SOUTH GAUTENG HIGH COURT, JOHANNESBURG

CASE NO: 10/26773

DATE: 19/11/2010

In the matter between:

XAVIER HAIR LAB CC Applicant

and

NOELENE VERSACE-PETERS First Respondent

ANGELA BATE GASKELL Second Respondent

J U D G M E N T

SALDULKER, J:

INTRODUCTION

[1] It has become increasingly common in the commercial world for purchasers of businesses to protect their investments by ensuring that the sale of business agreements they conclude, include restraints of trade agreements which prohibit vendors setting up competitive businesses.

[2] In this application, the applicant seeks an interdict prohibiting the respondents from trading in contravention of a restraint of trade agreement included in a sale of business agreement concluded between the applicant and the respondents.

BACKGROUND

[3] During April 2009 the applicant entered into a written sale of business agreement (the sale agreement), whereby it purchased the business of a hair salon trading under the name and style of 'Streaks Ahead' (the business), from the seller, an entity, Vagabonds CC, represented by the respondents who were its sole members. The business is conducted from the premises situated at 37 Voortrekker Avenue, Edenvale.

[4] The sale agreement included a restraint clause (the restraint) binding the members of Vagabonds CC, the respondents herein. The relevant terms of the sale agreement were, *inter alia*, that:

4.1 the applicant purchased the business from the respondents as a going concern together with all the goodwill pertaining thereto for the purchase consideration of R300 000-00 (my emphasis);

4.2 the sale included the business, the equipment, fixtures and fittings and stock- in- trade;

4.3 the respondents undertook to remain in the employ of the business for a period of 12 months from the effective date, being 1 April 2009.

[5] The restraint clause in the sale agreement, *inter alia,* read as follows:

'19 RESTRAINT OF TRADE

Each of the Seller's members, being the persons described above (the members)[the two respondents] hereby acknowledge that in consideration for the conclusion of this Agreement, they have undertaken to the Purchaser that for a period of one year from the date of expiration of the employment period, i.e. twenty four months after the Effective Date, they will not, anywhere within a radius of twenty kilometres from the Premises from which the business is conducted ("the prescribed area"), whether directly or indirectly, in any manner whatsoever and whether alone or jointly or together with or as agent for any other person, partnership, company, body corporate, association, business or undertaking of any nature whatsoever:- (my emphasis)

19.1 be engaged, interested or concerned, whether financially or otherwise and whether directly or indirectly, in or with any other person, partnership, company, body corporate, association, business or undertaking, carrying on or which may carry on any business or trade similar to or competing with or endeavouring to compete with the Business;

19.2 be a shareholder or member in any company or body corporate carrying on or concerned, directly or indirectly, with any business or activity described in 19.1 above'.

[6] Subsequent to the conclusion of the sale agreement, the respondents took up employment with the applicant in terms of the relevant provisions. It is common cause that the respondents remained in the employ of the business until 8 May 2010. The following month, in the month of June 2010, the applicant found that the monthly turnover of the business had reduced by an amount of approximately R 75 000-00. This was apparent from the comparative turnover figures of the business between the months of May and the subsequent months.

[7] On 15 June 2010, the applicant ascertained that the respondents had opened another hair salon, under the name and style of "Looks Devine", trading from premises situated at 44 St. Anna Road, Hurlyvale, Edenvale. These premises are less than 2km from the applicant's business.

SUMMARY OF SUBMISSIONS

[8] The applicant contends that the respondents are in breach of the restraint as the premises where they are operating the business of a hair salon, is less than 2km from the applicant's business, and thus falls within the restricted area of the restraint provisions. In addition, they assert that the business has as its protectable interest, the goodwill of the business which includes the salon's clientele. The respondents sold the goodwill of the business to the applicant and the applicant is thus entitled to the protection of

its legitimate rights against unlawful competition by the respondents. Although in form the applicant seeks an interim interdict, it is conceded by the applicant that the relief sought is final in nature, and the applicant must show that:

- it has a clear right;
- an injury has actually been committed or at the very least, is reasonably apprehended; and
- there is no remedy in the circumstances.

[9] The respondents contend that the restraint is unreasonable and not enforceable for several reasons. During the tenure of the respondents' employment the applicant through mismanagement and/or bad management, denuded the business of any protectable interest which it had at the time of conclusion of the sale agreement, and in effect destroyed the business. As a result, the respondents were compelled to resign and seek alternative employment. This resulted in the position that the applicant could not trade as a hairdresser, as it no longer complied with the terms of the Hairdressing and Cosmetology Services Bargaining Council (HCSBC) 'Collective Agreement' regulating the hairdressing industry which states that 'no legal owner of a business may carry on such business unless: in the case of a hairdressing establishment where the legal owner is a non-working owner at least one qualified certificate holder is employed'. Additionally, the respondents contend that having regard to the nature of a hairdressing business, the geographical radius of the restraint provision of 20 km is unreasonably large and the two year time period of the restraint, unreasonably long. Furthermore, the respondents dispute that they have removed the client lists pertaining to the business.

THE LAW

[10] Covenants in restraint of trade are valid and enforceable.[1] The onus is on the party seeking to escape a restraint of trade agreement to prove that the provisions of the restraint are unreasonable and unenforceable and contrary to public policy.[2] Restraint of trade clauses are also included in sale of business agreements by purchasers in an attempt to protect the goodwill of

1 *Reddy v Siemens Telecommunications (Pty) Ltd* 2007 (2) SA 486 (SCA).

the business, and/or to prevent the seller from starting up a competing business immediately after the sale.[3]

[11] Van Heerden JA made the following important observation when elucidating the fundamental rationale for the inclusion of a restraint of trade in a sale of business agreement in *Diner v Carpet Manufacturing Co of SA Ltd:*[4]

> "Courts are inclined to take a far stricter and less favourable view of agreements entered into between master and servant than it does of similar agreements between seller and purchaser and accordingly a restraint which would be unreasonable as between employer and employee could be reasonable as between the seller and the purchaser of a business. Public policy requires that, when a person has by his skill or other means obtained something which he wishes to sell, he should be at liberty to sell it advantageously in the market and, in order to enable him to sell it advantageously, it is necessary that he should be able to preclude himself from entering into competition with the purchaser. The possibility of such competition would necessarily depreciate the value of a goodwill sold and it is thus in the interest of the public that the sale of a goodwill should not be interfered with for an agreement excluding such competition would enhance the value of the goodwill …The test is whether the restraint affords no more than adequate protection to the party in whose favour it is imposed in respect of the enjoyment of the benefit of the goodwill he has purchased. The enquiry must, therefore, be whether competition in the area to which a restraint extends would in all probability injure the purchaser of the goodwill and it becomes necessary to consider in each particular case what it is for which and what it is against which protection is required, in order to decide upon the adequacy of the protection".

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2 *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A); *J Louw & Co (Pty) Ltd v Richter and others* 1987(2) SA 237 (N) at 243 B; *Kleyenstrüber v Barr and Another* 2001 (3) SA 672 (W).

3 *Diner v Carpet Manufacturing Co of SA Ltd* 1969(2) SA 101 (D); *Brenda Hairstylers v Marshall* 1968 (2) 277 (OFS); *Nachtsheim v Overath* 1968 (2) SA 270 (C); *Nampesca (SA) Products (PTY) Ltd and another v Zaderer and others* 1999 (1) SA 886 (C) at 898 I-J, 899 B-C.

4 1969 (2) SA 101 (D), at 105 B-C.

[12] It is important to bear in mind that the agreement *in casu* is a sale of business agreement which incorporates a restraint and a short term employment agreement. In *Chubb Fire Security (Pty) Ltd v Greaves*[5], where the restraint was enforced, Du Plessis J remarked as follows:

> "…it must be taken into account that the employment agreement forms part of a larger transaction in terms of which the applicant bought the business, including the goodwill, from the company."

And at p 363 para H Du Plessis JA stated that:

> "…it must be taken into account that the employment agreement forms part of a larger transaction in terms of which the applicant bought the business, including the goodwill, from the company…If it is correct that the respondent had been unlawfully dismissed, he has adequate remedies at his disposal to recover such damages as he may suffer."

[13] It is a commercial reality that a business' goodwill represents an immaterial property right deserving of protection.[6] Van Heerden & Neethling point out that:

> "Goodwill is naturally determined by divergent factors. For example, the reputation or good name of the undertaking, the fact that it is well-known and its creditworthiness are factors which may co-determine its goodwill. It is … in particular the locality of the undertaking and the personality of the entrepreneur or another person (<u>such as an employee</u>) who is connected with the business, that may exercise a great influence.[7]" (My emphasis)

[14] In *Jacobs v Minister of Agriculture*[8] Colman J stated:

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5 1993 (4) SA 358 (W) at 363 G-H.

6 See, for example, *Unlawful Competition*, Van Heerden & Neethling at p 94, 95 and 96.

7 Van Heeden & Neethling, *Unlawful Competition*,p96

8 1972 (4) SA 608 (W) at 621 A.

"…goodwill is an intangible asset pertaining to an established and profitable business, for which a purchaser of the business may be expected to pay, because it is an asset which generates, or helps to generate, turnover and, consequently, profits."

[15] In *Botha and Another v Carapax Shadeports (Pty) Ltd*[9] it was said that:

"Conversely, an undertaking by the seller not to enter into competition will enhance the value of the business. The same considerations apply to the case of an employee of the business. It follows logically, therefore, that a restraint of trade against a seller or an employee should be regarded as a part of the goodwill of the business…The benefit of an agreement in restraint of trade, which exists for the advantage of a business, passes to the purchaser of that business and its goodwill, as part of the goodwill. In my judgment, that view, as a general proposition, has everything to commend itself, and we should approve of it. It is, I consider, in consonance with the common understanding of what goodwill comprises, and with the exigencies of modern commerce."

[16] Restraints in sale of business agreements have been increasingly recognised by the courts worldwide, including those involving hair salon businesses.[10] The facts in *Brenda Hairstylers (Pty) Ltd and others v Marshall*[11] are similar to the case at hand. The second and third applicants bought the

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9 1992 (1) SA 202 (A) at 212 D-H.

10 In *Iraf Pty Ltd and others v Graham* (1982) 1 NSWLR 419, and at 429 the court stated: "To my mind the most important consideration on the question of the period of the restraint is the time required for severing the relationship between the defendant and those clients who would patronize the business after its sale. There is necessarily a large element of conjecture involved here. Additional evidence might reduce that element, but in the main the matter involved is the exercise of business judgment. For this reason considerable weight should attach to the period the parties themselves have selected. Notwithstanding this, I am satisfied that the period of three years is unreasonably long. Assuming the defendant going into business outside the kilometer radius, some of his clients might follow him, and the plaintiffs can claim no protection in respect of such clients…The only goodwill to be protected from injury by the defendant relates to those clients of his who would rather remain clients of the business than follow him outside the perimeter or go to another establishment. It might reasonably be expected that some proportion of these clients would leave the first plaintiff's business and patronize that of the defendant if he were to pass inside the perimeter of the protected area. The question then arises as to how long a period might be considered reasonable for securing a firm connection between these clients and the first plaintiff's business…In the ordinary course I should think that a period of nine to twelve months would be sufficient firmly to establish the relationship between the client and the new hairdresser".

11 1968 (2) 277 (OFS).

issued shares of a company, the first applicant, Brenda Hairstylers from the respondent. The respondent was the principal hairdresser with a substantial clientele and her mother Ms Marshall the manageress. In the agreement concluded between the parties, two clauses were inserted for the benefit of the applicants and to protect the goodwill. These two clauses were that Ms Marshall undertook to work for the purchasers for a minimum period of 7 years and undertook not to carry on the business of a ladies hairdresser, nor work or be financially interested in a business of a similar nature for the same period. Some time after the applicants took over the business, Ms Marshall absented herself from the salon and accepted employment elsewhere. The applicant sought to interdict her. The respondent contended that the restraint was invalid. The court found in favour of the applicants and held that the purpose of the restraint was to protect the goodwill of the first applicant. Erasmus J stated as follows:

> "In such a case, as in the case of the sale of a business proper, the covenantee is entitled to be protected against competition by the covenantor; since without such protection the covenantee would not get what he is C contracting to buy, nor would the covenantor give the covenantee what he is intending to sell.".[12]

[17] In *Nachtsheim v Overath* [13], the respondent, a ladies hairdresser had entered into a written agreement of employment with the applicant the proprietor of a hair salon known as 'Dumar Ladies Hairstylist'. The agreement contained 'a bar clause' that upon his termination of employment with the applicant, the respondent would not 'within a radius of five miles of the premises of any hairdressing business ' engage in any business similar to that of the applicant's. After the termination of his employment, the respondent entered the employ of a hair salon known as 'Lady London', a similar business to that of the applicant, and situated within the restricted radius. The applicant sought to interdict the respondent from being employed at Lady London on the basis that it was in breach of the bar clause which was a valid restraint. The applicant averred that during the respondent's stay at his hair salon a considerable clientele had been built up, who regularly requested the

12 *Brenda Hairstylers* at p 281 B-C.
13 1968 (2) 270 (C).

services of the respondent, and that a considerable number had been taken away with the result that his business had suffered harm and he had sustained damage to his goodwill. The following prescient observations of Corbett J are apt[14] :

> "…having regard to all of these facts, the circumstances of the case generally, more particularly the two year period of the employment contract, it seems to me that the applicant was entitled, at the time when this contract was entered into, to take steps for the protection of his business, more particularly for the retention of his customers, in the event of the respondent terminating his contract of employment and seeking employment elsewhere. It seems to me that, under the circumstances, the applicant had a real interest in the retention of such customers who might well be induced to patronise a rival business should the respondent become employed by such a business because of the personal relationship which arises between an employee in the position of the respondent and the clientele of the business." (my emphasis)

ASSESSMENT

[18] The intentions of the parties must be construed from the contract itself. The restraint provides *inter alia* that 'the members, (the respondents) acknowledge that in consideration for the conclusion of this agreement', they have undertaken to the purchaser that for a period of one year from the date of expiration of the employment period, i.e. twenty four months after the effective date (1 April 2009), they will not, *inter alia*, anywhere within a radius of twenty kilometres from the premises from which the business is conducted ("the prescribed area"), whether directly or indirectly, in any manner whatsoever be engaged in any business or undertaking, similar to or competing with the business, directly or indirectly. The commercial reality of the sale of business agreement between the parties and the respondents' role within the applicant's business, including their interaction with the client base, must be considered.

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14 *Nachtsheim* at p 272 G-H.

[19] It is clear from the words of the contract that in consideration for the conclusion of the sale agreement, the respondents undertook not to participate in any competing activity or undertaking for a period of twenty four months after the effective date and that the parties would not have contracted otherwise than on the basis that the respondents could not be employed within 20km of the business in a hairdressing salon. From a commercial perspective, the inclusion of the restraint made commercial and business sense. It was a specific provision giving efficacy to the restraint covenant, its object being to protect the goodwill of the business, and retaining its value.

[20] The respondents contend that the applicant has failed to show that it has a protectable interest within the 20km radius. In my view, this contention is without merit and implausible, as the respondents themselves have stated that 'especially in the light of the nature of the hairdressing profession and the nature of its clientele, the applicant's clientele will generally only come from a relatively short distance from the salon…'

[21] The respondents deny that they have opened another hair salon trading under the name and style of "Looks Devine". However, this contention is in my view without substance if one examines the following vague and contradictory statements deposed to by the respondents in their answering affidavit:

21.1 'On the applicant's own version, the applicant's representative, Mark Barnes, knew that the second respondent and I were working at Looks Devine situated at 44 St Anna Road, Hurleyvale, Edenvale, on or about 15 June 2010'.

21.2 'It is denied that the second respondent or I have opened another hair salon trading under the name and style of "Looks Devine" trading from premises situated at 44 St Anna Road, Hurleyvale, Edenvale…It is admitted that these premises fall within the restricted area envisaged within the restraint provisions of the agreement, however, for the reasons set out above, it is by respectful contention that the taking up of

employment at the said premises is not a contravention of the restraint provisions'.

21.3 'I deny that either the second respondent or I am operating a competing business within the restricted area. The second respondent and I are currently earning an income on a "rent-a-chair" basis at the said premises, and are not in any way operating a competing business. In order to clarify for this Honourable Court, a "rent-a-chair" arrangement is one commonly found in the hairdressing industry whereby a qualified hairstylist will pay an agreed monthly rental amount to the owner of a hairdressing business in order to make use of the facilities owned by that business. The hairstylist is not considered to be an employee of the hairdressing business, and the relationship is similar to that of a landlord and tenant'.

21.4 'I deny that either the second respondent or I have in any way attempted to 'make off' with the applicant's clientele, and further deny that we have in any way been operating in direct competition with the applicant. While it is admitted that I am now conducting my chosen trade within the restraint area, I reiterate that the second respondent and I had no choice but to do so, if we wished to continue earning a living conducting our chosen trade'.

[22] From the aforegoing, it appears that the respondents admit either that they are working at Looks Devine, and/or are running a business there; and/or they are currently earning an income on a 'rent-a-chair' basis within the restraint area and have agreed to pay a monthly rental to the owner. They also assert that they are not considered to be employees of the hairdressing business but have a relationship akin to landlord and tenant. It is *ergo* not in dispute that the respondents are engaged with another person or entity in the hairdressing business or trade, similar to or competing with the business of the applicant, less than 2km of the business they sold to the applicant. On their own version the respondents are operating a business, a competing one,

at premises falling within the restricted area envisaged within the restraint provision of the agreement.

[23] The respondents, the vendors of the goodwill of the business, agreed that in future they will not carry on a similar business in competition with the purchaser. They are thus in breach of the restraint, being some 2km away from the business that they sold to the applicant. As a result of the respondents' unlawful conduct, the financial prejudice to the applicant's business continues unabated.

[24] It is furthermore clear from the wording of the restraint that the object of the restraint was to prevent the respondents, the sellers of the hair salon from engaging in a business, a hair salon, in competition with the business with resultant damage being caused to the goodwill of the applicant's business. The insertion of the restraint clause was to guard against this particular apprehension that the applicant had insofar as the respondents were concerned.

[25] This apprehension is reasonable given that the respondents have had an opportunity to develop a personal relationship with the clientele, and the ability to influence them, to solicit their custom and divert them away from the applicant's business cannot be ruled out. In *Marion White Ltd v Francis*[15] it was stated that:

> "It is accepted by the plaintiff company that the burden rests on them to establish that this covenant is one which is reasonable in the interests of the parties and reasonable in the public interest, and that it is for the protection of some interest of the plaintiff company's in respect of which the plaintiff company is entitled to protection. It is obvious that in an establishment such as a ladies' hairdresser's establishment the assistants who actually deal with the customers, who dress their hair, wash their hair, and do whatever else they do for the customers, provide a very important part of the personal contact between those engaged in the business and the customers of the business. That constitutes an

[15] [1972] 3 All ER 857 at 862.

> important element of the goodwill of the business: and that is an interest which the employer is entitled to have protected". (my emphasis)

[26] The respondents contend that they had every intention of continuing in the employ of the applicant for at least the remainder of the restraint period but because of the applicant's and its representatives' unprofessional conduct and mismanagement, continued employment with the applicant became untenable. This mismanagement they contend had the effect of eroding the goodwill, the clientele of the salon and the applicant thus had no protectable interest. In my view, there is absolutely no reason for the applicant to prejudice its own client base. The applicant asserts that there was a reduction in the turnover after the respondents left its employ. That this is attributable to the respondents' competitive trade less than 2km from its business cannot be ruled out.

[27] In my view, the respondents bore the onus of showing that the manner of their termination of employment compromised the applicant's right to enforce the restraint. This was not done. Furthermore, the dispute with regard to the termination of the respondent's employment is not for this court to decide. If the complaint is one of unfair dismissal, the respondents have the CCMA[16] avenue available to them in regard to this dismissal dispute.[17] Additionally, the respondents have completely misconstrued the nature of the agreement. It is clearly and unambiguously a sale of a business as a going concern, which also provided for the brief employment of the respondents, post-sale of the business and which is ancillary to the sale of the business.

[28] The respondents also contend that the applicants are trading without a qualified hairdresser in contravention of the provisions of the HCSBC 'Collective Agreement' governing the hairdressing industry. In my view, these provisions do not have any relevance to the present dispute, which is the protection of the applicant's goodwill and the enforcement of the restraint. The applicant has a right to trade irrespective of the terms of the HCSBC

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16 Centre for the Conciliation, Mediation and Arbitration.

17 See *Chubb Fire Security (Pty) Ltd v Greaves* at para *ibid* p 5 of 5.

'Collective Agreement' and the right to take necessary measures to comply with the provisions of that agreement. The applicant is a close corporation and the rights to its clientele are vested in the applicant and exist independently from its right to trade.

[29] The respondents' contention that the applicant ceased to have a protectable interest in the clientele who frequented the salon is unconvincing and without merit. It is common cause that the applicant purchased the business with the goodwill attached thereto. The goodwill belongs to the applicant. The respondents have admitted that 'the sale of the business was primarily a sale of same as a going concern with the goodwill attached thereto'. They have further admitted that the applicant's business 'would normally have as its protectable interest the goodwill, clientele and it would in the normal course be entitled to protection against unlawful competition'. At the time Vagabonds CC sold the business to the applicant, the client base was substantial, and formed the greater portion of the goodwill of the business to be sold. The business sold by the respondents had established customers and goodwill.

[30] The respondents contend that the applicant's business is that of a typical suburban hairdressing salon with no confidential or proprietary information that they have become privy to as a result of working for the applicant. Further that at the date of the respondents' resignation, it ceased to have a protectable interest, or any interest whatsoever, in the clientele who frequented the applicant's business premises. In my view, all of these averments are contradictory and unconvincing, as the respondents have asserted that the applicant's only protectable interest is its client base that it purchased as part of the goodwill of the business in terms of the said sale agreement. Therefore, it does not appear to be in dispute that the applicant has a clear right to its customer base and clientele as part of its goodwill within the restraint distance.

[31] Additionally, the respondents contend that 20km is unreasonably large and the period of twenty four months, unreasonably lengthy. In my view, the

restraint covers an area of 20km, which is reasonable and necessary to protect the goodwill in the business purchased by the applicant. Given the nature of the hairdressing profession, if the applicant's clientele (the respondents' erstwhile clientele) come from a relatively short distance from the salon, as soon as the respondents began trading within 2km of the salon, the aforementioned clientele would have either moved with the respondents or it can reasonably be apprehended that some of the clientele will do so in the future, if they have not done so already. In such circumstances, there appears to be no other relief available to the applicant. From the comparative figures regarding the turnover, it is clear that the applicant's business has suffered severe financial loss. This must in all probability be as a result of the loss of custom, which could continue if the restraint is not enforced, causing the applicant severe and inescapable harm. The applicant has shown that it has a clear right to the protection of its goodwill business interests and that such right is being infringed unlawfully by the respondents. Should the respondents be permitted to continue operating their business within the restricted area and in competition with the applicant's business, the applicant's business will not survive and will suffer irreparable harm and financial prejudice. The applicant has no alternative remedy.

[32] In my view, the sale agreement between the parties is clearly and unambiguously a sale of a business as a going concern. At the time of the conclusion of the sale, the applicant would have had regard to the turnover of the business and the fact that the respondents had operated the salon for some time prior to the conclusion of the sale agreement. The restraint must have been specifically negotiated in order to protect the interests of the applicant subsequent to the payment of the purchase consideration. The restraint of trade was clearly not a *quid pro quo* for the employment but for the goodwill.

[33] The applicant's business has, as its protectable interest, the goodwill of the business which includes the salon's clientele. According to the applicant the clientele of the business is specifically unique, in that each customer's visit is recorded and the customer's details are stored inclusive of telephone

numbers, address, preferences and history of treatments and or services received by that customer. The clientele of the business thus constitutes a specific protectable interest proprietary to that business, and the applicant has equitable rights preventing the respondents from conducting a hair salon on a 'rent-a-chair' basis close to the business they sold. It is clear that even on the respondents' own version, the applicant has a clear right to its customer base and clientele as part of its goodwill within the restraint distance. The applicant is entitled to the protection of its legitimate rights against unlawful competition by the respondents.

[34] According to the applicant, when the respondents left the employ of the applicant, they removed client listings and information with the specific intention of utilizing this information to unlawfully compete with the business of the applicant. This is disputed by the respondents. However, in my view, this is not a dispute that must be resolved by referral to oral evidence. The fact remains that the respondents have had the opportunity of developing a close relationship with their clients and as a result the ability to influence them. The respondents sold the business with a protectable interest, and a strong client base. The respondents are aware of the names of their clientele, their old customers. Even if they are in possession of the clientele list, they cannot avail themselves of this special knowledge to regain that which they have parted with for value.

[35] It is clear that the respondents sold their business advantageously by including the restraint in the agreement. It is equally clear that they now seek to extricate themselves from the restraint whilst having profited by it, and continue to do the same business on a 'rent-a-chair basis', at premises within the restricted area of the restraint provision, and to profit from this business a short distance away.

[36] The restraint was to protect the applicant's business from competition, the potential competition emanating from the respondents who were well placed to compete effectively. As previous owners of the business, they have

acquired the knowledge, the skill, the contacts with the clientele, goodwill and reputation, which they would be able to exploit for their own account.

[37] According to the respondents, the provisions of the restraint are excessive and unreasonable in an open democratic society. No person should be unreasonably prevented from earning a lawful living. The fact that the parties expressly excluded the area from the ambit of the restraint does not mean that the respondents are excluded from the hairdressing trade. They may trade, but not competitively. The prohibition is only in respect of a competitive trade within a radius of 20km from the premises of the business that they sold. The restraint of trade clause imposed on the respondents is reasonable having regard to the applicant's legitimate business interests. The restraint does not prevent the respondents from continuing to earn a living outside of the restricted area, using their own skills and know-how of the hairdressing salon business.

[38] In my view, it is legitimate to limit a vendor's future commercial activities in respect of the business he has sold, by contractually obliging him not to compete with the purchaser. To do otherwise, would be to allow the vendors, to open a business in opposition to that which they have sold, and thus 'steal back' the customers they have sold to the purchaser as part of the goodwill. Post sale business restrictions on the activities of the seller are necessary to protect the goodwill of any business.

[39] The respondents after selling their business to the applicant, remained in its employment until May 2010 and thereafter in blatant disregard of the restraint terms became engaged in a business similar to that of the applicant, in flagrant competition to the very business it sold to the applicant and less than 2km away. Setting up the business in the manner that the respondents have done, less than 2km from the business they have sold, must be construed as taking advantage of the connections that they previously formed with the customers which contributed to the goodwill they sold. They are competing for their old customers.

CONCLUSION

[40] Consequently, I find that the true object of the parties in imposing the restraint was clearly to protect the goodwill of the business. In the sale of any business, the covenantee is entitled to be protected against the competition by the covenanter, since without such a protection the covenantee would not get what he is contracting to buy, i.e. a going concern, a lucrative business, nor would the covenanter give the covenantee what he is intending to sell.[18] Goodwill is an intangible asset which on the sale of a business is permanently disposed of by the seller.[19] Consequently the seller may not again utilise and enjoy this intangible asset. If a seller disposes of the goodwill of a business he is not allowed thereafter to act contrary to the sale. When the respondents sold the salon, it became the sole and absolute property of the applicant, and any infringement of the applicant's proprietary rights was consequently actionable.

[41] The respondents have failed to discharge their *onus*, that the restraint is unenforceable, unreasonable and against public policy. Consequently, the respondents should not be allowed to escape their contractual obligations. To hold otherwise would lead to injustice. The restraint imposed on the respondents, its extent and duration, and the geographical area within which the competitive activity is restricted, are all reasonable and enforceable having regard to the applicant's need to protect its legitimate business interests. If the respondents are not interdicted, the harm to the applicant's business and the financial prejudice will continue. There is no other remedy available to the applicant. The applicant has discharged its *onus* in respect of the requirements of a final interdict.

THE URGENT APPLICATION

[42] The applicant, having ascertained the unlawful behaviour of the respondents at the end of June 2010, immediately thereafter consulted with its attorneys. A demand was expeditiously sent out, informing the

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[18] *Protea Holdings Ltd and Another v Herzberg and Another* 1982 (4) SA 773 (C); *Coetzee v Eloff* 1923 EDL 113; *Botha and Another v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A).

[19] *A Becker & Co (Pty) Ltd v Becker and Others* 1981 (3) SA 406 (A) at 407 A.

respondents of their breach of the agreement and demanding the rectification thereof within 10 days. This was done with the express intention of seeking to avoid launching this application and involving the parties in unnecessary and costly litigation.

[43] The respondents persisted in their unlawful conduct and the applicant was left with no choice but to institute proceedings against the respondents on an urgent basis, to enforce a restraint of trade to which the parties had contractually agreed. When the matter came before Coppin J in the urgent court on the 20th of July 2010, the parties agreed that the matter be postponed to the opposed motion roll, and the costs reserved. The applicant has urged this court to award costs on an attorney and client scale. However, I am not convinced by the applicant's argument that this court should do so. The applicant is entitled to the wasted costs of the postponement on 20 July 2010.

ORDER

[44] In the result, I grant the following order:

44.1 that pending an action to be instituted by the applicant within 30 days of the date of this order, seeking relief that the interim interdict granted in terms hereof be confirmed, and the payment of damages by the respondents to the applicant:

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44.1. 1 the respondents, and anyone acting through them or on their behalf, are forthwith interdicted and restrained from operating the business of a hair salon within a radius of 20km from 37 Voortrekker Avenue, Edenvale ("the restricted area") for a period of 12 months from the 1st of April 2010;

44.1.2 the respondents, or anyone acting through them or on their behalf are ordered to forthwith cease and desist from continuing with the hair salon business trading under the name and style of Looks Devine

or any other business of a similar nature within the restricted area;

44.2 Failing the institution of the action in terms of paragraph 44.1, the interim order shall ipso facto lapse

44.3 The respondents are ordered to pay the costs of this application, including the wasted costs of the postponement on 20th July 2010, in respect of the urgent application.

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HK SALDULKER
JUDGE OF THE SOUTH GAUTENG HIGH COURT
JOHANNESBURG

DATE OF HEARING	29 JULY 2010
DATE OF JUDGMENT	19 NOVEMBER 2010
COUNSEL FOR APPLICANT	ADV DE OLIVEIRA
INSTRUCTED BY	JOHN WALKER ATTORNEYS
COUNSEL FOR RESPONDENT	ADV GRADIDGE
INSTRUCTED BY	RAYMOND KOSVINER ATTORNEYS