CG CASE NUMBER: 152/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ELCENTRE GROUP HOLDINGS LIMITED	First Appellant
ELCENTRE CORPORATION LIMITED	Second Appellant
VOLTEX HOLDINGS LIMITED	Third Appellant
VOLTEX (PROPRIETARY) LIMITED	Fourth Appellant
MULTILECTRONIC (PROPRIETARY) LIMITED	Fifth Appellant

and

JEREMIAH LIONEL BATTISS	First Respondent
THELMA ANN BATTISS	Second Respondent
INTERNATIONAL CABLES CC	Third Respondent

CORAM: CORBETT CJ, HEFER, NIENABER, VAN DEN HEEVER JJA et

KANNEMEYER AJA

HEARD ON: 14 SEPTEMBER 1993

DELIVERED ON: 28-09-93

J U D G M E N T

VAN DEN HEEVER JA

The issue in this matter is one of language rather than law, namely the interpretation to be placed on a restraint of trade provision in a lengthy and detailed document ("the contract") by which the second appellant ("Elcentre") took over three companies, along with the services of their four directors for a period envisaged as being a minimum of three years.

The companies were JLB Investments (Pty) Ltd ("JLB") and two trading companies: Atlas Cable Supplies (Pty) Ltd ("Atlas") and Association Cables (Pty) Ltd ("Association"). The directors, referred to in the contract as "the executives", were first and second respondents who are husband and wife, and Messrs M S L Rall and E R Read. Rall owned 20% of the issued shares in Association. First and second respondents between them held the rest of the shares in Association as well as all the issued shares in JLB and Atlas. The take-over by Elcentre was effected through the purchase of the shareholding of the companies, along with

whatever claims the sellers had against them as at 1 March 1987. The purchase price was approximately ten million rand, adjustable depending on certain contingencies, for tangible assets and book debts estimated in the contract to be worth about eight million rand. We do not know what the value of the sellers' claims against the companies amounted to, nor did the contract place any separate value on goodwill. Read who had no shares to sell was also a party to the contract, receiving a consideration for undertaking the same obligations and agreeing to be bound by the same restraints as the sellers. All the executives received only a small proportion of the consideration due to him or her in cash. The balance consisted of 200 cent shares in Elcentre, three quarters of those in turn to be issued to first appellant ("Elgro") of which Elcentre is a subsidiary, and Elgro undertaking in consideration therefor to issue twice as many 100 cent Elgro shares. The board of directors of each of the companies was to

be reconstituted according to Elcentre's directions but the executives were to remain on as directors for as long as each was in the employ of the relevant company. Each was obliged, simultaneously with signing the contract, to enter into a service contract with Atlas or Association.

The specimen service contract annexed to the (main) contract provided that it was to continue indefinitely subject to three months' written notice, but no notice could be given by the executive in question to obtain his release sooner than three years after the deemed service commencement date, namely 1 July 1987. The executive was bound to discharge his duties in the cable and wire distribution and electrical wholesaling fields, using his best endeavours

> "to promote and extend the business of the company and its subsidiaries and fellow subsidiaries for the time being ("the Group")".

Atlas and Association were entitled to transfer their

rights and obligations as employers to Elcentre or any subsidiary for the time being of that company, subject to qualifications which are irrelevant to the issue to be determined, as are the other clauses of the service contract.

The contract not only obliged the executives to serve what now became the Elcentre group of companies for this minimum period, but imposed two forms of restraint upon them. The first relates to the disposal of any of the Elcentre shares each executive received as the major part of his or her consideration. This was totally prohibited for a year, after which Rall and Read were free to do so. First and second respondents were however limited both as to the frequency with which they could sell shares and the number that was permitted to be sold on any one occasion, all the sales being subject to a right of pre-emption in favour of Elgro. The second restraint relates to competition with the Elcentre group of companies and protection of the

goodwill of the business of each of its members. I quote the clauses that have a bearing on this in full:

> "11.4 For the purpose of this clause -
>
> 11.4.1 'the area' means the Republic of South Africa as presently constituted, Transkei, Bophuthatswana, Ciskei, Venda, South West Africa/Namibia, Botswana, Swaziland and Lesotho;
>
> 11.4.2 a 'competitive business' means an undertaking of whatever nature carrying on business anywhere in the area in competition with Atlas, Association and Elcentre and its subsidiaries for the time being ('the Elcentre group') in the businesses of cable and wire trading and electrical wholesaling during the period of six months ending as at the date on which the employment of the executive concerned by the Elcentre group terminates for any reason.
>
> 11.5 ... Each of the sellers undertakes and ... Read undertakes in favour of each of the companies and in favour of each company which forms part of the Elcentre group and their respective successors-in-title and assigns that, for so long as he/she is employed by the Elcentre group and for at least three years thereafter, but for a period in any event aggregating not less than six years reckoned from" (the close of business on 30 June 1987) "he/she

shall not be interested, engaged or concerned in any capacity in any competitive business carried on anywhere within the area.

11.8 Each of the executives further undertakes that -

11.8.1 he/she will not during the period of his/her employment by the Elcentre group nor during the restraint period referred to in this clause 11 -

11.8.1.1 persuade, entice, encourage or procure any employee who is in the employ of the Elcentre group to terminate his employment with that group or to take up employment in, render services to or become involved or interested in any business of a competitor of the Elcentre group;

11.8.1.2 solicit, interfere with or entice any person, company or other entity who or which is a customer of or is in the habit of dealing with the Elcentre group to refrain in any way from doing so or to restrict or curtail such business dealings;

11.8.1.3 he/she will not during the period of his/her employment by the Elcentre group or at any time thereafter divulge or make use of any of the trade secrets of any of the businesses of the Elcentre group;

11.8.1.4 he/she will not, directly or indirectly, at any time during the aforesaid restraint period employ any employee who was employed by

> Atlas or Association or any other cable or wire business of the Elcentre group during the twelve month period immediately preceding the date of termination of his/her employment by the Elcentre group."

First and second respondents remained within the group for the obligatory period during which a number of changes in company structures and names took place. Nothing hinges on those. The five appellants are linked in one way or another and are accepted as being members of the Elcentre group. First and second respondents were in the employ of fourth appellant when they gave notice that 30 June 1990 would be their last working day.

On 19 July 1990 third respondent was incorporated with first and second respondents as its sole members. Its main objective and business is the export and import and sale of cables. First and second respondents were actively and openly involved in the management, control and operation of this business until

appellants obtained an interdict as a matter of urgency in the Witwatersrand Local Division preventing all three respondents from continuing that business. The founding affidavit contains some general allegations possibly suggesting unfair competition on the grounds that first and second respondents possess detailed and intimate knowledge of various aspects of the businesses conducted by some of the members of the Elcentre group. The application was however founded squarely on the restraint of trade condition contained in clause 11.5 read with 11.4 of the contract, quoted above. Appellants' attitude was and remains, not that respondents are trading outside the bounds of permissible but restricted competition, but that they may not become involved in the sort of business they are conducting at all until six years have expired as from the close of business on 30 June 1987. Respondents in their opposition to the application made no bones about their having entered the same field as that tilled by

appellants. They adopted and stand by the contention that they are entitled to do so within the limits set by the contract.

Hartzenberg J in an extempore judgment held that the definition of "competitive business" in clause 11.4 of the contract is not very elegantly worded; that it is necessary in order to give business efficacy to the contract to accept that what the parties must have intended, bearing in mind the purchase price agreed, was not the absurdity that respondents were prohibited only from joining any competitor of the Elcentre group already in existence during the six months before the parting of the ways came, but

> "that companies in the applicant group of companies trading with cable and wire and doing electrical wholesaling during the six month period before the respondents' resignation are all to be protected"

against any participation by respondents in the same sort of business as theirs.

In other words, he held that the adverbial

phrase of time contained in the definition of "a competitive business" relates to the activities, not of

> "an undertaking ... carrying on business ... in competition with"

members of the Elcentre group, but to the activities of

> "Atlas, Association and Elcentre and its subsidiaries for the time being".

The phrase accordingly determines the identity of the companies intended to be protected, and not the identity of competitors against whom protection is to be achieved.

This reasoning ignores the fact that if no competition whatsoever was to be permissible, it was unnecessary to identify the individual components of the group which were to be protected against competition. The aim of the clause is to protect all the members of the group throughout Southern Africa. The prohibition against trading in the fields mentioned would automatically continue as long as any member of the Elcentre group continued to do so in the area. And in

the unlikely event of all the members disappearing from the field the restraint would serve no purpose.

On appeal to the full bench of the Transvaal Provincial Division Eloff J held, Mc Creath and Van der Merwe JJ concurring, that the clause is neither ambiguous nor leads to any absurdity and that there is no occasion to alter its wording. The order of the court of first instance was set aside with costs, including the costs of two counsel.

Appellants are before us on leave sought and obtained in terms of section 20(4)(a) read with section 21(2) of Act 59 of 1959.

Clause 11.4.2 and clause 11.5 are an inelegant pair. Clause 11.5 deals with a restriction against competition for a period of six years regardless of whether an executive is still employed within the Elcentre group or not; yet, on either interpretation of clause 11.4.2, the definition of "competitive business" seems to be capable of application only in the case

where the employment of the executive concerned has been terminated. It is irrelevant for present purposes whether prohibition is imposed against competition by an executive while still in the employ of the group, though the service contract would seem to cater for that. What has to be determined is what are the limitations placed on the executives after leaving the employ of the group.

Appellants made much of the fact that the singular, i.e. the word "business", is used in clause 11.4.2 in that part of the definition reading "a 'competitive business' means an undertaking of whatever nature carrying on business anywhere in the area", as contrasted with the plural later used in "the businesses -of cable and wire trading and electrical wholesaling". The reasoning was that the plural of necessity related to more than one undertaking, and so did not refer to a competitive undertaking, but must refer to the companies within the Elcentre group, which were then qualified by

the adverbial phrase of time. There is no merit in this argument. "Carrying on business" is merely synonymous with "trading". The use of the plural in "the businesses of cable and wire trading and electrical wholesaling" is appropriate to describe different spheres of operation and does not necessarily connote different entities indulging in trade.

Appellants' contention would require the wording of 11.4.2 to be altered. Their counsel suggested that 11.4.2 should read "carrying on business ... in competition with Atlas, Association and Elcentre and its subsidiaries for the time being . . . which have conducted the" (or perhaps "in their") "businesses of cable and wire trading and electrical wholesaling during the period of six months ending" etc. There is however no absurdity in the contract which requires the wording to be tampered with, nor does the contract lack business efficacy despite the fact that its terms are perhaps somewhat unusual in that a competitive business is

customarily one identified by its present activities rather than what it did before the date on which an ex-employee is forbidden expressis verbis to join it. On appellants' contention the provisions of clause 11.8.1 would become totally redundant. I can think of no reason why the activities listed there should be forbidden to first and second respondents unless what in fact came about had been contemplated by Elcentre at the time of contracting as a real and permissible possibility: that respondents on leaving the Elcentre group might wish to set up on their own again in the field they knew well. Clause 11.8.3 also indicates that that must have been envisaged, hence a lengthy twelve month quarantine period was laid down before respondents could engage someone formerly in the employ of the group, ex abundanti cautela, to protect the goodwill of the businesses within the group. I say ex abundanti cautela since, because of the way the contract was structured, respondents' interests would run parallel

with those of the Elcentre group at least until they had disposed of all their shares. They must have each still owned close on two million of those, which would take a considerable time to dispose of, when their period of compulsory bondage came to an end.

As I have said, a "competitive business" would perhaps usually be identified according to its activities at the time an ex-employee to be restrained seeks to join such opponent rather than by reference to its trading activities for a period before such event. There is however nothing bizarre in the notion of using a time frame immediately preceding an executive's so leaving the group for purposes of identifying those who fall within the class of established competitors one of which might be dangerously strengthened were the executive to join forces with it. Use of that particular time frame in relation to the members of the group to be protected is bizarre since there was no suggestion of any practical purpose it might serve.

In short, I agree with the tenor of the paraphrase of the clause read as it has to be in the context of the contract as a whole, offered on behalf of respondents. In the contract appellants were saying on behalf of each member of the group something like this:

> "When you leave the group you may enter the field again, but only on the basis that you do not strengthen my existing competitors or take away my employees or existing customers or suppliers and so damage my business."

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

L VAN DEN HEEVER JA

Concur:

CORBETT CJ)
HEFER JA)
NIENABER JA)
KANNEMEYER AJA)