Case No 12/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter of:

PAUL EDWARD PUTTENHAM REEVES 1ST APPELLANT

REEVES INSURANCE BROKERS CC 2ND APPELLANT

and

MARFIELD INSURANCE BROKERS
(PTY)LTD 1ST RESPONDENT

GLENVAAL DEWAR RAND LIMITED 2ND RESPONDENT

CORAM: CORBETT CJ, HEFER, NIENABER, SCHUTZ
et SCOTT JJA

HEARD: 15 FEBRUARY 1996

DELIVERED: 28 MARCH 1996

JUDGMENT

SCOTT JA:

Prior to 1987 the first appellant (to whom I shall refer as "Reeves") and his father carried on business as insurance brokers in East London through the medium of a close corporation, Harold Reeves & Associates CC, in which Reeves had a 40% interest and his father a 60% interest. They were both well known in the East London and Border area and had established what were described as "valuable" relationships with the clients of the business. In 1987 the first respondent, which was then known as Glenvaal (Pty) Ltd and which carried on business as insurance brokers in various centres in the Republic, was anxious to open an office in East London. (The first respondent subsequently changed its name to Marfield Insurance Brokers (Pty) Ltd but it is convenient to refer to it as "Glenvaal".) At the time and for reasons which are not material to this appeal, the business of the close corporation had suffered a financial set-

back. Following negotiations and in terms of a written agreement of sale dated 21 July 1987 Glenvaal acquired the business (including its goodwill) of the close corporation as a going concern. The agreement provided further that Reeves and his father were to enter into service agreements with Glenvaal on the latter's usual terms and conditions. It is common cause that they both did so.

Reeves's service agreement provided that it was to be deemed to commence on 1 July 1987 and was to continue until 30 June 1988 whereafter it could be terminated on 3 calendar months' notice given by either party to the other. Clause 14 contained the restraint which forms the subject matter of the present appeal. The terms which are relevant are the following:

> "14.4 The Employee hereby undertakes to Glenvaal that during his employment and for a period of 3 years after the date upon which he ceases to be employed by Glenvaal (or any company in the Glenvaal Group) for any reason

whatsoever, he will not, within a radius of 350 kilometres from the City Hall in East London either alone or jointly together with, or as agent for any other person, firm, partnership, company, body corporate or association of any nature whatsoever:

14.4.1 be engaged, interested or concerned, whether Gnancially or otherwise and whether directly or indirectly, in; or

14.4.2 be a director of or a shareholder, directly or indirectly, in; or

14.4.3 act as a consultant or advisor to or be an employee of; or

14.4.4 directly or indirectly finance,

any of the business of insurance broking, underwriting, insurance consultants, insurance agents, claims settling agents (or be party directly or indirectly to any management contracts relating to any of such businesses); or any other business which may directly or indirectly compete with that carried on by Glenvaal, save for his employment with Glenvaal."

A restraint in virtually identical terms was contained in the agreement of sale.

Reeves was in due course appointed joint manager of Glenvaal's branch in East London. In this capacity he nurtured the relationships with former clients of the close corporation and established new client relationships for and on behalf of Glenvaal. By the very nature of his employment he also acquired a detailed knowledge of the insurance needs and cover of Glenvaal's clients. Reeves's father in the meantime retired on account of ill-health and did not become involved in the dispute which subsequently arose.

In 1994 Glenvaal and its holding company entered into an agreement with Dewar Rand Investments (Pty) Ltd, which also carried on business as insurance brokers, in terms of which the businesses of both Glenvaal and Dewar Rand were to be transferred to Glenvaal Dewar Rand Ltd (the second respondent) which had been incorporated for this purpose and which was also a party to the agreement. (I shall refer to this company

as "GDR".) With effect from 1 April 1994 the assets (including goodwill) and liabilities of both businesses were transferred to GDR which on that day commenced carrying on the new combined business on its own behalf.

In terms of the agreement the new company, ie GDR, was to offer employment to those employees of the vendors, ie Glenvaal and Dewar Rand Investment (Pty) Ltd, whom GDR wished to employ. The vendors in turn were to procure the signatures of such employees to a standard service contract, a specimen of which was annexed to the agreement. The standard service contract contained a restraint clause in terms of which, broadly stated, the employee was not to engage in any way in the business of insurance broking "within the Republic of South Africa as constituted on 31 May 1961" for a period of two years after he or she had ceased to be employed by GDR.

Reeves was one of the employees of Glenvaal whom GDR

wished to employ. On 1 April 1994 he accordingly remained on in his former position at the East London branch. Reeves, however, declined to sign the service contract which was presented to him for signature. He objected both to the restraint which he regarded as unreasonable, particularly in regard to the area of the restraint, and to the absence from the contract of details regarding such benefits as medical aid, the use of a motor car and the like which GDR at that stage was not yet in a position to furnish. Because of the senior position which Reeves was to occupy in the company the restraint proposed in his case was to be for a period of three and not two years. Various attempts were made to persuade Reeves to sign the service contract. By 31 August 1994 it had become clear that he would not do so and he was required to leave, which he did.

Reeves immediately set about establishing a business for his own account in competition with GDR. For this purpose the second

appellant (Reeves Insurance Brokers CC) was incorporated on 13 September 1994 with Reeves as its sole member. It is common cause that during the month of September 1994 Reeves persuaded some 32 clients of GDR (formerly those of Glenvaal) to sign appointments authorising the second appellant to act on their behalf in respect of all insurance matters.

On 3 October 1994 the respondents (Glenvaal and GDR) sought an order as a matter of urgency in the Eastern Cape Division interdicting Reeves from acting in breach of the terms of the restraint contained in his service agreement of 1987 (and the restraint contained in the 1987 deed of sale) with effect from 1 September 1994.

Following a postponement to enable answering and replying affidavits to be filed the matter came before Van Rensburg J who on 3 November 1994 gave judgment in which he substantially granted the relief claimed. He did not, however, grant the interdict in respect of the area

sought, ie within a radius of 350 km from the city hall in East London, but instead limited its application to "within an area including East London and extending from East London to the Chalumna River to the west; to and including Queenstown to the north; and to and including Umtata to the east". With the necessary leave the appellants (Reeves and the second appellant) appeal to this court. The respondents in turn cross appeal against the decision limiting the area in respect of which the interdict is to apply. In support of the relief claimed it was alleged in the founding papers that Reeves had "left his employment with the second applicant (GDR) with effect from 31.8.94". It was further contended that GDR as successor to the rights, including the goodwill, of Glenvaal was entitled to enforce the restraint against Reeves. In his answering affidavit Reeves alleged that some time prior to April 1994 he had been informed that GDR would seek to negotiate a fresh service contract with him and that in the

interim and until a new service contract was concluded the terms of his service agreement of July 1987 "would continue in full force and effect after the 1st April 1994". He accordingly did not dispute that his employment with GDR was subject to the restraint quoted above. An issue which gave rise to some debate in this Court was whether GDR remained obliged to give Reeves 3 months' notice in the event of a new service contract not being concluded. On behalf of the respondents it was contended that having regard to the circumstances surrounding what was accepted as being a tacit agreement of employment between Reeves and GDR in respect of the period subsequent to 1 April 1994, the existence of a term requiring the giving of such notice could not be justified. Counsel for the appellants contended the contrary. In the absence of more detailed allegations of fact the issue is not one which is readily capable of being resolved. Indeed, the papers Hied on behalf of both sides contained much

which was irrelevant and in the case of some of the relevant issues, relatively little in the way of factual allegations. In their replying affidavits the respondents, however, did not deny Reeves's allegation that pending the conclusion of a new contract the terms of his July 1987 service agreement would continue in full force and effect. That agreement, of course, made provision for the giving of 3 months notice by either party. In the circumstances I shall accept for the purpose of this judgment that the notice provision was a term of the tacit contract of employment in respect of the period subsequent to 1 April 1994.

On behalf of the appellants it was argued both in this Court and in the court below that upon a proper construction of the facts the termination of Reeves's employment with GDR on 31 August 1994 amounted to a wrongful dismissal or at the least to an unfair labour practice within the meaning of the Labour Relations Act 28 of 1956. In response

to the respondents' counter-contention that this was of no consequence having regard to the terms of the restraint, counsel for the appellants submitted that the words "ceases to be employed ... for any reason whatsoever" properly construed were not to be understood as including a wrongful or unfair dismissal of Reeves by his employer. Accordingly, so the argument went, the event necessary to put the restraint into operation had not occurred and Reeves was not bound by its terms.

In the court below Van Rensburg J decided the matter on the basis that GDR was under no obligation to enter into a contract of service with Reeves and that on the papers it was apparent that Reeves's existing employment with GDR had come to an end after the parties had failed to reach agreement on the terms of a new service contract. The learned judge concluded that -

> "(i)n these circumstances the first respondent (Reeves) can hardly be heard to say that he was unlawfully dismissed.

> From the outset it was in the discretion of the second applicant (GDR) as to whether it employed him or not."

Van Rensburg J did not consider the question whether or not GDR was obliged to give Reeves notice in the event of a new agreement not being concluded. Although in a letter dated 7 September 1994 addressed by GDR to Reeves it was stated that it had been mutually agreed that Reeves would leave the employment of GDR with immediate effect, it is clear, I think, from earlier correspondence and other allegations not in dispute that after months of negotiations Reeves was in effect given an ultimatum either to sign the new contract or leave forthwith. Once it is accepted, as I have, that Reeves was entitled to notice, it follows that by requiring him to leave immediately and without notice GDR was acting in breach of its tacit agreement with Reeves.

It becomes necessary therefore to consider the next question which is whether the phrase "for any reason whatsoever" in the restraint

clause is to be given a restricted meaning so as to exclude any wrongful termination of the contract of employment by the employer.

It has been held in a number of cases that the ordinary meaning of identical or similar phrases contained in restraint clauses is wide enough to include the unlawful termination of the contract of employment by the employer (see Biografic(Pvt) Ltd v Wilson 1974(2) SA 342 (R) at 349 C; Commercial and Industrial Holdings (Pvt) Ltd and Another v Leigh-Smith and Others 1982(4) SA 226 (Z) at 238 G - H; Capecan (Pty) Ltd T/A Canon Western Cape v Van Nimwegen and Another 1988(2) SA 454 (C) at 460 C - F; Chubb Fire Security (Pty) Ltd v Greaves 1993(4) SA 358 (W) at 362 H - J.)

Mr Lang, who appeared together with Mr Paterson for the appellants, nonetheless contended that such a wide meaning was not justified. Relying largely on cases involving the construction of exemption

clauses he submitted that in the absence of an explicit statement that even a wrongful termination by the employer would invoke the restraint, the phrase was to be construed as referring only to a termination of the employment relationship which did not involve a breach on the part of the employer or amount to an unfair labour practice.

In Government of the Republic of South Africa v Fibre Spinners & Weavers (Pty) Ltd 1978(2) SA 794 (A) at 804 C it was accepted that in the absence of ambiguity there was no justification for the proposition that unless the exemption clause expressly referred to negligence it was to be construed as referring to a head of damage based on some ground other than that of negligence.

Even accepting, therefore, that the clause in question is analogous to an exemption clause, the inquiry remains whether the ordinary meaning of the words used is wide enough to include a wrongful

termination of the contract by the employer. It is only in the event of ambiguity that recourse will be had to the contra proferentem or other rule of construction which may serve to give the words in question a limited meaning. See in this regard Chubb Fire Security (Pty)Ltd v Greaves, supra, at 362 A -I, where a similar contention in relation to forfeiture clauses was rejected by Du Plessis J.

In my view there is no ambiguity. The words "ceases to be employed" indicate an intention that the restraint is to operate once there is no longer an employment relationship between employer and employee. The words that follow, ie "for any reason whatsoever", make it clear that the circumstances in which the employment relationship comes to an end or the underlying cause of its termination are irrelevant to the operation of the restraint provision. There is accordingly no justification for the limited meaning which counsel urged should be given to the phrase.

Mr Lang did not contend that in the event of the provision in question being construed as including a wrongful termination it was on that basis alone contra bonos mores and as such invalid. What he did argue, as I understood him, was that having regard to events which occurred subsequent to the conclusion of the contract and in particular the circumstances in which the employment relationship came to be terminated, the enforcement of the restraint would be contrary to public policy. I shall return to this argument in due course. Before proceeding, however, to the next point which was advanced on behalf of the appellants it is convenient, I think, to make certain preliminary observations relating to the validity of a provision such as the one in question which permits the enforcement of a restraint in consequence of a breach by the employer.

An employee who by virtue of his employment would be in a position to exploit on his own behalf his employer's customer connections

is free on leaving his employment, subject to certain limitations, to compete with his erstwhile employer for the business of the latter's customers unless restrained by contract from doing so. See Freight Bureau (Pty) Ltd v Kruger and Another 1979 (4) SA 337 (W) at 341 E - H; Cambridge Plan AG and Another v Moore and Others 1987(4) SA 821 (D)at 846 13 - 847 A; Meter Systems Holdings Ltd v Venter and Another 1993 (1) SA 409 (W) at 430 I - 432 B. The legitimate object of a restraint is to protect the employer's goodwill and customer connections (or trade secrets) and the restraint accordingly remains effective for a specified period (which must be reasonable) after the employment relationship has come to an end. The need for the protection exists therefore independently of the manner in which the contract of employment is terminated and even if this occurs in consequence of a breach by the employer. Such a breach may, of course, take many forms. It may be committed by the employer in good faith and

be of a technical nature only. There may be fault on both sides. It is difficult to imagine that in such circumstances it would be against good morals to recognise the restraint and that the employer should have to forfeit the protection which the parties have agreed he should have regardless of how the employment relationship is ended. Even where the breach on the part of the employer is less innocent, it must be remembered that the employee is always free to pursue his contractual or statutory remedies against the employer. Where there is provision for the giving of notice the damage suffered by the employee may not amount to much. On the other hand, the loss to an employer in consequence of holding the restraint to be invalid may be considerable. In appropriate circumstances, as pointed out by Georges JA in Commercial and Industrial Holdings (Pvt) Ltd and Another v Leigh-Smith and Others, supra, at 238 I, an employee may be entitled to have his damages assessed on the basis of the existence

of the restraint. I can accordingly see no justification for regarding a provision such as the one in issue as contra bonos mores. Whether such a provision should be enforced in the light of all the circumstances prevailing when it is sought to invoke the restraint is a different question and one to which I shall revert later.

Counsel for the appellants further sought to rely on what would appear to be a substantive rule of English law that an employer who wrongfully terminates the contract of employment is precluded from enforcing a restraint of trade contained in the contract. The principle is stated in Chitty on Contracts 26 ed vol 1 at para 1201 thus:

> "If the party in whose favour a covenant in restraint of trade is entered into wrongly repudiates the agreement in which the covenant is contained, the covenantor is thereby discharged from his obligation. Wrongful dismissal, therefore, puts an end to any restrictive covenant in a contract of employment."

The rationale for the rule is not readily apparent from the three cases cited

in support of the proposition. They are: General Billposting Company Ltd v Atkinson [1909] A C 118 (HL); Measures Brothers Ltd v Measures [1910] 2 Ch 248 (CA) and S W Strange Ltd v Mann [1965] 1 All ER 1069 (Ch). In the General Billposting case it appears from the short speeches of Lord Robertson and Lord Collins (the Earl of Halsbury concurred with the latter) that it was accepted that the respective obligations of the employer to provide employment and of the employee to abide by the restraint were not strictly interdependent. The employer, however, was held not to be entitled to enforce the restraint because it was "ancillary to the contract of service" (per Lord Robertson at 121) and because the employer by his wrongful dismissal of the employee evinced "an intention no longer to be bound by the contract" (per Lord Collins at 122). No attempt was made in the subsequent cases to explain the rule; it was merely applied. It may be that its underlying basis is something akin to the now outmoded English

doctrine of fundamental breach which was applied to the interpretation of exemption clauses and which held that an exemption clause did not avail a party who was guilty of a breach going to the root of the contract. (See Elgin Brown & Hamer (Pty) Ltd v Industrial Machinery Suppliers (Pty) Ltd 1993(3) SA 424 (A) at 429 F - 430 A).

But whatever its basis in England, the rule is not one which can be easily explained in terms of the principles underlying our law. Indeed, Mr Lang did not suggest that it was an application of the exceptio non adimpleti contractus and disavowed any attempt to rely on the exceptio (cf Chubb Fire Security (Pty) Ltd v Greaves, supra, at 363 F - H where Du Plessis J sought to explain the rule on this basis.) There would also seem to be little justification for importing such a hard and fast rule into our law. As indicated above, the refusal to enforce a restraint because of a breach on the part of the employer, depending on the circumstances, could result

in a situation which is wholly inequitable. The wronged employee, on the other hand, will have his action for damages. Furthermore, as I shall show in due course, the absence of such a rule would not mean that the manner in which the contract of employment comes to an end is of no consequence.

Mr Lang placed reliance on two South African cases in which the rule in the General Billpostins case was adopted. The first was Drewtons(Pty) Ltd v Carlie 1981(4) SA 305 (C). In that case Watermeyer JP when dealing with a submission that a restraint went too far and was unreasonable because the contract could be terminated "for any reason whatever" said at 308E:

> "An employer cannot repudiate his obligations under the contract of employment and at the same time claim to enforce the restraint clause (vide General Billpostins Co Ltd v Atkinson 1909 AC 118)."

The second case was Info D B Computers v Newby and Another 1996(1) SA 105 (W) in which Goldblatt J, after referring to the

General Billposting case and a passage in Heydon The Restraint of Trade Doctrine (1971) at 299 - 300, said at 108 H - I:

> "I am persuaded, both on the ordinary principles of our law and the strong English and American authorities, that, unless there are terms to the contrary, a party who has wrongfully caused the termination of a contract of employment cannot rely upon the continued existence of a restraint of trade clause forming an integral part of such contract."

The judgment in the latter case does not identify the "ordinary principles" to which reference is made; nor does it contain an analysis to show how the rule in the General Billposting case is to be fitted into our law. Nonetheless, it is clear from the phrase "unless there are terms to the contrary" in the above-quoted passage that the decision is no authority for the proposition that the rule would apply even where the parties had agreed that the restraint was enforceable no matter how the contract of employment came to an end.

Turning to Drewtons' case, the passage in the judgment of

Watermeyer JP which I have quoted was criticised in Capecan (Pty) Ltd T/A Canon Western Cape v Van Nimwesen and Another, supra, by Van den Heever J who at 460 C described it as being:

> "... too widely stated, and the case quoted questionable authority for the proposition postulated."

The reference to the passage being "too widely stated" is presumably a reference to the application of the rule to the case where the parties in effect have agreed to the imposition of the restraint even where the contract of service is wrongfully terminated by the employer. In none of the three English cases referred to above did the restraint clause contain a provision that it was to apply if the contract was terminated "for any reason whatsoever" or some similar provision. Counsel for the appellants referred to a passage in Heydon The Restraint of Trade Doctrine at 300 in which it is said that in America a breach by an employer prevents him from obtaining an interdict or damages "even where the covenant provides that

it shall take effect no matter how the termination comes about". No authority in our law (apart from Drewtons' case) was cited for such a proposition; nor have I been able to find any. Even if the existence in our law of the rule in the General Billposting case were to be accepted I fail to see on what basis it could be applied once it is found that the parties were in agreement that the restraint was to operate in circumstances where the employer himself wrongfully terminated the contract of service.

For the purpose of the present case it is unnecessary to go further than to decide that the rule can have no application in such a case. Whether there is room for the application of the rule in the absence of such a provision in the restraint clause is a question which need not be decided at this stage and I accordingly refrain from doing so.

Finally, Mr Lang submitted that notwithstanding the provision permitting the restraint to operate in the event of Reeves ceasing to be

employed "for any reason whatsoever", the particular circumstances in which Reeves's employment came to be terminated were such that the enforcement of that provision (and hence the restraint) would be contrary to public policy. Before reverting to the facts it is necessary to consider the legal principles involved.

Where the wrongful termination by an employer is fraudulent, eg the employee is hired and fired with the sole object of imposing a restraint upon him, or otherwise amounts to a wrongdoing on the part of the employer which is wilful, ie it involves bad faith on his part, a court would on that ground alone decline to enforce the restraint. Indeed, an express provision in terms of which one contracting party undertakes to condone or submit to the fraudulent conduct of the other will be regarded as contra bonos mores and so offensive to the interests of society as to render it illegal and hence void. See Wells v South African Alumenite Co 1927 AD

69 at 72; Ex parte Minister of Justice: In re Nedbank Ltd v Abstein Distributors (Pty) Ltd and Others and Donellv v Barclays National Bank Ltd 1995 (3)SA 1 (A) at 20 D - E and 22 C - D. A provision which expressly permitted a restraint to be invoked by such conduct would similarly be regarded as contra bonos mores. It would make no difference that agreements in restraint of trade are otherwise not invalid but depending on the circumstances may be unenforceable. (As to the distinction between contracts which are contra bonos mores and therefore invalid, and those which although valid will not be enforced on grounds of public policy, see Schalk van der Merwe and L F van Huyssteen The force of agreements: valid, void, voidable, unenforceable? 1995 (58) THRHR 549 at 561 - 562 where the distinction is explained on the basis that the former are primarily contrary to some social interest while the latter primarily affect individual interests rather than social interests.) Where a provision such as the one in

the present case is couched in language wide enough to confer a benefit on a party resulting from his own fraud or wilful wrongdoing, to the extent that it does so, it will not be enforceable. See Government of the RSA v Fibre Spinners & Weavers (Pty) Ltd. supra, at 803 A - C and 806 G - H. But it does not follow that in the absence of fraud or wilful wrongdoing the circumstances in which an employee ceases to be employed are necessarily an irrelevant consideration when it comes to the question whether or not the restraint should be enforced. In Magna Alloys and Research (SA)(Pty) Ltd v Ellis 1984 (4) SA 874 (A) this Court rejected the English doctrine that a covenant in restraint of trade is prima facie invalid. It is now settled that whether a restraint is to be enforced or not depends upon whether it would be contrary to the public interest to do so. This is to be assessed in the light of the circumstances prevailing when it is sought to enforce the restraint and involves the weighing up of two main

considerations. These were summarised by E M Grosskopf JA in Sunshine Records (Pty) Ltd v Frohlins and Others 1990 (4) SA 782 (A) at 794 C - D as follows:

> "The first is that the public interest requires, in general, that the parties should comply with their contractual obligations even if these are unreasonable or unfair. The second consideration is that all persons should, in the interests of society, be permitted as far as possible to engage in commerce or the professions or, expressing this differently, that it is detrimental to society if an unreasonable fetter is placed on a person's freedom of trade or to pursue a profession."

In general the enforcement of an unreasonable restraint on a person's freedom to trade will be contrary to the public interest. The principal inquiry therefore is whether having regard to all the circumstances of the case the restraint can be said to be reasonable. The onus of proving unreasonableness is upon the party seeking to avert the enforcement of the restraint. As pointed out by Botha JA in Basson v Chilwan and Others 1993 (3) SA 742 (A) at 776 I - J, the effect of this in practical terms is that

once the covenantee has invoked the provisions of the contract and proved the breach -

> "the covenantor seeking to avert enforcement is required to prove on a preponderance of probability that in all the circumstances of the particular case it will be unreasonable to enforce the restraint."

The circumstances to which regard may be had cover a wide field and include typically those pertaining to the nature, extent and duration of the restraint and the legitimate interests of the respective parties in relation thereto. See CTP Ltd and Others v Argus Holdings Ltd and Another 1995 (4) SA 774 (A) at 784 B. Even factors such as the equality or otherwise of the bargaining power of the respective parties may be taken into account. See Basson's case, supra, at 777 C - D.

Where as in the present case the restraint may be invoked even following the wrongful termination of the contract of employment by the employer, there would seem to be no reason in principle why the existence

of such a provision in the restraint agreement and the circumstances in which the employment relationship came to be terminated should not be included in what Botha JA in the Basson case, supra, at 777 D described as "the multitude of factors to be taken into account in the inquiry as to the reasonableness of the restraint". In the absence of fraud or a wilful wrongdoing the termination of the contract of employment in consequence of a breach or an unfair labour practice on the part of the employer would not on its own, I think, ordinarily carry much weight. In appropriate circumstances, however, such conduct, eg the repudiation of the contract by the employer and the nature thereof, may well serve to tip the scales in favour of the conclusion that it would be contrary to the public interest to enforce the restraint.

Against this background I return to the facts. It was not contended on behalf of the appellants that the restraint was unreasonable in

relation to its content or duration. (The extent of the area of the restraint is in issue but this is the subject of the cross-appeal.) The sole complaint related to the circumstances in which Reeves's employment with GDR came to be terminated and the restraint invoked. GDR was clearly anxious to retain the services of Reeves. For the purpose of this judgment I have accepted that notwithstanding the failure of the parties to reach agreement after some 5 months of negotiations Reeves remained entitled to yet a further 3 months' notice. There is no basis for contending that the failure to give Reeves 3 months' notice or to pay him in lieu of notice amounted to a wilful wrongdoing on the part of GDR.

The next question is whether even in the absence of bad faith the wrongful termination of Reeves's employment was such as to render the restraint unreasonable and its enforcement contrary to the public interest. I think not. Reeves was employed first by Glenvaal and then by GDR

during the period July 1987 to August 1994. By virtue of the position he held he would have established close relationships with their clients and unless restrained would be in a position to exploit those relationships for his own benefit. Indeed, this is precisely what he set about doing once he left the employment of GDR. Moreover, the restraint was imposed not only as a quid pro quo for employing Reeves but also to protect the goodwill which Glenvaal had acquired on purchasing the business of Harold Reeves & Associates CC (cf Diner v Carpet Manufacturing Company of S A Ltd 1969 (2) SA 101 (D) at 105 C - G). Reeves's departure was preceded by protracted negotiations aimed at retaining his services. The conditions stipulated by GDR and to which he objected were applied to employees generally. He would have been well aware that in the absence of an agreement his employment with GDR would come to an end. The termination of his services therefore could hardly have come as a surprise.

In all the circumstances I am unpersuaded that the enforcement of the restraint would be contrary to the public interest.

It follows that the appeal must fail.

I come finally to the cross-appeal. It is common cause that Reeves ran Glenvaal's branch office in East London together with another local director. There was also a branch office at Port Elizabeth. It operated independently of the East London office and had been established as long ago as 1970. In his answering affidavit Reeves pointed out that the area covered by a radius of 350 kilometres from East London, being the area referred to in the restraint, extended well to the west of Port Elizabeth, to the eastern border of Transkei and very nearly to the Orange River in the north. He said his area of activity had been essentially the greater East London area extending in part into Transkei, and what was formerly referred to as the Border Corridor to Queenstown. He contended that if a

reasonable area of restraint were to be determined it ought not to extend further west than the Chalumna River, not further north than to include Queenstown, and not further east than to include Umtata. The allegation regarding Reeves's area of activity was not denied by the respondents (who, of course, were the applicants) in their replying affidavits and the court a quo in granting an interdict confined the restraint to the area which Reeves contended would be reasonable. The cross-appeal is directed against this limitation of the area in respect of which the interdict is to apply.

Mr Wallis, who appeared together with Mr Redding for the respondents, attacked this part of the judgment on two grounds. First, he pointed out that one of the 32 clients of GDR who had subsequently authorised the second appellant to act on their behalf carried on business at Lady Grey which is to the north of Queenstown and outside the area referred to in the court's order. Accordingly, so the argument went, it had

not been shown that the area described in the restraint was unreasonable in relation to the protection to which GDR was entitled. Second, he contended that the description of the area contained in the order was such that it was impossible to determine its boundary with any precision.

As to the first ground, the fact that the respondents are able to point to an isolated case of one client residing outside the area referred to in the court order does not mean that the area specified in Reeves's contract of service is reasonable; nor does it mean that the area determined by the court a quo is unreasonable. It is clear that at the very least Port Elizabeth had to be excluded from the area of the restraint. As I have indicated, it was common cause that Glenvaal had a separate branch office there. Mr Wallis found himself obliged to suggest that the Port Elizabeth area, determined with reference to an arbitrary distance (100 kilometres) from the

city hall, be excluded from the area of the restraint. But once Reeves's assertion regarding the area in which he operated is accepted (and it was not denied in reply) it follows that the area specified in the restraint clause would be unreasonably wide and that the extent to which it was cut down by the court a quo would not be unreasonable. In my view, therefore, the first ground of attack cannot be upheld.

As to the second, the description of the area contained in the order of the court a quo is no doubt less precise than it might have been. Nonetheless, in the circumstances of the present case I do not think that it is so vague as to require redefinition.

It follows that the appeal and the cross-appeal are dismissed with costs. The costs on each side are to include those occasioned by the

employment of two counsel.

D G SCOTT

CORBETT CJ)

HEFER JA) - Concur
NIENABER JA)
SCHUTZ JA)