IN THE HIGH COURT OF SOUTH AFRICA **Reportable: ~~Yes~~/No**

EASTERN CAPE, GRAHAMSTOWN.

CASE NO:3066/2010

In the matter between:

RICAMA CC Applicant

and

ANTOINETTE TWYNHAM Respondent

JUDGMENT

SANGONI JP

Introduction

[1] Pursuant to an alleged breach of the restraint of trade (restraint clause) by the seller in an agreement of purchase and sale of a restaurant business between the parties ("the agreement"), the applicant launched these proceedings seeking an order declaring that the respondent is in breach of the provisions of the restraint

of trade clause in the agreement and that the respondent be "interdicted and restrained for a period of 3 years as from 1 April 2010 from directly or indirectly, either as principal, agent, partner

representative, shareholder, director, employee, consultant, advisor, financier or in any like or similar capacity, from being associated or concerned with, interested in or engaged in any firm, business, company or other association of persons from carrying on business or being involved in any activity similar to the business of a restaurant or coffee shop in the City of Grahamstown and / or in the area of jurisdiction of the Makana Municipality."

Restraint of trade clause

[2] I record hereunder the entire clause:

> "21.1 The Seller, in order to protect the goodwill of the business and the interest of the Purchaser in the Business agrees and undertakes in favour of the Purchaser and the Business that it will not, within the City of Grahamstown and Makana Municipal area and for a period of three years after the take-over date, either as principal, agent, partner, representative, share holder, director, employee, consultant, advisor, financier or in any like or similar capacity, directly or indirectly be associated or concerned with, interested or engaged in any firm, business, company or other association of persons which carries on a business or activity similar to the business carried on by the Seller on the take-over date.
>
> 21.2 The restraint, more specifically means, that the Seller will not compete with the Purchaser in any form of Restaurant / Coffee Shop Business.

> 21.3 The Seller agrees that the restraints imposed upon it in terms of this clause are reasonable as to subject matter, area and duration and are reasonably necessary in order to preserve and to protect the goodwill of the business." (own underlining)

[3] The underlined phrases in paragraph 2 above compliment one another. Separately or collectively they highlight the activities that allegedly constitute a breach of the restraint clause. In terms of the agreement it would be a violation of the clause to carry on "a business or activity similar to the business carried on by the seller on the take-over date". In clause 1 of the agreement the business sold and purchased is recorded as a "Business of a Restaurant under the name and style of 'Bella Vita' and a Bed and Breakfast business". It is recorded that the business was sold and purchased as a 'Going Concern, with the Goodwill attached thereto". It is in fact expressed in the agreement that the purpose for the restraint clause is to "protect the goodwill of the business and the interest of the Purchaser". The aforegoing is not in dispute.

Brief Factual Background

[4] On 6 March 2010 the applicant, represented by Ms Caporossi, purchased from the respondent the business referred to above. The business included all assets, the liquor licence and goodwill. The applicant paid the purchase price in full. The respondent opened a Sushi business at Pepper Grove Mall within a radius of 3 kilometres of "Bella Vita" restaurant purchased by the applicant. On becoming aware of the move to open a business which to her

would compete with Bella Vita, Ms Caporossi instructed the applicant's attorneys to advise the respondent that opening that kind of business would violate the restraint clause.

[5] In response to the letter from the applicant's attorneys demanding that the respondent should desist from establishing the intended restaurant, the respondent through her attorneys said she had opened a Sushi Bar which is not in competition with the applicant's business and therefore according to her, not falling within the ambit of the restraint of trade**.** It is interesting to note that the respondent has throughout the papers before court described the business she is currently running as a sushi bar. However, respondent's attorneys stated in their letter, which is dated 27 September 2010, marked as Annexure "E" in the papers, that the respondent has no intention of closing down her restaurant. The wording goes like this:

> "We may further advise that our Client in fact informed your Client that she would be opening a Sushi Bar when leaving your Client's business at the end of the Grahamstown Festival and your Client in fact wished our Client success in her new venture.
>
> Accordingly we are instructed that our Client has not breached the Agreement and most certainly will not be closing down the Restaurant." (own underlining)

[6] This excerpt from the said letter will also be particularly relevant to the issue of whether or not the applicant consented to the establishment of the Sushi business and thus waived its rights to the protection offered it by the restraint of trade clause. I will deal with this later in the judgment. For the sake of completeness, I

should mention at this stage that the respondent alleges that during July 2010, respondent intimated to Ms. Caporossi that she was planning to open a Sushi Restaurant and that the latter did not object thereto. Instead, she wished the respondent good luck. At a later stage, before opening the Sushi business, the respondent requested Ms Caporossi to provide a letter of no-objection to the establishment of such business and the latter refused, indicating that she would take the matter up with applicant's attorneys.

[7] The respondent contends that the restaurant that forms the subject matter of the agreement is of an Italian style. It is also not in dispute that the applicant made some changes to the business, Bella Vita, after taking it over. Based on those changes the respondent contends that the applicant has altered the business significantly, such that the previous goodwill attached to the business has been discarded or substantially reduced and therefore nothing remains to be protected by the restraint.

[8] The changes mentioned by the respondent relate to the change of name from Bella Vita to La Trattoria. The difference in menu offered changed from several dishes of buffet one could choose from e.g. oxtail, chicken, curry, brinjale bake, butternut, sweet potato, spinach, salads, deserts etc to an Italian menu, comprising of starters, pastas and main courses. The décor was distinctive whereas the table cloths have now been replaced with white table cloths with the layout on the tables changed.

[9] Even with the changes alleged I am of the view that Bella Vita/La Trattoria did not cease to be a restaurant business. In both Bella Vita/ La Trattoria and the respondents business meals, refreshments, soft drinks, tea etc. are served. I agree with the dictionary meaning of the word restaurant, as provided by the applicant. It is given as:

> *"A commercial establishment where meals are prepared and served to customers".* – Collins.
>
> "*A place where meals may be had*." –Chambers.
>
> "*Public premises where meals or refreshments may be had*." – Oxford Concise.

The respondent acknowledges that she does serve meals, even though the respondent alleges that a chief part of her business is take-away. To me that does not exclude it from the definition of a restaurant as provided. There is no basis to exclude respondent's business from the effect of the restraint of trade clause, merely because respondent's meals served are of Japanese style and applicant's meals served are of Italian style. Despite the difference, in the quantity of the meals served as take away meals or sit down meals, respondent's business still operates as a restaurant and therefore subject to the restraint of trade clause. The agreement expressly provides that the seller will not compete with the purchaser in any form of restaurant/coffee shop business. The respondent is restrained from conducting a business that is a restaurant or similar business on the take over date. There is merit in applicant's

submission that she bought the restaurant and its goodwill and that is what she requires protected by a restraint of trade clause, whether there are changes or not suggested by the respondent.

[10] The relevant issue for determination in Everitt v Horn[1] was whether the respondents licensed restaurant business was to be regarded as "similar to or competing with" the fast food outlet operated by the applicant. The conclusion Van Rensburg J. came to was that those were not similar or competing businesses because of the essential nature of the businesses. He however concluded that "had the applicant wished to restrain the respondent from opening a licensed restaurant, he should have seen to it that the restraint clause in the agreement of sale was phrased in more specific terms"[2]. *In casu* the words "will not compete with the purchaser in any form of Restaurant/coffee shop business"[3] are sufficiently specific.

[11] The restraint of trade envisaged in the agreement is for the protection of the goodwill of the restaurant business and the interest of the purchaser, that is the applicant.

[12] The preamble to the restraint clause is "in order to protect the goodwill of the business and the interest of the Purchaser …". It is important to consider whether the conduct of the respondent that is alleged would not or does not negatively affect the goodwill of the business which is sold and purchased in terms of the agreement. The word 'goodwill' is capable of different meanings, depending on the context.[4]

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[1][1998] JOL 2168(E)
[2]Ibid P. 9
[3]Paragraph 21.2 of the restraint clause
[4]Agreements in Restraint of Trade in South African Law by Saner Issue (12) Page 7-7

[13] I am of the view that the version of goodwill that applies in this case is best illustrated[5] in Commercial and Industrial Holdings v Leigh-Smith, I reproduce there from an excerpt that reads:

> "The term "goodwill" has not proved easy to define. In *Commissioners of Inland Revenue v Muller & Co's Margarine Ltd* 1901 AC 217 at 234-4 Lord MACNAGHTEN defined it as follows:
> "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. It is the one thing which distinguishes an old established from a new business at its first start."
>
> In the case of *In re Brown* 242 NY 1 at 6 CARDOZO J states:
> "Men will pay for any privilege that gives a reasonable expectancy of preference in the race of competition … such expectancy may come from succession in place or name or otherwise to a business that has won the favour of its customers. It is then known as goodwill." (Own underlining)

[14] Similarly, in Caterham Car Sales & Coachworks Ltd v Birkin Cars (Pty) Ltd,[6] Harms JA after examining a number of cases states:

> "Goodwill is the totality of attributes that lure or entice clients or potential clients to support a particular business. The components of goodwill are many and diverse. Well recognised are the locality and the personality of the driving force behind the business, business licences, agreements such as restraints of trade and reputation. These components are not necessarily all present in the goodwill of any particular business." (Own underlining).

[5] 1982(4) SA 226 (ZC) 232 F to H.
[6] 1998(3) SA 938 (SCA) at 947

[15] The seller agrees in terms of clause 21.3 of the agreement that the terms "are reasonable as to subject matter area and duration and are reasonably necessary in order to preserve and to protect the goodwill of the business". It is thus fair to infer that the seller acknowledges in this excerpt that there exists goodwill to be reserved and protected. The contention by the defence that the respondent did not have a significant interaction with customers at the time she was running Bella Vita does not carry any weight. The goodwill to be protected may relate to the identity of the main figure in the business. The respondent was in Bella Vita running the business for a considerable time. The businesses are in close proximity'.[7] It will be remembered that even after the effective date the seller remained at the business Bella Vita for a considerable period (2½ months), assisting and managing. It follows in my view, that the changes highlighted, even if effected, would not absolve the respondent from honouring her contractual obligations.

[16] Respondent also takes the point that there is no interest deserving of protection by the restraint clause, arguing therefore that the restraint was unreasonable and unenforceable. The bases for the contention are that the business, Bella Vita's character was fundamentally changed; the respondent had not developed any customer loyalty whilst running Bella Vita and thus did not take away a part of Bella Vita's goodwill and that the respondent does not compete with the applicant in any way. The last point dealing with competition is reinforced by the fact that the respondent alleges that she informed the applicant of her

[7]Manousakis & Another v Renpal Entertainment CC 1997 (4) SA 552 (C)

intention to open a sushi bar even before the sale took place. That is of course denied by the applicant.

[17] The protectable interest relates to the protection of the goodwill, to restrain the respondent not to do business in competition with the applicant. There is no case made out that the terms are unreasonable or that the restraint was only meant to exclude competition.

[18] Mr. Paterson SC, representing the respondent together with Ms. Beard, argues that there are material disputes of facts which need to be resolved for purposes of adjudication of the matter. The ones I consider relevant are whether the respondent discussed her plans to open a Sushi business with Ms. Caporossi. This allegedly took place at the time the applicant had taken over the running of Bella Vita and during the period the respondent was assisting Ms. Caporossi with the hand over of the business about June / July 2010. The respondent reports that Ms. Caporossi wished her good luck in her new venture.

[19] Ms. Caporossi says it was only out of shock and surprise that she uttered the words “good luck”. It was not meant to be a positive gesture even though the respondent had told her she had no reason to worry as the Sushi business was only going to be a take away business. Ms. Caporossi confirms, the respondent requested her to provide a no objection letter to her opening a Sushi restaurant and she declined. She reiterates that the businesses in question attracts clientele from the same clientele base with no marked trends of preference between different age groups.

[20] From the circumstances of the case it is apparent that the respondent seeks to establish waiver by applicant, relying on what it refers to as a dispute of fact. Simply put, the position suggested by the respondent is that there is a dispute of fact as to whether the applicant waived its rights to the protection offered by the restraint clause as regards whether the applicant consented or not to respondent operating a Sushi business. In the event the dispute is not resolved the argument, effectively, is that the respondent has discharged the onus to prove waiver. In my view this kind of scenario impacts on which party the onus falls. This raises the question, whether if there was a genuine dispute of fact on the stated aspect, not resolved on the affidavits, it would mean the respondent has successfully established waiver on the facts of this case. In my view that would prove waiver by default.

[21] I however remain satisfied that there is inherent credibility[8] in Ms. Caporossi's averment. It appears improbable that Ms. Caporossi would consent to the opening of a Sushi business by the respondent. Why would the respondent request a letter of no objection. Equally, why would the applicant not provide it if there had been consent given. The version by the respondent as regards the events is far fetched. Even on the facts as related by the respondent, assuming they are acceptable, they would not establish waiver. They do not constitute a dispute of fact that is not resoluble on affidavit. The onus on the respondent would be to prove that applicant, with full knowledge of its rights decided to

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[8] Plascon – Evans Paints v Van Riebeeck Paints 1984 (3) SA 623 (A) at 635 A to C.

abandon them in a way that is inconsistent with an intention to enforce them.[9] The plea of waiver must fail.

[22] An extract from Wightman t/a JW Construction v Headfour (Pty) Ltd and Another 2008 (3) SA 371 (SCA). Para 13 reads:

> "A real, genuine and bona fide dispute of fact can exist only where the court is satisfied that the party who purports to raise the dispute has in his affidavit seriously and unambiguously addressed the fact said to be disputed. There will of course be instances where a bare denial meets the requirement because there is no other way open to the disputing party and nothing more can therefore be expected of him. But even that may not be sufficient if the fact averred lies purely within the knowledge of the averring party and no basis is laid for disputing the veracity or accuracy of the averment …"

[23] The applicant has made out a case to justify the grant of the relief sought in the notice of motion. In the result I grant an order in terms of prayers 1, 2, 3 of the notice of motion.

C.T SANGONI
JUDGE PRESIDENT
EASTERN CAPE HIGH COURTS

For Applicant : Adv. D. H. de la Harpe

[9] Laws v Rutherland 1924 AD 261 at 263

Instructed by	:	Dold & Stone Attorneys 100 High Street Grahamstown
For Respondent	:	Adv. T. J. M. Paterson SC Adv. M. L. Beard
Instructed by	:	Messrs Whitesides 53 African Street Grahamstown

HEARD ON 12 MAY 2011

DELIVERED ON 24 JUNE 2011