# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

Case No: 710/2008

In the matter between:

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| **LOUIS JOHANNES JACOBUS GROBBELAAR** | **First Appellant** |
| **DANIEL JOHANNES MONK HEYNS** | **Second Appellant** |
| **PETRUS CROUS WELGEMOED** | **Third Appellant** |
| and | |
| **SHOPRITE CHECKERS LIMITED** | **Respondent** |

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| **Neutral citation:** | ***Grobbelaar v Shoprite Checkers* (710/2008) [2011] ZASCA 11 (11 March 2011)** |
| **Coram:** | BRAND, NUGENT, LEWIS, MALAN and MAJIEDT JJA |
| **Heard:** | **15 February 2011** |
| **Delivered:** | **11 March 2011** |
| **Summary:** | Agreement in restraint of trade – breach of – sale of business as going concern – cession of rights – claim for damages - causation |

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**ORDER**

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**On appeal from:** Western Cape High Court (Cape Town) (Van der Westhuizen AJ sitting as court of first instance):

The appeal is dismissed with costs, including the costs of two counsel.

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**JUDGMENT**

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MALAN JA (BRAND, NUGENT, LEWIS, and MAJIEDT JJA concurring)

[1] This is an appeal by the defendants in the court a quo, against the judgment and order of Van der Westhuizen JA in the Cape High Court, declaring the defendants liable to the respondent, the plaintiff in the court below, for damages caused by their breaches of undertakings in restraint of trade.

[2] The dispute between the parties arose from the purchase on 23 November 1995 by Shoprite Checkers (Edms) Bpk (SCEB) of the businesses of Sentra Koop Handelaars Bpk and Megasave (Edms) Bpk (the Sentra/Megasave sale). The first defendant was the managing director of and shareholder in both the latter companies, the second defendant was a shareholder and director and the third defendant an employee. The two companies were buying organisations, Megasave conducting a wholesale and Sentra a retail business. A buying organisation acts as a broker between the supplier and the dealer. The dealer becomes a member of the buying organisation which negotiates prices to be paid with the supplier. The buying organisation pays the supplier and thus accepts the credit risk of the member who must reimburse it. The buying organisation earns its revenue from rebates and allowances made by the supplier, part of which is passed on to its members.

[3] It was a condition precedent of the Sentra/Megasave sale that the defendants conclude agreements in restraint of trade with SCEB. The terms of the restraint agreements signed by the defendants were identical save that the period of the restraint for the third defendant was 24 months and for the first and second defendants 36 months, from the time the defendants left the employ of SCEB. The first defendant left his employment on 31 May 1998, the second defendant on 30 April 1997 and the third defendant on 30 April 1998. The restraints thus expired on 31 May 2001 and 30 April 2000 respectively. As consideration for agreeing to the restraints the first and second defendants were paid R1,1 million each and the third defendant R 500 000. Clause 3 of each of the restraints provided:

'Die Werknemer onderneem hiermee teenoor Shoprite [SCEB] en op die basis van 'n beding ten behoewe van derdes, teenoor elke ander lid van die Shoprite groep vir die duur van die inperkingsperiode, dat hy nie: -

3.1 'n Belang sal hê of betrokke sal wees, direk of indirek, in enige hoedanigheid (insluitend maar nie beperk tot adviseur, agent, konsultant, direkteur, werknemer, finansier, bestuurder, lid van 'n beslote korporasie, lid van 'n vrywillige assosiasie, vennoot, eienaar, aandeelhouer of trustee) in enige entiteit, direk of indirek, wat gemoeid is in 'n mededingende aktiwiteit binne die gebied [ie the Republic and Namibia] nie;

3.2 Enige vertroulike inligting sal openbaar aan entiteite ander dan entiteite verbonde aan die Shoprite groep en wat geregtig is op sodanige vertroulike inligting nie;

3.3 Ten opsigte van enige mededingende aktiwiteit binne die gebied direk of indirek betrekkinge sal aanbied of enige dienskontrak sluit met of enige werwing te doen ten opsigte van enige persoon in diens van die Groep;

3.4 Enige poging sal aanwend om enige voorsiener of klant van die Groep te oorreed om enige kontraktuele verhouding van welke aard ook al met die Shoprite groep te beëindig of die terme daarvan te wysig tot nadeel van die Groep nie;

3.5 Binne die gebied en ten opsigte van die besigheid van die Shoprite groep gebruik sal maak van enige handelsverbintenis van die Groep met enige klant of voorsiener, anders as vir die doel om sy verpligtinge as werknemer van Shoprite na te kom nie.'

[4] Pursuant to an agreement of sale concluded on 31 October 1997 Shoprite Holdings Beperk acquired the share capital and loan accounts of OK Bazaars (1929)

Ltd from South African Breweries Ltd. OK Bazaars (1929) Ltd, as the plaintiff was then known, became a subsidiary of Shoprite Holdings and a member of the Shoprite Group.

[5] In order to make use of an accrued tax loss in OK Bazaars (1929) Ltd a reorganisation and rationalisation scheme was launched by the Shoprite Group in August 1998. To give effect to the scheme the business, assets and rights of SCEB and some 40 other companies in the Shoprite Group (the 'sellers') were in terms of an agreement of sale dated 28 August 1998 sold to OK Bazaars (1929) Ltd, the plaintiff, as going concerns with retrospective effect to 1 November 1997 (the 'SCEB sale'). Thereafter OK Bazaars (1929) Ltd changed its name to Shoprite Checkers (Edms) Bpk (the respondent in this court and plaintiff in the court below). SCEB subsequently changed its name to OK Bazaars (1998) (Pty) Ltd and, having disposed of all its business, became dormant. Clause 2 of the SCEB sale contained the following condition:

'It is a condition precedent for the transactions embodied in this Agreement acquiring force and effect that the approval of the Commissioner of Inland Revenue be obtained in terms of Section 39 of the Taxation Laws Amendment Act, Act 20 of 1994.'

It is not in dispute that the Commissioner approved the rationalisation scheme on 27 October 1998. SCEB managed the entire business as agent of the plaintiff from 1 November 1997 pending fulfilment of the suspensive condition.

[6] The plaintiff's cause of action is based on its acquisition of the entire business of SCEB with the inclusion of the rights SCEB held in terms of the restraints against the defendants, the plaintiff having taken possession of the business and conducted it. In the alternative the plaintiff relied on a written cession of the rights arising from the restraints dated 24 September 1999. The defendants admitted this cession.

[7] The plaintiff alleged in its particulars of claim that the defendants committed breaches of their restraint agreements by becoming involved in competitive activities, disclosing confidential information and by the establishment of a competing buying

organisation, The Buying Exchange Company (Pty) Ltd (BEC). The defendants allegedly, directly or indirectly, enabled BEC to conduct a competing buying organisation by providing it with advice, knowledge and financial assistance and by furthering the purpose and aims of BEC. Members of Megasave and Sentra were encouraged to resign and join BEC. The defendants disclosed the identity of suppliers and clients of the Shoprite Group to BEC and persuaded them to sever their contractual relationships with the plaintiff. The plaintiff listed some 11 members who resigned from Megasave and Sentra between 3 February 1999 and 16 March 1999 (the dates of resignation of three members are unknown). This conduct, it was alleged, was unlawful and in breach of the provisions of the restraint agreements. The amount claimed, some R8m, represented the income the plaintiff would have earned, but for the resignation of these members, until termination of the first defendant's restraint.

[8] The defendants pleaded that during the course of the second part of 1998 they considered the establishment of a buying forum, not a buying organisation, in which members of Megasave and Sentra could have taken part. The forum would not have competed with these two organisations. The defendants stated that they had discussions with certain of these members and gave instructions for the registration of BEC, the vehicle through which the buying forum would have conducted business. The defendants were appointed directors of BEC. The defendants added that during November 1998 certain members of Megasave and Sentra, with whom the buying forum was discussed, were dissatisfied with these organisations and indicated that they wanted to resign and to take part in the buying forum through an alternative buying organisation. Consequently, the defendants pleaded, they informed these members on 17 November 1998, when the first board meeting of BEC was held, that they could no longer be involved in the proposed organisation since that might infringe the provisions of their restraint agreements. They gave instructions to Mr B J Van den Berg, BEC's secretary, to have them removed as directors and terminated their involvement with BEC.

[9] At the first hearing before the court a quo Van der Westhuizen AJ granted absolution from the instance on the basis that the plaintiff had not shown that it had acquired the rights arising from the restraint agreements on the limited basis that there was no evidence that SCEB had complied with s 228 of the Companies Act 61 of 1973. In terms of the SCEB sale, SCEB and the other sellers sold their businesses to the plaintiff so that a resolution in terms of s 228 was required. On appeal to this court the order of absolution was set aside and the matter referred back to the trial court. Before the trial commenced a separation order was made, calling on the trial court first to determine the issue of liability, including the question whether the persons or entities listed in the particulars of claim resigned as members and ended their relationship with the plaintiff as a result of the defendants' alleged breaches of contract. At the resumed hearing only the first defendant gave evidence for the defendants and called as witnesses Mr G S Yusuf, a former employee of the plaintiff and later employed by BEC, and Mr J R Basson, the managing director of the plaintiff. Van der Westhuizen AJ made the declarator holding the defendants liable. As I have said, he also found that the defendants' conduct caused the resignations of the members of Sentra and Megasave referred to in the particulars of claim. In coming to these conclusions he rejected the evidence of the first defendant and drew adverse inferences from the failure of the second and third defendants to testify and call, amongst others, Van den Berg, as a witness.

[10] On appeal the judgment of the trial court was attacked on four bases: First, whether the plaintiff acquired the rights arising from the restraint agreement and, if so, whether the acquisition was prior to the defendants' breaches of contract or the 'damage-causing' events, viz the resignation of members of Megasave and Sentra; secondly, whether the defendants breached their obligations under the restraints; thirdly, whether such breaches, if established, caused the relevant members of Sentra and Megasave to terminate their membership or their relationship with the plaintiff; and, fourthly, whether the plaintiff had acquired the Sentra and Megasave business and their members prior to the resignations of the members (ie whether the plaintiff had in fact suffered loss).

[11] The trial court found that in the absence of any contradictory evidence the rights arising from the restraint agreements attached to the businesses of Megasave and Sentra, forming part of their goodwill. These rights included the rights arising from the restraint agreements as well as the right to earn an income from sales made by members of Megasave and Sentra. It was not in dispute that the purpose of the rationalisation scheme was to transfer the whole of the business of SCEB to the plaintiff. The rights referred to, the court found, were transferable and were in fact transferred to the plaintiff with effect from 1 November 1997, but at least on 27 October 1998, when the suspensive condition to the SCEB sale, the approval of the Commissioner for Inland Revenue, was fulfilled. It was not in dispute that SCEB conducted the businesses of Sentra and Megasave from 1 January 1996 as a division of its own business. SCEB also conducted as part of its enterprise a retail chain of supermarkets under the names of 'Shoprite' or 'Checkers'. The plaintiff conducted a retail chain of supermarkets under the names of 'OK Bazaars' and 'Hyperama'.

[12] It was common cause that pursuant to the rationalisation scheme the entire business of SCEB was sold and transferred to the plaintiff and merged with the business of the plaintiff. In their additional heads of argument the appellants disputed only the date of the transfer. The rationalisation scheme was implemented to take advantage of the accrued tax loss of the plaintiff and this could be done only if the entire business of SCEB had been transferred to the plaintiff. The plaintiff had in fact used part of the tax loss in the financial year ending June 1998.

[13] The best illustration that the entire business of SCEB was transferred to the plaintiff is the fact that SCEB became dormant after the transfer, and the plaintiff became the operating company in the group. These facts were not disputed at the trial.

[14] The first ground on which the plaintiff relied for its acquisition of these rights as pleaded in the particulars of claim was that they were transferred and acquired by the plaintiff's taking possession of the business and conducting it. This is indeed what the court a quo found. The defendants, however, characterized this finding differently and

contended that the trial court found that these rights passed to the plaintiff by operation of the SCEB sale *per se*. This is not correct. The trial found that the plaintiff 'die gehele onderneming van SCEB met effek 1 November 1997, ingevolge die koopkontrak van 28 Augustus 1998, gekoop, oorgeneem en bedryf het'.

[15] What the defendants disputed was the finding of the court a quo that SCEB managed the business of SCEB with effect from 1 November 1997 as the agent for the plaintiff. The defendants contended that SCEB managed, pending fulfilment of the suspensive condition, the business on behalf of Shoprite Holdings Ltd and not on behalf of the plaintiff. This is not correct. The clause 3 of Part Four of the SCEB sale provides that the management and control in respect of the businesses -

'shall be deemed to have passed to the PURCHASER on the Effective Date, from which date it has been managed and controlled on behalf of the PURCHASER by the SELLERS as its agent.'

The 'purchaser' as defined is the plaintiff. Shoprite Holdings Ltd is not one of the 'sellers'.[1] This conclusion is, moreover, borne out by the evidence of Mr A N Van Zyl, the plaintiff's secretary, and Ms S J De Boor, an employee of the plaintiff's auditors. In addition, the documents submitted as part of the application for approval of the rationalisation scheme show that the amalgamation of the entire business of SCEB with that of the plaintiff was envisaged. Moreover, the managing director of Shoprite reported in February 1998 to the directors of SCEB and Shoprite Holdings Ltd that the merged businesses were conducted as a single entity from 1 November 1997. The rationalisation scheme was approved on 24 February 1998 by the directors of both SCEB and the plaintiff. The SCEB sale was ratified by Shoprite Holdings Ltd on 7 July 1998. The court a quo was therefore correct in finding that SCEB conducted its business as agent for and on behalf of the plaintiff from 1 November 1997.

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[1] Clause 1.2.2.18 of Part One of the SCEB sale.

Was there a transfer of the right to enforce the restraints to the plaintiff?

[16] The defendants contended that there was no evidence that the rights had passed to the plaintiff before 24 September 1999 when the written cession was executed. The relevant members of Megasave and Sentra had all resigned before that date, viz during February and March 1999. It follows, so the argument went, that no rights of the plaintiff were infringed at the time of the resignations and thus no wrongs were committed as against the plaintiff at that time. The defendants submitted that clause 1 of Part Four of the SCEB sale, providing that the effective date of the sale would operate retroactively from 1 November 1997, was a deeming provision *inter se* that could not affect the parties to the litigation or elevate any prior act of the defendants to the breach of a right which the plaintiff did not have at the time of breach. The only evidence of a cession, it was argued, was the written document of 24 September 1999 which expressly provided for the cession. For the reasons set out these contentions cannot be accepted.

[17] There is, as was observed, a distinction between the agreement to cede and the real agreement of cession, although these will often coincide.[2]

'The undertaking to cede and the actual cession will often coincide and be consolidated in a single document, yet they remain discrete juristic acts. However, because they are frequently merged into one transaction the clear distinction between the obligationary agreement to cede and the actual cession sometimes tend to be smudged. They are nevertheless distinct in function and it can be so in time: by the former a duty to cede is created, by the latter it is discharged.'

[18] The SCEB sale was an agreement to effect a cession in future. A cession is an abstract legal act that is independent of the underlying, obligationary, agreement.[3] The cession of personal rights is brought about by agreement and no formalities are required.

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[2] P M Nienaber '*Cession*' 2 (2) *LAWSA* 2 ed para 8. See in particular *Botha v Fick* 1995 (2) SA 750 (A) at 765 A-B.

[3] *Rabinowitz & another v De Beers Consolidated Mines Ltd & another* 1958 (3) SA 619 (A) at 637B-C; *Dreyer & another NNO v AXZS Industries (Pty) Ltd* 2006 (5) SA 548 (SCA) at 554E-H; 2 (2) *LAWSA* 2ed para 8.

A cession may thus be either express or tacit, to be inferred from the conduct of the parties.[4] Clause 4.3 of Part Four of the SCEB sale requires the sellers, including SCEB, to 'use their best endeavours to procure, with effect from the fulfilment of the condition precedent referred to in clause 2 of Part One [ie the approval by the Commissioner for Inland Revenue], the cession and assignment of all rights and delegation of all obligations under the contracts to the PURCHASER with effect from the Effective Date, [1 November 1997]….' It does not follow from this clause that a real agreement of cession could not have been concluded tacitly. No formalities were required for the cession envisaged: all the parties had to do was to use their best endeavours to procure it. The intention was clearly that any cession, whenever done and in whatever manner accomplished, would suffice. The evidence was that SCEB conducted its entire business on behalf of the plaintiff from the effective date in order to give effect to the rationalisation scheme. The only inference to be drawn from this is that the parties by their conduct concluded the real agreement of cession transferring the rights flowing from the restraint agreements, being part of the business of SCEB, to the plaintiff.[5] This was no 'mere loose understanding'.[6]

[19] An agreement to cede may be subject to a suspensive condition, as in this case, or to a time clause relating to the cession, in which event the right will not pass until the condition has been fulfilled or the prescribed period has elapsed. Logically, the transfer of the rights to enforce the restraints was also subject to the same suspensive condition the SCEB sale was subject to. On fulfilment of the condition the parties *inter se* are then

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[4] *Botha v Fick* at 762B-H and 778F-G.
[5] See *Botha & another v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) 213A-B and at 214D-F where it was said: '[T]he obligationary agreement is the sale of the goodwill, including as it does the contractual right, while the transfer agreement by which the right is conveyed to the purchaser, is constituted by the delivery by the seller, and the acceptance by the purchaser, of the physical possession of the business, pursuant to the sale. The incorporeal assets comprising the goodwill are incidental to the business itself and they are transferred together, in the intendment of the law. … I am convinced that nothing more is required by law to render the cession effective as between cedent and cessionary …'.
[6] 2 (2) *Lawsa* 2 ed para 26.

placed in that position *ex tunc*.[7] In view of my conclusion below, I need not express an opinion on the effect of such a cession *inter omnes*, as against third parties, but will accept that as far as third parties are concerned the rights vested in the plaintiff only on fulfilment of the condition, on 27 October 1998, a date before the resignation of the members of Sentra and Megasave.

[20] The defendants, however, contended on appeal that the plaintiff had failed to show that the rights in respect of Sentra and Megasave formed part of the SCEB sale. The argument rested on a narrow basis. Clause 3.1.1 of Part One describes the merx as 'the SC business comprising: the entire retail supermarket business which is being sold as a going concern' as well as the immovable property and share sales and claims in respect of its subsidiaries. The 'retail supermarket business', the argument went, did not include the businesses of Sentra and Megasave: the latter's members were wholesalers and Sentra did not conduct a supermarket business. The definition of 'going concerns' in clause 1.2.2.6 of Part One and, by reference, of 'SC Business' in clause 1.2.2.17 again contain the same apparent limitation of the business sold as the 'retail supermarket business'. It was argued on behalf of the plaintiff that this interpretation was too restrictive and that, when the whole agreement is seen in context and against its factual matrix,[8] it became clear that the entire business of the seller under the SCEB sale was to be disposed of. It is not necessary to determine this issue. The trial court found that the businesses of Sentra and Megasave were transferred to and conducted by the plaintiff, initially by SCEB on behalf of the plaintiff and later, after

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[7] *ABSA Bank Ltd v Sweet & others* 1993 (1) SA 318 (C) 323B-C: 'It is also now, it appears, accepted that when a suspensive condition is fulfilled the contract and the mutual rights of the parties relate back to, and are deemed to have been in force from, the date of the agreement and not from the date of fulfilment of the condition, ie *ex tunc* …'. And at 323H: 'The effect of the aforegoing would therefore appear to be that rights acquired by third parties during the period of suspension would not be affected by the retroactivity in regard to the rights of the contracting parties'. Schalk van der Merwe, L F van Huyssteen, M F B Reinecke and G F Lubbe *Contract General Principles* 3ed (2007) p 488 refer to Wolfgang Fikenscher and Andreas Heinemann *Schuldrecht* (2006) para 59 II A 1 who state: 'An agreement, according to which the claim should be transferred to the cessionary retroactively, ie with an effect of an earlier date, can only be construed as a cession of the claim with effect *ex nunc*. This is inevitable for the sake of the protection of the debtor. A retroactive cession is, as matter of principle, excluded and not conceivable. However, the parties to the cession are obliged to treat each other as if the cession would have been effective at the earlier date, especially with respect to interest' (my translation).

[8] *KPMG Chartered Accountants (SA) v Securefin Ltd & another* 2009 (4) SA 399 (SCA) para 39.

fulfilment of the suspensive condition, by the plaintiff itself. For the reasons set out the real agreement of cession was concluded tacitly and pursuant to the rationalisation scheme followed by the SCEB sale which was implemented by SCEB taking possession and managing the entire business on behalf of the plaintiff. Only its effect was suspended pending fulfilment of the condition precedent. Whether or not the rights arising from the restraints formed part of the 'SC business' as defined is irrelevant: they formed part of the business of SCEB.

Breach of duty to plaintiff

[21] The defendants contended that, inasmuch as the plaintiff sought to recover damages suffered in its own right, it had to establish a breach of an obligation owed to it which resulted in the 'damage-causing' events, that is the resignation of the members. This again depended on the existence of a contractual obligation at the time of the conduct complained of. The submission was made that it was not within the power of the plaintiff to render an act retroactively wrongful by taking cession of the relevant right at a later stage. The first answer to this contention is that the real agreement of cession on fulfilment of the condition brought about the transfer of the rights of SCEB, arising from the restraint agreements, to the plaintiff. Since the plaintiff acquired the entire business of SCEB, the rights ceded also included all rights that had accrued to SCEB arising from the alleged breaches of the restraints. These rights vested *pendente conditione* in SCEB, and would in the ordinary course and in an appropriate case have provided a sufficient basis for an interdict at the suit of SCEB. Pending fulfilment of the condition any wrong would have been committed against SCEB, not as against the plaintiff. But on fulfilment of the condition the rights in respect of the restraint agreements and also those arising from their breach vested in the plaintiff. The damages (ie those resulting from the resignation of the members) were suffered only later after the plaintiff had acquired those rights. The claim for damages thus vested in the plaintiff.

Defendants' breaches

[22] The defendants contended that, assuming that the cession had taken place before resignation of the members, it was not sufficient for the plaintiff to rely on evidence of generalised breaches of the restraints but that it had to show particular acts on the part of each defendant that were causally linked to the resignation of each member. This, the argument proceeded, was not considered by the court a quo.

[23] The trial court found that BEC was a buying organisation that conducted business in competition with Megasave and Sentra. It was established after a meeting in August 1998 by members of these organisations at the Little Switzerland Hotel and convened by the defendants. After the meeting the defendants prepared a business plan for the proposed buying organisation which was handed in as Exhibit S. BEC was registered on the instructions of the first defendant. The office of BEC was set up as a result. The defendants directly or indirectly funded BEC. Their resignation at the first board meeting of BEC was not in good faith and, the court found, they continued to be involved in BEC. I accept these findings and the inferences drawn by the trial court. The conclusion of the court that the defendants planned and funded the establishment of a competing buying organisation seems to me the most likely, if not the only, inference to be drawn.

*The Little Switzerland Hotel meeting of 12 August 1998*

[24] The defendants convened the meeting. The trial court found that what was discussed was not, as alleged by the defendants, the establishment of a forum that would have done business through Megasave but a competing buying organisation. The evidence indeed shows that several of the largest members of Sentra and Megasave were invited. Mr A Allie, a member of Megasave, testified that everyone invited was hand-picked and that they represented some of the largest stores. The meeting was addressed by the first and second defendants, the first defendant playing the leading role. The third defendant attended. Allie had been informed before the meeting by the

first and second defendants that a new buying group would be formed and that he would be invited. He indeed received a written invitation and understood the purpose of the meeting to be the formation of a new group to ‘run down Shoprite Checkers’. Allie had no interest in supplying small members: all those invited were businessmen intending to establish a new buying group of which they would be the ‘muscle’. He understood that the rebate system at Shoprite was to be restructured and a franchise operation and administration fee introduced. The defendants were apparently unhappy with this course of events and informed the invitees that the new organisation would be less difficult, offering more benefits to members. Those invited were to be its directors and shareholders. They were encouraged to resign from Sentra and Megasave and take up shares in the new organisation. It was suggested that each had to contribute R100 000 as capital. New members would be recruited after the buying organisation was set up and its structure settled. The defendants undertook to provide a business plan for the new organisation and to submit it to those present for approval. Exhibit S was eventually produced. No reference was made at the meeting to the restraints to which the defendants were subject, not even when it became clear at the meeting, as was put to Allie in cross-examination, that some of those present wanted to form a new buying organisation.

[25] The trial court accepted that all three defendants had played a leading role in convening the meeting and that its purpose was the formation of a new buying organisation in competition with Sentra and Megasave. Had it been the intention to establish a buying forum, one would have expected the latter two organisations would have been invited as well, particularly where the concept of a ‘banner group’ had already been discussed by the second defendant with officials of the plaintiff. The meeting was clearly confidential and set up to discuss the establishment of a competing buying organisation. Had the defendants planned a buying forum, one would have expected them to continue with this enterprise. What they did, however, was to support the ‘core’ group. As the court found, Exhibit S, was a detailed plan for the establishment of a buying organisation, produced shortly after the meeting.

*Exhibit S*

[26] Exhibit S was distributed under the name of the interim management committee, comprising the first and second defendants. Each of the defendants contributed to it. In the letter accompanying the exhibit those who attended the meeting were thanked for their participation. Paragraph two thereof read that '[t]he enthusiasm and support that was shown, convinced us once more of the opportunity to combine our efforts. Attached herewith a draft document listing our plans.' The two cellphone numbers listed at the foot of the letter were those of the first and second defendants.

[27] Exhibit S was headed 'The Buying Exchange Company' and commences with the words '[i]n order to investigate\evaluate the need for an independent buying group it is necessary to analize certain basic concepts …'. It continued with descriptions of the retail market, the independent market and the future market. Franchises and buying groups were discussed. It was stated that Shoprite intended Sentra and Megasave to become fully franchised operations. This information, the trial court found, could only have come from the first defendant. The formal franchise market was expected to grow but 'a second market exists for either the true independent or those operating in the informal market'. The 'Concept for the Future' was to follow a 'top down approach' and to establish a low risk organisation with a small capital base. The ideal structure for the organisation was a company to be owned and controlled by 15 major equal shareholders and directors. The shareholders' agreement had to provide for ownership to remain in the hands of the major players and for the buy-out of or sale to new members and directors. Participants on the second level were to be involved on a membership or smaller shareholder basis. Provision was also made for an operating company and for the eventual listing on the JSE. It was not intended to sell the proposed company but rather to provide benefits to members through discounts and rebates and growth in the share value. The trial court correctly inferred that the latter provision was probably included to allay the fears of members that, as had happened in the case of Sentra and Megasave, the business of the new organisation would

eventually be sold by the defendants. This issue was specifically raised at the Little Switzerland Hotel meeting.

[28] The new organisation was to commence with the establishment and equipping of a buying office in Gauteng after the formation of the company and the setting of the share participations. Exhibit S stated that during the initial phase members had to conduct their accounts through their existing buying organisations because rebates usually ran to December of each year. It follows that the eventual resignation of members from their old buying organisations was contemplated. After the initial phase the buying organisation had to be established and second level members recruited. To recruit smaller members and allow for their rebate income it was planned to carry their accounts and pay suppliers on their behalf. It was not the intention to create a franchise operation although it was envisaged that some sort of 'combining image' had to be offered to smaller members. A timetable was annexed to Exhibit S requiring the company to be established by 30 September 1998. Dates were set for the establishment of the company, for top members taking up their shares, for the opening of the buying office, for the recruiting of second level members and for the administration and accounts system to be set up. The full organisation had to be functional by July 1999. Exhibit S also contained an income and expense budget, a *pro forma* letter to suppliers (which included a statement that Mr Leon Volschenk had been appointed as commercial manager) and a draft acceptance form for taking up shares in the company. The last section dealt with computer and software requirements, invoices and statements.

[29] The court a quo rejected the evidence of the first defendant that Exhibit S was merely an 'interim document' and not a specific guide to be followed. I agree with this assessment. The very wording of Exhibit S reflects that it was a detailed business plan for the establishment of BEC. This conclusion is supported by the reluctance of the defendants to admit its origin. The first defendant at first said in evidence that he gave Exhibit S to his attorneys. Although a document substantially the same as Exhibit S was discovered before the trial, it was only admitted after Allie had given evidence and

referred to it. The first defendant, moreover, denied in a discovery affidavit that there existed any documents pertaining to the establishment of BEC or the buying forum. He also denied, after the trial had commenced, that he was in possession of Exhibit S or that it was prepared by him or on his behalf. The trial court correctly drew the inference that the defendants deliberately tried to conceal their role in the drafting of Exhibit S and the establishment of BEC. The trial court, moreover, rejected the contention that an amount of R1,5m was insufficient for the establishment of a buying organisation. The manner of financing the new organisation was detailed in Exhibit S, and it was specifically stated that the capital of the company did not have to be substantial. The founding members were at first going to purchase through their existing buying organisations but thereafter through BEC. Moreover, at the first meeting of the BEC board on 17 November 1998 it was resolved that members would initially have to pay for their purchases in advance.

*Establishment of BEC*

[30] Events after the distribution of Exhibit S confirm that the defendants assisted in implementing the business plan. The first defendant instructed Van den Berg to see to the establishment of BEC, which was registered on 8 September 1998. The main business of BEC was to carry on the business of a 'buying organisation'. The first defendant provided both the name of the company and the description of its main purpose. An office was found and equipped. Volschenk and Van den Berg were appointed as managing director and secretary respectively. The defendants were BEC's first directors. Some of those who attended the meeting at the Little Switzerland Hotel took up their shares and were appointed directors of BEC. The members of Sentra and Megasave who became members of BEC resigned, as contemplated in Exhibit S, during February and March 1999, after BEC started operating.

[31] The minutes of the board meeting of BEC on 17 November 1998 confirm most of these events. It was attended by some of the persons who had attended the meeting at the hotel. Also present was the chairman of Verbruikers Groothandel. It was resolved

that ‘an option be exercised to take up shares in The BEC in exchange for shares by The BEC in VGK’. Verbruikers was a competing buying organisation and the undisputed evidence for the plaintiff was that the first defendant knew from early 1998 that it was for sale. Verbruikers, the trial court found, would provide the vehicle through which the members of BEC could make their purchases. It was resolved that the share capital of BEC was to be R1,5m and that there would be 15 main shareholders with ten board members and five executive directors. BEC was to function with a small capital base and members initially had to pay for their purchases in advance. The minutes show that BEC was geared to start operating on 1 February 1999 and that members would be informed of the date on which business would commence so that they could resign their existing membership. Legal opinion on the correct procedure for resignation had to be obtained. The minutes of the meeting of 3 February 1999 reflect that the resignations of members of Sentra and Megasave had been discussed with attorneys. Negotiations with suppliers had already taken place and they required written resignations. The conclusion of the trial court that BEC was established in breach of the defendants’ obligations under their restraints seems unassailable.

*Funding of BEC*

[32] Extensive evidence of the funding of BEC by the defendants through the Sengroep group of companies was led. MEGS was a wholly owned subsidiary of Sengroep, the shares of which were held by DSAL, Superbia and Desbel (all private companies). The three defendants were directors of MEGS during 1998 and 1999. They were also directors of Sengroep and DSAL in 1998. Van den Berg was the secretary of most if not all of these companies. Howard, their auditor, described Van den Berg as the ‘de facto executive’ of the group. In the 1998 and 1999 financial years the third defendant and Van den Berg were among the directors of Karaat (a private company associated with the Sengroep group). The latter was also the secretary of BEC.

[33] The account into which the funds flowed was an ABSA money market account, the account holder of which was reflected as BEC in the books of the bank on 28

October 1998. The account holder was subsequently indicated as MEGS. The trial court concluded that the account was indeed that of BEC. The defendants in their concise heads of argument filed at the request of this court admitted the findings made by the trial court to the effect that the account was that of BEC. Yet a day before this appeal was heard the defendants filed a supplementary note seeking to withdraw the admissions including the admission that the money market account referred to 'belonged' to BEC. The plaintiff had inadequate time to address the issues raised properly.

[34] It is not necessary to determine these issues. Clause 3 of the restraints prohibit the defendants from having an interest in or being involved with, directly or indirectly, in any capacity, including that of a financier, a competing activity. The flow of funds commenced with a transfer of R500 000 on 28 October 1998 from an account of MEGS to the current account of Karaat. On the same day BEC's current account was credited with the amounts of R10 000 and R90 000 and Karaat's account debited accordingly. On that day an amount of R400 000 was transferred from Karaat's current account to the disputed BEC money market account. Further transfers were made from this account to BEC's current account. MEGS also advanced a loan of R500 000 to Volschenk during 1999 while the defendants were its directors. At that time they knew that Volschenk was the managing director of BEC. The 'transfer' of this loan to Sengroep, and later to Desbel because the directors of Desbel had approved it does not detract from the conclusion that the defendants funded BEC through companies in the Sengroep group. Whether or not the disputed money market account belonged to BEC or MEGS is of no consequence. The fact is that both amounts originated from MEGS of which all three defendants were directors at the relevant times. They were, therefore, directly or indirectly, involved as financiers in BEC. In addition, the evidence of the first defendant was that, since they were still involved with BEC during October 1998, he requested Van den Berg to have ''n paar rand beskikbaar' for BEC. The transfer of the R100 000 (in two amounts of R10 000 and R90 000) occurred, as he said, 'in my tyd'. The first defendant also said that he did not put any money of his own into BEC but that if they, the defendants, had contributed then the funds had to be returned. There is no

evidence that the amount of R100 000 was repaid after the defendants had allegedly withdrawn from BEC. If any person could have explained the movement of the funds it would have been Van den Berg. The defendants did not call him as a witness. The inference that the defendants, in breach of their restraints, financed BEC is unavoidable.

Causation

[35] The defendants submitted that the evidence did not establish that the members of Sentra and Megasave resigned as a result of any conduct on the part of each defendant and that the plaintiff had not shown that the resignations were not attributable to other factors related to dissatisfaction with the plaintiff. In addition, it was submitted that the plaintiff had not demonstrated that there was a contract or some other relationship between the plaintiff and these members. The trial court, it was argued, erred in not applying the 'but for' test to establish whether the conduct of the defendants was the factual cause of the resignations.[9] The argument was that the trial court approached the issue on the basis that the defendants bore some or other burden of showing that the members resigned for reasons other than those alleged by the plaintiff. This is not how I understand the judgment of the court a quo. In this court Combrinck AJA in reversing the order of absolution from the instance held that there was *prima facie* evidence that the 11 members had resigned because of the conduct of the defendants. The expression *prima facie* evidence[10] 'is used to mean *prima facie* proof of an issue the burden of proving which is upon the party giving that evidence. In the absence of further evidence from the other side, the *prima facie* proof becomes conclusive proof and the party giving it discharges his onus.' I understand the judgment of the trial court to be saying no more than this. Nor was the question whether the members who resigned were members or buyers from Sentra and Megasave disputed in evidence: they had all resigned.

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[9] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700E-H.
[10] *Ex parte The Minister of Justice: In re Rex v Jacobson & Levy* 1931 AD 466 at 478. See the discussion by D T Zeffertt A P Paizes and A St Q Skeen *The South African Law of Evidence (formerly Hoffmann and Zeffertt)* (2003) p 124 ff.

[36] The witnesses for the plaintiff readily conceded that a large number of members resigned from Sentra and Megasave during the period following September 1998 and that there was dissatisfaction among them due to the policy of retaining rebates, the 1999 incentive scheme, the opening of competing stores and stringent structural and policy changes. The defendants relied on allegations to the effect that some of the members resigned as a result of the incentive package that was introduced at the end of 1998. Another member who resigned had requested a special concession which was denied. Other members were upset about competing stores of Shoprite opening or the structural changes that were introduced. The trial court found that there was no admissible evidence of the reasons why the defendants resigned and that the defendants' contentions were speculative. In addition, it found that the resolution taken by the BEC board at its meeting on 17 November 1998 that members would be advised when to resign from Sentra and Megasave implied that the incentive packages for 1999 could not have played a role in the decisions of four founding members of BEC because the package only became known in December 1998. The letters of resignation of these four members were worded in the same terms, all dated 3 February 1999, and faxed from BEC's offices. The majority of members who resigned were, by January 1999, reflected as members of BEC although they only resigned in February 1999. This indicates, as Combrinck AJA found, at least *prima facie* that the resignations were consequences of the defendants' conduct. In the absence of evidence to the contrary the *prima facie* proof becomes conclusive.

[37] Even if the facts relied upon by the defendants were established they do not assist them. The essence of the plaintiff's case is that the defendants acted in concert pursuant to a carefully contrived plan to establish, set up and finance BEC. This conduct constituted a breach of clause 3.1 of each of the agreements in restraint of trade. The resignations of the members were consequences of this conduct: these members would probably not have resigned but for the establishment of BEC. A plaintiff suing for breach of contract is, in any event, not required to show that the breach by the defendant was

*the* cause but only that it was *a* cause of the loss.[11] Nor was it necessary for the plaintiff to show particular acts of each defendant that were causally linked to the resignation of each member of Megasave and Sentra. Each defendant is liable for the conduct of the others individually or in co-operation with the other in breach of their respective restraint agreements in order to achieve their common object.[12] Their breach, the establishment of BEC, led to the resignations of the members of Sentra and Megasave or contributed to it.[13] The trial court found that the defendants acted in concert in pursuit of the common purpose to establish BEC. They intended members of Sentra and Megasave to resign and, *a fortiori*, caused their resignations.[14] It follows that the appeal should be dismissed.

Order

[38] The appeal is dismissed with costs, including the costs of two counsel.

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F R MALAN
JUDGE OF APPEAL

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[11] *Thoroughbred Breeders' Association v Price Waterhouse* 2001 (4) SA 551 (SCA) para 66.
[12] *Aetiology Today CC t/a Somerset Schools v Van Aswegen & another* 1992 (1) SA 807 (W) at 816C-E and compare *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA) para 10. The defendants were in a sense 'joint wrongdoers' as the term is used in delict.
[13] *Thoroughbred Breeders' Association* para 66: 'Where a plaintiff can prove that the breach of the defendant was *a* cause of the loss (as opposed to *the* cause thereof) he should succeed even if there was another contributing cause for the loss, be it an innocent one, the actions of a third party … or, logically, the carelessness of the plaintiff himself in failing to take reasonable precautions to avoid it.'
[14] I am not called upon to consider whether all the damages claimed is a consequence of the resignations of the relevant members.

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