2/9/2008

IN THE HIGH COURT OF SOUTH AFRICA

(TRANSVAAL PROVINCIAL DIVISION)

REPORTABLE CASE NUMBER: 23057/2006

In the matter between:

SPEC-SAVERS SA (PTY) LTD **First Appellant**

And

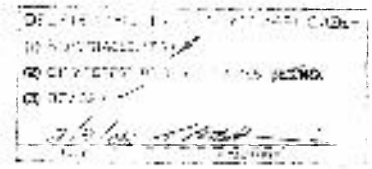
VARIOUS SPEC-SAVERS FRANCHISEES **2nd to 228th Appellants**

And

THE CHAIRPERSON N.O. OF THE PROFESSIONAL BOARD FOR OPTOMETRY AND DISPENSING OPTICIANS **First Respondent**

THE CHAIRPERSON OF THE UNDESIRABLE BUSINESS PRACTICES COMMITTEE **Second Respondent**

THE PRESIDENT OF THE HEALTH PROFESSIONS COUNCIL OF SOUTH AFRICA **Third Respondent**



JUDGMENT

THE COURT:

INTRODUCTION

1. Franchising has become an ever- expanding feature of modern business. A franchisor develops a product or products under a brand name, registers the trademark and the relevant patent, if any, and sets up a chain of businesses conducted and often owned by franchisees who are bound to him and usually to other franchisees by a franchising contract.
2. The contract obliges the franchisees to adopt the brand name and the advertising designed and put into the market by the franchiser and to deal in or sell the branded product.
3. In return for the privilege of becoming part of a business chain with a recognizable name and a well-known range of products, the franchisee undertakes to pay a franchise fee to the franchisor together with other optional fees or commissions.
4. Franchise chains typically have access to wholesale markets and to manufacturers and are able to negotiate lower prices for their specific products because of their greater purchasing power. The price reduction is then passed on, at least partially, to the public.
5. Wikipedia provides the following definition of the concept of franchising:

   ***"Franchising** refers to the method of practicing and using another person's philosophy of business. The "franchisors" authorize the*

proven methods and trademarks of their businesses to "franchisees" for a fee and a percentage of gross monthly sales. Various tangibles and intangibles such as national or international advertising, training, and other support services are commonly made available by the franchisor. Agreements typically last five to twenty years, with premature cancellations or terminations of most contracts bearing serious consequences for franchisees."

6. Franchise operations have developed in our economy in food chains, fast food outlets, retail stores, sports wear and sporting equipment, liquor stores and bars, music outlets, clothes stores and professions such as retail pharmacies.

7. Eventually franchising embraced the optometrists' profession as well – or *vice versa*.

8. Franchising is not altogether uncontroversial – there are those who lament the fact that big franchise operations tend to drive the individual practitioner, the corner shop and the small family business out of existence as they can afford to operate at lower profit margins, have access to bigger markets and are in a position to acquire stock at preferential prices because of their bulk purchasing power.

9. The applicants have charged the respondents with being consciously or unconsciously biased in favour of individual optometric practitioners, seeking to protect them against the advance of the franchising groups – a charge the respondents deny.

10. It is, fortunately, not necessary to delve into the question whether there is any substance in this allegation.

11. The present dispute concerns the compatibility of several clauses of a standard franchise operating agreement entered into between the franchisor and a chain of optometric practices with the ethical rules of the optometrists' profession.

12. The applicants are dissatisfied with – as they view the matter - one decision by the first respondent and four decisions of the second

respondent, given under the authority of, and taken in terms of a delegation of its powers by the third respondent.

13. The respondents contend that all the decisions were taken by the second respondent, the Undesirable Business Pratices Committee established by the third respondent.

THE PARTIES

14. The first appellant is Spec-Savers SA (Pty) Ltd, a company with limited liability duly incorporated and registered in accordance with the company laws of the Republic of South Africa, with principal place of business at 3rd Floor, Oasis North, Havelock Street, Central Port Elizabeth. The first appellant's only shareholder is KFML Holdings Limited, apparently an incorporated company whose particlars do not appear in greater detail from the papers. Nothing turns upon this aspect, however.

15. The 2nd to 208th appellants are companies that conduct the business of professional optometrists in terms of section 53(b) of the Companies Act 61 of 1973 – holding past and present directors of a company personally liable with the company itself for the debts and liabilities of the company - read with section 54A of the Health Professions Act 56 of 74. ("the HPA").

16. The first respondent is the chairperson of the Professional Board for Optometry and Dispensing Opticians, a statutory body established by the Minister of Health at the request of the third respondent, the council, in terms of section 15(1) of the HPA read with the Regulations Relating to the Constitution of a Professional Board for Optometry and Dispensing Opticians, published in GN 313 of 27th February 1998.

17. This board is referred to in this judgment as the "Board" or as the first respondent.

18. The second respondent is the chairperson of a committee of the Health Professions Council, the Undesirable Business Practices Committee that was established in terms of section 10(1)(a) of the Health Professions Act. The council may delegate so many of its own powers to such a committee as the council may deem desirable. Such delegation does not divest the council of its powers. This committee is referred to as the "Committee" or the second respondent in this judgment.

19. The third respondent is the Health Professions Council of South Africa, a statutory body established in terms of section 2 of the Health Professions Act. The third respondent is referred to in this judgment as "the Council" or the third respondent.

20. The Health Professions Council has it head office at 353 Vermeulen Street, Arcadia, Pretoria, Gauteng.

21. The appellants were originally joined by a similar group of franchisees together with their franchiser, the Torga Optical franchisor and franchisees. These parties withdrew prior to the hearing of this matter.

THE NATURE OF THESE PROCEEDINGS

22. The appellants have lodged an appeal in terms of section 20(1) of the Health Professions Act against – as they argue - one decision of the Board and four decisions of the Committee which declared certain provisions of the franchise agreement between the first appellant and the franchisees to be in conflict with the ethical principles as laid down in the ethical rules of the optometrists' profession and therefore to be undesirable business practices.

23. At the same time a review in terms of Rule 53 has been launched against the manner and fashion in which the decisions were taken. The review is based upon the provisions of section 6(2) of the Promotion of Administrative Justice Act 3 of 2000, hereafter referred to as "PAJA".

24. The parties disagreed in their papers and written arguments on the question whether the review should precede the appeal or *vice versa*.

25. However, when argument commenced, Mr Tip SC on behalf of the respondents conceded that the third respondent had at no stage clearly delegated its powers to the second respondent and had never vested the latter with the power to determine that the franchise agreement was unacceptable.

26. This failure could not be cured by a ratification of the second respondent's decisions as the third respondent was never provided with sufficient information regarding the facts that informed the second respondent's findings to enable it to take an informed decision to ratify any action on the second respondent's part.

27. The respondents therefore conceded that the review must succeed and that the appellants are entitled to the order that appears at the end of this judgment.

28. In the light of this concession, the appeal fell away.

29. The parties were agreed however, that the substantial issue between them, namely whether the franchise agreement does breach the ethical rules of the optometrists' profession, continues to exist between them.

30. They therefore requested the court to decide this issue by way of a declaratory order under the prayer for further and alternative relief claimed in the notice of motion.

31. It is clear that the public interest, the interests of justice, the parties' interests and the fact that all parties have requested the court to decide the merits dictate that the court should deal with the substantial

continuing dispute and should, in the exercise of its discretion, issue a declaratory order.

32. For purposes of convenience we refer to the franchisor and franchisees as applicants.

33. The five decisions relate to individual provisions of the franchise agreement between the first appellant and the 2nd to 228th applicants. The essential terms of this agreement must therefore be identified.

THE FRANCHISE AGREEMENT

34. The franchise agreement is the standard contract that the franchisees have to enter into with the franchisor, the first appellant. We quote the provisions thereof that are relevant to this judgment:

a) "**"brand"** means the **Spec-Savers** name and **logo**..." (clause 2.8.4);

b) ***""franchisee practice"*** mean (*sic*) the optometric practice conducted or to be conducted by ***the franchisee*** under the name and style of ***the brand*** from ***the premises*** in terms of ***the applicable legislation*** and ***this agreement"*** ; (clause 2.8.11);

c) ***""house brand products"*** mean all the products designated as such and branded by the distinctive logo, colour and style of ***the brand"*** ; (clause 2.8.18);

d) ***"" listed products"*** mean all the products on ***the Spec-Savers Product Catalogue*** other than ***house brand products;*** (clause 2.8.21);

e) "***monthly turnover"*** means ***the turnover*** in every ***franchisee practice*** for a specific month of the year; (clause 2.8.25);

f) "***optometrist"*** means a person registered as such under ***the Act"*** ; (clause 2.8.27);

g) "***turnover"*** means the total of:

the fees earned in ***the franchise practice*** from the practice of optometry; plus

the sales of ***core products,*** other merchandise and products effected by ***the franchisee*** whether for cash or on credit; plus

any sum paid to ***the franchisee*** by an insurance company in respect of loss of income;

less any discounts allowed and credits passed as well as any form of value added tax (or similar tax which may replace it) payable in respect of fees or sales; (clause 2.8.34.1 – 3);

h) "***the franchisee"*** must be a private company incorporated in terms of sub-section 53(b) of the Companies Act, 1973 and section 54A of ***the Act*** read with ***GNR 706/1994*** and all of the shareholders and directors of ***the franchisee*** must be and remain registered optometrist"; (clause 3.1.1);

i) "***the franchisee practice*** must be owned, controlled and conducted only by an ***optometrist***"; (clause 3.1.3);

j) ***'"The franchisor*** will not, directly or indirectly, manages, *(sic)* control, own or conduct ***the franchise practice.***", (clause 3.3);

k) "'**Fees**

7.1 As consideration for the granting by ***the franchisor*** of ***the Spec-Savers franchise,*** and the licence to utilise ***the intellectual property,*** on a non-exclusive basis, ***the franchisee*** shall:

7.1.1 on ***the effective date*** pay an initial fee of Rnul *(sic)* in respect of ***the franchisee practice;***

7.1.2 with effect from ***the effective date*** pay to ***the franchisor*** in respect of ***the franchisee practice:***

7.1.2.1 a monthly licence fee of 6% (six percent) of ***the monthly turnover*** plus VAT;

7.1.2.2 a monthly ***Specpac software*** licencing fee of R 310-00 plus VAT on the terms as set out in ***Annexure M***;

7.1.2.3 a monthly computer hardware and – software support fee of R 350-00 including VAT on the terms set out in ***Annexure N.***'"; (clause 7.1);

l) "***MARKETING CONTRIBUTION***

8.1 ***The franchisee*** shall pay a continuous marketing contribution equal to 3% (three percent) of ***the monthly turnover*** plus VAT thereon in respect of each practice comprising ***the franchisee practice,*** to ***the franchisor*** by way of debit order ....."

8.2 ***The franchisor*** shall be responsible for marketing ***the Spec-Savers brand*** and the national ***Spec-Savers franchisee*** network utilizing the continuous marketing contributions to be paid by all franchisees, on the terms set out in ***Annexure O***." (clause 8).

m) "for purposes of verifying ***the franchisee's*** compliance with ***this agreement*** and in order to ensure the protection of the ***intellectual property,*** be entitled to inspect, and if it so elects, to make and retain copies of all and any records, books and documents relating to the ***franchise practice*** and its businesses other than and excluding ***clinical records,*** whether recorded in hard copy or in electric format:".

35. The applicants allege that the franchisor provides a range of supporting services and other advantages to the franchisees, such as the determination of suitably situated businesses; the shop fitting and branding of the enterprise; access to a wide range of house brands that vastly exceeds the stock that a single optometrist could carry and therefore enables a franchisee to provide a better service to the public; support in negotiations with landlords to secure competitive rentals; continued national advertising that extends the market penetration of the franchisee; training of staff; human resource management; provision of information technology and promotion and legal and professional advice.
36. The benefits that flow from the franchisor's support for the individual franchisee is not truly contested by the respondents.
37. In addition, the applicants allege that the strong organization that is created by the franchising network enables previously disadvantaged members of the community to open their own franchise in communities that would not normally have access to an optometrist in their immediate neighbourhood.
38. These benefits attaching to a strong franchise organization are also not put in issue with any measure of conviction by the respondents.
39. The franchise agreement also records that, in the case of any conflict between the provisions of the contract and the applicable legislation, the latter will prevail – although that should be the natural result in any event unless the legislative provision is in conflict with the Constitution.

THE CREATION OF THE COMMITTEE AND ITS POWERS AND DECISIONS AND THE FUNCTIONS OF THE BOARD AND THE COUNCIL

40. There are vigorous disputes on the papers concerning the creation and the powers of the second respondent and the role that the first and

third respondents played in the events that gave rise to the present proceedings.

41. In the light of the concession that the process by which the Committee was empowered to take the impugned decisions was flawed, it is not necessary to deal further with this issue.

42. Rules in respect of acts or omissions that would require a professional board to take disciplinary steps against an offending practitioner are made by the council and become effective when approved by the Minister and published in the *Gazette*.

43. The Board, created in terms of section 15 of the Act, must play the role, together with the council, of guardian of the professional ethics and conduct of the particular primary health care profession for which it has been created, in this case that of optometry.

44. Had the decisions affecting the franchise agreement made by the committee been validly taken, the Board would be called upon to act as watchdog of the first instance in the light of the second respondent's findings and to report to council if it was of the opinion that disciplinary steps ought to be taken against offending practitioners.

45. When the advent of franchising to the optometrists' profession became an ethical issue, the first respondent called upon practitioners engaged in franchising to submit their agreements to it in 2001.

46. Although the agreements were not submitted at that stage, negotiations took place between representatives of the first and third respondents and i.a. representatives of the applicants. The franchise agreement was eventually submitted to the first respondent on the 19th September 2005.

47. The committee had in the meantime been established and held a meeting on 15th November 2005.

48. This was followed in December 2005 by two meetings of the Board with individual franchisees. The first respondent's chairperson reported to the Board. Thereafter the first respondent considered the various

clauses of the franchise agreement that appeared to it to be questionable and prepared a report for the second respondent.

49. In this report, the Board expressed the opinion that the franchise fees paid to the franchiser on the basis of turnover amounted to a sharing of fees and were not "market-related".

50. The Board further opined that the franchise agreement contained professionally impermissible provisions in respect of the house brands and the listed stock that franchisees were contractually obliged to keep, as this undertaking limited – in the Board's view - the optometrist franchisee's professional independence to decide on the type of treatment or the products that would be suitable for his or her patients.

51. The Board was further of the opinion that practitioners should individually be held responsible for unacceptable advertising that the franchisor might place in the media.

52. In addition, the Board was of the view that the access to the patient records held by the practitioner by the franchisor would be unethical and that the access to the patient records granted to the franchisor in terms of the agreement therefore created the potential that an infringement of patient confidentiality might occur.

53. The second respondent considered the Board's report and, after deliberation, purported to resolve at a meeting on the 13th February 2006 that several clauses of the franchise agreement identified in the Board's report were objectionable and constituted a transgression of the ethical rules of the optometrists' profession.

54. These decisions were purportedly confirmed during March 2006 by the committee after reconsideration of its decisions at the appellants' request.

55. The third respondent purported to ratify the impugned decisions in April 2006. It is now common cause that that step was flawed and that its purported delegation of its powers to the second respondent was ineffective.

THE APPLICABLE ETHICAL RULES

56. While the respondents considered the franchise agreement and engaged the appellants in the debate thereof, the ethical rules published on the 12th August 1994 were still applicable to the optometrists' profession. These rules define as improper or disgraceful conduct advertising in an unprofessional manner (Rule 1) and fee-sharing by accepting kickbacks or corrupt commissions, sharing fees with non-professional persons, touting or charging fees for services not rendered (Rules 6 to 9).

57. A revised set of ethical rules that was eventually published on the 4th August 2006 was already in preparation while the franchise agreement was investigated.

58. The respondents state that these rules were taken into account as part of the respondents' determination of policy and expression of the professional standards of the profession.

59. Rule 3 of these rules is quoted *infra* in the discussion of the ethical implications of the advertising practices of the franchise operation under consideration. It prohibits unprofessional advertising.

60. Rule 7 of the 2006 ethical rules deals with fees and commissions and reads as follows:

> *(1) A practitioner shall not accept commission or any material consideration, (monetary or otherwise) from a person or another practitioner or institution in return for the purchase, sale, or supply of any goods, substances or materials used by him or her in the conduct of his or her professional practice.*
>
> *(2) A practitioner shall not pay commission or offer any material consideration, (monetary or otherwise) to any person for recommending patients.*

(3) A practitioner shall not offer or accept any payment, benefit or material consideration (monetary or otherwise) which is calculated to induce him or her to act or not to act in a particular way not scientifically, professionally or medically indicated or to under-service, over-service or over-charge patients.

(4) A practitioner shall not share fees with any person or another practitioner who has not taken a commensurate part in the services for which such fees are charged.

(5) A practitioner shall not charge or receive fees for services not personally rendered, except for services rendered by another practitioner in his or her employment or with whom he or she is associated as a partner, shareholder or locum tenens."

61. Rule 12 of the 2006 rules deals with professional confidentiality and reads as follows:

(1) A practitioner shall divulge verbally or in writing information regarding a patient which he or she ought to divulge only –

(a) in terms of a statutory provision;

(b) at the instruction of a court of law; or

(c) where justified in the public interest.

(2) Any information other than the information referred to in sub-rule (1) shall be divulged by a practitioner only –

(a) with the express consent of the patient;

(b) in the case of a minor under the age of 14 years, with the written consent of his or her parents or guardian; or

(c) in the case of a deceased patient, with the written consent of his or her next-of-kin or the executor of such deceased's patient's estate."

62. It emerges from a comparison of the ethical rules that they do not differ from one another in substance, although the current rules are more detailed than the earlier set..

63. The applicants did not suggest in their affidavits that they suffered any prejudice in respect of the merits of the respondents' decisions because the draft rules were applied by the respondents to judge the compatibility of the impugned clauses of the franchise agreement with the standards set in the 2006 rules.

THE RESPONDENTS' IMPUGNED DECISIONS

64. The Committee – and not the Board, according to the respondents, (whose version would have had to be accepted in the light of the factual dispute on this issue if the matter had proceeded) - took five decisions that declared several provisions of the franchise agreement as being in conflict with the ethical rules and standards applying to the optometrist's profession.

65. These decisions were taken against the background of the third respondent having held that franchising as such was not unethical prior to the second respondent reaching its final conclusions on the franchise agreement.

66. The Committee decided not to approve the payment of the turnover-based license fees as this amounted to a sharing of professional fees. This decision was worded in substantially the same terms as the earlier recommendation of the first respondent to the second respondent.

64. The Committee resolved further, as formulated in a letter written by the respondents' attorneys, that:

"...the Spec-Savers Franchising Model should not be approved because it provides in clause 8 thereof and other related clauses, for payment of a percentage of turnover for marketing services which

payment is not market related and accordingly amounts to a sharing of fees in contravention of Ethical Rule 8 and Ethical Rule 7."

65. The Committee further resolved that the franchise agreement violated the practitioners' professional autonomy because of the practitioner *"...being forced to use franchiser supplied products in treating patients. This is in violation of the very essence of being a health practitioner and subjects practitioners to exploitation in violation of Ethical Rule 27....because clauses 2.8.8, 2.8.18, 2.8.21, 2.8.22, 2.3.31, 2.3.32 and related clauses in annexures "B" and "C' impede a practitioner's autonomy in performing the professional act of prescribing lenses and spectacles to correct errors of refraction."*

66. The Committee further resolved that the franchise agreement was unacceptable because of the fact that advertising for the franchise group is in terms thereof arranged by the franchisor on behalf of the franchisees and that the agreement therefore fails, in the view of the Committee,

"...to make provision for contractual undertaking of accountability by the practitioner for advertising conducted by the franchiser, the Franchise Advisory Council and/or person and agents acting on behalf of the above-mentioned person's instructions."

67. The Committee was further of the view that the provisions of the agreement, allowing inspection by franchisor of the commercial records of the franchisees in terms of clauses B1.1.7.6, B1.1.8 and B12.3 thereof,

"...violate(d) patient confidentiality rights."

APPLICANTS' CHALLENGES OF THE IMPUGNED DECISIONS

68. The applicants contend that the respondents' approach to the franchise agreement infringes their constitutional right to choose their

trade, occupation and profession freely as guaranteed in section 22 of the Constitution 108 of 1996.

69. This right includes the right to practice the chosen profession.

70. The right to choose a profession may be limited only by reasonable and justifiable measures that are acceptable in an open and democratic society based upon human dignity, freedom and equality.

71. Any restriction placed upon the practice of the chosen profession by the laws that regulate the relevant profession must be rationally connected to a legitimate governmental purpose: *Affordable Medicines Trust and Others v Minister of Health and others* 2006 3 SA 247 (CC) (2006 BCLR 529 (CC)).

72. This is the test that must be applied to the impugned decisions. There is no suggestion that the respondents seek to limit the choice of the profession for future or present optometrists, it is only the way in which their interpretation of the ethical rules limits the scope of the practice of the profession that is under attack.

73. The applicants further contend that the respondents have no right to interfere with the commercial activities of the optometrists' profession, and that the impugned decisions relate only to the commercial aspects of the franchisee practices and not the professional standards that regulate the professional functions of the franchisee owners. The decisions are therefore, in essence, *ultra vires,* the argument concludes.

74. Apart from the aforegoing, the applicants submit that the impugned decisions are irrational and incompatible with the respondents' duty to regulate the optometrists' profession in a reasonable manner that is exercised to achieve of a legitimate governmental purpose.

75. The applicants also argue that the impugned decisions are in conflict with the patients' – or the public's – right to access to health care services as determined by section 27(1)(a) of the Constitution. The applicants argue in support of this contention that the franchise allows

the optometrists to provide lower prices, comprehensive professional service, wider product choices and the establishment of practices in areas that would not be commercially viable if run by a single practitioner without the benefit of the support of a large commercial enterprise. Applicants further contend that their organization has opened the doors to optometrists belonging to historically disadvantaged communities to enter the profession and to establish their own professional companies supported by the franchise.

76. In the light of the decision to which the Court has come in respect of the disputed interpretation of the franchise agreement and the effect thereof upon the practice of optometry, it is unnecessary to investigate any alleged infringement of the right of access to health care.

THE RELEVANT FACTS THAT ARE COMMON CAUSE OR NOT SERIOUSLY DISPUTED

77. The following facts that are relevant to the consideration of the parties' arguments are either common cause, were not seriously disputed by the respondents in their papers or were not positively contested during argument:

    a. The applicants have formed a large commercial organization that has established franchisee branches in several outlying and economically depressed areas;
    b. The franchisor has access to a wider range of products than the average single optometrist practitioner;
    c. The product range is obtained at reduced cost because of the franchisor's purchasing power and the fact that the products are bought in bulk;
    d. The reduced cost is, at least partially, passed on to the consumer;

e. Single practitioners routinely charge more than the franchisees do;
f. Franchisees enjoy the technical and marketing support of the franchisor;
g. The franchise group's advertising is controlled by an advertising committee composed of the franchisor and franchisee members advising on the nature and extent of the franchisor's advertising campaigns;
h. The franchisor assists the various franchisees by providing training in business management, systems support and legal and business advice;
i. Young practitioners from historically disadvantaged communities are enabled by the franchisor to open their own practices and to serve their communities;
j. All the franchisees enjoy the support of the franchise brand that is well known and attracts customers;
k. Imported articles are obtained at preferential prices the benefit of which is passed on at least partially to the consumer;
l. The public benefits from the competitive prices at which products such as lenses and frames are offered;
m. The professional fees earned by an optometrist constitute about 20% of the turnover formula according to which the franchise fee is calculated;
n. There is no factual allegation that the product range offered by the franchiser is below the professional standard set by the Ethical Rules and the policies determined by the respondents;
o. The individual franchisee may acquire 10% of his stock from sources other than the franchisor's product range and house brands;
p. There is no allegation that any franchisee was ever unable to provide any products such as lenses or frames that were

required for the proper treatment of his patients because of the fact that the individual franchisee was a member of the franchise;

q. The franchisor can and does assist individual franchisees to obtain business premises in competitive locations;

r. The terms and conditions of the franchise agreement are accepted as reflecting the genuine intention of the parties thereto. There is no suggestion that any term thereof is simulated;

s. There is no suggestion that the franchisor or any of the franchisees has ever breached the patient confidentiality of any of the second to 208th appellants' patients;

t. Although the franchise agreement grants the franchisor extensive rights in respect of the manner and fashion in which the franchisee's business is conducted, there is no suggestion that the franchisor has ever attempted to prescribe to any franchisee how to conduct the professional part of any practice.

THE POWER OF THE COUNCIL TO CONTROL THE COMMERCIAL PRACTICE OF THE OPTOMETRISTS' PROFESSION

78. We have adverted above to the applicants' arguments that the third respondent does not have the power to control the commercial activities of the franchisees as professional optometrists.

79. The respondents rely on the provisions of sections 3 (c) and 4(c) and (d) of the Health Professions Act for their submission that the Council has the power to regulate the trading activities of the practicing optometrist. These sections read as follows:

"*3(c) ...to determine strategic policy, and to make decisions in terms thereof, with regard to the professional boards and the registered*

professions, for matters such as finance, education, registration, ethics and professional conduct, disciplinary procedure, scope of the professions, interprofessional matters and maintenance of professional competence;"

"4(c) consider any matter affecting the professions registrable with the council generally, and make representations or take such action in connection therewith as the council may deem advisable;

(d) make rules on all matters which the council considers necessary or expedient in order that the objects of this Act may be achieved;.."

80. The respondents further contend that the council has the power to take appropriate action if the manner in which the optometrist's commercial activity is conducted affects the profession's ethics or standards.

81. As a statement of principle, this assertion may be correct. It is not necessary, however, to investigate the question of how far the third respondent's powers may extend into the realm of commercial activity in the present instance. The respondents have nailed their colours to the mast of the finding that the terms of the franchise agreement under consideration do infringe the existing ethical rules and professional norms. It is therefore only necessary to examine whether the agreement does fall foul of the professional ethics of the optometrist's profession as held by the respondents or not. If they do, the respondents are entitled to a positive finding in this respect, if not, the question must be investigated whether the second respondent was correct in its conclusion that the agreement constituted an undesirable practice in its present form.

THE ONUS

82. It is common cause that the respondents' decisions limit the manner in which an optometrist may practice his or her profession.

83. The respondents therefore bear the onus to establish that the restrictions placed upon the practice of the optometry by their decisions are rationally formulated to support a legitimate government purpose.

THE ARGUMENTS

84. The arguments offered for and against the individual impugned decisions are considered seriatim below. This is expressly done against the background of the fact that the review has been conceded on the grounds set out above and purely to demonstrate the parties' contentions.

The first decision: ***Payment of turnover – based franchise fees***

85. The Board advised the second respondent, which accepted the advice and made it part of its own decision, that "*fixed administrative costs should be market-related*" and that franchise fees based on turnover amounted to a sharing of fees.
86. A franchise fee is paid for the right to be part of the franchise group and the benefits conveyed thereby.
87. The turnover according to which the fee is calculated includes as part thereof the professional fees.
88. The turnover is calculated as set out in the agreement.
89. The respondents argue that this determination amounts to a sharing of fees.
90. Fee-sharing must be distinguished from a formula that is based upon the income earned by the practice concerned.
91. The practice income is a conglomerate of all monetary receipts earned by way of fees and profits from sales in a professional practice:

"Income (consists of) Periodical ...receipts from one's business, lands, works, investments, etc" (Reader's Digest Great Encyclopaedic Dictionary 1969); *'(the amount of) money or other assets received or due to be received from employment, business, investments, etc, especially periodically or in the course of a year."* (Shorter Oxford English Dictionary, 5th ed.; 2002).

92. The term *"fee sharing"* has, in the professional environment, acquired an odious connotation, namely the sharing of remuneration due to a professional person for a professional service rendered by the latter with a non-professional person; allowing a person who is not professionally qualified to perform a professional service on behalf of the professional himself and charging professional fees for services rendered in this fashion; or accepting commissions and kickbacks for the purchase, sale or supply of any goods, substances or materials used by the professional in the conduct of his professional practice. See, in general in this connection: *Incorporated Law Society v De Jong* 1904 TS 283; *Moore v Haupt* 1913 CPD 1036; *Incorporated Law Society v Fraser & Scott* 1909 ORC 13. A particularly interesting decision on all fours with the facts of this matter is the decision of the Supreme Court of Wyoming in *Wyoming State Board of Examiners of Optometry v Pearle Vision Center, Inc.* 1989 WY 2; 767 P.2d 969, in which the court held that a franchise operation that had many parallels with the organization under consideration in this matter and included professional fees in the calculation of the payments due to the franchisor, did not constitute fee sharing.

93. It is clearly in the odious context that the respondents use the term fee-sharing with reference to the payment of franchise fees to the franchisor, which the respondents regard as unprofessional and in conflict with the ethical rules.

94. In the current ethical rules (and in the earlier set) the term *"fee-sharing"* bears the odious meaning.

95. It then becomes necessary to examine the terms of the franchise agreement against the background of the facts recorded above.

96. The fees that the optometrist is entitled to are recorded and audited in terms of the franchise agreement.

97. A portion thereof is included in the calculation of turnover as part of the franchise practice income.

98. There is no suggestion that this calculation is not done properly and honestly as part and parcel of an arms' length transaction.

99. This clearly distinguishes this practice from the odious professional practice that is described as "fee-sharing" in professional circles and the ethical rules. The tainted term carries the implication that the practitioner who is guilty thereof aims to obtain an advantage of a financial nature in a devious and dishonest fashion by employing tactics that involve deceit and fraud.

100. In the present instance, franchise fees are calculated as a percentage of the practice income, described as turnover and determined according to a fixed formula, payable for defined benefits that have been contracted for in a fashion that is neither dishonest nor devious.

101. The dishonest practice is designed to increase the business or profit of the professional person by involving the labours of non-professional accomplices, or by engaging in corrupt practices.

102. In the case of the present franchise, the franchise fee is based upon earnings received or due to be received for honest commercial and professional endeavour. In essence, the fee income is intermingled with the other sources of income of the practice for purposes of calculating a fee for benefits openly transacted for and had and received.

103. The respondents overlook the fact that any professional optometrist, indeed, any practicing professional person conducting a private practice, whether incorporated or otherwise, must devote some part of his or her fee income toward the payment of practice expenses,

whether in respect of salaries, stock acquisition, rental or – as in this case – franchise fees

104. The respondents appear to argue that, had the professional fees not been mentioned as part of the turnover formula, and the franchise agreement had simply provided for payment of a percentage of the total income, there would have been no objection to the agreement, once it was decided that franchising was not objectionable *per se* as being unprofessional.

105. This is an unrealistic approach that overlooks business realities and brands an honest business practice with the odious concept of fee-sharing as it is understood in professional circles.

106. By the same token, the respondents overlook that the odious concept of fee-sharing either denotes a corrupt practice of receiving commissions or kickbacks, or of involving unqualified persons in the rendering of professional services.

107. There is no suggestion in the franchise agreement that the franchisor provides any professional services of whatever nature or participates in the rendering thereof.

108. The professionally objectionable practice of fee-sharing is more often than not designed to tout for work and to reward a non - professional person for channeling work to the practitioner that she or he would not otherwise obtain. There is no suggestion that the franchise agreement is tainted in any way in this respect.

109. It would lastly appear that the respondents have over-emphasized the source of the funds included in the turnover formula that determines the fee payable to the franchisor. The unacceptable conduct that is covered by the term of "fee-sharing" in the professional context does not necessarily, and not only, consist of the actual sharing of a particular fee, or the untoward payment of a percentage thereof. In essence, the odious practice of fee-sharing covers all unprofessional conduct that involves the practitioner in the dishonest pursuit of a monetary reward or the dishonest

involvement of an unqualified person in the professional activities of a registered practitioner.

110. Once this is established and it is common cause that the franchisor and the franchisee are not engaged upon dishonest business, it follows that the respondents have misconceived the nature of the franchise agreement and that the inclusion of the professional fees in the computation of the franchise payment cannot be described as fee-sharing that is unprofessional. The payment of the franchise fee is neither dishonest nor corrupt, nor does it involve the services of unqualified individuals being falsely presented as the fruits of a professional person's labours.

111. By the same token, it is difficult to understand on what basis the respondents object to the franchising formula as being "not market-related". The fee is the result of a negotiated agreement contracted between business entities engaged upon a commercial enterprise in respect of a professional practice and the sale of optometric products to the public. The respondents provide no motivation for the finding that the resultant fees are not market related.

112. It follows that the first decision is neither logical nor rational, but the result of a misconception of conduct that cannot be described as unprofessional or in conflict with the ethical rules of the optometrists' profession.

The second decision: payment of a percentage of turnover for marketing services

113. The arguments relating to the payment of a percentage of turnover toward a marketing fund that is, according to the agreement, owned by the franchisees jointly and is devoted to marketing services, are *mutatis mutandis* the same as those considered under the previous heading that

deal with the objections advanced by the respondents against the computation of the franchise fee.

114. The result of the objections to the fee payable in respect of marketing services must consequently be the same.

The third decision: franchisee being forced to use the franchisor's products in treating patients

115. This decision appears to suggest that the respondents are of the view that the franchisees' independence as professional practitioners is compromised by the fact that they are obliged by the franchisor to ensure that 90% of their stock comprises house brands or other products specified by the franchisor.

116. The decision might be seen to suggest that the franchisees' choice of products is limited by the product range to less than an acceptable variety of lenses and frames to enable them to provide a proper professional service to the public.

117. The respondents have, indeed, submitted in their heads of argument that, as the franchisor determines the suppliers, there is no guarantee that the supply of a wide choice will always be ensured.

118. There exists no factual basis for this submission.

119. The appellants have alleged that the franchisor's product range is in fact much more extensive than that of the average single practitioner, providing a much wider choice to the public than would otherwise be available to the franchisees.

120. This allegation is barely denied.

121. If it is true, there is little reason to fear that a practitioner is *"...limited in his or her choice for whatever reason* (to provide the product best suited to the patient's need), *the professional decision to that extent*

becomes biased toward the franchise obligations of the practitioner and patient considerations then to the same extent become secondary.", as the respondents suggest in their heads of argument.

122. One of the most important considerations that would motivate a practitioner to join a franchise is the access that it provides to the former to a wider and reliable product range.

123. Quite apart from the fact the no evidence of any limitation of a practitioner's choice has been advanced, and that no practitioner has been accused of consciously prescribing a product that did not optimally answer his patient's needs, the respondents lose sight of the fact that every practitioner is entitled to carry 10% of stock of his or her own choice to meet the instances in which the prescribed stock does not provide the practitioner's professional requirements.

124. The grounds advanced for the respondents' decision therefore lack a rational basis.

The fourth decision: the lack of accountability for advertising conducted on the franchisee's behalf by the franchise organization.

125. As has been set out above, the franchiser receives a monthly marketing fee from the franchisees calculated as 3% of the turnover of the professional practice.

126. This fee is paid into a separate marketing fund for the purposes of advertising that is placed in the relevant media on behalf of all franchisees. The fund is managed by a "Franchise Advisory Council" composed of franchisee representatives and the franchisor.

127. The franchisees elect a representative from their ranks, one for each of nine geographical regions determined for this purpose by Annexure "O" to the Franchise Agreement.

128. The Franchise Advisory Council is further composed of one regional support co-ordinator appointed by the franchisor for each of these

regions, the franchisor's managing director, operations manager, national marketing executive, national training executive, all of whom are *ex officio* members, together with two members nominated by the holding company or the first appellant.

129. The council has the power to advise the franchisor and the franchisees on national and regional marketing strategies and training of franchisees personnel; proposed amendments to the Operations Manual, improvements to the franchise logo, signage and other franchise features and information technology.

130. Apart from these functions, the council may advise on national and regional marketing and to *"..endorse, on behalf of the national Spec-Savers franchise network, the agreed national and regional marketing campaigns as proposed by the franchisor from time to time."* (clause O1.2.2)

131. The respondents regard these provisions as objectionable as the franchisees do not, in terms of the franchise agreement, accept personal responsibility for the content of any advertising that the franchisor may publish on behalf of the franchise network.

132. It is argued on behalf of the applicants that any practicing optometrist is in any event bound by the ethical rules and the legislation that regulates the health professions, which make ample provision for the prevention of unprofessional advertising and therefore obviate the necessity to include a further clause in the agreement that each franchisee is personally responsible for the content of the advertising that the franchisor may publish.

133. Reference should be made in this regard to the ethical rules published on the 12th August 1994, which expressly state that " *advertising in an unprofessional manner, or permitting, sanctioning or acquiescing in such advertisement*" constitutes improper or disgraceful

134 conduct The 2006 Ethical Rules of Conduct for Practitioners Registered Under the Health Professions Act, published on the 4th August 2006,

subject any practitioner whose conduct falls foul of these rules to potential disciplinary steps in terms of Chapter IV of the Act, which may, in terms of section 42 thereof include suspension or removal from the register.

135. Rule 3 (1) reads as follows:

"A practitioner shall be allowed to advertise his or her services or permit, sanction or acquiesce to such advertisement: Provided that the advertisement is not unprofessional, untruthful, deceptive or misleading or causes consumers unwarranted anxiety that they may be suffering from any health condition."

This rule is qualified by sub-rule (2):

"A practitioner shall not canvass or tout or allow canvassing or touting to be done for patients on his or her behalf."

136. Each practitioner is therefore bound by his professional rules to avoid advertising that is in conflict with the profession's standards and ethics.

137. The franchise agreement is, apart from the express terms contained therein, subject to the Act and the rules published by the third respondent.

138. The Act contains statutory sanctions against unprofessional and untruthful advertising.

139. It is therefore difficult to understand why the respondents should wish to insist upon an express term in the franchise agreement that the individual franchisee must undertake personal liability for any advertising published on his or her behalf, as this obligation has already been statutorily imposed upon the every practitioner.

140. The objection to the advertising arrangements contained in the franchise agreement is therefore not rationally motivated.

The fifth objection: Breach of patient confidentiality

141. The franchise agreement provides for access by the franchisor to the names and addresses of patients and clients of the individual franchisee practices, both for the purpose of assessing the commercial performance of the practice and of obtaining the information for purposes of direct marketing.

142. The agreement does, however, contain express clauses that prohibit the access to the patients' clinical records. This is common cause.

143. The respondents have declared that this practice is undesirable as the patient's right to privacy may be compromised thereby.

144. The respondents are concerned, so they argue in the first instance, that information relating to the patients' personal health, treatment and medical condition may be accessed by the franchisor without the patients' consent.

145. This concern is met by the applicants with the argument that the agreement contains the express provision that the franchisor is not entitled to have sight of any clinical records of any patient.

146. The respondents are not convinced that this contractual provision provides adequate protection for the patients and suggest that the potential still exists that the franchisor might access the clinical information to which it is not entitled.

147. While patient confidentiality must obviously be protected – compare: *NM and Others v Smith and Others (Freedom of Expression Institute as amicus curiae)* 2007 (5) SA 250 (CC) – it is difficult to understand the respondents' concerns in this respect. Short of accusing the first applicant of unlawfully and dishonestly obtaining access to the clinical files, there is no reason to assume that any practitioner would fail to honour the basic ethical principles of his profession.

148. If any of the franchisees were to be prepared to disclose clinical information relating to their patients without the latters' consent, an amendment of the franchise agreement would be as ineffective to prevent

such conduct as would the statutory provisions and ethical rules that already prohibit conduct of this nature

149. There is in any event no evidence that any of the franchisees have ever been guilty of granting access to their patients' clinical records to the franchisor without the patients' consent, or that the franchisor has ever sought to obtain such information from the franchisees. This ground of objection on the part of the respondents against the agreement is therefore not rational.

150. The franchisees' obligation to provide access to patients' names and addresses for marketing purposes may be a different matter. Unsolicited advertisements are viewed by many consumers as an intrusion into their personal space and an irksome nuisance. Patients might therefore be justifiably irritated at finding junk mail delivered to them by their optometrist's franchise organization.

151. On the other hand, there might well be many patients who would like to be kept abreast of the latest developments in fashion frames and related products and would want to be informed of any bargains offered by the franchise organization.

152. We are not aware of any authority, nor have we been referred to any, that has held that a practitioner is guilty of unprofessional conduct for allowing the names and addresses of his patients to be used for advertising purposes of a franchise organization of which he is a member. While the unauthorized disclosure of any facts relating to a patient's medical condition or treatment received indisputably amounts to unprofessional conduct – *Jansen van Vuuren NO v Kruger* 1993 (4) SA 843 (A) – the obligation imposed by the franchise agreement upon the franchisee to participate in marketing efforts of the franchise group by making use of the patients' addresses has not been categorized as unprofessional conduct. See in this regard the authoritative discussion of this topic in the definitive work by Carstens and Pearmain *Foundational*

Principles of South African Medical Law, Chapter 11, p 943 et seq.; Strauss, *Doctor, patient and the law,* 3rd edition, p 103 et seq.

153. While there exists no ethical prohibition against the use of patients' addresses for purposes of advertising, the franchisees might be well advised to include a provision in the franchise agreement that patients should be specifically advised when providing their addresses to the optometrist that they might be used for marketing purposes, and patients should be given the option to indicate to the franchisee that they would prefer not to receive any promotional material from the franchise organization.

154. This salutary practice may in any event become obligatory in the near future, if consumer protection legislation currently under consideration by Parliament is accepted and promulgated.

155. In the absence of any ethical prohibition against marketing as envisaged by the franchise agreement, the respondents' objection cannot be held to be rational.

156. It follows that the applicants are entitled to a declaratory order in the terms sought in the notice of motion and the heads of argument.

COSTS

157. The applicants have been substantially successful, not only in respect of the review, but also in obtaining a declaratory order in their favour.

158. They are therefore entitled to their costs.

159. These costs must include the costs of two counsel, as both parties employed silk and junior counsel and the matter is of considerable importance to the parties and the public. Obtaining the services of two counsel was therefore clearly justified.

160. The court was greatly assisted by both sets of Counsel and would like to express its appreciation for the helpful arguments presented to it.

THE ORDER

1. The review application is upheld and the decisions taken by the second respondent regarding the franchise agreement entered into by the first applicant with the 2nd to 208th applicants are set aside.
2. It is declared that:
   "The Spec-Savers franchise agreement entered into between the first applicant and the 2nd to 208th applicants, as embodied in the Spec-Savers master franchise agreement, annexure SS4 to the appellants' founding affidavit:
   (a) does not contravene the Health Professions Act;
   (b) does not contravene any ethical rules, regulations, policy statements or guidelines of the Council;
   (c) does not involve the performance of "unprofessional conduct" within the meaning of the Health Professions Act."
3. The respondents must pay the applicants' costs, such costs to include the costs of two counsel.

SIGNED AT PRETORIA on this 17th day of September 2008.

E BERTELSMANN
Judge of the High Court

For the appellants: W Tiemann SC
A Cockrell

J RAULINGA
Judge of the High Court

For the respondents: E Trip
J Moerdyk