THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 20693/2014

In the matter between:

GRAINCO (PTY) LTD **APPELLANT**

And

JACOBUS ALEWYN VAN DER MERWE **FIRST RESPONDENT**
JOHANNES JACOBUS KITSHOFF **SECOND RESPONDENT**
PERDIGON (PTY) LTD (formerly GRAINCO INVESTMENTS (PTY) LTD t/a PERDIGON) **THIRD RESPONDENT**

Neutral citation: *Grainco (Pty) Ltd v Van der Merwe* (20693/2014)) [2016] ZASCA 42 (30 March 2016)

Coram: Ponnan, Wallis, Mbha and Mathopo JJA and Plasket AJA

Heard: 17 March 2016

Delivered: 30 March 2016

Summary: Purchase and sale ─ sale of business, inclusive of goodwill ─ implied prohibition against seller canvassing customers of sold business ─ prohibition a term implied by law ─ only seller bound by it.

ORDER

On appeal from Western Cape Division of the High Court, Cape Town (Rogers J sitting as court of first instance): judgment reported *sub nom GrainCo (Pty) Ltd v Van der Merwe & another* 2014 (5) SA 444 (WCC).

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

JUDGMENT

Plasket AJA (Ponnan, Wallis, Mbha and Mathopo JJA concurring):

[1] In the court below, the Western Cape Division of the High Court, Cape Town, the application of the appellant, GrainCo (Pty) Ltd (GrainCo), to interdict the respondents, Mr J A van der Merwe (Van der Merwe), Mr J J Kitshoff (Kitshoff) and Perdigon (Pty) Ltd (Perdigon), a company in which they were shareholders, from soliciting business from, canvassing, enticing, drawing away or dealing with a long list of people and entities, or attempting so to do, together with other related relief, was dismissed with costs.

[2] The issue that arises for decision in this appeal is whether, when a business is sold as a going concern, inclusive of its goodwill, the implied prohibition against the canvassing of customers binds anyone other than the seller. Rogers J, in the court below, found that the respondents were not the sellers of the business and not bound by the implied prohibition. He dismissed the application to interdict them from canvassing customers of GrainCo on this basis and refused other relief not germane to this appeal.

[3] He granted leave to appeal to this court principally, it would appear, because he thought that this court may wish to revisit the correctness of the

judgment in *A Becker & Co (Pty) Ltd v Becker & others*,[1] a case concerned with the implied prohibition and its relationship with an express restraint of trade. I shall say something of this invitation at the end of this judgment.

The facts

[4] The material facts that gave rise to this matter are uncomplicated and largely common cause. In 2000, Van der Merwe and Kitshoff established a company which they called GrainCo (Pty) Ltd. This company was referred to in the papers as 'old GrainCo'. I shall use the same term when referring to it.

[5] Old GrainCo traded with great success in the grain commodities market, thanks in large measure to the efforts and expertise of Van der Merwe and Kitshoff. It quickly developed a substantial reputation in its field. It traded in white and yellow maize, sunflower seeds, soya beans, wheat, canola, sorghum, lucerne, brans, proteins and feed grains such as oats, feed barley and lupines.

[6] Essentially, old GrainCo managed the supply chain between farmers and processors by facilitating the flow of grain products from one to the other. In other words, it bought grain from farmers and sold it to processors, although its transactions were not necessarily 'back-to-back' transactions: instead, it operated in terms of a risk-based business model which involved speculation, risk-spreading and hedging. It was described in the founding affidavit of Mr H B Vermooten as a 'trusted brand with customers on both sides of the supply chain'.

[7] The success of old GrainCo sparked the interest of BKB Limited (BKB). For the most part, it traded in and marketed wool, mohair and livestock, although it had other interests too. It had no involvement in the grain commodities market but wished to be involved in it.

[1] *A Becker & Co (Pty) Ltd v Becker & others* 1981 (3) SA 406 (A).

[8] BKB consequently entered into an agreement, styled an amalgamation agreement (the amalgamation agreement), in terms of which it purchased the business, inclusive of the goodwill, of old GrainCo as a going concern. Various parties are referred to in the agreement. They are Thembeka Capital (Pty) Ltd, 'the other shareholders', BKB and old Grainco. The 'other shareholders' are listed in an annexure as the Swartkop Family Trust, the J J Kitshoff Family Trust, the J R van Niekerk Trust and the Dalin Trust. All four of these entities were represented by Van der Merwe and Kitshoff. These entities together held 74.9 percent of the issued ordinary shares of old GrainCo, Thembeka Capital holding the rest.

[9] Clause 2.1 of the agreement recorded that Thembeka Capital and the other shareholders 'are the registered holders and beneficial holders of the GrainCo Shares'. Clauses 2.3 and 2.4 stated:

'2.3 GrainCo is the registered holder and beneficial owner of the Company Assets, which, *inter alia*, include the business conducted by GrainCo, as a going concern, and its interest in BKB GrainCo (Pty) Ltd . . .

2.4 BKB wishes to acquire the Company Assets from GrainCo and GrainCo is willing to dispose of the Company Assets to BKB, subject to the terms and conditions as set out in this Agreement.'

[10] Clause 3 is the crux of the agreement. It provided:

'3.1 GrainCo hereby disposes of the Company Assets to BKB, who hereby acquires the Company Assets from GrainCo in exchange for

3.1.1 the allotment and issue by BKB of the BKB Shares to GrainCo;

3.1.2 a cash consideration equal to R4 000 000 (four million rand) which cash consideration is specifically allocated to the debtors listed in Annexure I; and

3.1.3 BKB hereby assumes the GrainCo Liabilities.'

The company assets are listed in an annexure. They include goodwill.

[11] Clause 3.2 recorded that GrainCo would be 'liquidated and/or deregistered' subsequent to the agreement. Clause 3.4 placed an obligation on GrainCo to 'take such actions as to ensure that the BKB Shares received

are distributed to its shareholders'. The value of the shares referred to in clause 3.1.1 was R24 450 430.

[12] Clause 6 dealt with the apportionment of the BKB shares allotted to GrainCo. Thembeka Capital received 25.1 percent of the shares, while the remaining 74.9 percent was allotted as follows: the Swartkop Family Trust and the J J Kitshoff Family Trust each received 46.66 percent of the shares while the J R van Niekerk Trust received 1.34 percent of the shares and the Dalin Trust received 5.34 percent of the shares

[13] Clause 12 contained a comprehensive restraint of trade. It restrained old GrainCo, Van der Merwe and Kitshoff, for a period of five years[2] and within the 'geographical area comprising the states forming part of the Southern African Development Community',[3] from having an interest in any entity which had an interest in any activity in competition with BKB, or themselves having an interest in any such competitive activity; from involving themselves in competitive activity that could have the effect of causing BKB prejudice; from directly or indirectly canvassing 'any customer and/or client of BKB for or on behalf of any entity in which they are interested', or on their own behalf; and from disclosing confidential information.[4]

[14] In addition, they agreed with BKB that none of them would, 'either for their own account or as representative or agent of any entity' in which they had an interest 'persuade, induce, encourage or procure any employee' employed by BKB to 'become employed by or interested, directly or indirectly, in any entity which is interested in a competitive activity'; to terminate his or her employment with BKB; or to furnish information or advice acquired by the employee as a result of his or her employment to 'any unauthorised person'.[5]

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[2] Clause 12.1.5.
[3] Clause 12.1.6.
[4] Clause 12.2.
[5] Clause 12.3.

[15] Old GrainCo, Van der Merwe and Kitshoff agreed that the restraint was 'reasonable as to subject matter, period and territory' and that clauses 12.2 and 12.3 'shall be given the widest possible interpretation'.

[16] Vermooten, in the founding affidavit, explained the effect of the transaction envisaged by the amalgamation agreement as follows:

'The effect of the transaction was that BKB did not acquire the shares of Old GrainCo, but only its business and assets (including the shares of the businesses controlled by Old GrainCo) for a purchase price of R28 450 430.00. The majority of the purchase price was paid to the trusts controlled by Kitshoff and van der Merwe by the allotment of BKB shares to them. R4 million was paid to them in cash.'

[17] As soon as the amalgamation agreement was concluded, BKB sold the business it had acquired to a company called Saamwerkverspreiders (Pty) Ltd, which later changed its name to GrainCo (Pty) Ltd (GrainCo). Van der Merwe was appointed as the managing director of GrainCo in 2006. He also entered into an employment contract with it for a fixed term of five years. That ended on 30 June 2012, simultaneously with the termination, by effluxion of time, of the restraint of trade. He then entered into a new contract of employment. Kitshoff was appointed as a director of GrainCo and was employed, in terms of a five year contract of employment, as its head of trading. When the contract of employment ended, together with the restraint of trade, Kitshoff entered into a new contract of employment.

[18] In the years that followed the acquisition of the business, GrainCo expanded its operations and increased the number of its depots. It formed a new division, called BKB Logistics, and an existing division, GritCo, which milled yellow maize to produce maize grit, moved its plant and tripled its capacity. A third division, BKB GrainCo (Pty) Ltd trading as BKB Grain Storage, also operated as a wholly owned subsidiary of GrainCo. It provided the service of storage and management of grain in silo bags. The number of people employed by GrainCo increased from 54 to 280.

[19] GrainCo, as a whole, operated profitably but matters took a turn for the worst in 2013. The reasons for the downturn are in dispute but there is no need to resolve this particular dispute of fact.

[20] It was, however, in this environment that Van der Merwe resigned as managing director and as an employee of GrainCo. He did so with effect from 31 March 2013. A month later, Kitshoff resigned. So did a number of senior employees thereafter.

[21] At the beginning of June 2013, a company named Grainco Investments (Pty) Ltd, trading as Perdigon, opened its offices across the road from GrainCo. (It later changed its name to Perdigon (Pty) Ltd.) In addition to Van der Merwe and Kitshoff, who were its shareholders, it was staffed by people who had either resigned from or taken voluntary retrenchment packages from GrainCo.

[22] Perdigon described itself as 'commodity traders specialising in the management of the supply chain between the producer and the processor' of grain. It is clear that Perdigon competed with GrainCo from the outset, even though there were differences in approach and scope.

The issue

[23] During the course of the proceedings in the court below, the implied prohibition against the canvassing of clients was referred to as the *Trego* prohibition. This was a reference to the leading English case of *Trego & another v Hunt*[6] in which Lord Macnaghten set out the basis for the prohibition and its contours when he stated:[7]

'And so it has resulted that a person who sells the goodwill of his business is under no obligation to retire from the field. Trade he undoubtedly may, and in the very same line of business. If he has not bound himself by special stipulation, and if there is no evidence of the understanding of the parties beyond that which is to be found in all cases, he is free to carry on business wherever he chooses. But, then, how far may

[6] *Trego & another v Hunt* [1896] AC 7 (HL).
[7] At 24-25.

he go? He may do everything that a stranger to the business, in ordinary course, would be in a position to do. He may set up where he will. He may push his wares as much as he pleases. He may thus interfere with the custom of his neighbour as a stranger and an outsider might do; but he must not, I think, avail himself of his special knowledge of the old customers to regain, without consideration, that which he has parted with for value. He must not make his approaches from the vantage-ground of his former position, moving under cover of a connection which is no longer his. He may not sell the custom and steal away the customers in that fashion. That, at all events, is opposed to the common understanding of mankind and the rudiments of commercial morality, and is not I think to be excused by any maxim of public policy.'

[24] While *Trego* concerned a partnership, rather than the sale of a business, the principle enunciated in it – that the seller of goodwill is prohibited from taking it back by canvassing for the old business' customers – was accepted as correct in *Becker*. In that case, Becker, in his personal capacity and as a director of his company, A Becker & Co (Pty) Ltd, sold the business of the company, inclusive of the goodwill, and bound himself to a restraint of trade. In terms of the sale agreement, the purchaser acquired the right to the use of the name of the company (as happened with GrainCo in this case) and the original seller changed its name, while the purchaser became A Becker & Co (Pty) Ltd. When the restraint of trade had expired, Becker began to approach former customers with a view to soliciting their business. An interdict was sought to restrain him from doing so but, at the close of the plaintiff's case, absolution from the instance was granted.

[25] In upholding the appeal and setting aside the order for absolution from the instance, Muller JA held that *Trego* was correct and that if 'a seller disposes of the goodwill of a business he is not allowed thereafter to act contrary to the sale'.[8] In his separate concurring judgment, Van Heerden AJA held that *Trego* was consistent with the principles of South African law.[9]

[8] Note 1 at 414G-H.
[9] Note 1 at 418C-D.

[26] Van Heerden AJA also considered the juridical basis of the implied prohibition. He held that there were two possibilities: either it arose from a tacit term – an unexpressed term that arose from the actual or imputed intention of the parties; or it arose as an implied term, properly so called – a term implied by law, a *naturalium* of the contract.[10] He concluded that the implied prohibition was a term implied by law in a contract for the sale of a business that includes the goodwill:[11]

'Die erkende *naturalia* van 'n koopkontrak van liggaamlike goed kan egter analogiese toepassing vind op die verkoping van 'n immateriële goed soos werfkrag. Dié wat ten gunste van die koper strek, is gerig op beskerming van sy genot en gebruik van die *merx*. Vandaar, bv, die verkoper se verpligtinge rakende uitwinning en verborge gebreke. Soos reeds aangedui, konstitueer 'n direkte inwerking deur die verkoper 'n nadelige aantasting van die koper se genot en gebruik van die werfkrag. Daar is dus alle rede om sodanige inwerking in stryd te ag met 'n *naturalium* van die betrokke koopkontrak.'

[27] That being so, the principle can only be invoked in relation to a seller of a business. It is clear from clauses 2 and 3 of the amalgamation agreement that the only parties to the sale of old GrainCo were it and BKB. Unlike in the *Becker* matter, in which Becker was a party to the sale of the business, both personally and in a representative capacity, Van der Merwe and Kitshoff were not parties to the sale in this case. They could accordingly not be bound by an implied term of the agreement. The appeal must therefore fail.

Leave to appeal

[28] In the course of his judgment in the court below, Rogers J dealt at length with the *Becker* case and with what he considered to be flaws in its approach to the relationship between the implied prohibition against

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[10] Note 1 at 419E-H. See too *Alfred McAlpine & Son (Pty) Ltd v Transvaal Provincial Administration* 1974 (3) SA 506 (A) at 532C-H.

[11] Note 1 at 419H-420B. 'The recognised *naturalia* of a contract of sale of corporeal things can however find application by analogy with the sale of an incorporeal thing like goodwill. Those which operate in favour of the purchaser are aimed at the protection of his use and enjoyment of the *merx*. Hence, for example, the seller's obligations concerning eviction and latent defects. As already indicated, a direct interference on the part of the seller constitutes a prejudicial impairment of the purchaser's use and enjoyment of the goodwill. There is thus every reason to consider such an interference to be in conflict with a *naturalium* of the particular contract of sale.' (My translation.)

interfering with the goodwill of the sold business and the express restraint of trade that bound Becker. He suggested that the conclusion in *Becker* in this respect 'might warrant reconsideration' by this court.[12]

[29] The issue that appears to have consumed a great deal of the attention of Rogers J was one that could only have become relevant if he had found that Van der Merwe and Kitshoff were parties to the amalgamation agreement. As he had made a finding to the contrary – and quite correctly so – there was no reason that I can discern for him having to address the correctness of *Becker*, much less give this court 'the opportunity of mending its earlier judgment'.[13] It is an issue that this court would not have had to consider and if it did have anything to say on it, it would have been obiter. Entirely academic issues such as this should not be forced upon this court.

The order

[30] The appeal is dismissed with costs, including the costs of two counsel.

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C M Plasket
Acting Judge of Appeal

[12] *GrainCo (Pty) Ltd v Van der Merwe & another* 2014 (5) SA 444 (WCC), para 54.
[13] *S v Kgafela* [2003] ZASCA 53; 2003 (5) SA 339 (SCA) para 3. See too *Blaauwberg Meat Wholesalers CC v Anglo Dutch Meats (Exports) Ltd* [2003] ZASCA 144; 2004 (3) SA 160 (SCA) para 20.

APPEARANCES:

For Appellant:	A I S Redding SC (with him T Dalrymple) Instructed by: Chris Baker & Associates, Belville Symington & De Kok, Bloemfontein
For Respondent:	J A Newdigate SC (with him H Jansen van Rensburg) Instructed by: De Klerk & Van Gend Inc, Cape Town McIntyre & Van der Post, Bloemfontein