Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE No: 22332/2010

In the matter between:

RADIO RETAIL (PTY) LTD	**First Applicant**
RADIO RETAIL FOR SPAR (PTY) LTD	**Second Applicant**
ZAPOP (PTY) LTD	**Third Applicant**

And

PRIMEDIA (PTY) LTD t/a PRIMEDIA INSTORE	**Respondent**

JUDGMENT DELIVERED ON 10 MARCH 2011

HENNEY, AJ:

INTRODUCTION

[1] This is an urgent application launched by the three Applicants for interdictory relief based on unlawful competition. The Respondent thereafter launched a counter-application on the same facts.

The parties seek final relief against each other on the basis of unlawful competition. Both the parties allege that the other unlawfully interfered in the contractual relationship they respectively had with a number of Spar Retail franchisees. Mr. Van Rooyen SC appears for the Applicants. Mr. Hurwitz SC appears for the Respondent.

[2] The facts underlying the main and counter-application briefly stated are as follows:

2.1 The Applicants are involved in the in store marketing and promotions amongst the Spar franchisees and the suppliers since early 2009. The Applicants contend they had concluded exclusive agreements with approximately 333 Spar franchisee stores and as a result of this, they are entitled to provide in store promotions and marketing on an exclusive basis. This fact according to the Applicants was made known by Spar Western Cape (franchisor) by endorsing and promoting the Applicants' services in all Spar franchisee stores on 8 March 2010.

2.2 The agreements were based on three fairly standard written contracts. In all three variations of these agreements, the Spar franchisee grants the Third Applicant the exclusive right to do in store promotions and marketing in their respective stores for a period of 24 months.

2.3 The Applicants now aver in the main application that the Respondent had unlawfully interfered in their contractual rights, by making false representations about or concerning them to the franchisees, suppliers and customers in the in store marketing industry. They further alleges that the Respondent is interfering in their contractual relationship with the various Spar franchisees and by marketing, selling and installing similar media types in some of the Spar franchisees.

2.4 The Respondent on the other hand, insofar as the main application is concerned, disputed the validity of the contracts between the Applicants and the Spar franchisees. In particular, they dispute the existence of any valid contract between the Applicants and the franchisees, due to the fact that a number of those contracts had not been signed as at the date when this application was launched.

2.5 The Respondent also disputes the fact, that these contracts concluded with the franchisees were a *stipulatio alteri* in favour of the Third Applicant. Furthermore, they disputed that there was tacit acceptance of the contract by the Third Applicant where these contracts were not signed.

2.6 In the counter-application, the Respondents allege they had pre-existing agreements with 110 Spar franchisees. Some of which the Applicants allege they had concluded contracts with. The Respondent alleges that by conducting business with them, the Applicants are unlawfully interfering in their contractual relationship.

2.7 In their Replying Affidavit, the Applicants presented new facts and also requested that their original Notice of Motion be amended. In response thereto, the Respondent opposed the Application for Amendment and requested that all new evidence be strike out.

2.8 The Applicants requested that the matter be heard on an urgent basis in terms of Rule 6(12) of the Rules of Court. The Respondent argued that the matter was not so urgent to have warranted an initial hearing on 15 October 2010 and that the Applicants should pay the costs in this regard.

[3] **THE MAIN ISSUES FOR DETERMINATION CAN BE SUMMARISED AS FOLLOWS:**

3.1 Whether this matter should be heard on an urgent basis.

3.2 Whether the parties have made out a case for final relief.

3.3 Whether the further submissions in the Replying Affidavit of the Applicants should be struck out as it raises a new cause of action not introduced in the Founding Affidavit.

3.4 Whether the cause of action raised by the Applicants in their Founding Affidavit was based on a valid written contract.

3.5 Whether a contract concluded by either the First or Second Applicant in favour of the Third Applicant can be interpreted as a *stipulatio alteri*.

3.6 Whether the Third Applicant, despite having not signed such contract, had tacitly accepted the terms of such contract by performing certain functions at the respective Spar franchisees.

3.7 Whether there are irreconcilable disputes of facts that would warrant this court rather to refer the matter for evidence, especially where evidence is needed to ascertain whether the Third Applicant had indeed tacitly accepted the contract. If regard is to be had to the rules laid down in the **Plascon-Evans Paint Ltd v Van Riebeeck Paints 1984 (3) SA 623(A) at 634H – 635C**.

3.8 Whether the Applicants are entitled to amend their original Notice of Motion to include further Spar franchisees that need protection from interference on the part of the Respondent.

I now turn to deal with these issues.

[4] **THE QUESTION OF URGENCY**

4.1 The Respondent submits that the application is not urgent so as to warrant a departure from the ordinary rules of court. The Applicants on the other hand aver that due to the confusion in the market place as to who have the

exclusive right to conduct in store marketing and advertising in the numerous Spar outlets country wide. According to the Applicants the longer the confusion reigns, the greater the prejudice will be to their status and credibility.

4.2 This is not an ordinary case where the urgency relates to life or liberty. In my view, having regard to the financial implications and commercial interests to both parties, a sufficient basis had been laid by the Applicants to invoke the provisions of Rule 6(12) of the Uniform Rules of Court and to depart from the ordinary rules relating to motion proceedings. Support for this view can be found in the matter of **Twentieth Century Fox Film Corporation and Another v Anthony Black Films (Pty) Ltd 1982 (3) SA 582 (W)** at **586 F – G**, wherein **Goldstone J** (as he then was) held that: ***"In my opinion the urgency of commercial interests may justify the invocation of the Uniform Rule of Court 6(12) no less than any other interests".***

[5] **APPLICATION TO STRIKE OUT AND APPLICATION TO AMEND THE NOTICE OF MOTION**

The Applicants made further submissions that were not raised in their Founding Affidavit. This was in response to the issues raised in the Answering Affidavit of the Respondent. The following evidence was recorded in the Replying affidavit:

a) that all the written contracts concluded by the Applicants after it had been

concluded and after confirmation of it had been obtained by the respective franchisees in a computer programme known as the V-Tiger;

i) That some of the contracts concluded with the franchisees was a *stipulatio alteri* in favour of the Third Applicant;

ii) that there was a waiver by the Third Applicant of compliance in writing of the acceptance of benefits, in terms of the contract;

iii) that there was tacit acceptance of the terms of the contracts by the Third Applicant;

iv) that although the Third Applicant had not signed some of the written agreements, it had already accepted the terms of the contract and had performed according to the terms thereof.

[6] The Respondent contends that the above submissions constitute new evidence and should be struck out.

[7] The Applicants contend that although the material included in the Replying Affidavit may be regarded as new in the context of the main application, such material merely serves as an answer to the Respondent's allegations made in the context of the counter-application. The Respondent did not file a separate affidavit in support of the counter-application, but filed one affidavit in answer to the main application and which also served as a Founding Affidavit in support of their

counter-application.

[8] There are clear portions of the Respondent's Affidavit that can be considered to be a response to the allegations contained in the Founding Affidavit. There is also sufficient evidence in the same affidavit that lay the foundation for the counter application. The main thrust of the Respondent's answer to the Applicants' case in the main application is that none of the Applicants have any right to market or sell any media types, and that no valid contracts exist between the Applicant and the franchisees.

[9] The main thrust of the counter-application of the Respondent is that the pre-existing agreements it has with 110 Spar franchisees and that the Applicants, by attempting to conclude agreements with these Spar franchisees, are unlawfully interfering in their contractual rights.

[10] The submissions contained in the Applicants' Replying Affidavit clearly constitute new evidence. It is apparent that the Applicants' only discovered after disclosure was made that some of the contracts were not signed.

[11] This court however has discretion to allow new evidence as long as it does alter or substitute the original cause of action. In **Triomf Kunsmis (Edms) Bpk v AE & CI Bpk en Andere 1984(2) SA 261 (W) at 269 f - g**, it was stated as follows, regarding this issue:

"Dit is een ding om slegs ekstra feite ter ondersteuning van 'n

bepaalde oorsaak van aksie, of te onderstreep of vir die eerste keer aan te haal in 'n repliserende verklaring. Dis 'n ander ding om geheel en al bollemakiesie te slaan ten opsigte van gedingsoorsaak wat die gedingvoering in 'n totaal verskillende rigting stuur."

See also the decision of **S A Heritage Resources Agency v Arniston Hotel Property (Pty) Ltd and Another 2007 (2) SA 461(C)**.

[12] The Applicants, had from the outset, based their claim on written contracts entered into by the First or Second Applicant with the franchisees, to make the Third Applicant a party to such contract, the benefits and obligations of which were accepted by the Third Applicant.

[13] The Applicants also sought to amend Annexure "A" to their original Notice of Motion to include further entities in favour of which it seeks protection under this application. These entities are Spar franchisees with which it also concluded agreements, namely, Nzhelele Spar, Pavillion Spar, The Hill Spar and Vorna Valley Spar.

[14] However, it seems that notwithstanding this amendment, the thrust of the dispute between the Applicants and Respondents remains the same. The Applicants contend in their Founding Affidavit that they have concluded agreements with 333 Spar franchisees, which included the abovementioned entities.

[15] The additional submissions contained in the Replying Affidavit together with the proposed amendment do not in any way introduce a new cause of action. See **Erasmus: Superior Court Practice at B1-179 following onto B1-180** in this regard. In the result, the application for amendment is allowed and the application to strike out is dismissed.

[16] **CONTRACTUAL RIGHTS OF APPLICANTS AND CONTRACTUAL RELATIONSHIP WITH THE SPAR FRANCHISEES AND THE SO-CALLED *STIPULATIO ALTERI***

The Respondent submitted that there existed no real contractual relationship between the Applicants and the respective franchisees, due to the fact that, firstly, the Third Applicant was not a party to the contract, secondly ,they did not sign some of the contracts and thirdly they dispute whether there was a tacit acceptance by the Third Applicant of the contract.

An important determination is whether the written agreements which the Applicants allege they have concluded with the various Spar franchisees (333 stores) are indeed valid contracts.

At this stage it would be appropriate and convenient to closely examine the respective written contracts which the Applicants rely upon. There are three variations of the agreement, the substance is essentially the same, it only has a different annexure and in respect to the first one that follows hereunder, the Third Applicant is not a signatory. Portions of the first agreement are recorded as

follows:

Promotion agreement

Memorandum of agreement entered into by and between

Radio Retail (Pty) Ltd

(registration number 1996/013197/07)

herein represented by RP Labuschagne, being duly authorised to act on its behalf.

(hereinafter referred to as the Radio Retail) and

_____

(herein represented by _____

duly authorised to act on its behalf.(hereinafter referred to as the Spar Retail Outlet)

1. ***Background***

This agreement is to be understood, interpreted and applied against the following background:

1.1 .....

1.2 .....

1.3 ***ZaPOP*** **can provide the Spar Retail Outlet with the specialised in store promotion, listed in annexure "A" hereto (hereinafter in store promotion).**

1.4 ***The parties have agreed on the basis on which the Spar Retail Outlet will grant an exclusive right to ZaPOP to do the in store promotion within its business on all media as shown in annexure "A".***

2. ***Exclusive right, payment and cancellation***

2.1 ***The Spar Retail Outlet gives an exclusive right to ZaPOP to do in store promotion within its business on all media as shown in annexure "A".***

2.2 ***The exclusive right is granted for a 24 month period.***

2.3 ***In exchange for being granted this exclusive right and for as long as this agreement is in force, ZaPOP will pay the monthly fee owing by the Spar Retail***

Outlet to Radio Retail.

2.4 ***Radio Retail warrants that ZaPOP will continue to provide the in store promotion as agreed to.***

3. ***General***

3.5 The signatories to this agreement warrant that they have been authorised to sign this agreement and thereby bind their principals.

Signed at _____ on this _____ day of _____ 2009.

_____

for and on behalf of Radio Retail (Pty) Ltd

Signed at _____ on this _____ day of _____ 2009.

_____

for and on behalf of the Spar Retail Outlet

(Own emphasis)

[17] It will be noted that the signatories to the agreement are the First Applicant, Radio Retail (Pty) Ltd, and the respective Spar franchisees.

[18] In clause 1.4 the First Applicant agrees that the franchisee will grant an exclusive right to **ZaPOP** to do the in store promotion within its business on all media types as shown in Annexure "A" to the contract. In clause 2.2 this exclusive right given to Third Applicant is granted for a period of 24 months. In clause 2.3 it is stated that in exchange for this exclusive right and for as long as this agreement is in force, **ZaPOP** will pay the monthly fee owing by the Spar Retail outlet to Radio Retail. Clause 2.4 provides that Radio Retail (First Applicant) warrants that **ZaPOP** will continue to provide the in store promotion as agreed to.

[19] Having regard to these provisions, although this is a contract or agreement between the First Applicant (Radio Retail) and the respective Spar franchisee, it is designed to enable the Third Applicant **(ZaPOP)** to come in as a party to the contract with the respective Spar franchisee. (See **Crookes NO and Another v Watson and Others 1956 (1) SA 277(A) at 291 C**).

This kind of agreement is commonly known as a so-called *stipulatio alteri.* (See also the matter of **Joel Melamed and Hurwitz v Cleveland Estate (Pty) Ltd 1984 3 SA 155 (A) 172 A – F** where this principle was accepted).

[20] I am of the view that the Applicants have indeed made out a case that this type of agreement is indeed a valid agreement in the form of a *stipulatio alteri* in favour of the Third Applicant.

[21] The second variation of which 227 agreements were concluded will now be considered. For ease of reference, one such agreement is also quoted hereunder.

Promotion agreement

Memorandum of agreement entered into by and between

Radio Retail for Spar (Pty) Ltd

(registration number 2002/03036/07)

herein represented by R P Labuschagne, being duly authorised to act on its behalf

(hereinafter referred to as Radio Retail) and

.....

Hereinafter represented by ....., duly authorised to act on its behalf (hereinafter referred to as the Spar Retail Outlet)

1. ***Background***

This agreement is to be understood, interpreted and applied against the following background:

1.1 *The Spar Retail Outlet intends using Radio Retail for the provision of specialised in store voice promotion.*

1.2 .....

1.3 ***ZaPOP (Pty) Ltd (hereinafter ZaPOP), an associated company in the same group as Radio Retail, can provide the Spar Retail Outlet with specialised in store promotion listed in annexure "A" and can install the same within its business.***

1.4 .....

1.5 *The parties have also agreed on the basis on which the Spar Retail Outlet will grant* ***ZaPOP*** *an exclusive right to do in store promotion within its business.*

2. ***Obligations of Radio Retail***

2.9 *Radio Retail warrants that* ***ZaPOP*** *will pay it for in store voice promotion within the Spar Retail Outlet for the entire period during which this agreement is in force.*

2.10 .....

2.11 *The parties agree and record that the provision of Radio Retail's services at the cost of* ***ZaPOP*** *constitutes fair and equitable compensation for the exclusive right granted to* ***ZaPOP*** *in terms hereof.*

3. ***Obligations of the Spar Retail Outlet***

3.1 .....

4. ***Exclusive right to ZaPOP***

4.1 ***The Spar Retail Outlet grants ZaPOP exclusive right to do in store promotion within its business on media shown in annexure "A" hereto.***

4.2 ***This exclusive right shall be for a period of 24 months with effect from 1 August 2010 or from such other date as the parties may agree to in writing.***

4.3 *The services that* ***ZaPOP*** *can offer can be obtained from* ***Zapop's*** *website,*

www.zapop.com or from Radio Retail.

4.4 ***ZaPOP accepts the benefits flowing from such exclusive right by the signature of its duly authorised representative on this agreement.***

5. ***Commencement and cancellation***

5.1 ***The Spar Retail Outlet confirms that it has satisfied itself with the nature of and benefits to be had from Radio Retail's and Zapop's in store promotion services.***

5.2 ***The agreement takes effect when it has been signed by both parties.***

5.3 ***The Spar Retail Outlet may validly cancel the exclusive right of ZaPOP to so do in store promotion on 6 calendar months' written notice to Radio Retail, provided that such notice is given after the expiry of the agreed minimum period referred to in paragraph 4.2.***

6. ***Communication***

7. ***General***

Signed at _____ *on this* _____ *day of* _____ *2009.*

_____

For and on behalf of Spar Retail Outlet

Signed at _____ *on this* _____ *day of* _____ *2009.*

_____

For and on behalf of Radio Retail for Spar (Pty) Ltd

Signed at _____ *on this* _____ *day of* _____ *2009.*

_____

For and on behalf of ZaPOP (Pty) Ltd

[22] It is clear from this type of agreement, that the Third Applicant should have been a signatory to the agreement. The provisions in this contract are similar to those of the first agreement with regards to the position of and the obligations

placed on the Third Applicant **(ZaPOP)**, namely clauses 1.3, 1.5, 2.9 and the whole of 4. Clause 2.11 places further obligations on and grants further rights to **ZaPOP** which are not contained in the type of agreement of which Radio Retail (First Applicant) was a signatory.

[23] In their Founding Affidavit the Applicants relied on these agreements as the agreements concluded with the various franchisees. It later however, became evident that as at the time of instituting of proceedings on the 8 October 2010, these agreements had not been signed by the Third Applicant. It seems that the bulk of these types of agreements were only signed on 21 October 2010. The contention of the Respondent was that these agreements were therefore invalid and that none of the Applicant's, particularly, Third Applicant, have any right to sell or install the media services or media types referred to in Annexure "B" of the Applicant's Notice of Motion.

I will now turn to consider whether in the absence of a signature by the Third Applicant on this type of agreement there was tacit acceptance by the Third Applicant, and whether the fact that the Respondent disputes this is a genuine dispute of fact.

DISPUTE OF FACT

[24] It was argued by Mr Horwitz that there exists a dispute of fact between the parties as to whether there was tacit acceptance on the part of the Third Applicant, in respect of both these types of agreements.

[25] According to Mr Horwitz the existence of a tacit agreement, is ordinarily a conclusion of law that a court must draw inferentially from the facts placed before it. In this regard, Mr Horwitz relied heavily on the dictum in **Joel Melamed and Hurwitz v Cleveland Estates (Pty) Ltd 1984 (3) SA 155(A)**. In the abovementioned case the court referred to the dictum of **Standard Bank of South Africa Ltd and Another v Ocean Commodities Inc and Others 1983 (1) SA 276 (A) at 164G – 165B** the following was held:

> ***"In order to establish a tacit 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. It must be proved that there was in fact consensus ad idem. (See generally Festus v Worcester Municipality 1945 CPD 186 at 192-3; City of Cape Town v Abelsohn's Estate 1947 (3) SA 315 (C) at 327-8; Parsons v Langemann and others 1948 (4) SA 258 (C) at 263, Bremer Meulens (Edms) Bpk v Flores and Another, a decision of this Court reported only in Prentice Hall, 1966(1) A36; Blaikie-Johnstone v Holliman 1971 (4) SA 108 (D) at 119B-E; Big Dutchman (South Africa) (Pty) Ltd v Barclays National Bank Ltd 1979 (3) SA 267 (W) at 281E-F; Muhlmann v Muhlmann 1981 (4) SA 632 (W) at 635B-D.)"***

Then further:

> ***"In this connection it is stated 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 (see Plum's case supra at 163-4)."***

[26] The facts in this case are clearly distinguishable from that of the **Joel Melamed** case.

This is an agreement between the Third Applicant and a third party (the franchisee), who is not a party to this dispute. In the **Joel Melamed** decision, there was a dispute between the parties as to the existence of a tacit agreement and they had to lead evidence to convince the court of this fact. In this instance, however, the Respondent not being a party to the contract between the Third Applicant and the franchisees is in no position to deny the existence of a tacit agreement. The mere fact that the Respondent denies this fact in itself does not warrant a conclusion that, that fact does not exist.

I am unable to agree therefore that there exists a dispute of fact between the parties and I believe that Counsel for the Respondent's reliance on the case to which the Honourable Judge refers to in the **Joel Melamed** decision is misguided.

In applying the well established rule laid down in **Plascon-Evans**, I come to the conclusion that there is no real or *bona fide* dispute of fact between the Applicants and the Respondent.

I will now to the issue of tacit acceptance with regards to the Third Applicant.

[27] **TACIT ACCEPTANCE**

On the Applicants' version, the Third Applicant had indeed performed in terms of the contract, by having delivered, in store promotions and services at the various Spar franchisees.

The Respondent in their counter-application, states that the Applicants, including the Third Applicant, had conducted in store media advertising and promotions in the stores where they had valid pre-existing contracts. Their version is that the Applicants had been interfering in their contractual rights. By saying this, the Respondent by implication admits that the Third Applicant had performed in terms of the contract.

On the undisputed evidence before me I am satisfied that there was tacit acceptance by the Third Applicant in respect of these 227 contracts, despite not being signed by them.

[28] **UNLAWFUL INTERFERENCE**

I will now to deal with the alleged unlawful interference by both parties.
In the present matter, the mere fact that the Respondent was exercising rights in terms of a pre-existing contractual relationship with the Spar franchisees does not

in itself constitute unlawful interference in the contractual relationship the Applicants had with the Spar franchisees.

[29] If, however, the Spar franchisees indicated that they intended to relinquish or terminate the contractual relationship they had with the Respondent, and despite this, the Respondent persisted to such an extent that it caused the Spar franchisees to breach their contractual relationship with the Applicants, this, in my view, would have amounted to unlawful interference, on the part of the Respondents in the main application.

The same reasoning can be applied to the Respondent's counter-application, where it alleges that there was interference by the Applicants. The mere fact that the Applicants had entered into exclusive agreements with the Spar franchisees with whom the Respondent (110 Stores) had a pre-existing contractual relationship does not in itself constitute unlawful interference on the part of the Applicants.

The test for unlawful interference is set out in **Van Heerden – Neethling Unlawful Competition (2nd edition) at 245 – 252**

> ***"Interference with a contractual relationship is present where a third person's conduct is such that a contracting party does not obtain the performance to which he is entitled from the other party, or where a contracting party's contractual obligations are increased by a third person. This type of conduct may naturally also occur in the context of commercial competition".***

Which must be proved is not limited to unlawfulness falling into a category of clearly recognised illegality. Fairness and honesty in competition are criteria that have been emphasised in many of the decided cases."

The learned authors further state the following in relation to unlawful interference:

"Most decisions deal with intentional interference where a third party induces, entices or instigates one of the contracting parties to commit a breach of contract. In Atlas Organic Fertilizers (Pty) Ltd v Pikkewyn Ghwano (Pty) Ltd 1981 (2) SA 173 (T) 202 Van Dijkhort J stated that a "delictual remedy is a valuable to a party to a contract who complains that a third party has intentionally and without lawful justification induced another party to the contract to commit a breach thereof".
See also **Woodlands Dairy (Pty) Ltd v Parmalat SA (Pty) Ltd 2002 (2) SA 268 (ECD) at 279 B – D**

Against this background I will now deal with the conduct of each party in order to ascertain whether there was unlawful interference.

[30] **RESPONDENT'S CONDUCT – MAIN APPLICATION**

On 6 August 2010, the Managing Director of the Third Applicant addressed a letter to the Chief Executive Officer of the Respondent, requesting that the Respondent desist from marketing, selling or installing any media types in the franchisees with

which the Applicants had concluded exclusive agreements. The request was made in response to reports from franchisees like Lakeside Spar and Paarl East Spar that the Respondent's representatives had interfered with the Applicants' rights in terms of their agreements they had concluded with the various Spar franchisees.

[31] In response to this request, the Respondent distributed a letter, dated 19 August 2010, wherein the following was recorded:

> ***"19 August 2010***
>
> ***TO OUR VALUED CUSTOMERS***
>
> ***It has come to my attention that ZAPOP have announced that they have been awarded rights to provide in store media services in Spar Group stores.***
>
> ***The announcement is creating confusion in the market place and I consequently want to reaffirm that Primedia Instore remains the official and exclusive provider of instore media services for the Spar Group (Super Spars, Spars, Kwikspar and Tops).***
>
> ***Mike Prentice (Group Marketing Executive – Spar) and Julian Evans (Group Merchandising Manager – Spar) have endorsed this communication. If anyone is still unclear concerning the above status, you can contact Mike or Julian on 031 7191900 or myself on my cell, 082 451 2307 (graham@primeinstore.co.za).***
>
> ***I trust that this letter serves to remove all confusion.***

Yours faithfully

G.L. BOUWER

CHIEF EXECUTIVE OFFICER

c.c. M. Prentice (Spar)

J. Evans (Spar)"

[32] The Respondent contends that this letter was never intended to be distributed to any Spar franchisees, but only to the suppliers of the Spar Group (franchisor). The Respondent claims that it did in fact only send copies of such letter to the latter. If copies of this letter found their way to any of the Spar franchisees, this was not occasioned by the Respondent.

[33] This argument is untenable, because if it was their intention to inform their customers of the facts contained therein, the letter should have been directed only to the Spar Group stores suppliers and it should have clearly stated so. At that time, the Respondent was aware of the fact that the Applicants had dealings with the Spar franchisees and was busy with in store advertising and media services in some stores and if it was their intention not to influence the franchisees from doing business with the Applicants, they should have indicated same.

It is important to note that the letter or notice referred to earlier on had also raised concerns with the suppliers as to who was responsible for providing in store media or advertising of their products in the respective Spar franchisees. It is further difficult to understand why they did not inform their own franchisees (110) separately about the actions of the Applicants, and that the franchisees should not

permit the Applicants from doing any in store promotions or advertising.

[34] The Applicants in my view had, established, that this letter had an impact on the contractual relationship between the Applicants, the franchisees and their suppliers. The Applicants also cite other examples of conduct on the part of the Respondent as constituting unlawful interference at certain franchisees. These are:

(a) On 1 August 2010, 18 August 2010 and 25 August 2010, a representative of the Respondent approached the owner of the Paarl East Super Spar, and expressed the intention to install media types. The owner was hesitant to allow the Respondent to do this and called the Applicant. The Respondent's representative nevertheless went ahead to install media in this store. Here it seems that there was reluctance on the part of the owner of the franchisee to allow the Respondent's representative to install media in his store due to the exclusive contract already entered into on the 30 March 2010 with the Applicants. He was concerned he would be in breach of contract with the Second Applicant if the Second Respondent was allowed to install such media.

(b) The Lakeside Spar Franchisee owner, Shawn Paulsen had also displayed some discomfort with the continued contractual relationship with the Respondent after it had concluded an exclusive contract with the Applicants. He had indeed communicated this concern to the Spar Western Cape Distribution Centre (the Franchisor) and to the Applicants.

He, however, allowed the Respondent to install media despite his reservations.

(c) Mr Yusuf Banderker, of the Westerford Kwikspar Rondebosch, who concluded an agreement on 18 March 2010 with the Applicants, informed them on 17 September 2010 that he had requested the Respondent's representatives to remove all Primedia advertising material from his store. Here it seems that the Spar Franchisee had unconditionally severed all links with the Respondent, if there indeed was such a relationship. The Respondent does not deny these events, nor does it claim in their Answering Affidavit, as they do in the cases of the Paarl East, Lakeside Kraaifontein, Kuilsriver Sonstraal and Bellville Spar Franchisees claim, that they had a contractual relationship with this Spar franchisee.

In my view, in this specific instance, this amounted to clear interference.

(d) Ms Bernadette Visser, of the Kraaifontein Spar, concluded an agreement with the Applicants on 31 March 2010. She claims that the Respondent had put up advertising material contrary to the agreement she had with the Respondent.

(e) In the case of the Kuilsriver Super Spar, (f) the Sonstraal Super Spar, (g) the Bellville Super Spar, there was also some discomfort on the part of owners of the franchisees in continuing with a contractual relationship they had with the Respondents after they had concluded exclusive agreements

with the Applicants.

The Respondent in their answer to the Applicants' allegations regarding interference in the contractual relationship with the abovementioned Spar franchisees contends that they have a contractual relationship with such Spar franchisees. In particular, they contend that with regards to the Paarl East Superspar, Lakeside Spar, Kraaifontein Superspar, Kuilsriver Superspar, Sonstraal Superspar and Bellville Kwikspar, they lawfully exercised their contractual rights by sending their representatives to these stores. They also contend they were entitled to do in store marketing and make payments to the franchisees for services they were permitted to render.

[35] They also do not deny that these franchisees had some discomfort and uneasiness in continuing with their contractual relationship with them, due to the fact that they had concluded exclusive agreements with the Applicants. These franchisees clearly wanted to avoid breaching their contractual relationship with the Applicants.

[36] Nowhere in the papers of the Respondent is any proof found that it had also concluded exclusive pre-existing agreements with any of the Spar franchisees that are mentioned, to exclude the Applicants or any other party. Their position is therefore not similar to that of the Applicants.

[37] The Respondent's claims therefore that they merely exercised an existing contractual right are without merit. The Respondent also does not deny that

various suppliers of products expressed confusion as to who was responsible for the in store marketing at various franchisees.

[38] It is also clear that all the incidents referred to above would have occurred after most of the exclusive contractual agreements between the Applicants and these franchisees had taken effect, which occurred on the 1 August 2010, and after the Respondent would have been informed of the Applicants status as exclusive rights holder in respect of these franchisees in their letter dated 6 August 2010. Then a letter was sent out on 19 August 2010. At that stage, the Respondent had become aware of the exclusive right the Applicants had acquired. The letter dated 19 August 2010 states that the Third Applicant had announced their rights to provide in store marketing in the Spar Group Stores.

[39] It is clear that on a conspectus of evidence the Applicants placed before me, the Respondent and its representatives had caused the franchisees to breach the exclusive agreements with the Applicants.

In summary, it becomes clear that the actions of the Respondent were designed to unlawfully interfere with the exclusive contractual relationship the Applicants had with the Spar franchisees. I therefore find on the main application that the Applicants have made out a case that the Respondent unlawfully interfered in the Applicants' contractual relationship with the franchisees.

[40] **THE COUNTER-APPLICATION**

The Respondent's counter-claim is based on the fact that in terms of the agreements concluded between the Respondent and the "Primedia" Spar franchisees, it has the right to market, sell and install media services. It is alleged that the Applicants are interfering with their contractual rights and the Respondent is therefore entitled to interdictory relief.

[41] If one is to have regard to the contract the Respondent entered into with the "Primedia" Spar franchisees, it seems that it was based on an offer that was sent to the various Spar franchisees to provide certain specified in store media services accompanied by a letter of acceptance. Once the franchisees had accepted the offer, the contract would be concluded. There is no provision in the contract/offer prohibiting the "Primedia" Spar franchisees from concluding a similar agreement with a third party.

[42] By concluding the contracts with the Applicants, the Spar franchisees, in my view, would not have been in breach of their contract with the Respondent. This, as said earlier, does not amount to unlawful interference. There is also no evidence similar to that which the Applicants had presented by their individual franchisees that they had reservations or felt discomfort in continuing with the contractual relationship they had with the Respondent due to the interference and certain conduct of the Applicants.

[43] In my view, the Respondent has failed to establish that the conduct of the Applicants was such that, it firstly induced one of the Spar franchisees who had an agreement with the Respondent to commit breach of contract and secondly, that the Respondent did not obtain the performance to which they are entitled to from the franchisees, they had contracted with.

The counter-application, therefore, is without merit and is accordingly dismissed.

[44] **REQUIREMENTS FOR A FINAL INTERDICT ON THE MAIN APPLICATION**

After having considered all the evidence, I am of the view that the Applicants have established that they have a clear right based on the various contractual agreements between them and the various Spar franchisees.

I am also satisfied that they have established that there is a reasonable apprehension that their commercial or business interest will suffer irreparable harm by the continued conduct of the Respondent.

It is further clear that if regard is to be had to the attitude of the Respondent, by failing to acknowledge the existence of the rights of the Applicants and that they will not desist from exercising what they perceived to be an interference by the Applicants in their rights (Respondent), which were shown not to be exclusive rights, there is clearly no other remedy available other than to restrain them from continuing to do so.

[45] **COSTS**

It follows that the Applicants are entitled to the relief sought with costs.

[46] **ORDER**

In the result, the following order is made:

1) The Application for Amendment in favour of the Applicants is granted with costs.

2) The application to strike out is dismissed with costs.

3) The main application succeeds with costs.

4) The counter-application is dismissed with costs.

5) The Respondent is interdicted from unlawfully competing with the Applicants by:

5.1 Making any false representations about or concerning the Applicants;

5.2 Interfering with the exclusive contractual relationships between the Applicants and the respective Spar franchisees, namely those as set out in

Annexure "A" attached to the Notice of Motion as amended to include Nzhelele Spar, Pavillion Spar, The Hill Spar, Vorna Valley Spar by soliciting any of these entities to breach or sever their agreements with the Applicants.

5.3 Marketing, selling or installing media types listed in Annexure "B", as amended, in any of the entities set out in Annexure "A" to the Notice of Motion.

5.4 Diverting corporate opportunities, to which the Applicants are entitled to in terms of their agreements with the entities listed in Annexure "A" of the Notice of Motion as amended, to Primedia or to any other person.

5.5 That the Respondent is directed to remove all media types sold or installed by it and similar to those set out in Annexure "B" to the Notice of Motion from the premises of the entities set out in Annexure "A" of the Notice of Motion as amended.

5.6 Costs to include the costs of two counsels.