IN THE HIGH COURT OF SOUTH AFRICA
(Cape of Good Hope Provincial Division)

REPORTABLE
Case No. 9462/02

In the matter between:

BELLVILLE APTEEK BK	**First Applicant**
THE PHARMACEUTICAL SOCIETY OF SOUTH AFRICA	**Second Applicant**

and

T NORTJÉ (PTY) LIMITED	**First Respondent**
NORTJÉ TOBIAS GERHARDUS	**Second Respondent**
THE SOUTH AFRICAN PHARMACY COUNCIL	**Third Respondent**
PICK 'n PAY PHARMACEUTICAL WHOLESALERS (PTY) LTD	**Fourth Respondent**

JUDGMENT DELIVERED ON 13 MARCH 2003

DAVIS J,

Introduction:

First applicant is a pharmacy trading in Bellville. Second applicant is an unincorporated national association of pharmacists which interests itself in combating commercial permeation of the industry. Applicants contend that first and second respondents have conducted a pharmacy business in contravention of the provisions of the Pharmacy Act 53 of 1974 ('the Act') and regulations which have been promulgated pursuant thereto.

Applicants seek a final interdict against first and second respondents to prevent

them from operating a pharmacy which trades using a trading name and signage which indicates that it is associated with the 'Pick 'n Pay' retail group and from allowing the Pick 'n Pay group to hold any interest in the business of the pharmacy or from exercising any control over the management and operation of the pharmacy.

Factual Background.

First and second respondents commenced trading on 27 November 2002 alongside the Parow Pick 'n Pay supermarket situated at the Pick 'n Pay family supermarket centre, Parow. A promotional leaflet which was distributed prior to the opening of the pharmacy provides an indication as to the nature of the business. The leaflet which is attached to respondents answering affidavit reads as follows: 'My name is Toby Nortjé, I'm the proud owner of the Parow family pharmacy which is the new franchise in Parow conveniently situated at the Pick 'n Pay family supermarket centre in Parow and supported by HealthPharm the new concept in pharmacy franchising. My family, staff and I pledge to deliver our professional and caring service to you and your family at all times. We are privileged to be supported by the Pick 'n Pay franchise family's reputation for buying, marketing and information technology.'

It appears that the Parow family pharmacy was the fifth HealthPharm franchisee to open its doors. The other four franchisees operate in Gauteng, the first of which began conducting business in September 2001.

First respondent's pharmacy was registered as a pharmacy in the category 'community pharmacy' on 1 November 2001. On the same day the trading title of first respondent was registered as 'Parow Family Pharmacy'.

Applicants contend that the franchise agreement and the contents of the franchise manuals to which first and second respondents are required to adhere

gives rise to a regime that contravenes the provisions of the Act, the Rules and the Regulations made pursuant to the Act. In particular, applicants contend that first and second respondents have granted to the Pick 'n Pay retail group:

1) An improper interest in the business of the retail pharmacy conducted by the first and second respondents and an improper interest in the shares of the first respondent.

2) An impermissible degree of administrative or managerial control over the retail pharmacy business.

3) The regime has also imposed upon the first and second respondents an obligation to utilise a trading title which has not been authorised by third respondent.

Standing.

Before dealing with the substantive questions raised by applicant, the question of applicants' standing must be considered. Mr Gauntlett, who appeared together with Ms Fichardt on behalf of first and second respondents, contended that the applicants were required to show a direct and substantial interest in the subject matter of the litigation and that an indirect commercial interest alone could not suffice. What was required was 'an interest in the right which is the subject matter of the litigation and…not merely a financial interest which is only an indirect interest in such litigation'. See **Henri Viljoen (Pty) Ltd v Awerbuch Brothers** 1953(2) SA 151 (O) at 169 H –170 H.

In its founding affidavit, first applicant avers that it has a real and substantial interest in ensuring that there is adherence to the legal requirements for the carrying on of the practice of a pharmacy.

Mr Gauntlett submitted that merely to allege a contravention of the provisions of the Act and Regulations does not **per se** confer **locus standi** upon applicants' for the relief sought. To the extent that first applicant contended that its goodwill had been infringed and that it stood to suffer financial loss as a result of the establishment of the business of first and second respondent, no facts were provided in its papers in general and in the founding affidavit in particular to substantiate this contention. In particular, Mr Gauntlett referred to the uncontested fact that there were no less than eleven pharmacies doing business on the main route between the first applicant's business and that of the first respondent. In addition there were approximately ninety five pharmacies trading within a ten kilometre radius of the first applicant. No evidence was supplied to show why or how first applicant stood to suffer in any way as a causal result of the trade practices of the Parow Family Pharmacy. Nor in Mr Gauntlett's view, was it possible to draw any adverse inference against respondents.

In summary, Mr Gauntlett contended there was no basis by which it could be accepted that first applicant, as opposed to any of the other 106 pharmacies in the area, would be adversely affected by the business operation of first and second respondents.

Mr Gauntlett also questioned the **locus standi** of second applicant. Second applicant was not a trading entity but a voluntary association operating as a

national and not a local body which had no interests surpassing those of its members. It had neither demonstrated that any right which it held had been infringed in any way nor that it was likely to suffer loss of any nature.

In support of this submission Mr Gauntlett referred to the decision in **SA Optometric Association v Frames Distributors** 1985(3) SA 100(O) at 104 B – F in which **Lichtenberg J** said:

> 'Any individual member would obviously have the required direct and substantial interest in the subject matter of the present litigation and consequently in the outcome thereof because his profits from the sale of spectacle frames are detrimentally affected by the sale of such frames by respondent; but can the applicant – association be said to have anything more than at most an indirect interest in the subject – matter of this application? I think not. The fact that some of its members stand to lose the profits which they would make from the sale of spectacle frames if a non-optometrist like the respondent is not interdicted from selling such frames does not accord the applicant as a "non profit association, an association not for gain" the required legal interest in the sense set out above. Since its own interest in the subject matter of the present dispute is no more than an indirect one, and it is certainly not a direct financial interest at all. Applicants "interest" in what happens to the profits of its members can, at best, be merely an indirect interest'.

Mr Gauntlett also submitted that second applicant was not properly before the court, because in the affidavit deposed to on its behalf by Mr Kotze, it had not been shown that Kotze had been properly authorised to institute the application on behalf of second applicant. The resolution which purportedly authorised Kotze to act read as follows: Franchisees in Pharmacy – Agreed with process on Pick 'n Pay franchise – Parow. The committee agreed to the legal process of an interdict against the operation of this franchise'.

This resolution patently did not authorise Kotze to act on behalf of second applicant in instituting the present application. The constitution of second applicant did not grant Kotze more powers than those expressly accorded to him. Mr Gauntlett thus submitted that there was no authority accorded to Kotze to depose to an affidavit on behalf of second applicant and hence the latter was therefore not properly before the court. See in particular **Griffiths & Inglis (Pty) Ltd v Southern Cape Blasters (Pty) Ltd** 1972(4) SA 249 (C) at 252 D – E.

Mr Dickerson, who appeared together with Mr Leach on behalf of applicants, submitted that first applicant was entitled to the relief sought in that it relied on a breach of legislation which had been enacted for the benefit of a class of persons of whom first applicant was a member. In this connection Mr Dickerson referred to a **dictum** of **Harms AJ A** (as he then was) in **Reckitt and Coleman SA (Pty) Ltd v SC Johnson and Son SA (Pty) Ltd** 1993 (2) SA 307 (A) at 321 B – C namely, 'It has long been accepted that this Act was not only an Act for the protection of the general public but also of merchants and manufacturers. A merchant or manufacturer may have **locus standi** to prevent a contravention in

accordance with the principles laid down in the **Roodepoort – Maraisburg Town Council v Eastern Properties (Prop) Ltd….**'where the Legislature prohibits the doing of an act in the interest of any person or class of persons, such person or any one of such class can obtain the intervention of the Court to enforce the prohibition without proof of special damage'.

Regarding the **locus standi** of second applicant, Mr Dickerson referred to the judgment in **Transvaal Canoe Union and Another v Butgereit and Another** 1986 (4) SA 207 (T). In that case the Transvaal Canoe Union was held to have **locus standi** to apply for an interdict to restrain respondent from interfering with the rights of its members to canoe on the Crocodile River on the basis that it had an interest of its own to protect, being that amongst its functions was the organising, controlling and administering of canoeing on this stretch of the Crocodile River.

Mr Dickerson also referred to clause 4 of the constitution of second applicant which contained its objects. In his view, these objects were similar to those of the Transvaal Canoe Union (see **Transvaal Canoe Union**, supra at 209 B-D). The objects of second applicant are set out in clause 4 of its Constitution thus:

'4.1 to promote the professional, educational and economic interests of the members of the Society and of the pharmaceutical profession.

4.2 to uphold and improve the professional integrity and standards of

professional conduct of the members of the Society,

4.3 to bind members of the Society to professional conduct,

4.4 to improve, promote and maintain the image of the profession,

4.5 to represent generally the views and interests of the members on all pharmaceutical matters, including representing the members in dealings with government and other similar agencies,

4.6 to uphold and assist in the promotion and maintenance of the health of the people of South Africa through the provision of a satisfactory and dependable pharmaceutical service,

4.7 to provide and promote benefits to its members and to do all such things as may advance the interests of its members; and

4.8 in recognising the diversity of the population of the Republic of South Africa, to promote the representation of all sectors of the South African community in its membership.

In my view, there is considerable merit in first and second respondents attack on the **locus standi** of both applicants. The high water mark of first applicant's claim that it will suffer direct financial harm as a result of the conduct of first and second respondents' business is set out in the founding affidavit of Mr Ackermann thus:

'36.1 This harm will arise as a result of the loss of custom and therefore trade turnover from the business of the First Applicant to that of the First Respondent.

36.2 I have no doubt that the reputation and goodwill of the Pick ‘n Pay brand and trademark will attract attention and lure customers to that store.
36.3 This is especially so given the proximity of the First and Second Respondents to the Pick ‘n Pay supermarket as well as the fact that the first respondent will be able, through the advantages of Pick ‘n Pay’s buying power, to offer lower prices than First Applicant can offer and against which the First Applicant cannot compete.
37 The damage and damages that fall to be suffered as a result of the conduct are almost impossible to assess. With regard to the financial losses that First Applicant is suffering, it is again virtually impossible to quantify with any procision these losses and therefore impossible to recover compensation for same in a subsequent damages action.’
Needless to say first respondent denied these allegations and pointed to the fact that many of the 100 pharmacies in the immediate 10 kilometre vicinity of the Parow Family Pharmacy, utilise brand names in the same manner as first respondent.

In a replying affidavit, Mr Ackermann on behalf of first applicant, denied that it would not suffer loss. He then stated ‘I have been advised that even if, notionally, one of First Applicant’s customers might move its custom from the First Applicant to the Second Respondent then the First Applicant enjoys sufficient interest’.

The replying affidavit was signed on 20 January 2003, almost two months after first respondent had commenced business. As Mr Gauntlett correctly observed, if there had been a tangible loss to first applicant during the first two months of trading, it could have been expected that some evidential basis for first applicant’s contentions would have been included in the replying affidavit. By contrast, the replying affidavit continues to employ bland, generalised statements which did not provide any evidential support for its assertion that it would suffer direct financial harm as a result of the trading of first respondent.

The basis of second applicant’s case turns on the argument that the interests which second applicant seeks to protect, being the promotion of responsible, accountable and ethical standards in the pharmacy profession were not being employed by first and second respondents. Thus Mr Kotze states in his affidavit ‘To that extent the second applicant has served as a watchdog of the interests of the members of the public in seeing to it that improper, unethical and illegal practices within the profession are stopped.’

In my view, the approach adopted by **Lichtenburg J** in SA **Optometric Association v Frames Distributors, supra** at 104 B-D reflects the correct

approach to the standing of voluntary associations in the position of second applicant. To recapitulate on what **Lichtenburg J** said, 'The fact that some of its members stand to lose the profits which they would make from the sale of spectacle frames if a non-optometrist like the respondent is not interdicted from selling such frames does not accord the applicant, as a 'non-profit association, an association not for gain' the required legal interest in the sense set out above since its own interest in the subject matter of the present dispute is no more than an indirect one, and it is certainly not a direct financial interest at all.' This approach finds support in a decision of a full bench of this Division in **Ahmadiyya AIIL v Muslim Judicial Council** 1983(4) SA 850 (C) at 864 B-F. See also **Natal Fresh Produce Growers' Association v Agroserve (Pty) Ltd** 1990 (4) SA 749 (N) at 759 B-D.

The constitutional extension of **locus standi** was also raised by applicants. Admittedly, within the constitutional context the position regarding **locus standi** has changed. **Kruger AJ in Highveldridge Residents Concerned Party v Highveldridge TLC** 2002(6) SA 66 (T) at para. 24 has summarised the position thus: 'Bearing in mind the expanded standing provided for by s 38 and the way in which the latter has been explained implemented in previous judgments, I am of the view that the restrictions placed by the common law and the legal standing of voluntary associations cannot and should not apply without qualification to voluntary associations seeking to invoke s 38 to seek redress, in the event of

rights in the Bill of Rights having allegedly been infringed or threatened. To restrict voluntary association in the way they are restricted by way of the common-law requirements, particularly when rights enshrined in Bill of Rights are at stake, would be incompatible with various principles contained in, and which by necessary implication underpin the Constitution'.

In the present dispute, however, there is no suggestion that any constitutional rights of applicants have been breached. Furthermore there is nothing in the objects of second applicant which place it in the same position as the Transvaal Canoe Union, which association had been established, **inter alia**, with the express purpose of fostering and organising the sport of amateur canoeing in, the very river area which was the location of the dispute. See **Transvaal Canoe Union, supra** at 209 G. For the purpose of this judgment, however, I will assume that both applicants have the necessary **locus standi,** notwithstanding the powerful counter pointers to which I have already made reference. I shall also assume that Mr Kotze (in the light of the further affidavit of Mr Stoltz) was duly authorised to depose to an affidavit on behalf of second applicant.

Applicants' Case.

In order to analyse applicants case, it is necessary to refer to certain key provisions of the Act and the Regulations promulgated under the Act. In terms of section 22(1) of the Act 'Notwithstanding anything to the contrary contained in

this Act, a body corporate (other than a corporation) may carry on business in the Republic as a pharmacist on the following conditions but not otherwise –

a) the body corporate shall have as the managing director of its business in the Republic, a pharmacist who resides in the Republic and who is not so as provided in sub-section (4) engaged in the business of a pharmacist which does not belong to the said body corporate either alone or in partnership with another person…..

c) a body corporate shall not carry on business as a pharmacist unless it holds a valid certificate…. of its registration and the registration of its managing director and unless the person registered as managing director in fact manages the business of the body corporate and complies with the requirements set out in paragraph (a) in respect of such managing director…

d) every pharmacy in which such body corporate carries on business shall be conducted under the continuous personal supervision of a pharmacist whose name shall be displayed conspicuously over the main entrance of such pharmacy.'

Section 22 A provides that no body corporate other than a body corporate which complies with the provisions of section 22(6) or 22 B)(1)(f) shall open, purchase or otherwise acquire a pharmacy in which the business of a pharmacy is carried on, or acquire any share in such pharmacy.

S 22(6)(b)(i) stipulates **inter alia,** that in respect of a company registered as a pharmacist with third respondent only natural persons who are pharmacists may

hold the shares of such company or have an interest in such shares.

In terms of paragraph 3 of the Regulations relating to the Practice of Pharmacy (GNR 1158 – 20 November 2000)('the Practice Regulations') the following acts shall be regarded as acts specially pertaining to the profession of the pharmacist:

1) The provision of pharmaceutical care by taking responsibility for the patient's medicine related needs and being accountable for meeting these needs, which shall include but not be limited to the following functions:

   a) evaluation of a patient's medicine related needs by determining the indication, safety and effectiveness of the therapy;

   b) dispensing of any medicine or scheduled substance on the prescription of a person authorised to prescribe medicine;

   c) furnishing of information and advice to any person with regard to the use of medicine;

   d) determining patient compliance with the therapy and follow up to ensure that the patient's medicine related needs are being met; and

   e) the provision of pharmacist initiated therapy;

(2) the compounding, manipulation, preparation or packaging of any medicine or scheduled substance or the supervision thereof;

(3) the manufacturing of any medicine or scheduled substance or the supervision thereof;

(4) the purchasing, acquiring, importing, keeping, possessing, using, releasing, storage, packaging, repackaging, supplying or selling of any medicine or scheduled substance or the supervision thereof; and

(5) the application for the registration of a medicine in accordance with the Medicines Act.

Paragraph 25(1) of the Practice Regulations provide that the managing director

of a company or the manager of a close corporation entitled to carry on the business of a pharmacist must –

(1) undertake the overall administration of the pharmacy business, which includes but does not limit it to the regulation of pharmacy matters, human resources, or matters relating to processes regarding medicines or scheduled substances including procedures and record keeping and shall be responsible to council for any act performed by or on behalf of such company or close corporation, including any omission to perform an act required to be performed by or on behalf of such owner which may involve disciplinary action by council, unless he or she can satisfy council that the responsibility for such act rests upon the nominee, responsible pharmacist or a pharmacist other than him -, or a self employed by such company or close corporation.

In terms of Rules relating to Acts or Omissions in respect of which the Council may take Disciplinary Steps (GNR 599 – 31 March 1989 ('the Rules') a number of acts or omission are deemed to be unethical or unprofessional conduct, subject to the disciplinary steps of third respondent, including adopting and using a trading title for a retail pharmacy without the prior written approval of third respondent (para 20) 'the use by a retail pharmacy as its trading title or as part of such title of the name of any other company, firm or business or any words indicating or suggesting that the pharmacy is associated with, belongs to or is in any way connected with such other company, firm or business, unless such other company, firm or business is registered with the Council as the owner or part owner of the pharmacy….' (para 21).

To return to applicants case and the three key issues which require analysis, being the use of a trading title, the grant of an interest in a pharmacy and the exercise of control.

1. Use of trading title.

Applicants contend that first and second respondents use the word HealthPharm which indicates that the business is associated with the Pick 'n Pay group. Signage employed includes the words 'HealthPharm', 'Family Value Pharmacy', 'professional health care from the people who care', 'a member of the Pick 'n Pay franchise family' It also includes the HealthPharm logo and the Pick 'n Pay trade mark. The signage containing the name of the first or second respondents and

Parow Family Pharmacy is to be found on a small notice above the entrance to the premises.

Mr Dickerson submitted that the word 'trade name' is defined in the **Concise Oxford Dictionary** to include the name under which a business trades. Accordingly, it was clear from photographs which had been attached to the founding affidavit that first respondent was trading under the name of HealthPharm, being the most prominent title under which the pharmacy conducted its business. Mr Dickerson conceded that first respondent may have employed another title, being Parow Family Pharmacy but it also held itself out as trading under the name of HealthPharm.

The manner in which the first and second respondent utilised the HealthPharm branding made it clear that the manner of usage established the branding as the trade name or trading title of the business. For these reasons, Mr Dickerson submitted that the use of the HealthPharm trade mark and associated branding amounted to the use of a trading title for which authorisation had not been given by third respondent.

2. The grant of an interest in the pharmacy and/or its share as to Pick 'n Pay.

Applicants submitted that the franchise agreement entered into between Pick 'n Pay and first and second respondent conferred upon the franchisor, Pick 'n Pay Retailers (Pty) Ltd, an interest in the shares of first respondent as well as an interest in the retail pharmacy business operated by first and second respondents. To this extent therefore, first and second respondents had acted contrary to both the Act and the Regulations.

In this connection Mr Dickerson referred to clause 23(2) of the franchise agreement which provides: ‘At all time subsequent to the first (annual) anniversary of the opening date, no shareholder or the franchisee shall sell or otherwise dispose of or transfer (including by way of donation) his/her (or any of his/her) shares in and/or claims against the franchisee unless –
23.2.1 the contemplated acquireror complies with and satisfies all applicable provisions and requirements of the pharmaceutical legislation; and
23.2.2. the contemplated acquireror thereof is reasonably acceptable to the franchisor and has been approved by the franchisor in writing; and
23.2.3 the franchisor’s position or risk (or potential risk) will not be significantly prejudiced or increased, as the case may be, by such contemplated disposal transfer; and
23.2.4 the franchisor has approved such disposal or transfer in writing, which approval such not be unreasonably withheld'.

Mr Dickerson also referred to the manner in which the franchise agreement had made provision for a number of methods whereby the Pick ‘n Pay group could protect and enhance the goodwill attaching to the intellectual property by directly intervening and dictating the business of the retail pharmacy. For example clause 14.2 of the Franchise Agreement provided that ‘in order to protect, and to be able to protect, the intellectual property, the franchisor (including its duly authorised professional advisers and employees and/or its duly authorised agents, representatives and/or nominees) shall, for the purposes of this agreement be entitled to –
14.2.1 determine the distinctive brand and style that should be used by the franchisee in the conducting of the business including without limitation, the décor of the premises…..the fixture and fittings, the manner, form and style of advertising and promotions by the franchisee, the style of (and requirements in respect of) the franchisee’s delivery vehicles (if any) the style of stationery, invoices and documentation used by the franchisee in the conducting of the business and the uniforms worn by the franchisee staff’.

Clause 15.5 obligated the franchisee ‘to operate and conduct the retail pharmacy business –
15.5.1.1. strictly in accordance with the provisions of the relevant title deeds or lease agreement or sub-lease agreement as the case may be, from which the franchisee derives its entitlement to possess the premises;
15.5.1.2 so as not to harm or prejudice the franchisor’s right, title, interest and goodwill to, in or derived from the intellectual property;
15.5.1.3 in a business-like and proficient manner and ensure that the retail pharmacy business at all times protects a good and competitive image;
15.5.1.4 strictly in accordance with pharmacy legislation.

In terms of clause 15.6.2, the franchisee's obligations include the display of the brand and the HealthPharm signage on or at the premises (both exterior and interior) and use its best endeavours to display the brand and the Health Pharm signage in the most appropriate and prominent places on or at the premises or as otherwise reasonably directed by the franchisor.

Clause 15.7.1 provides that 'subject to any legal constraint to the contrary, (the franchisee shall) stock such range of non pharmaceutical products in or on the premises as the franchisor may, in its reasonable discretion, direct from time to time'. In terms of 15.7.2, the franchisee must consider the mix and suggested range of pharmaceutical products recommended by the franchisor.

On the basis of these provisions, Mr Dickerson submitted that a legal relationship has been established in terms of both the franchise agreement and the supply agreement by which first and second respondents had unlawfully granted to the fourth respondent and to Pick 'n Pay Retailers (Pty) Ltd an interest in the business of a retail pharmacy which was impermissible in terms of the Act and the Regulations.

The Exercise of Management and Administrative Control vested in Pick 'n Pay:

The franchise agreement obliged first and second respondent to commence operating the pharmacy business on a date specified in the franchise agreement but only once the franchisor was satisfied that first and second respondents and their employees have 'satisfactorily undergone such training with the franchisor… as the franchisor may reasonably determine (clause 15.4.2.1). In terms of clause 15.4.2.2 first and second respondents are obliged to operate and conduct the business 'strictly in accordance with the provisions of .....the agreement, the HealthPharm system, the franchise manuals and the methods, system and standard procedures determined and directed by the franchisor, in its reasonable discretion, from time to time and further in accordance with any other written or

oral directives given by the franchisor, in its reasonable discretion, to the franchisee from time to time'.

In addition the franchise manual sets out a comprehensive set of requirements for dispensing procedures, reporting and stock procedures and staff relations.

In particular, Mr Dickerson referred to the section of the franchise manual dealing with dispensing procedures in which **inter alia** the following guidelines are set out: 'Make a study of the ingredients, especially of the (over the counter) drugs. There are many medicines that contain exactly the same active ingredients and are equally as effective e.g. actophlem and solthylex. Most of the time the price difference is almost negligible. The generic often carries a better mark-up'.

Mr Dickerson submitted that the regulatory regime set out in the manual and as the franchise agreement provided a clear evidential basis for applicants' case, namely that the first and second respondents had unlawfully and in contravention of the provisions of the Act and Regulations surrendered administrative control and management in and in respect of the pharmacy to fourth respondent and/or to members of the Pick 'n Pay group.

In support of these submissions Mr Dickerson referred to the decision in **J Pintusewitz (Pty) Ltd v South African Pharmacy Council** 1994(2) SA 68(C) at

76 I in which **Berman J** said '[t]his franchise agreement deprived applicant of a free and unfettered right to conduct its proposed business on an independent basis and Mr Pintusewitz of the effective use of the powers of a managing director to manage every part of applicant's business other than that relating exclusively to its purely pharmaceutical aspect. In fact, Mr Pintusewitz' role in the proposed pharmacy, in the light of the franchise agreement, is comparable to that of a **locum tenens** in a pharmacy, where the qualified pharmacist is absent through illness or is away on holiday and where the substitute pharmacist is subject to constant supervision by the person or company which owns the pharmacy business'. Mr Dickerson contended that the court's approach to the franchise agreement in the Pintusewitz case, supra, was of clear application to the facts of the present dispute and therefore should be followed.

Evaluation.

1. Whether First and Second Respondents are carrying on business using the words HealthPharm as the trading title for their retail pharmacy business?

In answering this part of applicants' case much of the argument turned on the meaning of the phrase 'trading title'. Rule 21 of the Rules relating to Acts or Omissions in respect of which the Council may take Disciplinary Steps (GNR 599: 31 March 1989) provides as follows:

'Use by a retail pharmacy as its trading title or as part of such title of the name of

any other company, firm or business or any words indicating or suggesting that the pharmacy is associated with, belongs to or is in any way connected with such other company, firm or business, unless such other company is registered with the Council as the owner or part owner of the pharmacy…..'

Mr Gauntlett submitted that 'title' (as opposed to a name or description) together with the use of the word 'trading' (denoting an action of commerce) referred to an identity under which the pharmacy was known in its particular industry. In this context 'trading title' had a specific purpose of identifying the pharmacy as general commercial business and as distinguishing it from another pharmacy. For this reason a trading title had to be approved by third respondent to prevent, for example, acts such as duplication, passing off, confusion or the use of offensive words which purpose, in Mr Gauntlett's view, was congruent with the provisions of section 35 A (c) of the Act which afforded the third respondent a discretion to prove the name or title under which the pharmacy may be conducted. For this reason Mr Gauntlett contended that the use of 'trading title' should be contrasted with the use of a brand or other promotional device in connection with the business. A branding title sought to associate a particular pharmacy with the market by means of the creation and use of an image through a name or description with which the pharmacy in question and other pharmacies are associated.

It is common cause that first respondent sought approval from third respondent of ‘The Parow Family Pharmacy’ as its trading title. This title was duly registered. Notwithstanding this registration, applicants contend that the photographs which were attached to its papers reveal that the ‘HealthPharm’ branding is affixed to all the windows of the premises from where the pharmacy trades, including the shop front windows alongside and above the doors and upon the glass doors themselves. The signage bears the words ‘HealthPharm’, ‘Family Value Pharmacy’ “Health Care’ and includes the HealthPharm logo and the Pick ‘n Pay trade mark. Any signage containing the name of the first and second respondents or ‘Parow Family Pharmacy’ can be found to the right of the entrance to the premises.

According to applicants, to the extent that first respondent may also have another trade title whether registered with third respondent or not was irrelevant to the question of whether in fact first respondent holds itself out as trading under the name of HealthPharm. First and second respondents sought to draw a distinction between a trade name and branding, contending that the manner in which the first and second respondents utilised the HealthPharm branding made it clear that the usage thereof sought to indicate that the Parow Family Pharmacy associated with a particular brand of pharmacy.

In evaluating this dispute, it is important to emphasize that the matter was

brought on motion. This court must resolve the dispute by an analysis of the competing affidavit evidence presented to it. In terms of the papers placed before the court, first and second respondents contend that first respondent trades under the trading title 'Parow Family Pharmacy'. In support of this contention, first and second respondent produced a range of invoices to show that suppliers charged 'Mr Tobie Nortjé (Pty) Ltd Parow Family Pharmacy, P O Box 1200, Parow'. Not only was Parow Family Pharmacy identified by way of signage at the entrance but the promotional material which has been used expressly announced 'the opening of the new Parow Family Pharmacy at 09h00 on 27 November 2002'. In addition a further promotional leaflet contained the following in a prominent place: 'Parow Family Pharmacy always offers:

- Best Basket value
- unbeatable special offers….'

In the light of the manner in which this matter has been brought before this Court great care must be taken simply to examine one component of the signage employed at the shop front of the pharmacy and then conclude that no clear distinction can be drawn between the branding of the business as a 'Pick 'n Pay franchise' being part of the HealthPharm pharmacy brand and the trading name, Parow Family Pharmacy.

A considerable debate ensued as to the value of evidence presented by

respondents which revealed that in the ten kilometre radius within which both applicant and first respondents trade, a number of pharmacies were connected to 'The Link Good Health Pharmacy' brand.

In his answering affidavit, second respondent refers to an article of October 2002 in the **Journal of Modern Pharmacy** where Mr Clive Stanton, a member of the second applicant and the president of the retail pharmaceutical sector of second applicant is quoted thus, 'We realise that it is practically impossible for single pharmacies to remain competitive amidst the various corporate players in the market place. For this reason, AlphaPharm Retail afford the pharmacists the opportunity of maintaining ownership of their pharmacy, while benefiting from the group's strength in leveraging its many resources.'

At the last moment, literally as the doors of the court opened, applicants filed an application seeking to strike out the use of photographs of Link and other pharmacies associated with franchise operations as well as the reference to Mr Stanton's article. Applicants contended that these portions of the answering affidavit raised a whole host of collateral issues concerning the conduct of other pharmacies and were insufficiently relevant to the issues with which this dispute was concerned.

Mr Gauntlett submitted that the material sought to be struck out by applicants

was intended to be employed in the very limited context of an application of the doctrine of **subsecuta observatio.** In thie connection Du Plessis **Re-interpretation of Statutes** (2002) at 260 writes: 'There is a Latin saying dating back to classical Roman law that **optima enim ests legum interpres consuetudo** ('custom is the best interpreter of a law'). The courts have not been quite that optimistic about the value of custom as an aide to interpretation ('[c]ustom….does not dictate absolutely the construction of statutes'), but do insist that "where a statute may fairly be interpreted in either of two ways, custom may well be invoked to tip the balance". An appeal to custom has thus…. been held to be justified only where the language of a provision to be construed is ambiguous or obscure. Continuous practices which evolved in the course of applying an early enactment may also be relied on to construe its similarly worded successors and specially if the words on which that practice was founded are repeated in the later enactment.'

In my view, the evidence which has been put forward by respondents can be employed in this very limited purpose only, mainly to assist in the resolution of the contested distinction between a trade name and branding. If, as appears to be the case, there is clear evidence that other pharmacies utilise brands to promote their business with the knowledge of third respondent, it would appear to be a factor, albeit an extremely limited one, in favour of the interpretation for which first and second respondents contend.

In argument, Mr Dickerson conceded that applicants' case was not based on the contention that all forms of franchising of pharmacies were prohibited in terms of the Act and the Rules. Once that concession is made, the proposition that pharmacies cannot in principle employ a brand name to associate with other pharmacies' and thus boost their goodwill cannot be gainsaid.

With the limited assistance which can be gained by the invocation of the doctrine of **subsecuta observatio** coupled with the uncontested evidence of respondents, namely that the Parow Family Pharmacy is employed regularly as its trading name, that this name appears prominently on promotional leaflets and is the name with which contracts of supply are concluded, the argument that the provisions of Rule 20 or 21 have been contravened cannot be justified on the evidence presented to this court.

The Agreements with Pick 'n Pay.

Applicants contend that the agreements concluded between first and second respondents and the fourth respondent and Pick 'n Pay Retailers (Pty) Ltd constitute a contravention of section 22 of the Act in that first and second respondents have granted an interest in the business of the retail pharmacy and/ or in the shares of first respondent to fourth respondent or to another company within the Pick 'n Pay retail group.

Section 22 (1)(b)(iv) empowers third respondent to cancel the registration of the pharmacy if it 'disposes of the whole or any part of its interest in the retail pharmacy business…. to any person other than a pharmacist'.

Whatever the meaning of the phrase 'interest in the retail pharmacy business', the section only operates if there has been a disposal. As **Irving Steyn J** said in **Finger and Others v Secretary for Inland Revenue** 1971 (2) SA 411 at 418 H – 419 A 'As I see the matter, any "disposal" by a person of an asset belonging to him must normally result in his being divested of all his rights in and to such assets **simul ac semel** the "disposal" thereof, and clearly death is the most final and conclusive form in which any person can be divested of all things temporal.' See also **Estate De Jager v Whittaker and Another** 1944 AD 246 at 250-251 in which the court emphasised that the word 'disposal' must imply a divestment of rights of another person or entity, in other words some form of alienation of rights.

There is nothing in the evidence before this court to suggest that first and second respondents divested of a whole or part of an interest in the retail pharmacy business to another person. In other words, no disposal of an interest was effectd of a kind which would bring the contractual arrangements between first, second and fourth respondent within the scope of s 22(1)(b)(iv) of the Act.

Section 22(6)(b)(i) requires that only natural persons who are pharmacists may hold the shares of a company conducting the business of a retail pharmacy or 'have an interest in such shares'. Section 22(1)(b)(iv) empowers third respondent to cancel the registration of any person other than the pharmacist who 'acquires any shareholding' in a body corporate carrying on business as a retail pharmacy.

Applicant's case is based on clause 23 of the franchise agreement as well as the supply agreement in terms whereof second respondent is prohibited from selling its shares unless it complies with certain requirements so specified. An examination of both the supply agreement and Clause 23 of the franchise agreement reveals that no such transfer of shares to fourth respondent or any other entity within the Pick 'n Pay retail group is sanctioned by Clause 23. The clear intention of clause 23 is to ensure that no franchisee shall sell or otherwise dispose of his or her shares unless certain conditions are met. The supply agreement contains a similar set of conditions. In no way do these two documents justify applicants' argument. At best the franchisor may possess a veto power against a franchisee disposing of its shareholding.

The question may then arise as to whether a veto power of this nature constitutes an interest on the part of the franchisor in the shares of first

respondent. This argument is predicated on a generous interpretation of the word 'interest'. The word 'interest' must be interpreted within the context of the qualifying phrase 'In the retail pharmacy business'. In this context the decision in **Lipschitz N.O v South African Pharmacy Board** 1985 (2) SA 702 (C) at 707 G-I is of relevance, particularly the following passage: 'The business of a pharmacist – in his capacity as pharmacist - is dealing in pharmaceutical products, i.e. medicines in some shape or form…. The sum total of his trading activity could then aptly be described as "the conduct of business by a pharmacist" but only that portion relating to pharmaceuticals could accurately be described as "the conduct of the business of a pharmacist"….'.

This **dictum** appears to support a narrower construction of the word 'interest'. If adopted in the context of the present dispute, there are no contractual arrangements which have been entered into between first and second respondent and any entity within the Pick 'n Pay group which would justify the contention that there has been a disposal of interest in the business of a pharmacist. That the franchisor may have an interest in the success of a franchise arrangement does not in itself translate into an interest in the business of pharmacy to the extent that the word 'interest' is employed by applicants to include interest in management or control that is appropriately dealt with under the third leg of applicants case. To the extent that it is contended that the franchisor has an interest in the franchise fee which it earns from the franchise

relationship, it was never contended by applicant that a franchise relationship **per se** was unlawful.

Management and Administrative Control vested in Pick 'n Pay.

Section 22(1)(c) of the Act requires that the managing director of the company, who must be a pharmacist, must 'in fact manage the business of the body corporate. Section 22(1)(d) requires that every pharmacy in which a body corporate carries on business shall be conducted under the continuous personal supervision of a pharmacist.

Regulation 22 of the Practice Regulations require that 'every pharmacy shall … be conducted under the direct personal supervision of a responsible pharmacist.' Regulation 25 (1) provides that the managing director of a company or the manager of a close corporation entitled to carry on the business of a pharmacist 'must…..undertake the overall administration of the pharmacy business which includes but is not limited to the regulation of pharmacy matters, human resources,. or matters relating to processes regarding medicines or scheduled substances including procedures and record keeping'. Regulation 25(4) stipulates that the managing director must 'be part of the decision making process effecting the pharmacy business'.

Applicants contend that these provisions contained in the Act and Regulations

require that the management, control and supervision of the premises and entire business of a retail pharmacy be vested in a person who is a qualified and registered pharmacist. These functions cannot validly be abdicated or delegated. Applicants contend that the terms of the franchise agreement and franchise manual have had the effect that first and second respondent have relinquished or been deprived of second respondent's right to manage and control the pharmacy or alternatively have lost their independence in the exercise of this right.

The critical question is whether, by concluding agreements which, by virtue of the nature of a franchise, are rigorously prescriptive as to the management of the commercial aspects of the pharmacy and the standards of service offered by the pharmacy, a pharmacist has ceased to manage the business for the purposes of the Act.

Clause 15.5.1 of the franchise agreement provides that the retail pharmacy business must be operated and conducted strictly in accordance with the provisions of the relevant title deeds or lease agreement or sub-lease agreement as the case may be, from which the franchisee derives its entitlement to possess the premises, so as not to harm or prejudice the franchisor's right, title, interest and goodwill to in or derived from the intellectual property, in a businesslike and proficient manner and ensure that the retail pharmacy business at all times projects a good and competitive image and strictly in accordance with pharmacy

legislation.

Intellectual property is defined in clause 1.2.27 to mean ‘collectively all of the intellectual property in respect of or relating to or resulting from or arising from or derived from or attaching to the HealthPharm system, the HealthPharm signage, the brand and the franchise manuals it being recorded that the franchisor is the proprietor of intellectual property.

The retail pharmacy business is defined as the business of a retail pharmacy offering the products for sale to members of the general public, conducted or to be conducted by the franchisee only from the premises in accordance with the pharmaceutical legislation in this agreement.

Products are defined to mean collectively all ranged pharmaceutical products, non-ranged pharmaceutical products, ranged non-pharmaceutical products and non-ranged non-pharmaceutical products.

There is nothing expressly contained in the provisions of Clause 15.5.1 read with the applicable definitions in Clause 1 which constitutes an invasion of a pharmacist’s ability to conduct a pharmaceutical business. By the very nature of entering into a franchise, first and second respondent agreed that certain business systems would be utilised. The objective of the franchise agreement

was to ensure that the retail pharmacy business projected an efficient and competitive image and was run on a businesslike basis. The evidence reveals that the franchise manual provide a business model within which the business must operate to achieve these business goals. This in no way detracts from the ability of second respondent to supervise the pharmacy continuously or to exercise an unfettered discretion insofar as the dispensing of pharmaceutical products are concerned. For this reason clause 15.7 of the franchise agreement draws a distinction between the role of a franchisor insofar as non-pharmaceutical products and pharmaceutical products are concerned. Clause 15.7.1 provides that, subject to any legal constraint to the contrary, (the franchisee shall) stock such range of non-pharmaceutical products in or on the premises as the franchisor may, in its reasonable discretion, direct from time to time. By contrast Clause 15.7.2 provides that (the franchisee) consider the mix and suggested range of pharmaceutical products recommended by the franchisor. In short, the franchise agreement appears to have followed the Act and the Regulations by drawing a clear distinction between the two forms of products so that the discretion of the pharmacist remains unfettered insofar as pharmaceutical products are concerned.

Conceptually, the agreements entered into by first and second respondent do not constitute a restriction **per se** on the managerial powers of the registered pharmacist, being respondent. For this reason, applicants would have been

required to produce evidence which indicated that the manner in which the business was run supported the interpretation of the agreement and the franchise manual for which they have contended. No such evidence was produced.

On the facts it cannot be said that the contractual arrangements amount to a cessation by second respondent of his ability to manage first respondent. As Mr Gauntlett contended, second respondent bound himself to manage first respondent in terms of a model which claims to be 'the best practice system'. The fact that second respondent would manage first respondent in terms of this model was, in itself, insufficient to justify the conclusion that the Act or Regulations had been contravened.

Much was made by applicants of the decision in **J Pintusewitz supra.** Indeed Mr Dickerson went so far as to suggest that this judgment was one of a full bench of this Division and thus was binding on this Court. A careful analysis of the judgment reveals that it was held that third respondent was justified in refusing to register the applicant with Mr Pintusewitz as its managing director. The precise legal basis on which the court arrived at this conclusion is not altogether clear to me. It would appear that the Court was satisfied that the reasoning adopted by the council (third respondent) in refusing the application could not be faulted. That reasoning was to the effect that 'in the light of the

terms of the franchise agreement which formed part of each application …..respondent was of the view that Mr Pintusewitz would not be the managing director of applicant nor would he act as such, nor would he in fact manage applicant's business and it (respondent) was therefore justified in refusing the application for registration', at 76 E-F.

The judgment in **Pintusewitz, supra** does not describe the provisions of the relevant franchise agreements in any detail, nor the provisions of franchise manuals, if any, which governed the transaction in that case. On the facts of the present case, there is insufficient evidence to conclude that the provisions of the franchise agreement and franchise manual inevitably reduce the second respondent to the status of 'a **locum tenens**…subject to constant supervision…a transparent and unsophisticated attempt on the part of the franchisor….to operate and to effectively own a retail pharmacy'. **Pintusewitz** at 76 J – 77 C.

It may well be that the purport of a franchise agreement and the franchise manuals in this case extended the role of the franchisor beyond that which **Berman J** appeared to consider would constitute a normal franchise operation 'whereby one commercial entity authorises and distribute the former's product(s) or to make use of the former's get-up, know-how and expertise in return for payment of a royalty fixed in a specific amount or a fee calculated according to a predetermined formula, (at 76 I). However as applicants have conceded that a

franchise operation **per se** does not contravene the Act and Regulations it would appear that the narrow model of a franchise as described by **Berman J** is not necessarily shared by applicants or third respondent as constituting the only meaning of a franchise operation. A franchise operation within the pharmacy context would appear to imply that some form of business model is employed to standardise systems thereby ensuring a regular level of good service and, for example, the application of computer software to ensure that the business maximises as its profits in the most efficient manner possible.

In summary, the evidence is insufficient to justify the conclusion urged by applicants.

Unlawful Competition.

Mr Gauntlett submitted that, even if it was found that the first or second respondents had acted in contravention of any of the alleged statutory provisions, applicants could only succeed if they could show

1) that the alleged transmission had led or would lead to an infringement of the applicant's goodwill; and
2) on the probabilities, that first and second applicants had actually suffered damage or were likely to suffer damage from the prohibited act. See Van Heerden and Neethling **Unlawful Competition** (1995) at 270 **et seq.**

As has already been noted first applicant did not demonstrate any causal relationship between the conduct or business operations of first respondent and the infringement of its goodwill. Further, it is difficult to see what actual damage has been suffered by second applicant.

To the extent that second applicant's case is predicted upon the basis that it seeks to enforce the Act which is designed to enhance the public interest, there is no evidence of any prejudice that it has suffered, save for its desire to restrict competition from outsiders against its members.

Costs.

Initially applicants sought urgent relief at the hearing on 29 November 2002. On that day the matter was postponed and a time-table was agreed. In the result, the wasted costs arising from that hearing must be paid by applicants.

For the reasons set out above, the application is dismissed with costs, including the costs of two counsel and the wasted costs occasioned by the hearing of 29 November 2002, to be paid by applicants jointly and severally.

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DAVIS J