REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA
GAUTENG LOCAL DIVISION, JOHANNESBURG

CASE NO: 30429/13

(1) REPORTABLE: YES
(2) OF INTEREST TO OTHER JUDGES: YES
(3) REVISED.

29/10/2014
DATE

SIGNATURE

In the matter between:

SA POINT OF PURCHASE (PTY)LTD	First Applicant
SILVERCREST TRADING 162 (PTY) LTD	Second Applicant
And	
HATTON-JONES, ELRED PAUL	First Respondent
DRIVER, CRAIG	Second Respondent
DE SOUSA, RICARDO	Third Respondent
BEACH, TREVOR	Fourth Respondent
AFRICAN SUPPLY CENTRE (PTY) LTD	Fifth Respondent
BOSMAN, WARREN	Sixth Respondent
IPE DESIGNS (PTY) LTD	Seventh Respondent

IPE INNOVATIONS (PTY) LTD	Eighth Respondent
BOBO, VELILE WILLIAM	Ninth Respondent
NDIBANO CONSULTING (PTY) LTD	Tenth Respondent

JUDGMENT

VICTOR J

[1] The issue for determination in this case is whether a final interdict can be granted prohibiting the first respondent (Jones) from breaching a restraint of trade agreement concluded between the first applicant (SAPOP) and him.

[2] The second issue is whether the remaining respondents can be interdicted from assisting and colluding with the first respondent and facilitating his breach of the restraint. The third issue is whether the second, third and fourth respondents can be interdicted from diverting maturing business opportunities in breach of their fiduciary duties. A fourth issue is the possession and use by the respondents of the applicants' proprietary and confidential information. Pursuant to the execution of an Anton Piller order obtained by the applicants against the respondents a substantial number of documents belonging to SAPOP were found.

[3] Until 30 June 2010, the applicant was owned by the first respondent (Jones), when Richmark and Oak Nominees Ltd acquired a 50% shareholding

from him. Richmark provided working capital to the applicant in the amount of R72 395 117. Thereafter Richmark assumed control of the applicant's finances and administration and facilitated the growth of the applicant. It also took over the company's secretarial work.

[4] As a result of the acrimony between Jones and one of the directors of the applicant, he sold the remaining shareholding to Richmark and Oak Nominees Limited. Ultimately the total purchase price paid to Jones for the sale of his shares was approximately R100 000 million.

[5] Thereafter Richmark and Oak on-sold the shares to Silvercrest, the second applicant herein. The second applicant has a direct interest in this litigation and properly intervened. The rights in and to the restraint of trade clause which was signed in favour of SAPOP by Jones were also transferred to Silvercrest for the reasons set out below. In terms of clause 15.5 of the agreement of sale neither party could cede any or all of the party's rights without the prior written consent of the other. In the event that there is no cession in writing the relevant principles are as set out in *Prism Holdings Limited and Another v Liversage and Others* 2004 (2) SA 478 (W) where Hoffman AJ relying on *Botha and Another v Carapax Shadeports (Pty) Ltd* 1992 (1) SA 202 (A) stated 'A contract in restraint of trade is to be "'regarded as a part of the goodwill of the business" sold.' When SAPOP sold to Silvercrest the goodwill of the business was sold and therefore the benefits of the restraint of trade were thus transferred to the second applicant. I find that

Silvercrest does have an interest to protect in these proceedings and therefore has locus standi to participate in these proceedings.

[6] I accept that the intervention application as stated in Silvercrest's founding papers was aimed at preserving the restraint to protect the goodwill in the business against Jones who was seeking to claw back from the business.

[7] SAPOP's interest in the goodwill is quite clear although there was no express reference to goodwill in the sale agreement. No figure was specifically attached to the goodwill and this fact formed an important part for determination in this case. It is clear to me that SAPOP was a party to the sale of shares agreement in which the restraint was contained. Therefore I find that the applicant has a direct and substantial interest in the enforcement of the restraint in order to prevent further erosion of its goodwill.

[8] In determining the continued interest in the enforcement of the restraint it is clear that SAPOP in transferring its shares to Silvercrest also transferred the goodwill and the restraint in the business.

[9] The material clause which forms the dispute in this matter is that found in clause 7 of the agreement.

> '7.1 The seller irrevocably undertakes that he shall –
> 7.1.1 not from the signature date until the expiry of 3 (three) years and six (Six) months after the Leaving Date, ("The Restraint Period") without SAPOP'S prior written consent, whether as proprietor, partner, director, shareholder, member, employee, consultant, contractor, financier, agent, representative, assistant, trustee, beneficiary of a trust, or otherwise and whether for reward or not, directly or indirectly be interested or engaged in or concerned with or employed by any

> business, trade, undertaking or concern which is the same as or competes with any business carried on by any company in the group and any time during the restraint period.
> 7.1.2 Not during the restraint period disclose to anyone information whatever in regard to the group or its business.
> 7.1.3 At all times be true and faithful to SAPOP in all dealings and transactions whatsoever relating to its business and interest.
> 7.2 The seller shall not be deemed to have breach these undertakings by reason of him having a bona fide financial interest in businesses, trades, undertakings or concerns which do not directly or indirectly compete with the activities of any company in the Group which have been disclosed to SAPOP in writing.'

[10] The case made out by the applicant against Jones, the second respondent Gregg Driver; the third respondent Ricardo de Sousa and the fourth respondent Trevor Beach, needs to be contextualised.

[11] Because of the nature of the industry in which SAPOP operates its vulnerability to unlawful competition places the above respondents who were senior employees in a position of trust in relation to SAPOP. They owed a duty of good faith and had a fiduciary duty to act in its best interest. It is the applicants' case that these fiduciary duties meant that they could not compete, appropriate corporate opportunities, make secret profits, use confidential information or place themselves in a position of conflict. They had to deal with SAPOP in good faith.

[12] Within six months of Jones ceasing to be involved with SAPOP the third and fourth respondents resigned, that is De Sousa and Beach, and stated in writing that they wished to pursue unrelated business opportunities. This is significant as they did exactly the opposite. The series of e-mails obtained during the execution of an Anton Piller order demonstrates that by 6 August

2012 Driver, De Sousa and Beach were well into the process of setting up a competing business namely African Supply Centre (Pty) Limited, the fifth respondent in these proceedings.

Whistle Blower

[13] A reference to the role of the whistle blower Ms Pretorius is an important feature in this case in order to demonstrate the intention not only of Jones, but Driver, De Sousa and Beach to compete with the applicant. A whistle blower, Ms Pretorius, in the employ of the eighth respondent advised the applicant that the first to fifth respondents were to provide point of purchase counters to Telkom. Ms Pretorius had previously had a business relationship with the applicant. When Telkom moved to its next phase of renovation to promote the Telkom Mobile brand the tender was awarded to Oasis who owned the intellectual property for the design of shop fittings for the Virgin stores which were later converted to Telkom Mobile.

[14] Pretorius was approached by Driver about her future employment plans. She was offered a job on or about 10 June 2013 and she took up the offer and was presented with a letter of employment by the eighth respondent. She understood that the factory owned by the tenth respondent would manufacture and install the shop fittings. The factory of the tenth respondent was equipped with machinery to do shop fitting and Point of Sale material. The tenth respondent was fully operational and had its own employees.

[15] The tenth respondent's factory was a mirror image of the applicant's factory save for a difference in size and a different name. Pretorius ascertained that key people previously employed by the applicant were now employed by the respondents and working at the tenth respondent's premises. These included a designer, a supervisor, an installer, a driver, a factory manager as well as Driver, De Sousa and Beach. She was advised on 2 August 2013 that her employment might be changed from the tenth respondent to the fifth respondent. Pretorius was told by De Sousa that he needed to speak to Jones to clarify whether she would be employed either by the fifth or tenth respondent.

[16] Upon enquiry by Pretorius, De Sousa explained that the fifth respondent had been established to create a distance between them and the tenth respondent. Various other aspects led her to conclude that Driver, De Sousa, Beach and certainly Jones were participating fully in a business directly in competition with the applicant. She also became aware that Jones was fully involved in the operational activities of the tenth respondent. He was given a basement parking and he would enter the building wearing a wig. One Mr Ernest Schoemaker stated quite openly that it was Jones' money behind the business and that his involvement would not be discovered.

[17] Pretorius specifically raised the question of Jones' restraint and Schoemaker claimed that it was null and void. Driver, De Sousa and Beach as well as Bosman, the sixth respondent, frequently travelled to Durban to meet with Jones who lived in Durban. De Sousa also kept Jones' personal

financial files with him. This was all discovered during the execution of the Anton Piller order. On one occasion Pretorius was requested to meet Jones at the Olivedale Clinic where he had a knee operation. She was introduced to him and her business development role was explained to him by Driver. A number of further meetings were arranged by Driver between Pretorius and Jones. The purpose of the meetings was for Pretorius to discuss the business strategy of the tenth respondent with him.

[18] On 14 August 2013 Pretorius was advised to meet Jones at the City Lodge near Monte Casino. This meeting was diverted to the City Lodge because Jones told her that there were no cameras at that venue. During the course of that meeting and in the presence of Jones and De Sousa there was a discussion as to how they could get work for renovations undertaken by MTN. Two private detectives employed by Jones attended at that meeting. Pretorius claims that one of them was the son of a leader of a gang in Soweto. Various other incidents caused Pretorius to be alarmed during the meeting with Jones. She ascertained that he had been provided information about the applicant's business. It was mentioned that there were spies. Jones gave an instruction during that meeting that the sum of R30 000 had to be withdrawn and handed to Driver for the purposes of "the cops" who had been told to hold one Monama, an employee of the applicant and to torture him a bit.

[19] Pretorius also noticed that Beach handed Jones a file containing the applicant's quotations and other confidential documents. The contents of the file were examined by him and he confirmed that the pricing was correct.

[20] The applicants believed that the respondents obtained work for the placement of Virgin Mobile Points of sale in 800 Ellerine stores. At the end of the day however it would appear that the contract was not awarded to them. There were other contracts referred to by the applicants and it would appear that the tenth respondent had not been successful in obtaining those contracts nor indeed had the applicant. These contracts were however business opportunities of SAPOP which should not have been handed to the respondents.

[21] A further cause for concern for Pretorius was the incident relating to her intimidation. Four men came to her house and parked nearby for approximately 3 and a half hours. This was after the relationship had broken down between Jones and Pretorius. These men had purportedly wanted to deliver legal papers to Pretorius at her home. Another incident pertains to an unidentified white male who handed a sealed brown envelope to a security guard for Pretorius. The male also handed an amount of R6 to a security guard at the applicant's premises. The envelope contained a photograph of her 12-year old daughter taken in the grounds of her school. The word "think" was typed across the page. A further incident on 7 September 2013 related to Pretorius being robbed of her cellphone while she was packing grocery packets into the boot of her car. The robbers demanded her

handbag, took her cellphone out and threw her handbag back into the boot. They also demanded her laptop and when she advised them that she did not have her laptop with her, they nonetheless grabbed the laptop bag lying in the boot and threw it back when they realised it was empty. There was also a further incident where four men driving an unmarked bakkie with no registration plates wished to deliver a document to her.

[22] All these allegations made by Pretorius are denied by Jones. Of significance however is the fact that documentation belonging to the applicant was found during the execution of the Anton Piller order which is corroborative of Pretorius' version of events. It is also denied by the respondents that the tenth respondent is doing any work in competition to the applicant. They claim that the only work done by the tenth respondent is limited to some items manufactured for Virgin Mobile at the request of the eighth respondent as well as Telkom Mobile.

[23] There were other facts demonstrating the collusion between the respondents to assist Jones in breaching the agreement. De Sousa's explanation about the backup material found in his external drive was explained as an omission to delete the information when he left the employ of the applicant. This explanation is implausible in the light of the overall picture where SAPOP's information was used by Jones as referred to by the whistle blower.

[24] However there are a number of features which cannot be disputed. The first is the soft loan of R5 million by Jones to the tenth respondent. There were no terms of interest or repayment. There are also the similarities in the equipment purchased for the tenth respondent and the employment of erstwhile employees of SAPOP which I have already referred to. Further the intention to compete with SAPOP is evidenced by procuring Pretorius as an employee. She had been a central resource when Telkom allocated contracts to SAPOP. She had been involved previously as a Senior Facilities Management Manager with Telkom Mobile and was responsible for the Telkom Mobile account. She was central in trying to retain Telkom Mobile as a customer for the respondents.

[25] The respondents contend that they had no knowledge of these facts. This cannot be accepted as their interaction with Pretorius prior to her employment with them was very clear that she would have been an important employee to get on their side. Although Pretorius left her employment with Telkom due to a personality difference with one of her seniors, the respondent head hunted her to make sure she could procure contracts that had formerly gone to SAPOP

Brochures and web site of the tenth respondent

[26] The attempts by the respondents to down play the size of the competitive business is contradicted by the company brochure and the web-site of the tenth respondent. The contradictions are as follows: The respondents claim that the tenth respondent has two general spray booths whilst SAPOP has

nine spray booths and that this results in a substantial difference in the type of work and quality of work that can be undertaken. However on the web-site the tenth respondent claims that they have spray painting rooms of over 300 square metres collectively which boast the latest in spray painting and drying equipment in the world and that they have not spared any expense to ensure that clients could have the highest possible standard in manufacturing this point of purchase furniture. The aim of the advertising brochure is to do work in exactly the same field as SAPOP. In the ordinary course that would have been perfectly lawful but with Jones as the financier and backer (even without reward see clause 7.1.1 of the agreement) Jones was indirectly clawing back SAPOP's business as can be gleaned from the advertisements of the tenth respondent.

[27] Furthermore the vision as set out in the company brochure and website also demonstrates an intention to breach Jones' restraint and that is an ongoing threat justifying an interdict. A further claim by Pretorius was that Beach and various other employees, being Bobo and Sidambe had a meeting with the representatives of Telkom Mobile at the tenth respondent's premises. Beach of course denies this. The ninth respondent denies ever having a meeting with representatives of Telkom Mobile. The applicants emphasise that Bobo, that is the ninth respondent, actually expressed himself in that affidavit so as to suggest that such a meeting had indeed taken place.

Cumulative effect of the respondents' conduct

[28] Whilst one or more of these particular aspects might not cast or create suspicion the cumulative effect of all these features of conduct do certainly suggest that on a balance of probabilities Jones and all the respondents that I have referred to were assisting Jones in breaching the restraint agreement. A further fact that causes some concern is that Jones lent and advanced an amount of R5 million to the tenth respondent for the purpose of purchasing machinery and equipment to carry out shop fitting work without an agreement of loan in place. The fact of the loan of R5 million was a magnanimous act of charity towards the tenth respondent to get it up and going but this gesture is but one feature that lacks credence and goes to the many cumulative facets that demonstrate Jones' modus operandi.

[29] According to the applicant that machinery would not only be for what Jones claimed to be a shop fitting for 40 Drimac stores, however this is not an isolated incident and is indicative of a whole range of acts which can only lead to the inference that Jones was fully involved in a competitive business with the applicant.

[30] A further meeting of minds between Jones, Driver, De Sousa, Beach and African Supply Centre can also be found in the agreement and business plan for a concern called Leading Ladies. This of itself does not lead to an inference that Leading Ladies was to be in competition with the applicant. However, the making of common cause between the respondents mentioned

does suggest that a well thought out plan had been prepared and worked out when everybody had left the applicant.

[31] The nominee agreement between De Sousa, Driver, Beach, Bosman, Bobo and Sidambe was not explained by the respondents in any amount of detail. An undated nominee agreement was found at De Sousa's residence as well as an income statement, notification of payment, debit order instruction and agenda of the tenth respondent. Also found at his home was a folder containing a SAPOP schedule of accounts, and other SAPOP confidential information. However, the cumulative effect is indicative of the plan that they had devised.

Time Line

[32] I was handed a timeline of the relevant events which shows Jones as being a leading protagonist in setting up these businesses and in particular the business of the tenth respondent which I find to be in competition with the applicants. For example, in the period January 2012 to April 2012, when the relationship broke down between Jones and Richmark, in order to overcome that impasse, it is Jones who raises the prospect of his remaining shares being bought out. The sale agreement is negotiated between July and November. Jones withdraws from the business and the restraint of trade clause is an integral part of those negotiations and in fact the restraint of trade could have been a deal breaker.

[33] The agreement for the remaining shares was concluded in January 2013. During the period June 2012 to December 2012 Jones pays Driver R1 million. He pays Kwenda R500 000. The assertion is made by the applicants that there were certain payments made to Jones and the documents were forged. However in looking at this time line one needs to look at it as a whole. During the period August 2012 to December 2012 the negotiations of the Leading Ladies structure started evolving. It involves Jones, De Sousa and Bobo putting a business plan together with heads of agreement. Leading Ladies emerges and further meetings are held in January 2013 again to progress the involvement of Leading Ladies. However, those negotiations were aborted after February 2013. The purpose of referring to that particular involvement is to demonstrate the close relationship between Jones and the persons named as respondents in these proceedings. In October 2012 there is a sale of shares in the tenth respondent to De Sousa, Beach, Driver, Bosman and Kwenda and there is an unallocated portion. The respondents contend that the portion unallocated should not be construed as a cover-up of what would have been Jones' interest.

[34] A further emphasis in the timeline is the fact that Beach became aware as early as August 2012 of an advertisement with a sale of a shop fitting factory. He then reserves the name, African Suppliers. There is a draft memorandum of agreement between Jones, Driver, De Sousa and Beach. African Supply Centre is incorporated in November 2012. De Sousa, Beach and Driver are appointed as directors and De Sousa, Beach and Driver are appointed as consultants.

[35] The Anton Piller application also yielded information about equipment being supplied to the tenth respondent. It is at that very time that the R5 million is lent to the tenth respondent to purchase that equipment. There are also e-mails relating to bending machines and the contention is that Driver during May 2013 diverted a certain business opportunity belonging to SAPOP i.e Draft Cable South Africa and in July 2013 Driver again diverted the Ellerines business opportunity. As I have stated nothing came of the potential business opportunity but nevertheless it is a diversion of potential business away from SAPOP.

[36] Of importance is the fact that from June 2013 African Supply Centre invoiced the tenth respondent for consultancy and management fees. All this demonstrates the inter-relationship between African Supply Centre, the directors and consultants. Of further importance is the fact that the employees referred to take up employment at the tenth respondent's premises during May 2013. At this time Driver is heavily involved in negotiating with Pretorius for her to take up employment. He initially invited Pretorius to meet him at SAPOP but then diverted her to another venue.

[37] The remaining analysis of the timeline demonstrates unequivocally that there was certainly a concerted and clandestine conduct on the part of Jones, Driver, De Sousa, Beach, the fifth respondent and the tenth respondent to compete and take work away from the applicant. In my view Jones was the king pin in arranging all of this. The question is whether the respondents are

entitled to apply their trade and their skills before they left the employ of the applicant until the time of this application.

[38] This must be assessed in terms of their intention and whether it was wrongful to interfere with or be aligned with the contractual relationship between SAPOP and Jones. If such competition would amount to 'intentionally assisting in breaching the restraint of trade undertaking' then such conduct can be interdicted. See *Genwest Batteries (Pty) Ltd v Van der Heyden and others* 1991 (1) SA 727 (T). The relevant respondents had gone a long way to conceal Jones' presence and in particular at a time while they were still employed by the applicant. This conduct is wrongful. It is intentional and certainly by the time the Anton Piller application was launched the respondent should have had knowledge of the restraint clause. I also find it improbable that Driver, De Sousa and Beach would not have known about the restraint clause even well before their leaving the applicant. The contentions of Jones having specific parking at the tenth respondent and using a bakkie and other forms of disguise demonstrate unequivocally that the respondents I have referred to were all involved together with Jones in clandestine activity and calculated to assist Jones in breaching the restraint agreement.

Was goodwill included in the sale agreement?

[39] In order to determine whether an interdict is justified the central issue is whether goodwill was included in the sale. The respondent contends that the applicant has turned the contractual restraint into a goodwill restraint and this was only done in reply. The submission by the respondents that the

applicants have abandoned reliance on the restraint clause is incorrect. I find that the submission that the cause of action has been changed from a contractual restraint to a goodwill restraint must fail. Goodwill is an integral part pertaining to the value of shares and the respondents were unable to provide any support to the contrary. The fact that there is no reference to goodwill in the sale of shares agreement does not undermine the fact that the goodwill would have been and was an integral part of the purchase price. This is demonstrated unequivocally by the fact that Jones was supported in these negotiations by legal advisors and the fact that the restraint was a potential deal breaker.

The restraint clause and public policy

[40] A further issue is whether the restraint in question is too wide and contrary to public policy in relation to the area and time. The area is unlimited and the time period of the restraint is three years six months. It was contended by the respondents that those two features are contrary to constitutional values and business practices. I shall analyse those aspects shortly. However it is clear that Jones concluded a contract with the applicant and in that contract there was a contractual provision that bound him in the express manner namely for three years six months and for the area in question.

[41] In *Littlewoods Organization Limited v Harris* 1978 (1) All ER 1026, although the case referred to was in an employment context and not a vendor context it was held to be essential that parties be held to their agreement

unless there are circumstances which are contrary to public policy. Parties must be held to their contract.

[42] The facts in this case do not refer to a standard employee/employer relationship. The context is that of a vendor. In this case Jones was handsomely paid for the sale of the shares close to R100mill. The sale agreement in this case did not define goodwill as a separate item. In the circumstances it is necessary to determine whether the goodwill of the business can be taken into account and whether the restraint is merely a business goodwill restraint or whether it is a true contractual restraint. In my view the two cannot be separated. Goodwill is an asset in a business with its own identity notionally and commercially. The goodwill was integrally linked to the business of the applicant. A restraint of trade against the seller of a business should be, and indeed is, in our law , generally regarded as part of the goodwill of the business sold. See Botha supra at 212D-E and the book *Agreements in Restraint of Trade in South African Law* by John Saner at paragraph 7.3. The restraint against Jones as the seller of the business is generally regarded as part of the goodwill of the business sold. In this case there is also the express restraint clause in paragraph 7 of the agreement.

[43] In *Diner V Carpet Manufacturing Co Of Sa Ltd* 1969 (2) SA 101 (D) 105B-C

> '..yet under certain circumstances it may be to the interest of the individual to contract in restraint of this freedom, and the community if interested to maintain freedom of trade is equally interested in maintaining freedom of contract within reasonable limits. 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 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.'

[44] Neethling in the publication Van Heerden and Neethling Unlawful Competition, 2nd Ed at pages 101-102 states:

> 'Goodwill is naturally determined by many and divergent factors namely the attributes or components of goodwill that lure (potential) customers to the undertaking. Other factors have also been identified as co-determinants of an undertaking's goodwill are its reputation or good name, its credit worthiness, and its business licences and agreements such as restraint of trade. Goodwill is nevertheless not formed by these factors on their own but by their functioning within the context of the undertaking.'

[45] Jones' defence therefore was that the restraint period is unreasonable, the area of the restraint is too wide and the business which it protects is too wide. It was submitted on behalf of Jones that this particular industry is all he has ever known and that it would be *contra bones mores* to put him in a situation where he cannot practise his trade. However, that submission must be weighed against the very handsome amount Jones received for the sale of his shares and there has to be a distinction between an employee/employer situation and a typical vendor restraint.

[46] In relation to the fact that the period was contrary to public policy the respondents relied on *Den Braven SA (Pty) Limited v Pillay* [2008] 3 All SA 518 (D). In my view what Jones agreed to was not contrary to public policy. He had an opportunity to reflect on the provisions of the contract; his attorney

exchanged correspondence over some time regarding the terms and conditions of the agreement and in particular the goodwill restraint. Such a restraint is perfectly permissible in these circumstances. In this regard reliance was placed on *Heaven Group (Pty) Ltd v Woolman* 2013 JDR 1463 (GSJ); and *Diner* supra.

[47] The respondent relied heavily on the facts in *Basson v Chilwan* 1993 (3) SA 742 where Van Heerden JA held that in restraining a member and erstwhile employee of the Close Corporation (Basson) at the instance of the other members, the Chilwans:

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

[48] In the present case this principle pertains to Jones and his reliance on the remaining aspect of the *Basson* case. This cannot be analysed outside of the particular context in terms of which this restraint clause was negotiated and the opportunities that Jones had to consider the situation.

[49] It is clear that the goodwill of the business is the force which attracts custom and promotes its trade. The case of *Commissioners of Inland Revenue v Muller and Co's, Margarine Limited* 1901 AC 217 HL at 224 was quoted with approval in *Botha* supra.

[50] Goodwill of a business is an asset which is bought and sold every day and it is of such a nature that it can be vindicated if necessary in a court of

law. See *Torf's Estate v Minister of Finance* 1948 (2) SA 283 (N). The personality or driving force behind the business is a well-recognised component of goodwill. In this regard Jones had built up a highly successful business in the form of the applicant and Jones was in fact that business. This was well recognised and with Jones being the driving force behind that business it would be impermissible for him to use those features to set up a business in competition with the applicant. Jones would have known the import and influence of his personality in SAPOP. He used those particular skills to set up a business in competition and he knew he would very quickly attract a breach of the restraint agreement. His clandestine appearances at the tenth respondent and his interaction with the whistle blower demonstrate he breached the restraint agreement. He never tried to challenge the restraint clause until he was found out and this is a further feature in assessing the reasonableness and public policy feature of the restraint clause.

[51] In determining whether the contractual restraint was unfair or particularly limiting the clause does make provision that Jones as the seller could have got permission to trade e.g. in a different part of the world or trade in a way which would not be in competition with the applicant. Jones never sought to obtain that permission to set up the tenth respondent and to trade in the way which the tenth respondent has.

[52] Reference was also made to the case of *A Becker & Co (Pty) Ltd V Becker And Others* [1981] 4 All SA 289 (AD) in regard to a seller clawing back the goodwill and the business. Counsel on behalf of the parties also referred

the court to a number of cases referred to by Saner supra in an analysis of what goodwill is. Essential to an assessment of the public policy impediments suggested by Jones the most compelling feature is that Jones received remuneration for the restraint. I was also referred to the case of *Duro Pressings (Pty) Ltd v Naidoo Deenaylan and Robmeg Steel (Pty) Limited* 25645/2013, a judgment by Becker AJ where the commercial reality dictates that a business' goodwill is a right which is deserving of protection.

[53] In *Sunshine Records (Pty) Ltd v Frohling & Others* 1990 (4) SA 782 (A) at 794 C-D the following is stated:

> 'The first is that the public interest requires, in general, that 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.'

This is exactly what Jones did. He limited his right to freedom of trade for the period in question and in the manner set out in the restraint clause in exchange for the handsome purchase price in question.

[54] In this regard I find that Jones should have adhered to his contractual obligations. He should have not involved the respondents in the way that he did. There is nothing in the public policy submissions that would find this to be abhorrent making the restraint incapable of implementation. Saner in the question of public policy referred to a number of cases and quite clearly the

question of public policy is an 'unruly horse' that has to be determined on a case by case basis.

[55] In my view, having regard to the principles as set out in *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* [1984] 2 All SA 583 (A) and various other cases the facts and context of this particular case certainly does not lead to the conclusion that the restraint is contrary to public policy. It was submitted on behalf of the first respondent that a restraint, which is three-and-a-half years and which is really indefinite in its geographical limitation is something which these courts would never enforce and it has never been done before. However, that submission must be tested in the light of all the cases which this court has been referred to and the particular context and the facts of this case, being a vendor restraint and in which a large sum of money was paid. Clause 7.1.1 of the agreement specifically makes provision to relax the restraint clause. This was not done by Jones.

[56] In the case of *Commercial and Industrial Holdings (Pty) Limited and Another v Leigh Smith and Others* 1982 (4) SA 226 (ZS), Georges JA had no difficulty imposing in an employee/employer situation a restraint for a period of five years.

[57] There was an explanation for the three years six months restraint time provision. In this particular industry a potential customer would take three-and-a-half years before they would re-order new furniture. This too was disputed by the respondents and the submission was made that there was a

turnaround time of one year. Be that as it may, Jones would have at the time of negotiating the restraint clause been aware of such a situation and could have negotiated the restraint down to one year. He did not do so.

[58] It was submitted on behalf of Jones that it did not matter what he had signed in relation to the restraint, the restraint must be assessed at the time of the breach and it would be totally contrary to public policy to uphold such a restraint clause. The restraint clause has to be assessed within the context of a vendor restraint. If assessed at this point in time within the context of these facts such as payment, and my finding that the restraint clause was an integral part of the goodwill I find that the clause is consistent with public policy.

[59] Whether a restraint is in conflict with public policy needs to be assessed in the light of all the circumstances. In the light of all the circumstances in this case, I find that the applicants' rights to enforce the restraint are not contrary to public policy. The restraint was in the interests of SAPOP as provided for in the agreement of sale and part of the un-quantified goodwill upon the sale from SAPOP to Silvercrest. The purchase price was generous and the restraint was inserted in favour of SAPOP for a very good reason.

[60] I do not find that the term is cast in such a wide manner. If for example Jones wished to continue this business in say Cape Town or in another part of the world (as counsel stated - Mongolia), he would have had the right in

terms of the restraint clause to seek the written consent of the applicant to do so. He has not done so.

[61] I was also referred to a number of extracts in Christie's Law of Contract in South Africa as to the common law on the question of illegality and enforceability of restraints of trade and what the modern law position is. In brief I was referred to the case of *Sasfin (Pty) Ltd v Beukes* 1989 (1) SA 1 (A) and it is clear that a court may strike down a clause which is *contra bones mores* but as I have found in this case the contract was negotiated between equals. Further I was referred to the case of *Juglal v Shoprite Checkers* (Pty) Ltd 2004 (5) SA 248 (SCA) at 258 and I quote Heher JA:

> 'Because the courts will conclude that contractual provisions are contrary to public policy only when that is their clear effect it follows that the tendency of a proposed transaction towards such a conflict can only be found to exist if there is a probability that unconscionable, immoral or illegal conduct will result from the implementation of the provisions according to their tenor. If, however, a contractual provision is capable of implementation in a manner that is against public policy but the tenor of the provision is neutral then the offending tendency is absent.'

In my view there is no aspect in the restraint provision which is offensive and contrary to public policy.

The relief sought

[62] The applicant have drafted their notice of motion in very careful terms and the relief sought against the respondents is directed at such conduct which would further be in breach of Jones' responsibility not to breach the restraint clause.

Costs

[63] On the question of costs it is clear to me that Jones masterminded this entire operation although Driver, De Sousa and Beach are senior people and it is clear that they have business knowledge, it nonetheless is evident that Jones, in the absence of an explanation by the respondents, carefully orchestrated this entire unlawful conduct scenario and got the respondents embroiled in to what they were doing. It is for that reason that I exercise my discretion and state that Jones should bear the costs of the application. Jones's conduct was reprehensible in the circumstances and deserves a punitive costs order in my view. His conduct was wide ranging and involved a lot of people to carry out the breach of the restraint clause.

[64] As regards the loss of business opportunities neither the applicant nor the tenth respondent was successful. There is no need for me to make any further order in relation to that relief. If the provisions of the order that I intend making are adhered to there will be no further diversion of the applicants' business opportunities away from the applicant to the tenth respondent or another entity formed by them.

The order that I make is the following:

1. The first respondent is:

1.1. until 1 July 2016, being the expiry of 3 (Three)years and 6 (six) months after 31 December 2012 ("Restraint Period"), interdicted and restrained whether as proprietor, partner, director, shareholder,

member, employee, consultant, contractor, financier, agent, representative, assistant, trustee or beneficiary of a trust or otherwise, and whether for reward or not, directly or indirectly being interested or engaged in or concerned with or employed by any business, trade, undertaking or concern which is the same as or competes with any business carried on by the applicant and its subsidiaries at any time during the Restraint Period.

1.2 interdicted and restrained during the Restraint Period from disclosing to anyone any information whatsoever in regard to the applicant and its subsidiaries or their business: and

1.3. ordered to cease any and all interest, engagement, concern, assistance or involvement in the businesses being conducted by the second, third, fourth, fifth, sixth, seventh, eighth, ninth, and tenth respondents and by any combination of them.

2. The second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents are, from the date hereof until 1 July 2016, interdicted and restrained from, directly or indirectly and whether for their own accounts or for the account of another and in any capacity whatsoever:

2.1 assisting the first respondent in any manner whatsoever to breach the restraints referred to in prayer 1 above; and

2.2 participating in the conduct of any business activity with the first respondent in circumstances where the first respondent is in breach of the restraints referred to in paragraph 1 above.

3. The first, second, third, fourth, fifth, sixth, seventh, eighth, ninth and tenth respondents are ordered to return the originals and any copies of the documents set out in annexure "A" hereto.

4. The first respondent is ordered to pay the costs of this application, including:

4.1 The costs occasioned by the applicant in relation to the Anton Piller proceedings and the execution thereof under case number 34029/13;

4.2. the costs of two counsel in the Anton Piller application and this application; and

4.3 on the scale as between attorney and client in both applications.

VICTOR J

COUNSEL FOR APPLICANTS SUBEL SC, Q LEECH

INSTRUCTED BY WERKSMANS

COUNSEL FOR RESPONDENTS	ROOS SC, T OHANESSIAN
INSTRUCTED BY	GARY MAZAHAM ATTORNEYS
DATE OF HEARING	29 MAY 2014
DATE OF JUDGMENT	7 AUGUST 2014

Final interdict sought based on restraint clause in sale of shares agreement totalling approximately R100 million. Goodwill not defined- finding made that restraint is a goodwill restraint. Respondent and those colluding with him interdicted.

Restraint period of 3,5 years- area of restraint undefined- on the facts, period and area not unreasonable.