LL Case No 560/1989

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

CHRISTIAAN JOHANNES BOTHA First Appellant

HEINZ-BERNHARD WOLTERS Second Appellant

and

CARAPAX SHADEPORTS (PTY) LIMITED Respondent

CORAM: BOTHA, SMALBERGER, MILNE, F H GROSSKOPF JJA et KRIEGLER AJA

HEARD: 15 AUGUST 1991

DELIVERED: 27 SEPTEMBER 1991

JUDGMENT

BOTHA JA:-

The two appellants were formerly employed as sales representatives by a close corporation, Carapax Shadeports CC, to which I shall refer as "Carapax CC". In terms of their written contracts of employment the appellants bound themselves to Carapax CC not to become involved in trading in competition with the business of Carapax CC within a certain area for a period of one year after termination of their services. During the latter part of 1988 Carapax CC ceased to carry on business. Its business was acquired and taken over by the respondent in this appeal, and the employment of the appellants in the business came to an end, in circumstances to be mentioned presently. The appellants thereupon joined forces and set up their own business, within the area of the restraint, in competition with the business of the respondent. This caused the respondent to apply on notice of motion in the Transvaal Provincial Division for orders enforcing against the appellants the restraint provisions

contained in their contracts with Carapax CC. The appellants opposed the application. The matter was heard by DE KLERK J. He granted the respondent the relief it sought, with costs, and thereafter dismissed an application by the appellants for leave to appeal. In consequence of a petition addressed to the CHIEF JUSTICE, the appellants were granted leave to appeal to this Court. The costs of the two applications for leave to appeal were reserved for decision by this Court.

Carapax CC carried on business as a manufacturer and marketer of shadeports and hailnet steel structures. The employment of the first appellant in the sales division of Carapax CC commenced in August 1986, and that of the second appellant in June 1987. In May 1988 the appellants and Carapax CC entered into written contracts of employment, the terms of which are identical. In each, Carapax CC is referred to as "the employer" and the appellants severally as "the

employee". Each contract records, inter alia, that the employer engages the employee, who agrees to serve the employer, in "sales capacity"; that the employee shall duly and faithfully perform all duties reasonably assigned to him by the employer; that the employee shall devote all his time and attention during normal business hours to the business and affairs of the employer; that the employee shall use his best endeavours to properly conduct, promote and protect the business interests of the employer, to preserve its reputation and goodwill; that the employment of the employee shall continue for an indefinite period, subject to not less than one calendar month's written notice being given by one party to the other; and that the employee shall be entitled to receive from the employer, in consideration of the services to be performed by him, "commissions only".

Paragraphs 7 and 8 of each contract read as follows:

"7. 7.1 The EMPLOYEE undertakes in favour of the EMPLOYER, that he will not, either alone or together with [or] as agent for any other person, firm, company or association whatsoever: -

7.1.1 carry on; or

7.1.2 be interested in any way, as a Director, Proprietor, Partner, Shareholder, Financier, Advisor, Consultant or otherwise, in; or

7.1.3 be engaged in; or

7.1.4 grant financial assistance or Loans of money to;

any business which anywhere within the area known as the PRETORIA, WITWATERSRAND AND VEREENIGING (PWV) [area] conducts a business in competition with that of the EMPLOYER'S business.

7.2 The undertaking in sub-paragraph 7.1 (above) shall endure for a period of ONE (1) year after the EMPLOYEES termination of employment.

7.3 Each of the undertakings and restraints in sub-paragraph 7.1 (above), shall be regarded as distinct and severable convenances, ...

8. 8.1 The EMPLOYEE acknowledges that the restraints detailed above are fair and reasonable;

8.2 It is recorded in this context, that the EMPLOYER was the founder of the said BUSINESS and that competition from the EMPLOYEE would inevitably affect the said

BUSINESS;

....."

The validity of the restraints, as such, is not in issue. Nor is it in issue that the appellants' setting up and running of their own business constituted an infringement, in a factual sense, of the terms of the restraints. It is common cause that Carapax CC would have been entitled to enforce the restraints against the appellants, if it had not disposed of its business to the respondent; and it is common cause that, if the respondent were entitled to enforce the restraints, the terms of the orders granted by the Court a quo are unobjectionable. Accordingly, there is no need to recite the facts bearing upon the reasonableness of the restraints, nor to cite the orders issued a quo.

The main issue in the appeal is whether the benefit of the restraints was transmitted from Carapax CC to the respondent. In the latter's founding

affidavit, filed in support of its notice of motion, a number of grounds were advanced for the contention that the respondent had locus standi to enforce the restraints. Some of them resulted in disputes of fact arising on the papers, e g as to whether the appellants knew of the take-over of the business by the respondent and whether they thereafter by their conduct entered into new contracts of employment with the respondent, on the same terms as those contained in their contracts with Carapax CC. In the view I take of the appeal, it is not necessary to traverse the facts in any detail. In my judgment, the appeal falls to be decided on a fairly narrow footing, and for that purpose the relevant facts can be stated briefly.

The respondent is a subsidiary of a company to which I shall refer as "Alnet". Alnet, which is a member of the Rentmeester/Rentbel group of companies, was one of the largest suppliers of materials for the business of Carapax CC. During the middle of 1988

Alnet expressed an interest in taking over that business. In the negotiations that ensued, it appeared that Alnet did not regard the close corporation as a suitable vehicle through which to acquire the business. A new company was required to be formed for the purpose. It was agreed that Carapax CC would change its name and that the new company would take over the words "Carapax Shadeports" in its name. On 21 September 1988 a deed of sale was entered into between Alnet, Carapax CC, and the latter's two members, Messrs Shaw and Minnitt. Clause 2 of the deed of sale provides as follows:

> "2.1 In this agreement unless inconsistent with or otherwise indicated by the context -
>
> 2.1.1 .....
>
> .....
>
> 2.1.6 'the Business' shall mean the whole of the business carried on by Carapax Shadeports CC until the Effective Date under its name and style at the Premises;
>
> .....
>
> 2.1.10 'the Effective Date' shall mean 31 August 1988 notwithstanding the

Date of Signature hereof;

.....

2.1.18 'the Purchaser' shall mean Alnet in its capacity as a trustee for a company to be formed or the company once it has been formed;

.....

2.1.20 'the Seller(s)' shall mean Carapax Shadeports CC, Shaw and Minnitt collectively;

....."

Clause 3 of the deed of sale bears the heading "SALE". It provides as follows:

> "3. The Seller hereby sells to the Purchaser who hereby purchases the Business as a going concern and as one indivisible transaction with effect from the Effective Date subject to the terms and conditions of this agreement."

Clause 4 relates to the purchase price. The stated price is recorded to be "allocated" in three parts; one for the trade marks, another for the net asset value of the business, and the remaining one "for the goodwill of the Business". (In the copy of the deed of sale which was placed before the Court a quo the figures of the purchase price and each of its three

constituent parts were obliterated, the explanation being that they were confidential to the parties to the agreement.)

In short, Alnet, acting as trustee for a company to be formed, purchased from Carapax CC its business as a going concern, together with the goodwill.

The respondent was incorporated on 4 November 1988. Thereafter its directors passed a resolution ratifying and confirming the agreement of 21 September 1988. It is common cause that the contract of 21 September 1988 stipulated a benefit for a third party, that the respondent was that third party, that it effectively accepted the benefit conferred upon it, and that it accordingly stepped into the shoes of Alnet as the purchaser of the business and its goodwill. In what follows I shall, for convenience, omit reference to the intermediate step of Alnet's acquisition of the business as trustee, and refer simply to the

respondent's acquisition as if it had been direct.

After the effective date mentioned in the deed of sale (31 August 1988) Shaw and Minnitt carried on with the business, and they continued to do so after the respondent's incorporation on 4 November 1988; as from the latter date, they were in control of the business as managers employed by the respondent. There was thus no interruption in the conduct of the business. As between Carapax CC and the respondent it was contemplated that the employees of the former would continue their employment with the latter. As a matter of fact, in an annexure to the deed of sale of 21 September 1988, Carapax CC warranted, inter alia, that its contracts with its employees were of full force and effect according to their terms, and it was recorded that copies of the contracts which were written had been handed to the purchaser. As far as the appellants are concerned, they continued working as salesmen in the business during the process of the take-over. They

allege that they were under the impression that the take-over would occur at a later date. They were told by Shaw and Minnitt that when once the business was transferred to the new owner, their terms and conditions of employment would be altered, inter alia in respect of the basis of their remuneration by way of commission. They were dissatisfied with this prospect, and decided to leave. The first to go was the second appellant. In November 1988 there was a discussion between Shaw, Minnitt and the appellants, during which the second appellant was told to leave immediately. He agreed to do so, but insisted that he would take all his customer quotations with him. A dispute ensued, which was resolved by means of a written agreement drawn up and signed by the parties. (I shall refer to this again later.) The second appellant then left the business. The first appellant agreed to stay on until February 1989, when, by agreement with Shaw and Minnitt, his association with the business was

terminated. Thereafter the appellants commenced their joint enterprise in competition with the respondent.

So much for the facts. The gist of the reasoning which led DE KLERK J in the Court a quo to grant the respondent's application, is reflected in the following excerpts from his judgment:

> "Applicant submits that as a matter of law the benefit of the covenant in restraint of trade passed to the purchaser of the business (applicant) as part of the goodwill when applicant bought the business."
>
> .....
>
> "I agree with this principle. In my view a covenant for the restraint of trade forms part of the goodwill, part of the assets of the business irrespective of whether the business is conducted by a company or by an individual and this asset passes with the goodwill when the business is sold."
>
> .....
>
> "The Deed of Sale by virtue of which the business and the goodwill of the Closed Corporation were sold clearly ceded to the purchaser, that is the applicant, the rights the Closed Corporation had in the restraint agreements and the restraint agreements were not personal to the Closed Corporation."

In this Court counsel for the appellants

challenged the correctness of this reasoning on a threefold basis, submitting (1) that the benefit of the restraints could not have been transferred from Carapax CC to the respondent as a matter of law, since there was no legal principle to such effect; (2) that, as a matter of fact, there was no cession to the respondent of the right of Carapax CC to enforce the restraints, since the evidence did not disclose such a cession; and (3) that, in any event, even if the evidence did reveal a cession, it was invalid and ineffective as against the appellants, since their consent to it was necessary and such consent was not proved in evidence.

I shall deal with the first two submissions together. In argument we were referred to only two South African reported cases which are more or less directly in point: Coetzee v Eloff 1923 EDL 113 and Protea Holdings Ltd and Another v Herzberg and Another 1982 (4) SA 773 (C). In Coetzee v Eloff supra the plaintiff and the defendant had entered into a contract

in terms of which the defendant undertook not to carry on the trade of a blacksmith within a certain municipality during such time as the plaintiff or any of his successors in business might be carrying on the trade in that town. (It does not appear from the judgment under what circumstances the undertaking was given, but it may be assumed, I think, that the defendant had sold the blacksmith's business to the plaintiff.) Thereafter the plaintiff in terms of a verbal agreement sold the business and its goodwill to a third party, who carried on the trade. The plaintiff, alleging that the defendant was carrying on trade in breach of his undertaking, sued him in a magistrate's court for payment of damages alleged to have been suffered by the third party, and for which the latter was holding the plaintiff liable. The magistrate found for the defendant. An appeal against his decision was dismissed. The Court held that the benefit of the defendant's undertaking was included in

the goodwill of the business and that it had passed to the third party, who was entitled to sue on it. For this conclusion reliance was placed on two English cases, Jacoby v Whitmore (1883) 49 LT 335 and Townsend v Jarman (1900) 2 Ch 698. It was held, further, that, as no particular form of words were required for the purpose of effecting "a complete cession of action", nor that it should be in writing,

> "the verbal sale of the goodwill in this case was quite sufficient, therefore, to effect such cession."

In the result it was held that the plaintiff's right to sue was extinguished and that he had no cause of action against the defendant.

In the Protea Holdings case supra FRIEDMAN J said (at 787G) that it was clear that

> "the benefit of a covenant in restraint of trade can pass to the purchaser of a business as part of the goodwill of that business",

citing Coetzee v Eloff supra and Townsend v Jarman supra. However, on the peculiar facts of that case it

was held that the transaction between the two parties concerned had not brought about a passing of the goodwill, in fact, and that therefore it could not be contended that the right to enforce the restraint clause had been transferred from the one party to the other, as a concomitant of the goodwill.

I turn to the English cases mentioned above. In Jacoby v Whitmore supra one Cheek, described as "an oil colour man and Italian warehouseman", had employed Whitmore as a shopman, in terms of an agreement in which Whitmore undertook not to carry on a similar business within a mile of Cheek's shop. Whitmore left Cheek's employ and Cheek sold his business to Jacoby, assigning to him the "beneficial interest and goodwill" in the business. Whitmore set up his own business within a mile of the premises that Jacoby had taken over from Cheek. The Court of Appeal held that Jacoby was entitled to an injunction against Whitmore. BRETT

MR said (at 337):

> "He [Cheek] sold to Jacoby the 'beneficial interest and goodwill' of the business, and as the cases I have referred to decide that such a contract adds to the goodwill, under the word 'goodwill' alone in this assignment the benefit of the agreement with Whitmore would, in my opinion, pass."

COTTON LJ said (at 338):

> "Although the assigns of the covenantee are not mentioned in the agreement, the covenantor has a property in the goodwill, and we must consider what was necessary for his protection at the time when the contract with Whitmore was entered into. These covenants are essentially assignable, for protection to the goodwill is required after it has been sold. Another question is, Has the goodwill been assigned? The object of the agreement was to keep to the business the customers who traded at Cheek's shop. The benefit derived from so keeping the customers was a beneficial interest, if it was not part of the goodwill, though I feel no doubt that it was part of the goodwill. Therefore I am of opinion that the covenant was in fact assigned."

In Townsend v Jarman supra the defendant had taken the plaintiff into partnership in an established business, under an agreement in terms of which the

plaintiff was restrained from carrying on a similar business after the dissolution of the partnership. Some years later the parties sold and assigned their beneficial interest and goodwill in the business to a company. Thereafter the company was wound up and the goodwill of the business was sold and assigned to the plaintiff. In an action by the plaintiff against the defendant (for relief which need not be referred to here), the defendant put up a counter-claim for an injunction restraining the plaintiff from carrying on the business, contending that the benefit of the covenant in restraint of trade did not pass to the company on its purchase of the partnership business, as it was merely a covenant between the partners and not a portion of the partnership business. FARWELL J rejected the contention as fallacious, and went on to reason as follows (at 703-704):

> "The defendant, therefore, cannot successfully assert that this was a covenant in gross not incident to the business.

Moreover, it plainly increased the value of the business in the hands of an assignee, and the defendant in terms assigned the whole of the goodwill to the company. The defendant, therefore, is in this dilemma: if it is a covenant in gross, it is void; if it is not, the benefit of it is not vested in him, but in his assignees. Test it in this way. Suppose the plaintiff had gone out of the partnership so that the defendant was entitled to enforce the covenant against him, and the defendant had then sold the goodwill to the company, could it have been contended that the company had not got the benefit of this covenant? The point would have been hopelessly unarguable. The benefit of the covenant, therefore, passed as incident to the goodwill, not only for the reason I have suggested, but also for the reason given in the case of Jacoby v. Whitmore ..., namely that the covenant was for the benefit of the business. ... The foundation of that decision was that the covenant added to the value of the goodwill, and the inference, therefore, was irresistible that in conveying the goodwill the grantor intended to convey and the grantee to obtain the whole of the benefit and protection of everything incident or beneficial to the goodwill. ... That an assignment of the goodwill passes the benefit of such a covenant is plain from Jacoby v. Whitmore. ... I therefore hold that the benefit of the covenant was one of the incidents of the goodwill, and that it was conveyed by the defendant to the company, and by them to the plaintiff."

The effect of these two cases was summarised by FARWELL LJ in Henry Leetham & Sons Limited v Johnstone-White (1907) 1 Ch 322 (CA) at 327 as follows:

> "It seems to me to follow from the decision of the Court of Appeal in Jacoby v Whitmore..., applied by me in Townsend v Jarman ..., that on the sale of a business with a goodwill, although nothing more is said, the benefit of the restrictive covenant passes with the business, because it is not for the benefit of the individual, but it is for the benefit of the business."

The notion that the benefit of a covenant in restraint of trade forms part of the goodwill of a business would seem to be well established in English law. It may, perhaps, be explored a little further, in the context of the concept of goodwill generally. The nature of goodwill is most frequently described with reference to the attributes of a business which are apt to promote its trade. So, in Jacobs v Minister of Agriculture 1972 (4) SA 608 (W) COLMAN J said (at 621A-B):

> "... goodwill is an intangible asset

> pertaining to an established and profitable business, for which a purchaser of the business may be expected to pay, because it is an asset which generates, or helps to generate, turnover and, consequently, profits."

(See also Slims (Pty) Ltd and Another v Morris NO 1988 (1) SA 715 (A) at 727H-I). In The Commissioners of Inland Revenue v Muller & Co's Margarine Ltd 1901 AC 217 (HL) at 224 LORD MACNAGHTEN said of goodwill, succinctly:

> "It is the attractive force which brings in custom."

But, as he went on to say,

> "Goodwill is composed of a variety of elements."

It differs in its composition, according to the circumstances of any particular case. The seller of a business who does not put himself under a restraint of trade may not solicit old customers of the business, but he is free to enter into trade in competition with the purchaser of the business (A Becker & Co (Pty) Ltd

v Becker and Others 1981 (3) SA 406 (A) at 414H and 417C-419A). Such competition will usually be detrimental to the business. Conversely, an undertaking by the seller not to enter into competition will enhance the value of the business. The same considerations apply to the case of an employee of the business. It follows logically, therefore, that a restraint of trade against a seller or an employee should be regarded as a part of the goodwill of the business. This was indeed expressly recognized to be the case in the speech of LORD LINDLEY in The Commissioners of Inland Revenue v Muller & Co's Margarine Ltd supra at 235:

> "Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me."
> (My emphasis.)

And in Jacoby v Whitmore supra BRETT MR observed (at 337):

> "It has been said that such an agreement does not add to the value of the goodwill, because it does not bring fresh customers, but it prevents them from being taken away."
> (My emphasis.)

(See also Townsend v Jarman supra at 703.)

The view reflected in the cases discussed above may be paraphrased as follows: the benefit of an agreement in restraint of trade, which exists for the advantage of a business, passes to the purchaser of that business and its goodwill, as part of the goodwill. In my judgment, that view, as a general proposition, has everything to commend itself, and we should approve of it. It is, I consider, in consonance with the common understanding of what goodwill comprises, and with the exigencies of modern commerce. It is also in harmony with the principles of our law, subject to the observations which follow.

It is necessary to examine the view stated above a little more closely, in order to identify its legal and factual implications. In the case of Slims (Pty) Ltd and Another v Morris NO supra CORBETT JA said of a "business" that it is "a somewhat amorphous concept" (at 740 A/B), and NICHOLAS AJA said (at 727E):

> "The components of the merx in a sale of a business are to be ascertained from the contract of sale".

These remarks apply equally to the goodwill of a business, and to the sale of the goodwill. What is comprised in the sale of the goodwill of a business in a particular case is essentially a question of fact, not law. There is no fixed or invariable rule by which the benefit of an agreement in restraint of trade passes to the purchaser of the goodwill of a business. For instance, such an agreement may in terms confer a purely personal benefit on the owner of the business only; in such a case, the benefit of it does not enure to the advantage of the business, it is not part of the

goodwill, and it will not pass to the purchaser. An example of such a case is to be found in Davies v Davies (1887) 36 Ch 359 (CA). There an agreement restrained a retiring partner from trading "in any way so as to either directly or indirectly affect" the two remaining partners (referred to in the quotation below as "the father" and "the half-brother"). In his judgment COTTON LJ mentioned that counsel had referred to Jacoby v Whitmore supra, and went on to say (at 388):

> "... but in my opinion there is one great objection to enforcing this covenant, that I do not think it is a covenant the benefit of which would pass with the goodwill to the purchasers, the company. The case to which he referred was a case where there was a contract not to trade within certain limits. That was evidently a covenant in order to protect the business and the goodwill of it, and therefore it was one which would pass with the goodwill to a purchaser of the goodwill; but there is no such absolute covenant here, and, to my mind, it is a covenant which points to the personal benefit of the father and of the half-brother rather than to any protection of the goodwill."

In Heydon The Restraint of Trade Doctrine at 200-201 we find the following comment:

> "Since a covenant protecting goodwill is normally for the benefit of the business rather than its current owner, it can be freely assigned, and will pass to assignees inter vivos and personal representatives whether they are mentioned or not, and whether the assignment is of the whole business or only part of it. These are the general rules; they give way to the contrary intention of the parties. But there is a presumption of assignability, for to construe goodwill covenants as personal only 'is to deprive them of much, if not most, of their value. The seller expects a better price, and the buyer is willing to pay a better price, than the business would command without it. But the business, when once purchased, is worth on the market only what the owner can reasonably hope to sell it for, and if he cannot sell it, without destroying its protection against competition by the man who created and built it up, he is quite sure to suffer loss.' Examples of the parties expressly indicating a different intention are agreements not to compete while the buyer owns the business, or not to compete 'in opposition to Robert F. Shaw, Jr.,' or, by a retiring partner, not to act so as to 'affect the continuing partners.'"

In practice a purely personal restraint will no doubt be the exception, not the rule. Ordinarily a

restraint of trade agreement is entered into for the benefit of the business. In such a case the benefit of it is incidental to the business, and part of its goodwill. As such the benefit will ordinarily pass to the purchaser of the goodwill, that is to say, if no contrary intention of the parties appears, and all other things being equal. Ultimately, what one is dealing with here, is an inference of fact as to the intention of the parties. Hence the observation of FARWELL J in Townsend v Jarman supra, in the passage quoted above, that:

> "... the inference ... was irresistible that in conveying the goodwill the grantor intended to convey and the grantee to obtain the whole of the benefit and protection of everything incident or beneficial to the goodwill."

If it appears, then, on the facts, that the benefit of a restraint agreement forms part of the goodwill of a business which is sold, and is thus intended to pass to the purchaser, how, in the eyes of

the law, is that benefit transferred to the purchaser? What I have been referring to as "the benefit" of an agreement in restraint of trade, pertaining to a business, is, in the eyes of the law, the contractual right to enforce the restraint. It vests in the owner of the business. He is the creditor in respect of it. When he sells the goodwill of the business, the merx embraces that contractual right. We have, therefore, a sale of the contractual right, or claim. In our law, the transfer of a contractual right, or claim, by the creditor to another person takes place by means of a cession of the right. In Johnson v Incorporated General Insurances Ltd 1983 (1) SA 318 (A) at 331G-H JOUBERT JA referred to the two elements involved in a cession of a right as the "agreement of transfer" and the "obligatory agreement" (the latter may also be referred to as the "obligationary agreement" - see Scott The Law of Cession (2nd ed) at 59 note 1). Applying that terminology to the situation now being

discussed, the obligatory agreement is the sale of the goodwill, including as it does the contractual right, while the transfer agreement by which the right is conveyed to the purchaser, is constituted by the delivery by the seller, and the acceptance by the purchaser, of the physical possession of the business, pursuant to the sale. The incorporeal assets comprising the goodwill are incidental to the business itself and they are transferred together, in the intendment of the law. In the context of a situation like the one now under discussion, and in accordance with modern trends of thought, I am convinced that nothing more is required by law to render the cession effective as between cedent and cessionary, whatever theories may be advanced in other contexts (pace Scott op cit at 27-44). On the other hand, the remark in Coetzee v Eloff supra, quoted earlier, that the sale of the goodwill was "quite sufficient ... to effect such cession", should be read subject to what has been said

above.

It remains to apply the views set forth above to the facts of the present case. Doing that, the results are (I hope) self-evident. The restraints imposed on the appellants by clauses 7 and 8 of their contracts of employment were clearly agreed upon for the benefit of the business of Carapax CC. They were incidental to that business and formed part of its goodwill. The contractual right to enforce them, which vested in Carapax CC, was sold to the respondent, as part of the goodwill. The cession of the right was effected together with the delivery of the business by Carapax CC to the respondent, pursuant to the sale. The benefit of the restraints passed from Carapax CC to the respondent, as a matter of fact, since the evidence shows that there was an effective cession of the right by Carapax CC to the respondent, in accordance with the requirements of the law.

That disposes of the first two submissions of counsel for the appellants. Before I turn to the third one, there is a further aspect of the matter to which I should refer briefly, for the sake of completeness. As was mentioned earlier, the appellants allege that they were told that their conditions of employment would change when the business was transferred to its new owner, and that this was unacceptable to them. In November 1988 the second appellant was told by those in control of the business that he should leave his employment immediately, which he did. On this basis the point was made in the written heads of argument for the appellants that Carapax CC had repudiated its obligations under the contracts of employment, that the appellants had accepted the repudiation, and that the restraints were accordingly not enforceable against them. The response in the written heads of argument for the respondent was a contention that the facts relating to the alleged repudiation and the acceptance

of it were irrelevant. For this contention reliance was placed on the decision in Capecan (Pty) Ltd T/A Canon Western Cape v Van Nimwegen and Another 1988 (2) SA 454 (C), a case which concerned the enforcement of an agreement in restraint of trade against an employee, following upon the latter's unlawful dismissal. In argument before this Court there was some debate about the correctness or otherwise of the reasoning in the judgment in that case. However, in the course of the argument counsel for the appellants informed us that he could not pursue the contention that, on the facts, there had been a repudiation of the employer's obligations, or that the appellants' employment had been unlawfully terminated. Counsel's attitude was right. The evidence on record shows that the appellants' contracts were terminated by mutual agreement. They are, therefore, in the same position as if their contracts had been terminated on one month's notice, as provided for. Accordingly I

expressly refrain from expressing any view on the correctness of the decision in the Capecan case supra.

The third submission advanced by counsel for the appellants was that the right to enforce the restraints could not validly be ceded without the consent of the appellants. Although counsel spent some time in developing the submission, I propose to dispose of it briefly. The thrust of the argument was that the contracts of employment were so personal in nature that they involved an element of delectus personae. It was said that one must have regard not only to the nature of the services that the appellants were obliged to render, as set forth in the contracts, but to the whole of the relationship between the employer and the employees. For instance, counsel said, the employees could expect that their conditions of employment with Carapax CC would not be changed to their detriment; they could expect that their beneficial remuneration by way of commissions would not be replaced by a less

advantageous salary; that their entitlement to leave would not be curtailed; that, in the ordinary course of events, their contracts would not be terminated on notice; and so forth. All these expectations, counsel urged, would be dashed if Carapax CC were entitled to cede its rights under the contracts to a stranger, without the appellants' consent.

In my view the argument is untenable, in the face of the recent decision of this Court in Densam (Pty) Ltd v Cywilnat (Pty) Ltd 1991 (1) SA 100 (A). What was said there, at 112A-113I, may be paraphrased briefly as follows: for the purpose of deciding whether a debtor's consent is required to a cession of the creditor's right against him, regard must be had to the debtor's obligation which is the counterpart of the right in question, in order to assess whether it would make a difference to the debtor if the right is enforced against him by the cessionary, in place of the cedent. In the present case, the obligation of the

appellants with which we are concerned, is the obligation not to trade in the manner specified in the restraint clauses, an obligation which comes into operation after the termination of the contracts of employment. It can make no difference at all to the appellants whether the right to enforce compliance with that obligation is exercised by the cedent, Carapax CC, or the cessionary, the respondent. Counsel's submission is rejected.

Finally, it remains to deal with a subsidiary argument raised by counsel for the appellants. It relates to written agreements entered into by each of the appellants at the time when they left their employment, with Shaw and Minnitt. (According to the latter, they were acting at the time on behalf of the respondent, which is borne out by the fact that the respondent is named in the agreements as the other party to them; the appellants say that they did not notice that and that they thought they were dealing

with Carapax CC; but there is no need to pursue this aspect of the matter.) I mentioned earlier that, when the second appellant left in November 1988, he threatened to take his customer quotations with him, and that the ensuing dispute was resolved by means of an agreement. In terms of the agreement, the second appellant relinquished "all benefits and rights to quotations written by himself but not signed by client", in consideration of which he was paid R10 000,00. The agreement then records that the second appellant:

> "agrees that existing quoted clients cannot be approached by himself for a period ending 30/6/89."

The first appellant entered into a similarly worded agreement when he left in February 1989.

The argument for the appellants was that these agreements operated as a novation of the restraint provisions contained in the contracts of employment. In my view the argument is not open to the

appellants. There is no hint whatever in their affidavits, filed in opposition to the application, that they would seek to rely on a defence of novation; the agreements were not referred to in that context at all. The respondent was not alerted to such a defence and it cannot be surmised that, had it been so alerted, it would not have been able to put forward relevant evidence to controvert the defence. But, in any event, on the papers as they stand I am satisfied that the argument based on novation is without merit. It is not enough that the provisions of the agreements to some extent overlap the provisions of the restraint clause. At the time when the parties entered into the agreements there was a specific dispute relating to the appropriation of customer quotations which required to be resolved, quite apart from the general restraints. For novation, it must be shown that the parties intended to extinguish the existing obligations arising out of the restraint provisions in the contracts of

employment. It is impossible to find for the appellants on that score.

The appeal is dismissed, with costs.

Such costs include -

(a) the costs flowing from the employment of two counsel in the appeal;

(b) the costs of the application for leave to appeal in the Court a quo; and

(c) the costs of the application to this Court for leave to appeal.

A.S. BOTHA JA

SMALBERGER JA

MILNE JA

F H GROSSKOPF JA

KRIEGLER AJA

CONCUR