THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 354/11

(Not reportable)

In the matter between:

PRIMEDIA (PTY) LTD t/a PRIMEDIA INSTORE	**Appellant**
and	
RADIO RETAIL (PTY) LTD	**First Respondent**
RADIO RETAIL FOR SPAR (PTY) LTD	**Second Respondent**
ZaPOP (PTY) LTD	**Third Respondent**

Neutral citation: *Primedia v Radio Retail* (354/2011) [2012] ZASCA 32 (29 March 2012).

Coram: Mthiyane DP, Cloete, Cachalia, Malan, Leach JJA

Heard: **15 March 2012**

Delivered: **29 March 2012**

Summary: **Unlawful competition – appellant enforcing rights in terms of pre-existing contracts – no unlawful competition proved.**

ORDER

On appeal from: Western Cape High Court, Cape Town (Henney AJ sitting as court of first instance):

1. The appeal is upheld. Save as set out in para 2, the respondents are ordered to pay the costs of the appeal, including the costs of two counsel.
2. The appellant is to pay the costs of the appeal against the dismissal of its counter-application including the costs of two counsel.
3. Paras 3 and 5 of the order of the court a quo are set aside and the following order is substituted:
   'The main application is dismissed with costs, including the costs of two counsel.'

JUDGMENT

CACHALIA JA (Mthiyane DP, Cloete, Malan, Leach JJA concurring):

[1] This is an appeal against a judgment of the Western Cape High Court (Henney AJ) – with its leave – granting the respondents final interdictory relief against Primedia, the appellant in these proceedings. The high court found that Primedia had unlawfully interfered with the contractual relationships between the respondents and 330 retail franchisees associated with the well-known Spar Group. It also dismissed Primedia's counter-application for an interdict restraining the respondents from unlawfully interfering with its contractual relationship with 110 of these franchisees.

[2] As is evident the parties compete in the retail in-store industry in the area of product marketing. They do so inter alia by providing media types to attract the attention of customers who patronise these stores. Stores that use these services enter into agreements with service providers, such as the parties in this case, who market, sell and install the media types.

[3] The three respondents have since early in 2009 collaborated in marketing their services to Spar franchisees, and have entered into exclusive agreements with 330 franchise stores to provide in-store promotions for their media types.

[4] The present dispute began when Mr Riaan Labuschagne, the managing director of ZaPOP, learnt that Primedia's representatives had visited two of the stores with whom the respondents had exclusive agreements to promote its products. So he wrote to Mr Graham Bouwer, Primedia's chief executive officer, on 6 August 2010 to request Primedia to stop promoting the respondents' identified media types or similar media types at any of the 330 stores in question, and to remove any such products from the stores where they had been installed.

[5] In response, Mr Bouwer distributed a notice on 19 August 2010 to suppliers of the Spar Group. It read thus:

'**TO OUR VALUED CUSTOMERS**

It has come to my attention that ZaPOP [the third respondent] have announced that they have been awarded rights to provide instore 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.'

[6] A week later Mr Labuschagne sent another letter to Mr Bouwer complaining that this notice contained several false and misleading statements: it suggested, he said, that ZaPOP had no right to provide media services to Spar stores despite the respondents having written agreements to do so; it implied that the Radio Retail was creating 'confusion' in the market by announcing that it had rights to provide these services when it did not, and it asserted untruthfully that the appellant was the 'official and exclusive' provider of these services to stores of the Spar Group. The letter called upon Primedia to retract the notice within 14 days. A copy of this letter was sent to Mr Prentice and Mr Evans, the two Spar officials mentioned in the notice.

[7] The respondents' attempts to secure a retraction of the notice failed. On 7 September 2010 Primedia's attorneys responded to the letter maintaining that the notice was intended only for suppliers of the Spar Group, and not the franchisees. They also requested proof, on behalf of Primedia, that the respondents had in fact entered into exclusive agreements with the franchisees.

[8] On 10 September 2010 the respondents' attorneys made an extract of an agreement with the relevant exclusivity provisions available to Primedia's attorneys and reiterated their demand that Primedia remove 'all media types' installed in any of the 330 stores.

[9] Primedia's attorneys responded by letter on 21 September. They questioned the validity of the exclusivity agreement, asserted that the media types installed by Primedia were 'markedly different' from those of the respondents and declared that in the absence of the respondents being able to demonstrate a clear right to provide services to the franchise stores exclusively, Primedia would not accede to the request to remove its media types from the stores in question.

[10] On 8 October 2010 the respondents instituted interdictory proceedings against Primedia seeking urgently to restrain it from competing unlawfully with them by interfering with their contractual rights with the franchisees. They alleged that Primedia was marketing, selling and installing media types similar to theirs in those stores. They also sought to prevent Primedia from making false representations, allegedly of the kind in Mr Bouwer's notice of 19 August 2010, concerning them.

[11] The application was initially set down for hearing on 15 October 2010. Two days earlier Primedia's attorneys had written to their counterparts and had undertaken, on behalf of their client, not to make any false representations about the respondents. The parties then agreed on a timetable for the filing of further affidavits.

[12] In its answering affidavit, filed on 28 October 2010, Primedia reiterated its earlier undertaking not to make false representations about the respondents. It also offered three defences to the relief claimed: first, it took issue with the validity of the contracts that the respondents had allegedly concluded with the franchisees by asserting that the respondents had not proved their contractual rights; second and importantly, it asserted that it had pre-existing agreements with 110 franchisees, which entitled it to provide its media services to them – this assertion also formed the basis of the counter-application in which Primedia alleged that the respondents were interfering with its rights under these pre-existing agreements; finally, Primedia alleged that its media types were not the same as those for which the respondents sought protection.

[13] When the matter proceeded in the high court the respondents sought final relief, and the matter was argued on this basis. They therefore had to satisfy the well-known requirements for the grant of an interdict: a clear right, reasonable apprehension of irreparable harm to their contractual relationships with the

franchisees with whom they had contracted and the absence of any alternative remedy to protect their rights.

[14] The learned judge found that the respondents had satisfied these requirements and granted the respondents all the relief they had asked for. He found that the contracts that the respondents had entered into with the franchisees were valid; that by circulating the notice on 19 August 2010, and dealing with the franchisees in question, Primedia had unlawfully interfered with the respondents' contractual relationships; and he dismissed Primedia's assertion that it was merely exercising its pre-existing contractual rights. As I have mentioned the judge also dismissed Primedia's counter-application.

[15] When the matter came before us Mr Gautschi, who appeared for Primedia, abandoned his client's appeal against the dismissal of the counter-application. He, however, persisted with all the defences that Primedia raised before the high court. Because of the approach adopted by Mr Gautschi, it is not necessary to deal with defence concerning the validity of the respondents' exclusive agreements.

[16] The thrust of his submission before us was this. Primedia and ZaPOP are competitors. The competition between them is lawful. Of the 330 franchisees with whom ZaPOP has agreements – assuming their validity, which was not conceded – Primedia has pre-existing agreements with 110. ZaPOP's exclusive agreements relate to certain media types only. Primedia has its own media types, which are not the same as ZaPOP's. By virtue of its pre-existing agreements Primedia is entitled to market, sell and install its media-types in any of the 110 stores. There is no suggestion in the papers that Primedia has been entering these stores for a purpose other than to promote its own products. And there is no evidence that Primedia was inducing any of the franchisees to breach their contracts with the respondents, or that it was otherwise unlawfully competing with them.

[17] In *Schultz v Butt*[1] this court stated the general rule relating to unlawful competition thus:

'[E]very person is entitled freely to carry on his trade or business in competition with his rivals. But the competition must remain within lawful bounds. If it is carried on unlawfully, in the sense that it involves a wrongful interference with another's rights as a trader that constitutes an *injuria* for which the Aquilian action lies if it has directly resulted in loss . . . In order to succeed in an action based on unfair competition, the plaintiff must establish all the requisites of Aquilian liability, including proof that the defendant has committed a wrongful act. In such a case, the unlawfulness which is a prerequisite for Aquilian liability may fall into a category of clearly recognised illegality . . .'

[18] One such category is inducing or procuring a breach of a contract: an action for damages, or where appropriate, an interdict will lie against any person who intentionally and without justification induces or procures another to breach a contract made with any other person. Where interdictory relief is sought, as in this case, it is not necessary to prove actual injury, ie an actual breach of contract. Proof of reasonable apprehension will suffice.[2]

[19] Although the judge found that Primedia's conduct had caused the franchisees to breach their exclusive agreements with the respondents, there was no evidence of any such breach. And before us the respondents did not contend that there was. Their cause of action was that Primedia had been unlawfully competing with the respondents by interfering with their contractual rights with the franchisees – hence their claim for interdictory relief. The respondents therefore had to show that Primedia was intentionally and without justification interfering with their contractual rights.

[20] In this regard Mr Olivier, on behalf of the respondents, contended that they were not seeking to prevent Primedia from entering the stores with which the

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[1] *Schultz v Butt* 1986 (3) SA 667 (A) at 678.
[2] *V & A Waterfront Properties v Helicopter & Marine Services* 2006 (1) SA 252 (SCA) paras 20-22.

respondents had exclusive agreements, or from promoting its own media types in those stores. The relief sought was, he argued, much more narrowly framed and aimed only at restraining Primedia from: (a) interfering with their contractual relationships with franchisees in question by soliciting them to unlawfully breach or to sever their agreements with the respondents; and (b) marketing, selling or installing the respondents' media types and diverting corporate opportunities, to which the respondents were entitled in terms of their agreements, to itself.

[21] Concerning the diversion of corporate opportunities, Mr Olivier properly conceded that there was no such evidence. The high-water mark for the other relief claimed by the respondents, as Mr Olivier put it, is contained in the founding affidavit of Mr Mark Finestone, the general manager for Radio Retail and Radio Retail for Spar. As most of the relief claimed hinges upon the following extract of the evidence in the affidavit, it is necessary to reproduce it in full. It reads thus:

'The confusion caused by Primedia's conduct

1. It is evident that considerable confusion has been created by Primedia's aforestated notice and actions. Some of the stores are of the impression that they are obliged to contract with Primedia or to allow its activities in-store, given the latter's "status" with the Spar Group as suggested in the aforestated notice. Primedia has further exacerbated the situation by sending representatives to stores, with which the Applicants' have exclusive agreements, and insisting upon installing media services there. I mention a few examples.

1.1 Mr Hein Bakkes of the Paarl East Superspar in Paarl reported to me that Primedia had on two separate occasions since 1 August 2010 wanted to place advertising and media products on his shop's trolleys contrary to our contract with him. The representative was at his store on about 18 August 2010 and again on 25 August 2010, whereupon Mr Bakkes called me to confirm whether the Primedia representative was allowed to install the media on his trolleys. He was concerned that he would be acting in breach of his contract with Radio Retail for Spar if Primedia was allowed to do so. I advised Mr Bakkes not to have the media installed on his trolleys. Mr Bakkes informed me on 15 September 2010

that Primedia nevertheless continued with media installations in his store, and that he was not sure when this would be removed. He accordingly wanted clarification as to by when can he expect the placement of ZaPOP media in-store, and the removal of the Primedia products. Mr Bakkes concluded an exclusive agreement with Radio Retail on 30 March 2010.

2. Mr Shawn Paulsen of the Lakeside Spar in Lakeside sent an e-mail message to the Spar Western Cape Distribution Centre on 27 August 2010 for clarification regarding the interrelationship between ZaPOP's and Primedia's activity in-store. I telephoned him on the same day to explain the situation to him. On 16 September 2010 Mr Paulsen confirmed to me that Primedia is currently still active in his store, with its representatives coming and going as they please. They do not announce themselves or their activity in his store. Mr Paulsen has recently received a "quarterly cheque" from Primedia pursuant to media installations in his store. Mr Paulsen concluded an agreement with Radio Retail on 31 March 2010, with effect from 1 August 2010. However, he confirms that he is confused due to Primedia still acting in-store. He has allowed them to continue, but needs clarity. Until the situation is resolved, he will continue to collect his quarterly payments from Primedia. I annex hereto . . . a copy of an email sent by Mr Paulsen to a representative of Spar Western Cape . . ..

3. Mr Yusuf Banderker of the Westerford Kwikspar in Rondebosch, who concluded an agreement with the Applicants on 18 March 2010, informed me on 17 September 2010 that a Primedia representative was in his store some weeks ago with advertising material, and that he (Mr Banderker) had to request the representative to remove the Primedia products from his store.

4. Ms Bernadette Visser of the Kraaifontein Superspar reports that Primedia representatives are very active in her store, and come and go in an *ad hoc* fashion. They do not announce themselves upon arrival, and place or remove media materials in the store at their own discretion, contrary to the terms of the agreement with us. Primedia has recently contacted the store to request the creation of an invoice to Primedia for the period April to June 2010 for media which had previously been installed for campaigns in this period. Ms Visser feels uncomfortable about the situation, as her store does not wish to become involved in a dispute between the Applicants and Primedia. The Kraaifontein Superspar concluded an agreement with the Applicants on 31 March 2010.

5. Mr Andre van Rensburg of the Kuilsriver Superspar, who concluded an agreement with the Applicants on 18 November 2009, reported that Primedia representatives had been in his store in the week of 17 September 2010. They come in on an *ad hoc* basis and show him what they will be putting up in store, and which will be in breach of his contract with us. Mr van Rensburg is confused as to what the impact of his agreement with the Applicants is on the situation. He has requested confirmation that Primedia "must go" and ZaPOP must "come in". He does, however, still collect quarterly rebates from Primedia for previous media installations and campaigns in-store. I annex, marked . . . a copy of a letter dated 18 January 2010 from Primedia to the Kuilsriver Spar, in which various promotions conducted in the store by Primedia for the period July to September 2009 are set out. It is evident from the description of the media types used in respect of each supplier, that those media types are similar to the ones offered by the Applicants.
6. Ms Mari Meyer of the Sonstraal Superspar, who concluded an agreement with the Applicants on 31 March 2010, stated on 17 September 2010 that Primedia representatives come into her store approximately every two weeks, without announcing themselves to her. They simply install their products, in breach of the terms of the agreement with us, and leave. She does not know how to handle the situation.
7. Ms Annalize Putter of the Bellville Kwikspar reported that Primedia was in her store on 17 September 2010, asking her for an invoice for previous media supporting campaigns installed in their store. Primedia had given her a letter . . . from which she had to create the invoice. Ms Putter requires confirmation as to when the Primedia products must be removed from her store. She concluded an agreement with the Applicants on 20 May 2010.'

[22] Primedia answered these allegations by stating that in respect of all of the franchisees mentioned above, except Mr Bardenker's Westerford Kwikspar in Rondebosch, it had pre-existing contracts with which its representatives were lawfully exercising Primedia's rights under these agreements. The judge, however, rejected Primedia's answer on the basis that its contracts were, unlike those of the respondents, not exclusive. And he appeared to attach some

significance to the fact that some of the franchisees had been uncomfortable and confused for having to deal with Primedia's representatives while they also had exclusive agreements with the respondents.

[23] It is understandable that some of the franchisees found it awkward in having to deal with two competitors with whom they had contractual arrangements. But the fact that some of the franchisees were not sure how to manage their relationship with the two parties can hardly be laid at Primedia's door. There is no suggestion from any of them that Primedia's representatives were doing anything other that enforcing the terms of their contracts with the franchisees in question.

[24] I can see no reason why the fact that these were not exclusive agreements had any bearing on Primedia's right to enforce them. In two of the seven examples of unlawful interference that the respondents mention – Lakeside Spar and Kuilsrivier – the franchisees specifically say that they continued to collect their fees or rebates for Primedia's media installations – obviously because of their existing agreements with Primedia. In not one of the remaining examples is there even a vague suggestion that Primedia's representatives were attempting to induce any of the franchisees to breach or to terminate their contracts with the respondents unlawfully. Nor is there evidence to suggest that any of the media types that Primedia's representatives were marketing, selling and installing were the same as those of the respondents.

[25] In the case of Mr Bardenker of Westerford Kwikspar Rondebosch – the only instance where Primedia does not appear to have an agreement – he requested Primedia's representatives to remove their products from the store. The judge considered this to be a case of 'clear interference'. But I respectfully disagree. Mr Bardenker does not say that the representatives refused to remove their products from the store or that they in any other way behaved in a manner that suggested that they were intentionally interfering with his agreement with the

respondents. And the papers come nowhere near permitting any inference to be drawn that this was the case.

[26] This brings me to the only remaining relief that the respondents sought – that Primedia be interdicted from making false representations about the respondents. The basis for this relief was the notice that Mr Bouwer distributed to the Spar suppliers on 19 August 2010. But once Primedia, two days before the respondents had launched their application, and later again in their answering affidavit, had given an undertaking not to disseminate false statements about the respondents, the respondents could have had no reasonable apprehension that Primedia would repeat the statements – assuming that they were unlawful. An interdict is not granted for past invasions of a right; it is concerned only with future infringements,[3] and there was no evidence to suggest that the respondents had a legitimate fear in this regard. There was therefore no longer any ground to interdict the further dissemination of false representations. So the high court ought not to have granted the respondents this relief.

[27] To conclude, I stated at the outset that the parties to the present dispute are competitors. To succeed in its application for final relief, the respondents had to prove that Primedia was competing unlawfully with them. The interdict could have been granted only if the facts stated by Primedia in its answering affidavit, together with the admitted facts in the respondents' affidavits, justified this finding.

[28] In all but one of the seven examples that the respondents cited as evidence of unlawful interference with their contractual relationships with the franchisees in question, Primedia asserted, as a fact, that they were merely enforcing their pre-existing contacts with those franchisees, as they were entitled to do. That this may have caused some discomfort and uneasiness among of the

[3] *National Council of SPCA v Openshaw* 2008 (5) SA 339 (SCA) para 20; *Simonlanga & others v Masinga & others* 1976 (4) SA 373 (W) at 375H-376A.

franchisees does not mean that Primedia was not entitled to enforce their contracts, and there was no proper basis for the high court to have rejected Primedia's claim that this is what it was doing. In the only case where Primedia did not have a pre-existing agreement – Westerford Kwikspar Rondebosch – there was simply no evidence that Primedia unlawfully interfered with the respondents' exclusive contract. Finally, for the reason already given, there were no grounds to interdict Primedia from making false statements about the respondents.

[29] It follows that the appeal must succeed and the respondents must pay the costs of the appeal. Primedia belatedly abandoned its appeal against the dismissal of its counter-application. So it will have to pay the costs of the appeal in this regard. We were concerned in this appeal only with the orders at paras 3 and 5 of the order of the high court (which concerned the relief sought in the main application). It follows that those are the only orders that fall to be set aside.

[30] The following order is made.

1. The appeal is upheld. Save as set out in para 2, the respondents are ordered to pay the costs of the appeal, including the costs of two counsel.
2. The appellant is to pay the costs of the appeal against the dismissal of its counter-application including the costs of two counsel.
3. Paras 3 and 5 of the order of the court a quo are set aside and the following order is substituted:

   'The main application is dismissed with costs, including the costs of two counsel.'

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A CACHALIA

JUDGE OF APPEAL

APPEARANCES

For Appellant:	A Gautschi SC (with him L Hollander)
	Instructed by:
	J Sweidan Attorneys c/o Walkers Inc, Cape Town
	Symington & De Kok, Bloemfontein
For Respondent:	S Olivier SC (with him P S van Zyl)
	Instructed by:
	Werksmans Attorneys, Cape Town
	McIntyre & Van der Post, Bloemfontein