THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Case No: 837/2010

In the matter between

GERT JAKOBUS VAN DER WATT	**FIRST APPELLANT**
MARTHA JACOBA VAN DER WATT	**SECOND APPELLANT**

and

CHRISTIAAN JACOBUS JONKER	**FIRST RESPONDENT**
AGRIWEN (EDMS) BPK	**SECOND RESPONDENT**
AGRIGEN PETROLEUM (EDMS) BPK	**THIRD RESPONDENT**
AGRIGEN DIESEL BULTFONTEIN (EDMS) BPK	**FOURTH RESPONDENT**

Neutral citation: *Van der Watt v Jonker* (837/2010) [2011] ZASCA 140 (23 September 2011)

Coram: **HARMS AP, LEWIS, PONNAN, CACHALIA and MAJIEDT JJA**

Heard: **5 SEPTEMBER 2011**

Delivered: **23 SEPTEMBER 2011**

Summary: Contract – Sale of business including goodwill – effect of – locus standi in enforcing contract.

ORDER

On appeal from: Free State High Court (Bloemfontein) (Kruger J, sitting as court of first instance):

The appeal is dismissed with costs.

JUDGMENT

MAJIEDT JA (HARMS AP, LEWIS, PONNAN and CACHALIA JA concurring):

[1] This is an appeal against the judgment and order of Kruger J, sitting as court of first instance in the Free State High Court, Bloemfontein, enforcing the terms of a restraint of trade agreement. Leave to appeal was granted by this court.

[2] In terms of the order of the court below, the appellants, as respondents, were restrained for a period of 10 years from being involved in a business entailing the trading, storage, handling, sale, marketing or distribution of fuel, oil and/or related products in the areas serviced by the second, third and fourth respondents (as applicants below). They were each also restrained from providing financial support or acting as a consultant, adviser or agent of any person or entity conducting business in the abovementioned respects.

[3] The first respondent, Mr Christiaan Jacobus Jonker (Jonker), started the business of the second respondent, Agriwen (Pty) Ltd (Agriwen), third respondent, Agrigen Petroleum (Pty) Ltd (Agri-petroleum) and the fourth

respondent, Agrigen Diesel Bultfontein (Pty) Ltd (Agri-diesel) in 1991, 2000 and 2001 respectively. Agriwen's predecessor was Kuiltjie Landbou (Pty) Ltd trading as Agri-Mekka Koppies[1] and its business was primarily the sale of agricultural products to farmers, similar to the type of business usually conducted by agricultural co-operatives. In 1998, Agriwen's business was expanded to include the distribution of Engen petroleum products in certain areas of the Free State province. Agri-petroleum was involved in the sale and distribution of Engen petroleum products under the Zenex brand[2] in certain other circumscribed areas of the Free State, with three distribution depots at Bothaville, Bultfontein and Virginia. Agri-diesel was established as a black economic empowerment entity, also for the sale and distribution of Engen petroleum products in certain other areas in the Free State (ie different to the areas serviced by Agriwen and Agri-petroleum). I shall refer to these three businesses collectively as 'the Agri group'. It bears mention at the outset that the businesses were indeed conducted as one large, diverse entity. Jonker was not a shareholder in the Agri group companies in his own name; his trust, the Chris Jonker Trust, held these shares.

[4] The first appellant, Mr Gert Jakobus van der Watt, was a close family friend of Jonker until their business relationship turned sour. Van der Watt started working for Jonker in 1997 as shop manager of Agri-Mekka Koppies and he later became Agriwen's marketing manager until September 2000. Thereafter Van der Watt served as marketing manager for Agri-petroleum until 2005. Van der Watt held a 30 per cent shareholding in Agri-petroleum and a 21 per cent shareholding in Agri-diesel. He is married to the second appellant, Mrs Martha Jacoba van der Watt, who was not a shareholder or employee of any of the businesses in the Agri group. In 2005, by agreement with Jonker, Van der Watt terminated his services with Agri-petroleum and started a new business in Randfontein selling and distributing Sasol petroleum products, mostly to industrial clients (the Agri group businesses

[1] The name was changed to Agriwen in 2004.
[2] Engen took over the Zenex businesses countrywide at about the time when Agri-petroleum had been established, first as a shelf company, just before 2000.

distributed Engen petroleum products, mostly to farmers). The Randfontein business was purchased in the name of the erstwhile third respondent in the court below, Big Red Investments (Pty) Ltd, a company owned in equal parts by Van der Watt and Jonker. Despite this equal shareholding, Van der Watt was reflected as the only shareholder on the company documents, to protect Jonker's business relationship with Engen. For the same reason a similar arrangement regarding the purchase and shareholding was reached between them in respect of the filling station business at Randfontein, which was purchased in the name of the erstwhile fourth respondent, Turquoise Moon (Pty) Ltd. Mrs van der Watt is the sole shareholder and director of this last mentioned company. The filling station business was conducted under the trade name 'Dynamic Fuels'.

[5] It is common cause that the Randfontein and Agri group businesses all did very well. However, Van der Watt wanted to operate separately and independently. Jonker acquiesced to a separation of the Randfontein and Agri group businesses, culminating in a written agreement on 25 April 2007 (the restraint agreement). This agreement is the kernel of the dispute between the parties and it is therefore necessary to set out its salient features. The restraint agreement was between Jonker on the one part and the two van der Watts on the other. It contained a recordal that the parties do business in the Randfontein companies and in the Agri group companies and that they agree to separate these businesses. The agreement provided that the Van der Watts became the sole shareholders of the two companies in which the Randfontein business was conducted, while Jonker in turn became the sole shareholder in the Agri group companies. It was agreed further that, in order to effect a fair and equitable settlement, Jonker would pay to the Van der Watts R2 million in cash - a point that assumes particular significance in this case. Clause 6 contains restraints in respect of both the Van der Watts and Jonker in respect of a 10 year period in the petroleum business for the geographical areas serviced by the Agri group businesses (for the Van der Watts) and for a radius of 80 kilometres from Randfontein (for Jonker). It was recorded further in clause 6 that the parties agree that the restraints of trade

are fair and reasonable in respect of their nature, extent and period and that they do not extend further than is reasonably necessary to protect the businesses of the respective companies.

[6] Jonker and the Agri group companies sought and obtained relief in the high court in terms of the restraint agreement on the basis that the Van der Watts were proved to have solicited customers of the Agri group and were trading in contravention of their restraint under the trade name Dynamic Fuel on both the distribution and retail sides. It was not seriously in issue that the Van der Watts were trading in the Agri group's service areas contrary to the restraint provisions. To the extent that Van der Watt sought to create a factual dispute on this aspect in the papers, the high court correctly found for Jonker and the Agri group that there was indeed a breach if the restraint was enforceable. In this court counsel for the Van der Watts sensibly argued the matter on the basis that the Van der Watts were in fact trading in the petroleum business in the affected areas. Their attack was directed against the enforceability of the restraint. Three main issues were raised in argument on behalf of the appellants, namely Jonker and the Agri group's locus standi, the unenforceability of the restraints due to the absence of a protectable interest on the part of Jonker and the Agri group and lastly the 10 year period of the restraint. As will presently appear, this appeal stands to be decided on a somewhat different basis to the one advanced by the parties and decided by the high court. In this regard, this court drew the parties' attention prior to the hearing to its decision in *A Becker & Co (Pty) Ltd v Becker & others.*[3] I shall deal with that decision in due course.

[7] It is convenient to deal first with the locus standi issue. Appellants' counsel argued the point not on the legal standing per se, but on the question whether Jonker had the right to sue in the absence of a protectable interest. He contended that Jonker himself does not have a protectable interest since he is

[3] *A Becker & Co (Pty) Ltd v Becker & others* 1981 (3) SA 406 (A).

not the owner of the goodwill in the Agri group. Such goodwill, counsel submitted, was held by the companies themselves. It was contended further that Jonker is not a shareholder in any of the Agri group companies. Reference was made to a dictum of Botha JA in *Botha & another v Carapax Shadeports (Pty) Ltd* [4] which reads as follows:

'What I have been referring to as "the benefit" of an agreement in restraint of trade, pertaining to a business, is, in the eyes of the law, the contractual right to enforce the restraint. It rests in the owner of the business. He is the creditor in respect of it.'

These contentions are misconceived. Jonker was a party to the contract. It is in that capacity that he seeks to enforce the restraint. The restraint agreement stipulates that Jonker himself became the sole shareholder in the Agri group. And clause 4 of the restraint agreement provided that Jonker must pay the sum of R2 million in cash to the Van der Watts. His protectable interest plainly arises from the restraint agreement itself and there can be no ambiguity about this at all.

[8] This court's decision in *Basson v Chilwan & others*[5] fortifies the aforementioned conclusion. The Chilwans owned Chilwans Bus Services, a large transport company based in Cape Town with countrywide operations. Basson had acquired vast experience in the design and construction of busses. After he had built a bus for the Chilwans with which they were very satisfied, they negotiated successfully with Basson to jointly set up a bus construction business. This resulted in a written agreement to form a close corporation, named Coach-Tech, with the Chilwans and Basson holding equal interests in it. A restraint clause, which formed the subject of the dispute between the parties, was included in the agreement in respect of Basson's employment and the confidentiality of the agreement.

Of importance for present purposes is that the parties to the restraint agreement were the four Chilwans, Basson and Coach-Tech. Both Nienaber JA[6] and Van Heerden JA[7] held that the Chilwans were entitled to seek

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[4] *Botha & another v Carapax Shadeports (Pty) Ltd* 1992(1) SA 202 (A) at 214B.
[5] *Basson v Chilwan and others* 1993 (3) SA 742 (A).
[6] At 768J–769B.
[7] At 774G-H.

enforcement of the restraint against Basson as embodied in the agreement. In the words of Van Heerden JA (supra):

'Tweedens het die Chilwans net so seer as Coach-Tech 'n belang by die beperking gehad. Enige handeling wat tot nadeel van Coach-Tech sou strek, sou onvermydelik nadelig op hul ledebelange inwerk. Bowendien was hulle partye tot die kontrak waarin die beperking op Basson gelê is . . .' (Emphasis supplied.)

Jonker therefore, as a contracting party like the Chilwans, plainly has a protectable interest affording him the right to sue for enforcement of the restraint. The startling contention was made in the appellants' heads of argument (although not persisted with in oral argument) that the Agri group companies lack a protectable interest since they had not been parties to the contract. This circuitous argument is self-evidently destructive of the one or the other proposition. But *cadit quaestio* – as indicated in *Chilwan*, both the companies and Jonker clearly have a protectable interest and they have a right to sue on the restraint agreement.

[9] I turn next to a discussion of the application of *Becker* to this case. In that matter Becker had sold his jewellery business which he conducted in a company, the appellant, A Becker & Co, to one Akoodie. The assets sold included goodwill and certain restraints of trade were set out in the written agreement of sale. The restraint of trade was for a period of five years and extended to the entire Republic of South Africa. Becker and his companies, to which the restraint applied, complied in full with it until the expiry of the restraint period. After the restraint had fallen away, Becker through his companies approached his old customers in order to solicit business from them. Circulars were distributed reminding former customers of Becker's previous jewellery business and announcing that Becker was back in that business. Akoodie, through the appellant company which he had bought from Becker, sued for an interdict to restrain Becker and his wife (who had been in the business with Becker) from canvassing or soliciting business from their old customers. In upholding the appeal against an order of absolution this court held that while the express restraint in respect of competition had fallen away, the sale of the company's goodwill meant that Becker and his wife were

prohibited from soliciting business from their former customers. Muller JA referred with approval to the speech of Lord Macnaghten in *Trego v Hunt* [8] and held as follows:[9]

'In my opinion the judgement in the English case of Trego v Hunt . . . is correct. If a seller disposes of the goodwill of a business he is not allowed thereafter to act contrary to the sale'.

In a separate, concurring judgment Van Heerden AJA analysed in detail the origin and nature of the right to goodwill in a business. He pointed out that it is an incorporeal property right usually based on two components, namely locality of the business and the personality of the driving force behind the business.[10] In alienating the goodwill of a business, a vendor commits himself not to perform any act adverse to the granting of the right. In this regard Van Heerden AJA cited the well established English law notion that 'a vendor is not entitled to derogate from his grant', as espoused by Lord Herschell in *Trego v Hunt*.[11] It is by now also firmly established in our law that, absent a restraint provision, the seller of goodwill is permitted to trade in competition with the purchaser, but he may not solicit his old customers for business.[12]

[10] The present matter falls squarely within the *Becker* principles. Van der Watt seeks to take back that which he has sold for a consideration of R2 million in cash, namely the old customers with whom he did business while part of the Agri group. It is plain from *Becker* and the authorities cited there that the present matter concerns the protection of goodwill as well as the restraint of trade. Harms JA described goodwill in *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd*[13] as follows:

'Goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business.'

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[8] *Trego v Hunt* [1896] AC 7 at 22-25.
[9] At 414H.
[10] See also *Receiver of Revenue, Cape v Cavanagh* 1912 AD 459 at 461–462.
[11] At 19-20.
[12] *A Becker & Co (Pty) Ltd v Becker & others* at 417F-G and 418G-H; see also: *Corbin on Contracts* vol. 6A s1386: 'When a business is sold with its goodwill, but without any express promise not to compete, the seller is privileged to open a new business in competition with the buyer; but he is under obligation not to solicit his former customers or to conduct his business under such a name and in such a manner as to deprive the buyer of the "goodwill" that he paid for.'
[13] *Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd* 1998 (3) SA 938 (SCA) para 15.

In *The Commissioners of Inland Revenue v Muller & Co's Margarine Ltd*[14] Lord Macnaghten defined goodwill thus:

'What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation and connection of a business. It is the attractive force which brings in custom.'

[11] It is plain on the undisputed facts that van der Watt had built up strong business relationships with Agri group's existing customers through his previous employment there. He had also formed strong personal associations with some of them through his family and that of his wife. This is particularly so in the case of the Parys, Koppies and Bothaville areas[15]. It is significant that Van der Watt, on his own version, focused Dynamic Fuels' business entirely on those areas of the Free State where the Agri group operates. This suggests, to my mind, that he targeted customers in those areas for his new business. The uncontroverted facts demonstrate that Van der Watt actively solicited those Agri group customers by marketing his petroleum products at the Koppies club, where a number of them were in attendance, at a golf day where he actively marketed Dynamic Fuels' business and through a direct approach to at least one Agri group customer, Mr Taljaard. There is in my view no difference between this type of general canvassing, that is, at a club or during a golf day and that employed in *Becker,* namely the distribution of circulars to erstwhile customers. It is not necessary to prove direct overtures to Agri group customers by Van der Watt. In any event, as the court below correctly found, the Taljaard case amply demonstrates that direct canvassing and solicitation was undertaken by Van der Watt. It was admitted in Van der Watt's answering affidavit that he had personally informed Jonker that he intended resuming his business activities in the Agri group's service areas. His defence was that the restraint of trade was unenforceable and that he might consequently trade with his old Agri group customers in competition with Jonker and the Agri group.

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[14] *The Commissioners of Inland Revenue v Muller & Co's Margarine Ltd* [1901] AC 217 at 223-224.

[15] The Van der Watts live in Parys and had opened a filling station there. Mrs van der Watt hails from Bothaville and Van der Watt's family live in the Koppies area.

[12] In summary: Jonker and the Van der Watts separated their businesses through their written agreement as mentioned. The businesses were sold as going concerns. It is trite that such a sale of business as going concern includes that business' goodwill. A restraint of trade against a seller forms part of the goodwill of a business.[16] In order to determine all the components contained in the *merx* in a sale of a business one must have regard to the contract and those components will normally, if not invariably, include the goodwill of the business.[17] There can be no doubt that the parties intended to and did in fact sell the goodwill in the respective businesses to each other. The appellants' counsel did not contend otherwise. The legal consequences of such sale were apparently not emphasized in the high court and, as stated, the parties were alerted to *Becker's* case by this court prior to the hearing. But in the papers, Jonker, on behalf of the respondents, repeatedly complained that the goodwill was being eroded by the Van der Watts' conduct. The issue was therefore raised pertinently in the papers and referred to in the judgment of the high court. As stated, the Van der Watts' answer was that the restraint is unenforceable. But in a supplementary answering affidavit an auditor of the Van der Watts undertook, on their instructions, a calculation of the price of the various businesses, including goodwill. Implicitly therefore, the appellants had been alive to the fact that goodwill formed part of the businesses purchased and sold respectively. The legal consequences of trading in contravention of the alienation of the goodwill appear, however, to have eluded them. For these reasons Jonker and the Agri group have the right to assert their rights to goodwill in terms of the restraint agreement.

[13] The position of the second appellant, Mrs van der Watt, requires brief consideration. It was contended on her behalf that no relief should have been granted against her, since she was neither an employee nor a shareholder of

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[16] *Botha & another v Carapax Shadeports (Pty) Ltd* at 212D
[17] *Slims (Pty) Ltd v Morris NO* 1988 (1) SA 715 (A) at 727E; *Shoprite Checkers (Edms) Bpk v Grobbelaar* [2011] ZASCA 11 paras 18-19.

any of the Agri group companies. The contention cannot be upheld. First, Mrs van der Watt was a signatory to the restraint agreement. Second, it is abundantly clear on the papers that Van der Watt is using his wife's company, Turquoise Moon (Pty Ltd, as a front to conduct the retail business (the filling stations) with Agri group customers as a target market. Lastly, she was a co-recipient of the R2 million cash consideration in terms of the agreement. She is therefore also in breach of the agreement.

[14] Having reached this conclusion, it is not necessary to deal at length with the restraint of trade issue. It would suffice to uphold the findings of the high court, that the Van der Watts were in breach of the restraint and that the ten year period was not unreasonable. I agree with the high court that the following features of the restraint were conclusive – the reciprocity of the restraint (i.e. binding both the Van der Watts and Jonker), the fact that the Van der Watts were paid R2 million in cash as part of the deal, the success attained by Van der Watt with the Randfontein business even with the restraint in operation, Van der Watt's special relationship with the Agri group customers while he worked for the group as a marketer, the Taljaard incident, the fact that Van der Watt is specifically targeting the areas where the Agri group operates and lastly the fact that this is a commercial, not an employer-employee restraint agreed upon when the parties parted ways in their business relationship and at a stage when they were fully conversant with their respective businesses' extent and potential.

[15] The appeal is dismissed with costs.

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S A MAJIEDT
JUDGE OF APPEAL

APPEARANCES:

Counsel for appellants	:	C E PUCKRIN SC (with him AJP ELS)
Instructed by	:	Thomas & Swanepoel, Tzaneen Symington & de Kok, Bloemfontein
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