REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

(WESTERN CAPE HIGH COURT, CAPE TOWN)

Case no: 3541/12

In the matter between:

P CHRISTODOLOU & SONS TEXTILES CC	**First Plaintiff**
PAULOS CHRISTODOLOU	**Second Plaintiff**

and

WOOLWORTHS (PROPRIETARY) LIMITED	**Defendant**

Heard:9 – 10, 11, 15 and 17 April 2013

JUDGMENT

DELIVERED: 12 JUNE 2013

SAVAGE AJ:

[1] The first plaintiff, P Christodolou& Sons Textiles CC (“the CC”), a close corporation of which the second plaintiff, Mr PaulosChristodolou (“Christodolou”), is the sole member, has since 1998 operated a Woolworths franchise in Kokstad in terms of a written franchise agreement. After the franchise store was upgraded and a food market introduced in December 2009, an addendum to the franchise agreement was signed recording the expiry of the franchise term on 23 September 2013. The plaintiffs now claim*inter alia* rectification of theexpiry date recorded in this addendum and additional relief.

[2] The plaintiffs’ varied causes of action are apparent from the particulars of claim, amended on four occasions as their legal team was changed for reasons that included the ill health of their previous counsel. The result is that the pleadings are not a model of clarity, with the final set of particulars having been filed on the first day of trial causing the trial, by agreement, to stand over in order to allow Woolworths to plead to the amended claim.

Material facts

[3] From the evidence of Christodolou, his wife, Ms PanayotaChristodolou and Ms Dawn Pottier (“Pottier”) the material facts appear as follows.

[4] Christodolou’sfather and uncle immigrated to South Africaand settled in Kokstadsome years before he was born in 1960 and the extended family is involved in a number of varied business enterprises in the area. During 1997Christodolou and his wiferesponded to a notice placed by Woolworths in the Kokstad Advertiser calling for applications for a “franchise ownership” of a Woolworths store in Kokstad. A meeting was held with Mr Leon Laing (“Laing”)

and Mr RoeliePrinsloo(“Prinsloo”) of Woolworths, to discuss the franchise opportunity. During the meeting the couple were asked about succession plans for the business. They indicated that they were interested in the franchise with the future of their two young sons in mind who could ultimately take the business over from their parents. Laingand Prinslooinformed the couple that provided the franchise remained in good standing after an initial franchise period it would be renewedindefinitely thereafter with the approval of Woolworths.

[5] Laing and Prinsloo also indicated to the couple that the franchise and lease agreements would run concurrently. They were provided with a copy of the Woolworths franchise mission document in which it was stated:

> *PREMISES*
>
> *Woolworths’ negotiating power will be used to secure the best rentals for suitable premises. The standard Woolworths lease will be used. The standard procedure is that the Franchisee will enter into the lease agreement with the lessor, but Woolworths retain the right to take over the lease should the Franchise agreement be terminated prematurely. All obligations under the lease agreements must be executed by the Franchisee. The lease period will run concurrently with the period of the Franchise agreement*.

[6] Prior to signature of the franchise agreement, Christodolouinspected the site in respect ofwhich Woolworths was negotiating and was satisfied that the franchise could be a success. With the franchise approved, Christodolou invested R2.1 million in the enterprise exclusive of stock and the franchise agreement was signed on 21 August 1998. In terms of the agreement, the

franchise was to endure for a period of 10 years from 23 September 1998 with the option to extend for one five-year period thereafter, provided that twelve months' notice of the intention to extend was furnished to Woolworths by the plaintiffs.

[7] In terms of clause 34.4 of the franchise agreement, the parties agreed to observe the utmost good faith in their dealings with one another:

'In implementation of this Agreement, the parties hereto undertake to observe the utmost good faith and they warrant in their dealings with each other that they shall neither do anything nor refrain from doing anything which might prejudice or detract from the rights, assets or interest of the other of them.

[8] Clause 34.2 contained a standard non-variation clause requiring any variation of its provisions to be recorded in writing. The agreement was recorded to be "*the sole contractual relationship between the parties*" and its terms override "*all or any written or oral agreements, understandings or arrangements entered into or concluded*" between them.

[9] The franchise agreement defined "the Premises Lease" to mean *"the Agreement of Lease in terms whereof the Franchisee has a right of occupation in respect of the Premises and includes renewals or extensions thereof from time to time*" and compelled the franchisee in terms of clause 23 to conduct the franchise only at the premises agreed. Woolworths in collaboration with the franchisee was to negotiateon behalf of the franchisee "*the terms, conditions and conclusion of the Premises Lease with any landlord or prospective landlord*" under clause 33.1 on the basis that, in terms of clause 33.2:

'*Notwithstanding any acts or omissions on the part of the Franchisor under clause 33.1 above or otherwise in respect of or connected with the negotiation and/or conclusion of the Premises Lease, the Franchisee agrees that it will conclude any such Premises Lease entirely at its own risk, and that it will have no claim, of whatsoever nature, arising from the participation, in whatever capacity, of the Franchisor in the negotiation and/or conclusion of the Premises Lease*.'

[10] When the franchise period commenced on 23 September 1998, the franchise agreement had been signed but the lease agreement with Clearman Properties (Pty) Ltd had not. The plaintiffs occupied the premises in the absence of a lease agreement for approximately a year until the lease was signed on 27 September 1999, with the commencement date of the lease backdated to 1 October 1998. The commencement date of the lease was therefore concurrent to that of the opening of the franchised store, although the ten-year lease period was calculated from date of signature of the lease and therefore did not mirror the agreed term of the franchise.

[11] Woolworths, in terms of clause 33.1 of the franchise agreement, negotiated the premises leaseon behalf of the franchisee and was a party to the lease agreement and its two addenda, with a *stipulatioalteri* in respect of the premises reserved in favour of Woolworths.

[12] The lease endured for a period of 10 years, subject to the option of three five-year renewal periods. In the event of the termination of the franchise

agreement, there existed in clause 14 of the lease agreement a*stipulatioalteri* in favour of Woolworths:

14.1 The Lessor acknowledges and agrees that the Lessee conducts its business from the Premises under and by virtue of a written franchise agreement ("the Franchise Agreement") with Woolworths (Proprietary) Limited ("Woolworths"). In order to give effect to the rights and remedies of Woolworths under the Franchise Agreement (and without limiting any of the rights or remedies of the Lessee under this lease), the Lessor agrees and undertakes to and in favour of the Lessee and to Woolworths that:

14.1.1 Woolworths shall be entitled to take cession and assignment of all the rights of the Lessee under this Lease on the termination of the Franchise Agreement for any reason whatsoever should Woolworths elect to do so on written notice to the Lessor within 30 (thirty) days after the termination of the Franchise Agreement for any reason whatsoever;

14.1.2 ownership of all items of stock in the Premises from time to time sold and supplied by Woolworths under the Franchise Agreement and ownership in and to all such items of stock is and remains vested in Woolworths under the Franchise Agreement until same are sold and the Lessor shall not have any hypothec or other claim over all or any items of stock on hand in the Premises, from time to time;

14.1.3 should the Lessor furnish the Lessee with any notice under this lease then it shall simultaneously therewith furnish a copy per registered post to Woolworths at its domicilium…;

14.1.4 the Lessor shall not allow the Lessee to cede or assign its rights under this Lease nor sub-let the premises or any portion thereof nor allow any other person to occupy same without the prior obtained written consent of Woolworths.

14.2 The provisions of this clause 14 constitute a stipulatioalteri in favour of Woolworths…"

14.3 *Woolworths will guarantee the payment of rental for a maximum period of 6 (six) months in the event of the Lessee defaulting on rental payments.*

[13] The franchise, through the efforts of the Christodolou family supported by Woolworths, proved itself to be a success. Mr Cobus Barnard ("Barnard") of Woolworths andChristodolouaccordingly explored options to open further Woolworthsstores in the Northern Transkei and KwaZulu-Natal area, none of which came to fruition. In addition, Christodolouconsidered a Woolworths franchise offered in Maputo but having travelled there was not interested in pursuing it.

[14] Between 2006 and 2007Christodolou discussed with Barnard the possibility of expanding the Kokstadstore to include foods and extra clothing.This had followed Barnard's concerns that the Kokstadstore looked 'like a Pep store' and that clothing was not displayed properly. Barnard indicated that he was pleased that Christodolou was developing the brand and the business. Emails were exchanged between Christodolou and Mr Bernie Alfino ("Alfino"), Woolworths' Real Estate Manager, during August 2006 regarding space needs in respect of the envisaged Kokstadstore expansion.In an email toChristodolou on 11 October 2007, Barnard confirmed on behalf of Woolworths that the

introduction of foods into the Kokstad store had been agreed “in principle”. Christodolou testified that this in principle approval meant to him that “we were going to get there”.

[15] Following these discussions and with Woolworths as the driving force, less than three weeks later on 30 October 2007Christodolou and Woolworths signed the first addendum to the lease agreementin terms of which the premises were leased from MICC Properties (Pty) Ltd, which had taken cession of the lease, from 1 March 2008 for a period of 10 years with an optional renewal period of five years.The new lease period did not mirror the term of the franchise contained in the franchise agreement.The addendum was signed prior to the termination of the original period of lease, a month after the date on which the plaintiffs in September 2007, in terms of clause 7.2.1 of the franchise agreement, were required to give twelve months’ notice of their intention to extend the franchiseand almost a year prior to Woolworths confirming on 8 September 2008 that the plaintiffs’ franchise was to be extended for five years to 23 September 2013. Recordedin the addendum was an extension of 300m^2 to the premises leased.

[16] Christodolou testified that he did not give notice of his intention to renew the franchise agreement until told by the head of the franchise division to do so as he understood that the franchise would simply be renewed. He did not consider it to be a risk that Woolworths would not agree to a longer franchise period as he had put money into the franchise and he had been “negotiating on premises with Woolworths”.

[17] Woolworths was over this period involved in reviewing its franchise model and made an offer to certain franchisees of a twelve-year contract with increased commissions but no end of term payment to the franchisee.This offer was not accepted by Christodolou. Around this time, at a presentation given at Woolworths' offices in Cape Town regarding its approach to franchises, Mrs Christodolou was informed that Woolworths was not interested in taking over the Kokstad store as a corporate store.

[18] Christodolou's evidence was that, having signed the first ten-year lease addendum, Woolworths kept asking him to prepare viabilities over a ten-year period. On 21 April 2009 Christodolouforwarded these projections to Woolworths in a capital expenditure viability study regarding the introduction of foods into the Kokstadstore,in which his financial projections for the store were detailed andprofits of R8.9 million for Woolworths from franchise fees and commissions over ten yearswere projected. In addition, an anticipated internal rate of return for the franchise of 14.7%, a net profit value over eight years at 16% and a payback period of eight yearswere recorded.

[19] On receipt of the projections Mr Nick Acker ("Acker") of Woolworths forwarded Christodolou'sdocument by email the same day to *inter alia* Mr Simon Susman and Mr Norman Thomson ("Thomson") of Woolworths in which the following was stated:

> '*At the meeting last week I undertook to contact the franchisee to check on his turnover forecasts to determine why he would to embark (sic) on a "loss-making" venture by introducing a Food market*
>
> *Not surprisingly he is much more bullish on sales, both in Food and Clothing*

I took a more cautious approach and increased the Foods sales projection from R 200k per week to R 215k per week and the Clothing upliftment (on the back of the Foods upliftment) from 10% to 15%

I also tweaked some of the expense parameters and I believe that he can make money from this venture - projected IRR of 14.7%

I propose that we approve the introduction of the Food market"

[20] Thomson replied to the email from Acker on 24 April 2009 stating:

'*I am happy with this. Can you get him to accept these numbers as his own best estimates? Please keep these viability numbers close at hand in case we ever get into a profitability debate*…'

[21] It was put to Christodolouin cross-examination that viabilities are prepared over a longer period as it is not sensible to consider the repayment of capital expenses over a one or two year period. He replied that Woolworths "*should have said this guy won't make it in four years*" but did not. He did not seek an extension to the franchise agreement as the lease addendum had been signed for ten years.

[22] On 2 October 2009, prior to the opening of the upgraded Kokstad store, both Christodolou and Woolworths signed a second addendum to the lease agreement commencing on 1 May 2009 for a period of 10 years with an optional renewal period of five years. This second addendum recorded the increase to the 300m^2 extension to the premises leased and recorded the introduction of foods into the leased premises.

[23] On 3 December 2009 the upgraded store was opened. Christodolou's evidence was that he had invested over R5 million in the new store but that the

period agreed in the second lease addendum gave him comfort that his investment was secure and his risk therefore small. Furthermore, the franchise agreement would, in his mind, be extended automatically as it was the Woolworths brand involved, Woolworths had indicated that the revamp of the store should proceed and that the company would help Christodolou 'all the way'. With the trust of Woolworths, he expected the company to do the right thing.

[24] In his evidence Christodolouqueried why Woolworths, as the professionals, would allow him to extend the store if only for a period of four years. Mrs Christodolou's evidence was that it never crossed her mind that the franchise may end in four years as ten-year viabilities had been submitted and the lease addendum had been signed for ten years.

[25] On 4 December 2009, at the request on this day of Ms Dawn Pottier("Pottier") of Woolworths,Christodolou signed an addendum to the franchise agreement, which recorded the introduction of foods into the store and the expiry of the franchise agreement on 23 September 2013.

[26] In the plaintiffs' first further particulars provided, it was stated that Christodolou received the franchise addendum on 2 December 2009 fromMs ZoeyRylands ("Rylands"). Christodolou's evidence in cross examination was thatRylands, who had arrived at the store on 2 December 2009, gave him the addendum on 3 December 2009 and said he must look at it and sign it. He was busy and under pressure and said he could not read it then and that she would

have to give him time. Rylands told him that Pottier would give it to him to sign. Mrs Christodolou saw Rylands reminding Pottier to get the addendum signed.

[27] Pottier's evidence was that she asked Christodolou on a few occasions on 4 December 2009 to sign the addendum.Christodolou and his wife stated that Pottierhad the addendum in a brown envelope, which she said shehad received from Rylands, and asked Christodolou to sign it. However, Pottier's evidence was that the Christodolou already had the addendum when she asked him to sign it.

[28] Christodolou testified thatin response to his query as to what the addendum concerned, Pottier informed him that it was a foods addendum dealing with turnovers, how to conduct the business and commission structures, that she needed to take it with her to Cape Town and that the store would be closed down if it was not signed. Christodolou attempted to contact his attorney two or three times without success and then opened the addendum, signed and initialled it. He "did not read a word" of the agreement, which had notbeen sent to him electronically before he signed itas he was in a rush given his direct involvement in the logistics of the newly opened upgraded store.

[29] Mrs Christodolou confirmed that Pottier had said the contract concerned food commissions, that Pottier had handed it over and that her husband had signed it without reading it. Pottierstated that sheassumed Christodolou had read the addendum but that she did not ask him this. She denied that she had said the store would be closed down but confirmed that her instructions were to

leave Kokstad with the signed addendum although in her experience a franchisee is required to sign an agreement before a store is opened.

[30] Christodolou's evidence was that had he known that 23 September 2013 was recorded as the expiry date of the franchise in the addendum he would not have signed it, nor would he have upgraded the store or introduced foods into it. Both he and his wifebelieved that the franchise was extended for ten years, concurrent with the lease addendum, given the viabilities prepared over a ten-year period.

[31] On 20 September 2011 Woolworths informed Christodolou that it would trade as a corporate store in Kokstad from 24 September 2013 and that the plaintiffs'Kokstad franchise would end at midnight on 23 September 2013. On receipt of this letter Christodolou called for a copy of the franchise addendum. In the letter from Woolworths it was recorded that the CC would be entitled to an end of term payment provided that the requirements of the end of term policy were met. The end of term payment offered by Woolworths to the plaintiffs amounted to 3.6 times the net profit over the preceding three-year period plus assets and stock, but was rejected by the plaintiffs given the investment made in funding the upgrade of the store and the fact that it had taken years to build the business into a successful enterprise which the plaintiffs had understood they would retain into the future.

Discussion

Rectification

[32] Against the foregoing background, the plaintiffs launched the present action, claiming *inter alia* rectification of the franchise agreement. The plaintiffs' claim for rectification relies on the common intention of the parties prior to the conclusion of the franchise addendum that the duration of the franchise agreement would be extended to 30 April 2019, identified to the duration of the lease, subject to renewal in terms of the franchise agreement for a period of five years. They plead that as a result of mistake, the franchise addendum did not reflect this common intention of the parties.

[33] Rectification is aremedy that has as its purpose to give effect to the true intention of the parties.In order to succeed, the plaintiffs,having pleaded mistake, must prove that the sustained common intention of the parties is not expressed in the agreement due to an error or mistake, or the *dolus*of one party. (Christie *The Law of Contract* (6thed at 344). Rectification presupposes a common intention and does not find application in circumstances of unilateral mistake.

[34] If the party seeking rectification can prove an agreement anterior to or contemporaneous with the writing with which the written agreement, owing to a mutual mistake, fails to conform, the Court will rectify the erroneous instrument. *Weinerlein v Goch Buildings Ltd* 1925 AD 282 at 288; *Meyer v Merchants' Trust*

Ltd 1942 AD 244 at 253 and 256; *Von Ziegler and Another v Superior Furniture Manufacturers (Pty) Ltd* 1962 (3) SA 399 (T) at 409E.

[35] In *Brits v Van Heerden*2001 (3) SA 257 (C) at 283B it was stated that –

'…*the mistake does not have to relate to the writing itself, but might relate to the consequences thereof. The mistake may be one common to both parties; the mistake may be that of only one party; the mistake may be induced by misrepresentation or fraud. But there must be a mistake. In my view, the crux of the matter is that the mistake, be it a misunderstanding of fact or law or be it an incorrect drafting of the document, must have the effect of the written memorial not correctly reflecting the parties' true agreement*."

[36] Rectification does not constitute a variation of the written agreement, but a correction or completion of it so as to reflect what the parties agreed.Rectification cannottherefore be excluded by a clause prohibiting variation. *Leyland (SA) (Pty) Ltd v Rex Evans Motors (Pty) Ltd* 1980 (4) SA 271 (W) at 273.

[37] In *Tesven CC and another v South African Bank of Athens*2000 (1) SA 268 (A) at para 13 it was stated that the parolevidence rule does not exclude evidence of a prior oral agreement or a common continuing intention which a party seeks to lead in support of a claim for rectification.See *Rand Rietfontein Estates Ltd v Cohn* 1937 AD 317 at 327. At para 16 Farlam AJA stated that:

'*To allow the words the parties actually used in the documents to override their prior agreement or the common intention that they intended to*

record is to enforce what was not agreed, and so overthrow the basis on which contracts rest in our law: the application of no contractual theory leads to such a result.'

Period of franchise and lease agreements

[38] While the franchise mission document did not create rights as between the parties, it recorded an intention on the part of Woolworths that there exist concurrency between its franchise and lease agreements which made business sense so as to ensure that the premises from which a franchise store would operate were secured for the period of the franchise.

[39] The plaintiffs from opening of the franchise store complied with their contractual obligation to trade from the premises negotiated and secured by Woolworths. In this regard, while the periods recorded in the franchise and lease agreements have not mirrored each other in precise terms, there has existed *de facto* concurrency between the date of occupation of the premises and the operationof the franchise. This is evident from the retrospective commencement date of the lease and the fact that, apart from the first year, the period of the lease has at no time been less than the agreed franchise period.

[40] Having obtained in-principle agreement to introduce foods into the Kokstad store, the agreed extension to the leased premises, negotiated by Woolworths, followed. Christodolou'sconfidence that "we were going to get there" appears to have been justified.What is apparent is that Woolworths

negotiated thenew ten-year lease period recorded in the addendumand effective on 1 March 2008, before a final decision had been taken on the introduction of foods and prior to the expiry of the ten-year period recorded in the original lease agreement signed in 1999. While clause 33.2 of the franchise agreement recorded the agreement of "*the Franchisee … that it will conclude any such Premises Lease entirely at its own risk, and that it will have no claim, of whatsoever nature, arising from the participation, in whatever capacity, of the Franchisor in the negotiation and/or conclusion of the Premises Lease*', the parties were obliged to observe the utmost good faithtowards one another and hadwarranted"*that they shall not do anything which might prejudice or detract from the rights, assets or interest of the other of them*".

[41] In such circumstances it is difficult to understand why Woolworths would have negotiated and Christodolou would have signed the first lease addendum had further space over a ten-year period not been required in order to introduce the sale of foods out of a larger franchised store and when the lease period recorded in the original lease agreement could have remained operative.

[42] Approximately five months after the new lease period commenced on 1 March 2008, the parties agreed to the extension of the term of the franchise agreement to 23 September 2013. This extension was granted after Christodolou sought the franchise extensionin August 2008, eleven months out of time, following his having been informed to do so by the head of Woolworths' franchise division. Christodolou's view was that he understood that the franchise would simply be extended given that he had put money into the

franchise and Woolworths was aware of and had negotiated the ten-year lease addendum, including the extension to the leased premises. When the franchise period was then extended, neither party raised the lack of congruency between the franchise and lease periods.

[43] Christodolou's evidence that he was repeatedly requested by Woolworths to provide ten-year viability projections in respect of the franchise was not disputed. He provided Woolworths with acapital expenditure viability study on 21 April 2009 in whichfinancial projections over an eight and ten-year period,and not over the remaining four-year franchise period, were recorded.

[44] Acker'sconcern as to why Christodolou would embark on a loss-making venture by introducing foods into the store was not further explained in the email, nor did Acker testify at the trial to explain such comment or why it was that he nevertheless proposed that the introduction of foods be approved, amendingcertain of the projected figures and concluding that he was of the view that Woolworths "*can make money from this venture - projected IRR of 14.7%*". What is patently clear from Acker's email is that the projections considered were not projections over a four-year period but over a ten-year period. It is further material, and in my mind not simply coincidental, that these projections were over ten years when an additional ten years to the lease had been agreed between the parties in terms of the lease addendum, which had commenceda year earlier. The fact that the second lease addendum was later signed with a commencement date retrospective to 1 May 2009 for a period of ten years provides further support for the fact that ten years was the period being considered by the parties.

[45] Thomson's reply on 24 April 2009 to Acker's email asked that Christodolou "*accept these numbers as his own best estimates*" and that the numbers be kept close at hand in case of a "*profitability debate*". This email did not record that the projections were made in respect of an incorrect period, or that they should have been made in respect of a four-year period. It illustrated rather Thomson's acceptance of the ten-year period projected. I am satisfied in the circumstances that the evidence clearly shows that the parties were *ad idem* in working off ten-year and not four-year projections in considering viability and that expanded premises had been secured over the same period in order to allow the introduction of foods into the store over this period.

[46] This conclusion is relevant given that Woolworths would therefore have known that given that ten-year projections had been examined and profitability questions raised over a ten-year period to approve the venture, the introduction of foods over a four-year period would not, on the projections, have been viable given the capital outlay required and the limited time available to make profits.

[47] The profits considered by Woolworths were profits to be made in the franchise arrangement. As much is evident from the projections. The profitability of foods in a corporate store was not under consideration. As much is evident from the emails between Acker and Thomson from which it was apparent that Woolworths was not considering the projections on the basis that it would step into the shoes of the franchisee and take over the Kokstad store as a franchise store upon expiry of the franchise period in 2013. For this reason, Thomson requested that Christodolou be asked to "*accept these numbers as his own best estimates*" and that the numbers be kept close at hand in case of a "*profitability*

debate", and Acker concluded that Woolworths could make money on the venture calculated over a ten year period with the franchisee included in the calculations.

[48] In the circumstances, the fact that no mention was made of a four-year period remaining for the franchise, supports a conclusion that Woolworths did not hold the view that it was four years that was to remain on such franchise term.

[49] Acker's mention of a "loss-making" venture by introducing a food market and the fact that Christodolou was "(n)*ot surprisingly … more bullish on sales, both in Food and Clothing*" do not persuade me differently given the period of the projections under consideration and the fact that a limited franchise term was not considered in the projections.

[50] Five months after the introduction of foods into the franchise was approved in April 2009, the parties signedthe second lease addendum on 2 October 2009 with the commencement date backdated to 1 May 2009. In terms of the addendum, the lease was to endure for a period of ten years until 30 April 2019 with an option to renew for a further five years. Theextended leased premises and the introduction of food sales from the premises were recorded in the addendum. In terms of clause 33.2 of the franchise agreement "*the Franchisee agrees that it will conclude any such Premises Lease entirely at its own risk, and that it will have no claim, of whatsoever nature, arising from the participation, in whatever capacity, of the Franchisor in the negotiation and/or conclusion of the Premises Lease*". However, Woolworths was also not only

obliged to observe the utmost good faithtowards the plaintiffs buthad warrantedthat it would "*not do anything which might prejudice or detract from the rights, assets or interest*" of the plaintiffs under the franchise agreement. What is apparent is that thepremises were required from which to run the franchise and the plaintiffs therefore would have no use for a ten-year lease on premises in the absence of a franchise. Of this fact, I am satisfied that Woolworths wouldreasonably have been aware.

Signature of the addendum to franchise agreement

[51] The upgradedKokstadstore openedon 3 December 2009,two months after the lease addendum had been signed. Prior to the store opening no further agreement was signed between the parties.On 4 December 2009 Christodolou signed the franchise addendum, which was witnessed by Pottier and Mr Mike Hargreaves in Kokstad, and was later signed by Thomson and Mr Andrew Jennings for Woolworths.

[52] In signing the addendum to the franchise agreement, a presumption exists that Christodolou knew and understood the contents of what it was that he had had signed. Nicholas J in *Glen Comeragh*(*Pty*) *Ltd v Colibri*(*Pty*) *Ltd* 1979 (3) SA 210 (T) at 215A–C put it as follows:

'(t)*he fact that a person has put his signature to a document gives rise to a presumption of fact that he knew what it contained. The reason given (in Hoffmann South African Law of Evidence 2ed at 391) is that 'people do not usually sign documents without reading them'. . . . It would not in my view be at all unusual for a person signing such a document [a standard form of contract]*

not to read it, whether because of laxity, unwariness, heedlessness, or confidence in the integrity of the [offeror]. In my view, a more satisfactory basis for the presumption of fact is that a person by his conduct in putting his signature to a document admits that he is acquainted with its contents (cfKnocker v Standard Bank of SA Ltd 1933 AD 128). The admission is not of course conclusive, but it is sufficient to establish that fact prima facie.'

[53] The plaintiffs' case is that Christodolou did not know what it was that he was signing. In order to determine the issue, the circumstances surrounding signature of the franchise addendum are relevant.

[54] Woolworths took issue with the fact that in their further particulars the plaintiffs stated that the franchise addendum had been received from Rylands, yet in his testimony Christodoloudeviated from this version of events, first testifying that he had been handed the addendum for signature on 4 December 2009 and then that it had been received on 3 December 2009. Christodolou's evidence on this issue was argued, with reference to *McDonald v Young* 2012 (3) SA 1 (SCA) at 6I-7A,to be is so dishonest and therefore improbable that it is "*contrary to all reasonable probabilities and, despite the fact that it was unchallenged* [in the sense of Woolworths being unable to produce positive evidence that he read the document] *counts for 'nothing'*".

[55] It is not disputed that Christodolou was asked to sign the franchise addendum in an extremely busy period in which he was integrally involved in troubleshooting problems and learning new systems related to the introduction of foods into the Kokstad store. While his recall of the date on which he was

given the addendum was not perfect, I accept his evidence to be truthful that Rylands arrived at the store on 2 December 2009, that she spoke to him about signing the addendum on 3 December 2009 and that he indicated that he was busy and needed time. Rylands wasnot called to testify that this was not so.

[56] It is clear from the evidence that Christodolou knew that Woolworths wanted the addendum signed. His unsuccessful attempts to contact his lawyer accorded with his testimony that he is dyslexic and uses lawyers to look at contracts, unless they are one page. The evidence of both Christodolou and his wife was that he did not read the contract before signing was not contradicted by Pottier who did not observe if Christodolouhad read the addendum, although she assumed that he had.It is to me plausible that Christodolou, having not had success in contacting his lawyer, being consumed in the logistics ofthe store opening, faced with Pottier's insistence that she had to leaveKokstadwith the addendum signed and having previously indicated to Rylands that he needed time with which he had been provided, took the decision to sign it.

[57] I accept too the evidence of Christodolou and his wife that Pottier indicated to him what was contained in the addendum and that no mention was made of the franchise period. There existed a friendly professional relationship over a five-year period between Pottier and Christodolou, whose father and mother respectively had known each other. In such circumstances, it is entirely plausible to me that Christodolou would ask Pottier to indicate to him what was contained in the addendum and be prepared to rely on it, particularly given the urgency with which signature was required and the fact that he was busy. Pottier's evidence that she could not recall discussing the addendum with

Christodoloudoes not persuade me that she did not and was evidence that was contradicted by Mrs Christodolou. From Pottier'sevidence it was clear that she was focused on leaving Kokstad with the signed addendum, having been charged with this task in somewhat invidious circumstances given that she testified that such contracts are usually signed before a store opens.

[58] It was argued for Woolworths that there is no cause to doubt Woolworths' desire that the addendum should be signed before the opening of the store. This was clearly so, however no explanation was provided as to why Woolworths had not resolved the necessary contractual issues recorded in the addendum with Christodolou prior to the opening of the upgraded store. For Woolworths to present such a contract to Christodolou in the middle of an extremely busy opening period had the effect that he was compromised in his ability to review the contract and ensure that he was in agreement with its contents. To then insist on its signature in the face of the extreme pressure, with Pottier agitated to leave Kokstad and with Christodolou, having previously indicated that he needed time and with him then unable to contact his lawyer, was in my mind unreasonable.

[59] Having regard to the evidence tendered, I cannot agree with the contention for Woolworths that Christodolou was "extraordinarily dishonest" in his testimony regarding the contract, explained by his desire to hide from the Court the true fact that he knew what he was signing and that the overwhelming probability is that he had read the clause providing for a termination date of 23 September 2013. I find to the contrary that Christodolou presented as an honest and credible witness who had not constructed a version of events to support a

complex claim against Woolworths.His recall,while not always perfect, was not dishonest, let alone “extraordinarily dishonest”. His testimony reflected the pressures of the store opening period and its imperfections confirmed to me that it was genuine. Furthermore, material aspects were supported by Mrs Christodolou, whose credibility as a witness was not brought into issue by Woolworths, and who I am satisfied was also an honest and reliable witness on the issues in respect of which she had knowledge.

[60] I find therefore on the evidence before this Court that while Christodolou signed the addendum to the franchise addendum on 4 December 2009, the probabilities favour Christodolou’s version that had he been alerted to the franchise expiry date contained in the addendum, he would not have signed the addendum given his financial investment in the store, the acceptance by Woolworths of his viability projections recording returns over ten years, the ten-year lease period which had already commenced and his expressed commitment to the franchise.

[61] Accordingly, it follows that I am satisfied that in signing the addendum Christodolou was not aware that he was consenting to the expiry of the franchise on 23 September 2013.

Conduct of Woolworths

[62] It was argued for Woolworths that on 8 September 2008 when the franchise agreement was extended to 23 September 2013, Woolworths did not intend that the franchise would endure beyond this date and its understanding of the situation is fatal to a claim for rectification.

[63] However through its conduct I am satisfied that Woolworths presented itself in such a manner that a reasonable person in the position of Christodolou would have understood Woolworths to be consenting to the introduction of foods into the store and the extension of the franchise period in order to do so.

[64] This is so given that on approving the introduction of foods into the store and on signing the lease addendum, Woolworths did not indicate to Christodolou that in spite of the ten-year viability projections and the ten-year lease period, the franchise would nevertheless expiry in four years. Given the projections and the lease, Woolworths in my view conducted itself in such a manner as would lead a reasonable person to believe that it was assenting to the extension of the franchise agreement for a period of ten years. As a consequence of its conduct, I find that Christodolouacted upon the belief that Woolworths had assented to the extension of the franchise agreement on this basisand entered into the franchise addendum.

[65] The well-known *dictum* referred to by Blackburn J in *Smith v Hughes* (1871) LR 6 QB 597 at 607, and referred to in *Pieters& Co v Salomon* 1911 AD 121 at 137, is that:

'*If, whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon the belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.*'

[66] Christie states that if this were not accepted to be the case, "*our law would be in a sorry state, as it would be obliged to hold that whenever there was no true subjective agreement there was no contract, even if the one party had given the other reasonably to understand that they were in agreement*". (Christie 6thed at 11-12. See too *George v Fairmead*(*Pty*) *Ltd* 1958 (2) SA 465 (A) 471 B-D Fagan CJ;*National andOverseas Distributors Corporation (Pty) Ltd v Potato Board* 1958 (2) SA 473 (A) at 479G–H per Schreiner JA;*SonapPetroleum (SA) Pty Ltd v Pappadogianis*1992 (3) SA 234 (A);and *Du Toit v Atkinson's Motors Bpk* [1985] 2 All SA 149 (A) per Van Heerden JA).

[67] The circumstances under which the franchise addendum was presented to Christodolou do not assist Woolworths. It is clear on the facts that Christodolou, while busy with all issues related to the store opening and the unique complexities of introducing foods into the store, Woolworths presented the franchise addendum to him for signature without explanation as to why this was not done prior to the store opening.

[68] In my view a reasonable person would have concluded that the sustained common intention of the parties was that the franchise agreement was to be extended for a period of ten years. This is so given the conduct of Woolworths with regards to the ten-year projected viabilities and the conclusion of the ten-year lease. The effect of Woolworths' conductwas that it was sufficient to constitute a misrepresentation which had the effect of misleading the plaintiffs when signing the franchise addendum.It follows therefore that on the facts before me, the franchise expirydate recorded in the addendum was a consequence of this misrepresentation on the part of Woolworths and did not

record the common intention of the parties. I am satisfied that a reasonable person would have perceived the common intent of the parties to be that the franchise period would be extended to endure for the period recorded in the lease addendum and that the recordal in the franchise addendum of 23 September 2013 constituted a mistake. I find therefore that in such circumstances the addendum to the franchise agreement stands to be rectified. Consequently, the franchise addendum must be rectified to record the expiry date of 30 April 2019 being the date on which the ten-year lease addendum terminates.

[69] I am not persuaded by the further argument put up for Woolworths that at best the plaintiffs held a *spes* that the franchise period would be extended. It is material that the parties had, in terms of clause 34.4 of the franchise agreement, undertaken in the implementation of the franchise agreement'*to observe the utmost good faith'* and warranted '*in their dealings with each other that they shall neither do anything nor refrain from doing anything which might prejudice or detract from the rights, assets or interest of the other of them'*. Such a good faith undertaking remained binding on the parties and in as much as it obliged the plaintiffs to act in good faith, so too did it oblige Woolworths.

[70] In *Shoprite Checkers (Pty) Ltdv Bumpers Schwarmas CC & Others* 2002(6) SA 202 (C) 215 H – I Davis Jstated that –

'*Whatever the uncertainty, the principle of good faith must require that the parties act honestly in their commercial dealings. If the one party promotes its own interests at the expense of another in so unreasonable a manner as to*

destroy the very basis of consensus between the two parties, the principle of good faith can be employed to trump the public interest inherent in the principle of the enforcement of a contract.'

[71] The good faith undertakingto which both parties were bound required Woolworths not to promote its own interests, in the words of Davis J, in an unreasonable manner against the plaintiffs. I am satisfied however that the evidence shows that in breach of the undertaking provided, it did precisely that in taking the stance that it did towards the plaintiffs.

[72] Woolworths took issue with the recordal at paragraph 17 of the plaintiffs' particulars of claim that the plaintiffs in signing the addendum were taking up" their option to extend the franchise agreement through to 30 April 2019 stood in contrast to the claim for rectification. Although drafted poorly, I am not persuaded that this paragraph stands contrary to my findings regarding the reasonable perception as to the intent of the parties and the mistake therefore recorded into the addendum.

[73] To summarise, I find that the plaintiffs have discharged the onus of establishing that they are entitled to rectification of the addendum to the franchise agreement.

Tacit option to extend franchise

[74] I move now to consider whether a tacit option contract exists in terms of which it was agreed that the plaintiffs held an option to extend the franchise agreement for a period of five years from 2019 to 2024.

[75] The principles governing importation of a tacit term were restated by Nienaber JA in *Wilkins NO v Voges*1994 (3) SA 130 (A) at 136I-137B, as follows:

> '*A tacit term, one so self-evident as to go without saying, can be actual or imputed. It is actual if both parties thought about a matter which is pertinent but did not bother to declare their assent. It is imputed if they would have assented about such matter if only they had thought about it - which they did not do because they overlooked a present fact or failed to anticipate future one. Being unspoken, a tacit term is invariably a matter of inference. It is an inference as to what both parties must orwould have had in mind. The inference must be a necessary one: after all, if several conceivable terms are all equally plausible, none of them can be said to be axiomatic. The inference can be drawn from the express terms and from admissible evidence of surrounding circumstances. The onus to prove the material from which the inference is to be drawn rests on the party seeking to rely on the tacit term. The practical test for determining what the parties would necessarily have agreed on the issue in dispute is the celebrated bystander test*.'

[76] Applying these principles to the evidence in this case, I am not satisfied from the signature of the second lease addendum that there existed unequivocal conduct which is capable of no other reasonable interpretation than that the intention of the parties was to include an option to extend the franchise agreement for a further five years from 2019. This is given that the viability projections prepared by Mr Christodolou made no reference to the option of

such an extended period and I can only conclude on the facts before this Court that the parties had not considered the period from 2019 until 2024. In such circumstances, a conclusion that a tacit option contract existed between them is not sustainable on the facts.

[77] Given my findings with regards to the rectification of the franchise addendum, it is not necessary to consider the remainder of the causes of action raised by the plaintiffs.

Costs

[78] The plaintiff seeks an order of costs order against the defendant, inclusive of the costs of two counsel.

[79] I am satisfied that in the circumstances of this case, it was both reasonable and justifiable that a second advocate be appointed and accordingly, that the order as to costs is to include the costs of two counsel.

Order

[80] In the result, the following order is made:

1. Clause 3.2 of the Addendum to the Franchise Agreement signed by the plaintiffs on 4 December 2009 and by the defendant on a date thereafter is rectified to read:

   “Clause 7.1.2 shall be deleted in its entirety and replaced by a new clause 7.1.2 which clause shall read as follows:

"7.1.2 endure for a period reckoned from the Commencement Date and expiring at midnight on 30 April 2019."

2. The defendant shall pay the plaintiffs' costs, inclusive of the costs of two counsel.

KM SAVAGE
ACTING JUDGE OF THE HIGH COURT

Appearances:

For plaintiffs: D Gordon SC and A Christison

Instructed by Llewellyn Cain Attorneys

For defendant: E Fagan SC and E van Huysteen

Instructed by Edward Nathan Sonnenberg