



THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

MEDIA SUMMARY OF JUDGMENT DELIVERED IN THE SUPREME COURT OF APPEAL

FROM The Registrar, Supreme Court of Appeal
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Please note that the media summary is for the benefit of the media and does not form part of the judgment.

***GrainCo (Pty) Ltd v Van der Merwe
(20693/2014) [2016] ZASCA 42***

MEDIA STATEMENT

Today the Supreme Court of Appeal (SCA) dismissed an appeal by GrainCo (Pty) Ltd, and upheld an order of the Western Cape Division of the High Court, Cape Town that had dismissed an application to interdict two of GrainCo's former employees from canvassing its customers.

The issue before the SCA was whether, when a business is sold as a going concern, inclusive of goodwill, the implied prohibition against the canvassing of its customers bound anyone other than the seller.

Mr J A van der Merwe and Mr J J Kitshoff, the first and second respondents, established a company called GrainCo (Pty) Ltd, referred to in the papers as 'old GrainCo'. Old GrainCo traded in the grain market, managing the supply chain between farmers and processors by facilitating the flow of grain products from producer to processor. BKB Limited (BKB) which traded in and marketed wool, mohair and livestock took an interest in old GrainCo, due to its success, and subsequently entered into an amalgamation agreement in terms of which it purchased the business, inclusive of the goodwill, of old GrainCo. In terms of clause 3, the seller of the business was old GrainCo. Clause 12 of the agreement contained a comprehensive restraint of trade. It restrained old GrainCo, Van der Merwe and Kitshoff for a period of five years from conducting any activity that would cause prejudice to BKB.

As soon as the amalgamation agreement was concluded, BKB sold the business it had acquired to a company called Saamwerkverspreiders (Pty) Ltd, which later changed its name to GrainCo (Pty) Ltd. At the beginning of June 2013, after the restraints of trade had expired and Van der Merwe and Kitshoff had resigned from GrainCo, a company named Grainco Investments (Pty) Ltd trading as Perdigon, opened its offices across the road from GrainCo. (This company later changed its name to Perdigon (Pty) Ltd.) In addition to Van der Merwe and Kitshoff, who were Perdigon's shareholders, it was staffed by people who had either resigned from GrainCo or had taken voluntary retrenchment packages from it. This was the basis of the application to interdict the respondents as the appellant alleged that they had canvassed, enticed and dealt with a long list of people and entities which were GrainCo's customers.

The court held that the implied prohibition against canvassing customers was a term implied by law in a contract for the sale of a business that included the goodwill. As such it could only find application in respect of a seller of a business.

The SCA held therefore that it was clear from clauses 2 and 3 of the amalgamation agreement that the only parties to the sale of old GrainCo were it and BKB. Van der Merwe and Kitshoff were not parties to the sale and therefore they could not be bound by an implied term of the agreement.

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