Republic of South Africa

IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

CASE NO: 13217/2010

In the matter between:

ADT SECURITY (PTY) LIMITED	**Applicant**
and	
ANTON JOHAN BOTHA	**1st Respondent**
WILLEM JACOBUS BOSMAN	**2nd Respondent**
MARGER LAMONT SECURITY CC	**3rd Respondent**
JAZZ SPIRIT 1100 CC T/A BLUE BAY GUARDS AND SECURITY SOLUTIONS	**4th Respondent**

JUDGMENT DELIVERED: 18 NOVEMBER 2010

BINNS-WARD, J:

[1] In this matter, in terms of a draft handed in by counsel at the commencement of his argument, the applicant seeks a final order:

1. Interdicting and restraining the first respondent, for a period of 12 months from 1 May 2010, and the second and fourth respondents, for a period of 36 months from 1 May 2010, from

1.1 soliciting the business of any of the applicant's customers, whose names appear on the schedule marked 'List One' on annexure FA6A to the applicant's supplementary affidavit deposed to on 27 October 2010;

1.2 contacting any of the applicant's customers whose names appear on the schedule marked 'List One' on annexure FA6A to the applicant's supplementary affidavit deposed to on 27 October 2010 in order to solicit business from them away from the applicant;

1.3 attempting to persuade any of the applicant's customers whose names appear on the schedule marked 'List One' on annexure FA6A to the applicant's supplementary affidavit deposed to on 27 October 2010 from cancelling or attempting to cancel their contractual relationship with the applicant.

2. Directing the first, second and fourth respondents to pay the applicant's costs of suit, including the costs of the hearings on 23 June 2010 and 27 July 2010.

[2] The hearing in respect of the abovementioned relief was the sequel to an earlier application for interim interdictory relief. The application for interim relief was opposed. That application was determined by Blignault J, who handed down a reasoned judgment on 20 August 2010. I shall assume that any reader of this judgment will have access to, or be familiar with that given by Blignault J

and thus shall not unnecessarily repeat the summary of the relevant facts set out in the earlier judgment. Save for a supplementary affidavit on behalf of the applicant deposed to on 27 October 2010, the papers before me are the same as those that served before the judge in the proceedings for interim relief.

[3] Interim relief was granted in terms somewhat wider than those in which the applicant seeks final relief. The more confined relief currently sought arises from the restriction of the affected customers to those on List One on (the amended) annexure FA6 to the applicant's papers. Those are customers or clients of the applicant who had concluded service agreements with the applicant, whether before or after the conclusion of the sale of business agreement described below. Although a number of bases for potential relief were advanced in the founding papers – unfortunately not quite as coherently as might perhaps have been done had the draftsperson not been working under the exigencies of urgency, it is apparent from the formulation of the relief sought that what the applicant seeks is the enforcement of covenants in restraint of trade undertaken by the first and third respondents. The relief sought against the second and the fourth respondents is premised on the allegation that these respondents are in reality conducting themselves in a manner that manifests or facilitates a breach of the restraint of trade provisions by which the third respondent close corporation is bound. The other bases for relief identified in the founding papers nevertheless bear some relevance in this connection in that, while they might have given rise to independent grounds for interdictory relief, perhaps even of a wider nature than that actually sought, they also point to the

existence of protectable proprietary interests rendering the restraints of trade worthy of enforcement.

[4] The first and second respondents, who are natural persons, had previously carried on a business through the vehicle of the third respondent close corporation. That business involved the marketing and sale of security alarm systems and the provision of linked security monitoring services. The third respondent concluded a written agreement with the applicant on 23 January 2006, in terms of which it sold its business to the applicant with effect from 1 March 2006. The purchase price, which was subject to adjustment in various respects not currently relevant, was R13,5 million; of which R13 million was allocated to the purchase of the goodwill of third respondent's business. The agreement included 20 appendixes, most of which were omitted from the copy of the deed of agreement annexed to the founding affidavit. As far as one is able to discern, however, the expression 'goodwill' was not specially defined in the contract and therefore bears its ordinary meaning.

[5] It seems generally accepted that the term 'goodwill' is incapable of precise or comprehensive definition, but its general implication is well understood. The goodwill of a business is intangible property, which can be disposed of by the owner of a business independently or separately from the other assets which comprise the undertaking. I can do no better, with respect, than to cite Innes ACJ's explanation of the concept in *Receiver of Revenue, Cape v Cavanagh* 1912 AD 459 at 464-5:

> Any comprehensive definition of that expression is impossible. To quote from Lindley on "Partnership" (7th edition, p. 476): "The term goodwill can hardly be said to have any precise signification. It is generally used to denote the benefit arising from connection and reputation; and its value is what can be got for the chance of being able to keep that reputation and improve it." As has been frequently pointed out, its exact meaning may vary with the particular business with which it is in any given instance connected. It is generally compounded of two elements, personality and locality; but either of them may diminish to an extent which approaches, if it does not attain, vanishing point. The goodwill of a professional business depends largely upon personal connection, and much less upon locality; whereas the very converse may be the case in regard to the goodwill of a trading business. So far as a licensed house is concerned, the connection between the licence and the goodwill is so close that the cases in which they are separately dealt with must be few indeed. ... At the same time, it seems to me quite possible, though of rare occurrence in practice, to deal separately even with the goodwill of a licensed house. An hotel proprietor of long standing and, wide repute might quite conceivably dispose on profitable terms of his premises and their relative licences, while expressly retaining the goodwill for himself. And if he did so, there would be nothing to prevent his obtaining a licence for premises next door and soliciting all his old patrons to transfer their custom to his new hotel. Whereas if he parted with the goodwill, as well as the premises and the licences, he could not so solicit custom. (*Trego v Hunt*, L.R., 1896, A.C. 7, and *Curl Bros. v Webster*, L.R., 1904, 1 Ch.D., p. 685). The retention or alienation of the good will as a separate asset would make all the difference.

It is clear from that statement that customer connections form part of the concept of goodwill.

[6] A party which sells the goodwill of its business is not prevented thereby from setting up business in competition with the purchaser, but is restricted from doing so in a manner that would derogate from the asset which has been sold. One of the incidences of this is that the seller of goodwill might be able to do business with the customers of the business in respect of which it had disposed of the goodwill if they approached it of their own volition, but it would be in breach of contract if it actively solicited their custom by approaching them. See the

concurring judgment of van Heerden AJA in *A Becker & Co (Pty) Ltd v Becker and Others* 1981 (3) SA 406 (A) from 417, endorsed as a correct statement of the law in the principal judgment of Muller JA (Kotze, Diemont and Trengove JJA concurring), at 414H-415D. Whether the members of a close corporation which disposes of the goodwill of the business conducted by it are also thereby forbidden to solicit the business's customers for the purpose of later competing with the purchaser is something[1] to which, on my view of the evidence, it is not necessary in the current case for me to decide.

[7] It follows, however, from the aforegoing that if the purchaser of the goodwill of a business wishes to exclude completely the right of the seller to compete with the purchaser, the sale of goodwill provision will need to be complemented by a pertinent covenant in restraint of trade.

[8] In the current matter, the third respondent, as seller of the goodwill, bound itself for a period of 36 months, amongst other matters, not to accept any business from the clients of the business that was subject of the sale agreement. The first and second respondents entered into identically worded covenants in favour of the applicant as purchaser in their personal capacities.

[9] Shortly after the conclusion of the sale of the third respondent's business, the close corporation, which apparently traded as Blue Bay Alarms, concluded what was labelled as an 'authorised dealership agreement' with the applicant.

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[1] Cf. *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) at 811B-C.

[10] In terms of that agreement the third respondent contracted to recruit alarm account clients for the applicant. The dealership agreement provided in effect that the first and second respondents, as representatives of the third respondent, would solicit custom from the public within a defined geographic area, referred to in the agreement as 'the territory'. They would sell or hire electronic security equipment of a type approved by the applicant to such customers and would introduce those customers to the applicant with which, if the customers were considered creditworthy, alarm monitoring and response service contracts would then be concluded. The provisions of the aforementioned preceding sale agreement had indeed contemplated the possible conclusion of a dealership agreement and permitted the first and second respondents, as representatives of the third respondent, to approach and deal with the third respondent's erstwhile customers for the purposes of carrying out the authorised dealer's functions under the dealership agreement. The dealer was remunerated for its services under the dealership agreement by way of a commission on the service fees paid to the applicant by the customers introduced by it with whom service agreements were concluded.

[11] The third respondent was represented by the first respondent in concluding the dealership agreement. The deed of agreement was drawn in a manner that, by the content of its cover page, suggested that it was intended that the contemplated parties to the deed were the applicant, the third respondent, and first and second respondents - who are the only members of the third respondent - in their respective personal capacities. The relevant provision of

the agreement, apparently intended to bind the first and second respondents in their personal capacities, was the 'Personal Liability' clause (clause 30). It provided that by their signature thereto they, as members of the third respondent, would bind themselves as sureties and co-principal debtors with the corporation for the due fulfilment of its obligations under the contract. The signing members would also so personally bind themselves to a 12 month restraint of trade provision. The relevant terms of the restraint have been set out at para. [13] of Blignault J's judgment. However, despite the evident intention that the agreement would be signed by both the first and second respondents, only the former actually did so.

[12] The dealership agreement also contained a so called 'non-solicitation' clause; the relevant provisions whereof were quoted at para. [12] of Blignault J's judgment. In terms of this clause (in particular, sub-clause 21.2.1), the third respondent bound itself for a period of 36 months after the termination of the agreement not to solicit, whether directly or indirectly, any customers who had entered into service agreements with the applicant.

[13] The first and second respondents conducted business with the applicant through the vehicle of the third respondent in terms of the dealership agreement until the end of April 2010; at which time the close corporation gave notice of the termination of the agreement with effect from 1 May - that, notwithstanding that the agreement provided for 90 days' notice of termination prior to expiry of the then current executory period of the annually renewed contract, on 1 February 2011. The termination notice was given by way of an email to the applicant over

the names of the first and second respondents. The applicant appears to have accepted the third respondent's repudiation of the dealership agreement. By the time the dealership agreement was terminated, the restraint of trade provisions in the sale of business agreement had run their course and lapsed by effluxion of time.

[14] The termination of the dealership agreement coincided with the launch of a new business by the first and second respondents. The new business traded under the name Blue Bay Guards and Security Solutions. The degree of correspondence between the name of the new business and that which had been conducted by the third respondent is notable. It is not in dispute that the new business is conducted through the fourth respondent close corporation. It has also not been placed in dispute that the third respondent has ceased to carry on business since the termination of the dealership agreement. It is also common cause that as at the institution of these proceedings, on 11 June 2010, and thereafter until the first respondent's resignation, on 10 July 2010, the only members of the fourth respondent were the first and second respondents. A promotional article appeared in a local newspaper on 20 May 2010 stating, amongst other things, that the first and second respondents 'of Blue Bay Guards and Security Solutions (BBG and SS), effective as of May 1, have entered into a new and exciting partnership with Chubb in Plettenberg Bay'. Chubb is described in the founding affidavit as an alternative security provider to the applicant. It appears that Chubb provides the same services as the applicant and is in competition with it in the relevant geographic area.

[15] The facts summarised above give rise to a situation in which it is clear, subject to his ability to discharge the onus of showing that the restraint is unreasonable to the extent that its enforcement would be contrary to public policy (see *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 (4) SA 874 (A)), that the first respondent is bound by the 12 month restraint provision in clause 30.2.2 of the dealership agreement. Before determining whether the first respondent has discharged that onus it is convenient to consider the basis of the case against the second and the fourth respondents. It is premised on two closely interconnected considerations: (i) an alleged abuse of corporate personality and (ii) an alleged procurement by the second respondent as a member of the fourth respondent of a breach of the third respondent's obligations in terms of clause 21.2.1 of the dealership agreement; cf. *Atlas Organic Fertlizers (Pty) Ltd and Others* 1981 (2) SA 173 (T) at 202E-H.

[16] It is well established that the courts will not countenance the abuse of corporate personality to enable individuals to unconscionably avoid contractual obligations and will therefore in appropriate circumstances, on a fact sensitive basis, disregard the distinctness of a corporation's personality from those of its members and, for the purpose of deciding a matter, look at the substance rather than the form of things. Compare, for example, *Cape Pacific Ltd v Lubner Controlling Investments (Pty) Ltd* 1995 (4) SA 790 (A) especially at 802D-804E, *Le'Bergo Fashions CC v Lee* 1998 (2) SA 608 (C) and *Gilford Motor Co Ltd v Horne and Another* [1933] Ch 935 (CA) ([1933] All ER Rep 109) – the latter being English authority approved in both *Cape Pacific* and *Le'Bergo Fashions*.

[17] In *Hülse-Reutter and Others v Gödde* 2001 (4) SA 1336 (SCA) ([2002] 2 All SA 211) at para. [20], Scott JA remarked, however, that 'some misuse or abuse of the distinction between the corporate entity and those who control it which results in an unfair advantage being afforded to the latter' must be evident before a court will undertake the so-called 'piercing of the corporate veil'. In the context of the finding on the facts in that case that there was no evidence of any abuse of the corporate personality, I venture, with respect, that the observation was *obiter*. I in any event do not believe that the learned judge of appeal intended to derogate from the principle affirmed in *Cape Pacific* that a generally flexible approach is indicated. As he wrote elsewhere in the same paragraph, 'Much will depend on a close analysis of the facts of each case, considerations of policy and judicial judgment'. So, for example, in *Alec Lobb (Garages) Ltd & Ors v Total Oil (GB) Ltd* [1985] 1 All ER 303 (CA), [1985] 1 WLR 173, the court disregarded the distinction between the separate personalities of a company and its shareholders in the context of a lease agreement with the shareholders personally embodying certain provisions which were in fact intended by the lessor to impose unenforceable restraint of trade terms on the company through which the shareholders traded on the leased premises. The court struck down the restraint of trade provisions as if they had been imposed on the company and not its shareholders. That case therefore entailed *a third party*, the lessor, striving, in a manner contrary to public policy, to act to *its* advantage by disguising its purpose by means of a contract ostensibly with the shareholders rather than the company.

[18] I believe that that discussion disposes of the argument of the respondents' counsel, which, if I understood it correctly, was to the effect that piercing the fourth respondent's corporate veil took the applicants nowhere, because all that was behind the fourth respondent's veil was the second respondent, and not the third respondent. The argument reflected, as I have sought to demonstrate, an unjustifiably constrained and inflexible apprehension of the basis upon which the distinctness of corporate personality may be disregarded by a court.

[19] The reason for the apparent cessation of the conduct by the first and second respondents of a security business through the vehicle of the third respondent and the commencement by them, contemporaneously with the termination of the dealership agreement, of an essentially identical business through the vehicle of the fourth respondent is nowhere explained by the first and the second respondents. In my view it is evident, as a matter of probability, that this course was adopted by the first and second respondents to avoid the non-solicitation undertaking in clause 21.2.1 of the dealership agreement that prevented the third respondent from conducting this business. It also incidentally gave rise to an arguably impermissible means of purporting to avoid the legal consequences of the disposition to the applicant by the third respondent of its goodwill in terms of the aforementioned sale agreement. Seen in that way it is equally evident that the use of the fourth respondent as vehicle for the conduct of the business was no more than a dishonest strategy or device by the first and second respondents, who at all material times were the guiding minds of both close corporations, to avoid the third respondent's contractual obligations.

[20] The first respondent's resignation as a member of the fourth respondent was plainly induced by reason of the embarrassment his connection with the fourth respondent occasioned by reason of his being bound by the restraint of trade undertaken by him in terms of clause 30.2.2 of the dealership agreement. It was evidently perceived by the first and second respondents that because the second respondent was personally not bound by such restraint he could continue alone with the business through the vehicle of the fourth respondent with impunity. If one were not to look behind the separate personalities of the third and fourth respondents and to judge matters only on the form or structure of the new business arrangement, the first and second respondents' perception would be well-founded. But as soon as one considers the underlying substance of what was entailed it becomes clear that it would be unconscionable to allow the stratagem of the use of such form or structure to be effective.

[21] In the circumstances of second respondent's complicity in the abuse of the fourth respondent's corporate personality in this way it is appropriate, on the basis of the principles as they were applied in the *Le'Bergo Fashions* and *Gilford Motors* cases, to regard the restraint undertaken by the third respondent in favour of the applicant as enforceable against both the second and the fourth respondents. Should the situation of the fourth respondent change so as to make its continued subjection to the restraint, in terms of any interdict which might issue, inappropriate, it would always be open to it to apply for the amendment or discharge of such interdict; cf. *Genwest Batteries (Pty) Ltd v Van der Heyden and Others* 1991 (1) SA 727 (T) at 728-9 and *Le'Bergo Fashions* at

614J-615B. The second respondent is in any event also susceptible to being interdicted in delict on the grounds that his actions were directed at the procurement of a breach of the applicant's contractual rights. Inasmuch as there was a complaint that this basis for relief against the second respondent was clearly articulated only in the replying papers, it has to be pointed out that the replying papers were replying papers in the application for interim relief and that the second respondent failed to avail of the opportunity to respond to those allegations in the application for final relief. The facts proven on the founding papers by themselves, however, afforded sufficient basis for the argument based on delictual relief to be advanced on the applicant's behalf.

[22] Turning then to consider whether any basis has been shown on which the restraints should not be enforced. The respondents denied that the applicant had any protectable proprietary interest. This denial was expressed in the baldest terms and I consider that the submission by the applicant's counsel that it could be rejected as so tenuous as not to raise a real, genuine or *bona fide* dispute of fact was well made. It is not denied that the third respondent, and therefore the first and second respondents as its human agencies, were in possession of the applicant's customer lists which contained contact details in respect of each customer that would objectively fall to be considered as 'confidential information' in the sense of that term established in judgments such as *Dunn and Bradstreet (Pty) Ltd v SA Merchants Combined Credit Bureau (Cape) (Pty) Ltd* at 1968 (1) SA 209 (C) and *Meter Systems Holdings Ltd v Venter and Another* 1993 (1) SA 409 (W) at 428-430; and *Van Castricum v*

Theunissen and Another 1993 (2) SA 726 (T) at 731-2. The use by a party of an agreement in restraint of trade to buttress its common law right to protection against the use by others of its confidential information is quite legitimate. The use by the first, second and fourth respondents of that information for the purpose of competing with the applicant is suggested in the number of the applicant's clients who were persuaded to terminate their contractual relationship in favour of substitute contracts with Chubb virtually contemporaneously with the termination of the third respondent's dealership agreement with the applicant and the commencement of the fourth respondent's business relationship with Chubb. Indeed it is apparent that there was at least one instance of the soliciting of the applicant's customers to that end even before the notification by the first and second respondents of the termination of the third respondent's dealership agreement with the applicant.

[23] It was also contended that the third respondent had a co-existent proprietary interest in the customer information that the applicant claimed as its property. This was said to arise out of the fact that the third respondent in many cases had established its own connections with the customers prior to their conclusion of any contracts with the applicant. This happened in the nature of the third respondent's discharge of its function as an independent contractor in terms of the dealership contract. In this respect the respondents' counsel placed particular emphasis on the provisions of clauses 7 and 13 of the dealership agreement. In my view this argument missed the point. Even were the premise correct, it would not afford a basis to avoid the consequences of the undertaking

of the restraint of trade obligations. By undertaking the obligations the third respondent subordinated its interest in the relevant information to that of the applicant. Moreover, the argument also overlooks that the very purpose of the establishment of what is contended were the third respondent's customer connections in this regard was to bring about a contractual relationship between those customers and the applicant.

[24] In my judgment therefore the respondents have not shown why the restraints should not be enforced. I am however unable to discern a logical or practical basis for the distinction between the 36 month time period of the restraint imposed on the third respondent and that of only 12 months on the first respondent. The protectable interests are identical in each case and the third respondent must have been recognised by the applicant at all material times as the alter ego of the first and second respondents. In the circumstances I am not persuaded that there is any reasonable basis to impose more harshly on the second and fourth respondents than on the first respondent in the interdictory relief to be granted.

[25] An interdict will issue against the first respondent notwithstanding his resignation as a member of the fourth respondent because I am sceptical about the genuineness of the intended effect of his act of resignation. It is unnecessary to find an evidential basis to support this scepticism because it is trite that the applicant is entitled to relief on the facts proven to have existed at the time of the institution of proceedings; see *Philip Morris Inc and Another v Marlboro Shirt Co SA Ltd and Another* 1991 (2) SA 720 (A) at 735B-C. On any approach, the first

respondent's conduct thus far gives rise to a reasonable apprehension by the applicant of a need for protection by means of interdictory relief.

[26] It was not in dispute that the costs of the proceedings on 23 June 2010 and 27 July 2010 should follow the result.

[27] An order will therefore issue:

1. Interdicting and restraining the first, second and fourth respondents, for a period of 12 months from 1 May 2010, from

   1.1 soliciting the business of any of the applicant's customers, whose names appear on the schedule marked 'List One' on annexure FA6A to the applicant's supplementary affidavit deposed to on 27 October 2010;

   1.2 contacting any of the applicant's customers whose names appear on the schedule marked 'List One' on annexure FA6A to the applicant's supplementary affidavit deposed to on 27 October 2010 in order to solicit business from them away from the applicant;

   1.3 attempting to persuade any of the applicant's customers whose names appear on the schedule marked 'List One' on annexure FA6A to the applicant's supplementary affidavit deposed to on 27 October 2010 to cancelling or attempt to cancel their contractual relationship with the applicant.

2. Directing the first, second and fourth respondents, jointly and severally, the one paying the others being absolved, to pay the applicant's costs of suit, including the costs of the hearings on 23 June 2010 and 27 July 2010.

A.G. BINNS-WARD
Judge of the High Court