

SOUTH AFRICA / JUDGMENT

Van As v Van der Merwe (A332/2010) [2011] ZAWCHC 20 (18 February 2011)

[2011] ZAWCHC 20

COURT

Western Cape High Court, Cape Town

BEFORE

R B Cleaver, C Fortuin

CASE / FILE NUMBER

A332/2010

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IN

THE HIGH COURT OF SOUTH AFRICA

(WESTERN

CAPE HIGH COURT, CAPE TOWN)

Case

no: A332/2010

In

the matter between:

GARRY

VAN AS

.....Appellant

v

EMILE

VAN DER MERWE

.....Respondent

JUDGMENT

HANDED DOWN THIS FRIDAY, 18 FEBRUARY 2011

[1] This appeal concerns in the main the interpretation of a written agreement for the sale of a business. The agreement in question

provided for the sale by the appellant of his motor-cycle business to the respondent for a purchase consideration of R500 000 which was allocated as follows:

- a) for equipment furniture and fixtures (R110 000)

- b) for stock in trade (R200 000)
- c) for goodwill (R170 000)
- d) for all other assets being purchased and sold (R20 000 - as a deposit for Opel Corsa Vehicle CEY 41577).

[2] The agreement contains the following clause:

The Seller covenants with the Purchaser that, as part consideration for closing of this agreement, the Seller will not operate a Motorcycle trading or service or in any way aid or assist others to operate such a business within a 50km radius of the location of present business for a period of five years."

[3] It is common cause that at least from seven months after the date of the deed of sale, the appellant was employed as the manager of a motorcycle dealer which operated within the 50km radius stipulated in the restraint clause.

[4] In the summons issued by the respondent in the Kuils River Magistrates' Court, the respondent's claim was formulated as follows:

"The Defendant breached the agreement by operating and/or aiding and/or assisting others to operate a motorcycle business within a 50km radius and within 5 year time period of the sale of the business.

As a result of Defendants breach as aforesaid the Plaintiff has suffered damages in the amount of R170 000.00 being the goodwill which the Plaintiff had lost due to Defendant operating a business of the similar nature within the 50km radius and within a 5 year period of the sale of the Plaintiff's business.

In the alternative the Plaintiff suffered damages in the amount of R170 000.00 in respect of loss of income due to the fact that the defendant operated a motorcycle trading and/or motorcycle service business and/or assisted others to operate such a business within a 50km radius of the present business."

The claim was reduced to R100 000 in order to bring it within the jurisdiction of the Magistrates' Court.

[5] The respondent and the manager of his business gave evidence to show that in the two years after the business was purchased, it suffered losses. Because of the manner in which the respondent's claim had been pleaded, this evidence is not strictly speaking relevant. I should remark in passing, however, that two major factors which contributed to the losses sustained by the business and which had nothing to do with any actions of the appellant were:

- 1) The respondents expenses in respect of salaries paid for the business were much greater than the salaries which had been paid by the appellant; and

2) A major customer of the business at the time of its sale removed his business from that of the respondent because he himself set up a motorcycle business in competition with that of the respondent.

[6] The appellant's plea was that the sale of the business had been concluded on other terms than those set out by the respondent, that he had not agreed to any restraint of trade or limitation on his ability to earn a living and in the alternative pleaded that the terms of the restraint were varied by agreement to allow him to be involved in the motorcycle industry and to realise his income earning potential.

[7] In cross-examination the respondent confirmed that he was claiming damages from the appellant because of the breach of the restraint of trade.

[8] The appellant closed his case without leading any evidence, an earlier application for absolution from the instance having been

refused at the close of the respondent's case.

[9] In finding for the respondent, the magistrate reasoned as follows:

"Die beskerming (that is. the protection afforded to the seller of goodwill) is gefee in die restraint of trade' klousule. Met die verbreking van die 'restraint of trade' klousule het daardie beskerming verval en het die beskermingswaardige beiang sy waarde vir die eiser verloor.

Die eiser is dus myns insiens geregtig op teruggawe van die bedrag wat hy vir die kiandisiewaarde betaal het

Indian die eiser nie n bedrag geld spesifiek vir die klandisiewaarde betaal net nie, sou hy moes bewys dat die verbreking van die 'restraint of trade' klousule 'n verskuiwing van ktandisie van die eiser se besigheid na die besigheid waar die verweerder betrokke geraak net. veroorsaak het en sou hy die kwantum van die vehies wat deur daardie verskuiwing teweeggebring is. moes bewys."

[10] The grounds of appeal are that the magistrate erred in finding;

The restraint of trade clause was binding on the appellant;

That the respondent had properly proved his damages;

That the respondent had established any nexus between the alleged breach of contract and the damages claimed;

The appellant would be entitled to carry on business in contravention of the restraint of trade clause provided he returned the payment which he had received from the respondent in respect of the goodwill.

The first ground of appeal will require consideration only if the appellant does not succeed on grounds 2 and 3. The finding referred

to in ground 4 did not form part of the ratio decidendi and will not require any attention.

[11] In his judgment the magistrate made reference to the judgment in *A Becker and Co v Becker and Others*.¹ This case was also concerned with an agreement for the sale of a business including its goodwill which also incorporated a restraint of trade provision. The court explained that the sale of the goodwill and the restraint of trade were entirely separate provisions and approved of a submission by counsel that the "sale of goodwill is not in any way tied up with the wording of the restraint clause".² In his separate and concurring judgment, Van Heerden JA explained that the naturalia of a contract are determined by concepts of reasonableness and fairness and that the sale of the goodwill of a business would require a seller, irrespective of whether a restraint clause had been incorporated or not, not to do anything actively to interfere with

the enjoyment of the goodwill sold by approaching previous customers of the business for business.

[12] It is by no means clear from the evidence before the magistrate how the sum of R170 000, apportioned to goodwill, was arrived at. It may well have constituted the difference between the value placed on stock and other tangibles sold and the purchase price. As explained by Van Heerden JA in Becker's case, goodwill or "werfkrag", the term preferred by him, can be said to constitute the totality of the attributes of a business which attract clients to the business, in contradistinction to the disposition of the clients towards the business. Goodwill is usually based on two components, namely the position of the business and the personality of the person in charge of the business.³

[13] It does not follow that because the value of the goodwill sold has been quantified in the deed of sale that breach of the restraint

clause will entitle the respondent to payment of the agreed value as damages, or as the magistrate found, that the respondent was entitled to repayment of the purchase price paid for goodwill. To start with, as was made clear in Becker's case, the restraint of trade clause has nothing to do with the goodwill clause. The remedy for breach of the restraint clause is of course usually a prohibitory interdict. As far as the sale of goodwill is concerned, our law is clear. A seller is not permitted, even after the expiry of a period of a restraint clause, to solicit business from former customers of the business, although he may set up a competing business if no restraint clause is in place or after the expiration of the period of a restraint clause. Where a purchaser does solicit business from former clients, the usual remedy is again that of a prohibitory interdict. That does not mean that damages cannot be claimed from a seller who is in the words of Lord Herschell in *Trego v Hunt*⁴

"seeks to take advantage of the connection previously fanned by his old firm, and of the

knowledge of that connection which he has previously acquired, to take that which constitutes the goodwill away from the person to whom it has been sold and to restore it to himself."

The quantification of such a claim will however not be easy and as mentioned, the purchaser seeking such relief will have to show that the seller solicited business from the former clients of the business

- [14] The respondents claim was for damages and in order to succeed the respondent had (a) to establish that the damages were caused by the appellant's breach of contract and (b) to establish by credible evidence the quantum of the damages suffered.
- [15] When assessing the evidence placed before the court, sight should not be lost of the manner in which the claim was pleaded. This was that the respondent had suffered damages amounting to R170 000, being the goodwill lost because the restraint clause had been breached; alternatively in respect of the loss of income because the respondent had set up a business contrary to the terms of the restraint clause
- [16] It is clear that the respondent failed to establish his claims on either of these two bases pleaded. No evidence was led to establish that the loss said to have been suffered in the main and alternative claims had been caused by the breach relied upon, it being simply assumed that because of the breach, damages in the sum of R170 000 had been suffered This was due to the failure to distinguish between goodwill on the one hand and the restraint of trade clause on the other. As to the quantum, there was no evidence to establish that the quantum of damages amounted to R170 000. The only evidence placed before the court was that the business had suffered a loss of some R111 000 in the first year and then approximately R238 000 in the second year, but it was clear from the evidence that various factors, including those which I mentioned in paragraph [5] contributed to the loss and the difference in the performance of the business in the hands of the respondent as compared with the business when operated by the appellant.
- [17] In the circumstances the finding by the magistrate cannot stand and the following orders will issue:
- 1) The appeal succeeds with costs
 - 2) The finding of the magistrate is set aside and substituted with the following:

"The defendant is absolved from the instance and the plaintiff is ordered to pay the defendant's costs."

R B CLEAVER

FORTUIN J

I agree.

C FORTUIN

1 1981

(3) SA 406 (AD)

2This submission by counsel was endorsed by the Court at 416B

3See Becker's case at 416 in fine to 417A

4Quoted in Becker's case at 418H. the reference to Trego v Hunt being 1896 AC 7

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Prepared on 12 October 2026 · Esheria