CASE NO. I 401/96

IN THE HIGH COURT OF NAMIBIA

ko paul Shepal
trust

HERMAN KiiHN **PLAINTIFF**

versus

BENJAMIN LEVEY &

1 OTHER **DEFENDANTS**

CORAM: GIBSON, J.

Heard on: 1996.05.28

Delivered on: 1996.09.10

JUDGMENT

GIBSON, J.: The plaintiff issued a summons against the defendant seeking payment of the sum of N$24 000 with interests and costs. The action arises from an agreement of sale of a business known as Transport Carriers and Consultants (Pty) Ltd of Windhoek. The plaintiff's case is that he has performed his obligations under the agreement, but that out of the purchase price of N$36 000 the defendants only paid the first instalment of N$12 000, that after this payment the defendants, in breach of the agreement, stopped payment of the remaining postdated cheques, being two cheques in the amount of N$12 000 each.

The defendants filed a notice of intention to defend and the plaintiff launched his application for summary judgment saying that the defendants have no bona fide defence, that the intention to defend is filed purely for the purposes of delay.

In a long and detailed affidavit the defendants deny that they have no bona fide defence to the plaintiff's action or that the opposition is filed merely to buy time. Defendants deny that they are indebted to the plaintiff as claimed. The defendants admit that there was an agreement between themselves and the plaintiff. The defendants assert that the agreement was partly in writing and partly oral, that it was contained in Annexures "A", "B" and further orally amplified to include the terms that the plaintiff would be subject to a restraint of trade as evidenced by the plaintiff's signed undertaking dated 12th October, 1995 in Annexure "C" to the opposing affidavit.

The defendants made the allegations, at paragraph 8 of their opposing affidavit, this way:

> "It was further agreed that we would take over the business by paying Plaintiff the sum of N$36, 000.00 on 10 October 1995 (N$12,000.00), 1 November 1995 (N$12,000.00) and 1 December 1995 (N$12,000.00). We gave Plaintiff two post-dated cheques for the amount. We orally agreed to write off the company's abovestated indebtedness to us in exchange for the company's name and its goodwill (including the retention of company's active clients) Plaintiff undertook to resign as director of company and to appoint the new shareholders, us, as directors (which was duly done by company resolution). See Annexure "B"."

The defendants also say that in terms of the agreement the plaintiff was restrained from doing or entering into a related business in competition with the company for a period of 36 months commencing on 10th October, 1995, in the Republic of South Africa and Namibia with special reference to clients or customers of the plaintiff's company during

the previous 12 months. The defendants conclude by saying this restraint of trade agreement was a material term of the agreement, but plaintiff in breach of the reciprocal obligations, continued and/or commenced to trade as Kiihn and Partners in competition with his former company in a related business and with the active clients of that company, for example Atlas Copco and Gideon de Wet of Veronica Farm. As a result of the plaintiff's breach the defendants suffered loss, of clients, turnover and business. The defendants give specific figures for October, November, December and January which show a downward monthly turnover from N$150 000 to N$37 830.07 and a slight upturn to N$68 929.41 in January 1996.

The plaintiff attacks the opposing affidavit filed by the defendants. It was submitted on behalf of the plaintiff that the affidavit does not comply with Rule 32(3)(b) of the Rules of the High Court, in that it does not fully disclose the nature and grounds of this purported defence in the form of their counterclaim and the material facts relied upon as required by Rule 32.

Rule 32(3) requires that the defendants should,

> "Satisfy the Court by affidavit that he or she has a bona fide defence to the action, such affidavit or evidence shall disclose fully the nature and grounds of this defence and the material facts relied upon therefor."

The meaning of the word "fully" as used in the above Rule and its predecessors was defined in Maharai v Barclays

National Bank Limited, 1976(1) SA 418 (A) at p. 426, where the learned Judge of Appeal Corbett, said:

> "The word 'fully' as used in the context of the rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the Court to decide whether the affidavit discloses his defence and completeness to enable the Court to decide whether the affidavit discloses a bona fide defence . . . At the same time the defendant is not expected to formulate his opposition to the claim with the precision that would be required of a plea; nor does the Court examine it by the standard of pleadings."

I would go along with the plaintiff's criticism that the defendants do not disclose fully the defence and the material facts upon which it is based only where this refers to the defendants' reference to their claim that the plaintiff's company owed an old and unpaid debt to the defendants' partnership. The debt is said to have originated in a set-off but which is not described, and is said to have been in an amount of money, which is again not disclosed. This defence however seems to have been mentioned in passing only. It was not relied upon in the heads of argument which deal with two defences being the exceptio non adempleti contractus and an illiquid counterclaim for damages.

It is agreed by both sides that a counterclaim can form the basis of a good defence in law, if it is clearly and well-pleaded. Crede v Standard Bank of South Africa Ltd, 1988(4)

SA 786 E.

So I now turn to consider the defendants' claim that the exceptio non adempleti contractus is available to them as a defence, and, that they have a counterclaim for damages against the plaintiff.

As I see it the defendants' case depends on whether the restraint of trade clause is valid and enforceable and nothing else. The submission is that the plaintiff's undertaking to be bound by the restraint clause followed the written agreements, annexed to the opposing affidavits as "A" and "B".

Annexure "A" witnesses the sale of business at N$36 000 excluding debtors and creditors including fixed assets (listed), equipment (listed), fixed assets on lease (listed), deposit for rented premises, company name registration and customers and concludes with the defendants as the new company directors and the plaintiff's resignation which is noted. The annexure is signed by the plaintiff and dated 10th October, 1995.

Annexure "B" is the resolution of the directors dated 10th October, 1995 accepting the resignation of plaintiff as director and approving the appointment of the defendants in his place. It also notes the transfer of the plaintiff's company shares to the defendants.

Annexure "C" is also dated 10th October, 1995. But it was

signed by the plaintiff on 12th October, 1995. The defendants say that Annexure "A" and "B" were orally amplified to contain the terms that the plaintiff would be subject to a restraint of trade as evidenced by Annexure "C". The defendants state in their affidavit that the purpose of the undertaking in the restraint of trade agreement was to prevent the plaintiff from causing damage to the company and its new shareholders, that this was expressly discussed with the plaintiff before he signed it. The defendants state further that since the commencement of the negotiations in August, 1995 the plaintiff gave them verbal assurances that the defendants need not fear any competition from the plaintiff because he was leaving the transport business in order to manage a guest farm.

Because of the obvious importance of Annexure "C" in this case it is essential to set out the whole of this document. The document is headed "Restraint of Trade":

> 1. 1.1 HERMAN HORST DIETER KiiHN, Identity Number 591218 0100 27 4, or no two or more erstwhile Shareholders of the Company shall be entitled to enter into a related business together, either directly or indirectly, whether as partners, directors or shareholders in a company or in any other way, within a period of 3 (THREE) calender years of the date upon which the last of them shall have ceased to be an employee or shareholder (whichever may be the later) of the Company.
>
> 1.2 The restraint shall be restricted to:
>
> 1.2.1 A business or business which competes with the Company or its subsidiary/ies in any business carried on by it.
>
> 1.2.2 The then existing clientele

of the Company as per its active client listing. Active client listing to be interpreted to read those clients, their holding companies and subsidiaries who has been dealing with the Company during the 12 month period prior to the erstwhile Shareholder/s leaving the employ of the Company.

1.2.3 The Shareholders acknowledge that they regard this restraint as fair and reasonable in every respect for the protection of the business of the Company.

1.2.4 The restraint of trade clause shall only be applicable to R S A and Namibia for a period of 38 (THIRTY SIX) months commencing the 10th of October 1995."

The purpose of the wording set out immediately below the heading can be implied from the title above. But the first paragraph, namely 1.1.1 seems to be contradictory. It is at variance with the ordinary understanding of a restraint covenant. Mr Smuts, who appeared for the plaintiff, has summed up the effect of paragraph 1.1.1. Mr Smuts submitted in his heads of argument that "the purported agreement is incomprehensible, that it does not contain an obligation on the part of the plaintiff in its formulation. I agree with the submission. The meaning of the words is difficult to determine because the language is unclear. However it may be argued that it is possible to construe the document so as to render it effective and to give effect to the intention of the parties to incorporate a restraint clause. The context in which clause 1.1.1 is contained may also be crucial, nestled as it is between the subtitle at the top

and paragraphs 1.2, 1.2.1 up to 1.2.4 that spell out the parameters of the restraint clause to prevent the designated competition. A businessman may be surprised that a purchase of a business and its goodwill promptly gives carte blanche to the seller to trade in competition.

Annexure "C" was undoubtedly drawn up by all the partners with a view that it should hame commercial efficacy in order to protect the business which the Plaintiff had sold to the defendants. The fact that Annexure "C" was drawn on the same date as Annexure "A", the sale agreement, and the resolution Annexure B, the assumption of directorships by the defendants, shows the importance that the parties attached to it and that it was part and parcel of the whole agreement. The assertion by the defendants that there were discussions with the plaintiff during which the plaintiff was made aware of the defendants' requirement that the plaintiff should give an undertaking not to enter into competition with the company he had just sold seems to be supported by the contemporaneous nature of the three documents, Annexures "A", "B" and "C".

If I accept that this was the background in which the restraint clause came to be drawn up I do not think that it would be easy to dismiss Annexure "C" as nothing but a meaningless document serving no purpose. The heading of Annexure "C", in my view says a great deal. Further, it is confirmed as to its purpose by the contents of its paragraphs 1.2, 1.2.1 to 1.2.4.

As to what to do about Annexure "C" and its indeterminate meaning, the words of Colman, J. in Burroughs Machines Ltd v Chenille Corp SA Ltd. 1964(1) SA 669 seem apposite. The learned Judge said at page 670,

> " . . . . I must, I think, have regard to the fact that exhibit 'A' is a commercial document executed by the parties with a clear intention that it should have commercial operation. I must therefore not lightly hold the document to be ineffective. I need not require of it such precision of language as one might expect in a more formal instrument, such as a pleading drafted by counsel . . . . . "

It is obvious that Annexure "C" is a document of some commercial importance. The background in which it was drawn up on the same date as the sale agreement, and its heading cannot be ignored. In my opinion the defendants' assertions in their opposing affidavit verified in Annexures "A", "B" and "C" are enough material to indicate the defence relied upon and its basis. Rule 32(3) (b) is therefore fully complied with. Therefore the defendants are entitled to go to trial to establish whether or not the defence of exceptio non adempleti contractus is properly raised, and, against the plaintiff and to see whether their claim that the plaintiff should comply with his undertaking in Annexure "C" before the defendants can be made to pay the full purchase price has substance. The principle is thus stated in B K Tooling Eiendoms (Bpk) v Scope Precision Engineering, 1979(1) SA 391, in the heading:

> " . . . . when a creditor in a reciprocal contract is prevented from fully performing his own counter-performance by the failure of the other party's necessary cooperation he, despite his own

> incomplete performance, can claim performance by the other party, but . . . subject to reduction of the performance claimed, namely by the costs which the creditor saves in that he does not have to perform fully in his own counter-performance."

I think that if the defendants prove that, there was an enforceable restraint clause, that the clause was reasonable in terms of the interests it sought to protect, reasonable in regard to the time and place during which and over which it operated, and the parties are shown to have been in an equal bargaining position at the time of contracting, the defendants would have every right to cross-examine the plaintiff in order to get an explanation about the activities of his company Kuhn and Co (Pty) Ltd and whether or not such activities compete with the plaintiff's former company. In the result the defendants have established a triable issue, therefore the application for summary judgment is bound to fail.

It is ordered that the application be and is hereby dismissed with costs.

GIBSON, JUDGE

ON BEHALF OF THE APPLICANT:	ADV D F SMUTS
Instructed by:	Diekmann & Associates

ON BEHALF OF FIRST AND SECOND DEFENDANT:	ADV J J SWANEPOEL
Instructed by:	R Olivier & Co.