performance or delivery of the merx and the purchaser asserts a competing right to delivery. Rather, the holder of the pre-emptive right, in this case the franchisor, seeks to enforce a contractual entitlement to an extended period to consider exercising its pre-

emptive right while the purchaser pursues a contractual right to specific performance, that is for delivery of the merx sold. The franchisor's right of pre-emption was provided by the franchise agreement concluded in 2004 but was only 'triggered' when the seller made an offer to the franchisor on 7 June 2010 expiring on 6 July 2010.[1] The sale of shares agreement was concluded on 22 April 2010. The franchisor did not accept the offer made by the seller within the period of 30 days for which the franchise agreement provided. Instead it relied on an extended period provided for by the addendum concluded on 5 July 2010. The sale of shares agreement predated the addendum that extended the franchisor's right of pre-emption. The only question argued before this court and the court below was whether the extended right should be given preference. The matter was argued within these narrow limits and, more specifically, on the question whether a new right of pre-emption came about as a result of the conclusion of the addendum. That the conditions precedent had been validly waived was not in dispute on the papers, nor was any argument directed at any equitable considerations that may have been relevant or at the appropriateness of an order for specific performance.

[16] Eksteen J accepted that the purchaser was unaware of the restraint imposed by the franchise agreement on the seller. He also accepted that on becoming aware of the sale, the franchisor insisted on holding the seller to its obligations in terms of the franchise agreement. He dealt with the argument on behalf of both the franchisor and the seller that the conclusion of the addendum pursuant to clause 43.3 of the franchise agreement[2] did not create a new contract or new personal rights as follows:

'[45] This may be so, however, the rights to a longer period than 30 days was not stipulated … in the Franchise Agreement as at the date when the Sale of Shares Agreement was concluded. It was not a

1 It is thus not necessary to inquire into the events that would 'trigger' a right of pre-emption. See Tjakie Naudé 'The Rights and Remedies of the Holder of a Right of First Refusal or Preferential Right to Contract' (2004) 121 *SALJ* 636 at 646 ff and Jan Lotz 'Purchase and Sale' in Reinhard Zimmermann and Daniel Visser *Southern Cross Civil Law and Common Law in South Africa* (1996) 361 at p 384-7.

2 Clause 43.3 provides: 'Subject to the express provisions of this agreement to the contrary, no amendment or consensual cancellation of this agreement or of any provision or term thereof, and no settlement of any disputes arising under or pursuant to this agreement, and no extension of time, waiver or relaxation or suspension of any of the provisions or terms of this agreement, shall be binding unless recorded in a written document signed by the franchisor, the financier and the franchisee. Any such extension, waiver, relaxation or suspension which is so given or made shall be strictly construed as relating strictly to the manner in respect whereof it was made or given.'

right which [the franchisor] could unilaterally extend nor could it claim specific performance in a court of anything more than 30 days as a *spatium deliberandi*. It required of the [seller] to confer that extended period on the [franchisor] by reciprocal agreement in writing. Without such further agreement its rights remained circumscribed. The *spatium deliberandi* to which it was entitled was 30 days.

[46] The benefit to keep the right of pre-emption open beyond a period of 30 days accordingly did not pre-exist the rights which accrued to the applicant under the Sale of Shares Agreement which rights would become unassailable in the event of the [franchisor] not exercising his right of pre-emption in accordance with the then existing rights.

[47] The entitlement to keep the right of pre-emption in existence beyond 30 days had accordingly, in my view, not vested at the time when the Sale of Shares Agreement was concluded on 22 April 2010 and accordingly, on the application of the rule *qui prior est tempore potior est iure* the rights acquired by the [purchaser] are of greater force than those subsequently acquired by the [franchisor] in respect of the extended period.'

[17] Generally a party to a contract is entitled to enforce it *in forma specifica*.[3] When faced with two competing claims for the same performance the position is more complex. Christie has outlined the approach followed by the courts in resolving such a dispute:[4]

'The courts' initial response was to hold that because neither B nor C [the two competing claimants] had a better right than the other, specific performance would not be granted to either, or would be granted only with an alternative of damages. This could hardly be regarded as satisfactory, because it left the choice to A [the grantor of the right of pre-emption] who had caused all the trouble, whether by foolishness or bad faith. In *Thomas v Robertson* (1907) 24 SC 404 there can be traced the beginning of a principle that the maxim *qui prior est tempore potior est iure* ought to be applied and specific performance be granted to B. This principle has been developed and accepted in a line of cases. Another principle, apparently conflicting, was applied in *Hofgaard v Registrar of Mining Rights, Stephenson and D'Elboux* 1908 TS 650, namely that specific performance should be granted to the one who can show a balance of equities in his favour. This principle also found favour. A satisfactory synthesis of these principles was achieved by

3 *Farmer's Co-operative Society (Reg) v Berry* 1912 AD 343 at 350 and see *Benson v SA Mutual Life Assurance Society* 1986 (1) SA 776 (A) at 782F-783C.
4 RH Christie assisted by Victoria McFarlane *The Law of Contract in South Africa* 5 ed (2006) p 525-6. See also Schalk van der Merwe, L F van Huyssteen, M F B Reinecke and GF Lubbe *Contract General Principles* 3 ed (2007) p 383 ff. See *Van der Merwe v Scheepers & others and the Coligny Village Council* 1946 TPD 147 at 153; *Croatia Meat CC v Millennium Properties (Pty) Ltd (Sofkleous Intervening); Sofokleous v Millennium Properties (Pty) Ltd & another* 1998 (4) SA 980 (W) at 988E-F; *Barnard v Thelander* 1977 (3) SA 932 (C) at 936 ff; *Botes v Botes & 'n ander* 1964 (1) SA 623 (O) at 626 ff; *Krauze v Van Wyk & andere* 1986 (1) SA 158 (A) at 171G-172E and 173I-J; *Ingledew v Theodosiou* 2006 (5) SA 462 (W) paras 55 ff.

Broome JP in *Le Roux v Odendaal* 1954 4 SA 432 (N), and it can now be taken as settled law that the possessor of the earlier right is entitled to specific performance unless the other can show a balance of equities in his favour, and that no distinction is drawn between rights arising from an option or right of pre-emption and rights arising from a sale.

The same approach of granting specific performance to the possessor of the prior right unless equities point the other way is applicable to any situation where there are competing claims for specific performance.'

[18] This approach has often been criticised, not only because of the inapplicability of the maxim to competing personal rights,[5] but also because 'the maxim merely expresses a result without providing any theoretical foundation for it. The nature of the preference derived from chronological priority, in particular, is obscure.'[6] However, as I have said, this appeal is limited to a very narrow inquiry, that is whether the extended right flowing from the addendum should be preferred to the purchaser's right to claim specific performance in terms of the maxim. The equities of the matter have not been debated, nor the applicability of the maxim called in question.

[19] Generally, the grantor of a right of pre-emption is obliged, before selling the property, to offer it to the holder of the right of pre-emption upon the terms reflected in the contract creating that right.[7] The franchisor, in this matter, was afforded a right of pre-emption in respect of the shares and claims of each shareholder in and against the franchisee company by clause 28 of the franchise agreement. The manner in which this right of pre-emption had to be exercised was set out in clause 25 which required the shareholders of the franchisee company to deliver a written notice to the franchisor offering to sell the shares and claims. The offer was open for acceptance by the franchisor for a period of 30 days. The seller made the offer to the franchisor on 7 June 2010. The franchisor, on the basis of the maxim *qui prior est tempore potior est iur*e, would have been entitled to delivery of the merx on exercising its right of pre-emption and would have been able to obtain an interdict against the seller before such

5 Naudé above at p 650 ff and Reinhard Zimmermann 'Good Faith and Equity' in Reinhard Zimmermann and Daniel Visser (eds) *Southern Cross Civil Law and Common Law in South Africa* (1996) 217 at p 237.
6 G F Lubbe 'Law of Purchase and Sale' 1986 *Annual Survey of South African Law* 141 at p 146-7.
7 *Owsianick v African Consolidated Theatres (Pty) Ltd* 1967 (3) SA 310 (A) 316D-E per Ogilvie Thompson JA; *Soteriou v Retco Poyntons (Pty) Ltd* 1985 (2) SA 922 (A) at 932B-D.

time to prevent transfer of the shares sold.[8] This, however, was not what occurred. It did not exercise its right of pre-emption and, instead, concluded the addendum with the seller, extending the period in which to accept the offer made to it pursuant to its right of pre-emption.

[20] The franchisor placed some reliance on clause 43.3 of the franchise agreement which contains a non-variation clause frequently encountered in commercial contracts. It is not clear how this clause assists the franchisor. There is no 'right' to vary the franchise agreement. Clause 43.3 does not grant any 'right' to extend the 30 day period provided for the exercise of the right of pre-emption. The franchisor had no such right. Any extension of the period for the exercise of the right of pre-emption had to be agreed upon in writing. This the parties did only when the addendum was concluded.

[21] It was also submitted that no new right was created when the addendum was entered into. The addendum, so the argument went, did not amount to a new agreement nor did it create new contractual rights after the conclusion of the sale of shares agreement. The rights flowing from the franchise agreement, it was suggested, continued to exist but were extended when the addendum was concluded. I am not persuaded by this contention. The addendum entailed the variation of the provision specifying the period within which the right could be exercised. The enforcement of the pre-emptive right was accordingly dependent on the new agreement. The ability to enforce it flows from the subsequent agreement giving rise to the addendum. But for that agreement the pre-emptive right would have lapsed after expiry of the 30 day period. It matters not that the addendum was concluded before the 30 day period had lapsed: whether concluded before or after the expiry of that period a new agreement varying the content of the pre-emptive right by extending the period for its enforcement was reached. This new agreement was concluded after the sale of shares agreement was entered into.[9] The franchisor did not exercise this right of pre-emption within the original 30 day period. It could have done so but did not. On a strict application of the *qui prior est tempore potior est iure* rule the rights of the purchaser should therefore be

8 *Longhorn Group (Pty) Ltd v The Fedics Group (Pty) Ltd & another* 1995 (3) SA 836 (W).
9 *Gauteng MEC for Health v 3P Consulting (Pty) Ltd* (199/10) [2010] ZASCA 156 para 25 relied upon by the appellants is based on an entirely different set of facts and is no authority for the proposition that the addendum merely prolonged the pre-emptive right.

preferred.

[22] By way of analogy the appellants relied on two decisions[10] as authority for the proposition that the old agreement remains in force and effect where one of the parties (or both) elects not to enforce a right to cancellation or elects to accept late performance. I fail to understand how these decisions assist the appellants. Both cases essentially concern waiver. The addendum is expressly stated to be an amendment of the franchise agreement and not a waiver of any of its terms. It is correct that where an agreement has been cancelled on account of the breach of one party the other may waive reliance on such cancellation. It is also correct that a party to an agreement may accept late performance. None of this assists the franchisor or detracts from the conclusion that the addendum gave rise to an entitlement that did not exist before the addendum was concluded. It follows that I am in agreement with the conclusion of Eksteen J that the right acquired by the purchaser became 'unassailable in the event of the [franchisor] not exercising his right of pre-emption in accordance with the then existing rights.'

[23] In the result the appeal is dismissed with costs.

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F R MALAN
JUDGE OF APPEAL

APPEARANCES:

10 *Neethling v Klopper & andere* 1967 (4) SA 459 (A) at 466C-H and *Manna v Lotter & another* 2007 (4) SA 315 (C) para 26.

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