THE COMPETITION APPEAL COURT OF SOUTH AFRICA

Case No: 155/CACOct2017

In the matter between

DAWN CONSOLIDATED HOLDINGS (PTY) LTD	**FIRST APPELLANT**
DPI PLASTICS (PTY) LTD	**SECOND APPELLANT**
SANGIO PIPE (PTY) LTD	**THIRD APPELLANT**

and

THE COMPETITION COMMISSION	**RESPONDENT**

Coram: Davis JP and Rogers and Boqwana JJA

Heard: 5 April 2018

Delivered: 4 May 2018

JUDGMENT

Rogers JA (Davis JP and Boqwana JA concurring)

Introduction

[1] The question in this appeal is whether, as the Tribunal found, a non-compete clause in a shareholders agreement contravened s 4(1)(b)(ii) of the Competition Act 89 of 1998 because it was a restrictive horizontal practice by which markets were

divided. The shareholders agreement was concluded between the first appellant, Dawn Consolidated Holdings (Pty) Ltd (Dawn),[1] and the Warplas Share Trust (WST) in respect of the third appellant, Sangio Pipe (Pty) Ltd (Sangio). The second appellant, DPI Plastics (Pty) Ltd (DPI), is Dawn's wholly owned subsidiary.

[2] The shareholders agreement was concluded in April 2007. The context was a transaction in which Dawn acquired a 49 per cent stake in a plastic pipe manufacturing business previously wholly owned by WST.[2] For purposes of the transaction, the business was transferred to a new company, Sangio, in which Dawn held 49 per cent and WST 51 per cent. It was accepted by all concerned that this transaction was not a notifiable merger.

[3] In January 2014 Dawn notified to the Commission a merger in terms of which it was to become the sole shareholder of Sangio. In the context of the merger notification, the Commission learnt of the shareholders agreement and the non-compete clause. Although the merger was approved, the Commission initiated a complaint into the question whether the non-compete clause, which was operative from April 2007 until the approval of the merger in 2014, violated s 4(1)(b)(ii).

[4] The Commission referred the complaint to the Tribunal. Unusually, the Commission was content to argue the case before the Tribunal on the basis of the affidavits. The Commission's founding affidavit did little more than allege the conclusion of the shareholders agreement and direct attention to the offending clause. The answering affidavit was sworn by Mr JA Beukes, who was appointed as the Chief Operating Officer of the Dawn Group Trading Division in October 2006, as the Chief Operating Officer of the Dawn Group as from 2008 and its Chief Risk and Compliance Officer as from March 2010. The Commission did not file a replying affidavit.

[5] In their heads of argument before the Tribunal, the Commission's counsel made reference to information appearing in the merger filing. This took the (then)

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[1] The named party was Distribution and Warehousing Network Ltd (DWN) or its nominee. DWN is Dawn's holding company. Since the parties treated Dawn as the contracting shareholder, it was presumably nominated by DWN.
[2] The business was conducted by an entity called Warplas CC.

respondents by surprise. The Tribunal ruled that although regard could be had to the merger documents, the respondents should be afforded an opportunity of filing a supplementary answering affidavit to deal with the points raised by the Commission. Beukes made a supplementary answering affidavit. Again there was no replying affidavit.

[6] Dawn is a wholesale trader and distributor of various hardware products including plastic pipes. In early October 2006 Dawn acquired DPI, a pipe manufacturer. At that time DPI manufactured large quantities of polyvinyl chloride (PVC) pipes and injection moulded fittings and small quantities of 'regular' high density polyethylene (HDPE) pipes. (DPI also made corrugated HDPE piping, which is a niche agricultural product. References in this judgment to HDPE piping is to regular, not corrugated, piping.)

[7] DPI served markets in the Western Cape. At the time of the acquisition Dawn had no experience in the manufacture of plastic pipes but wished to backward-integrate into that field. Insofar as HDPE pipe manufacture was concerned, the acquisition was not a success because the two extruders DPI used to make this piping were out of date and inefficient. Dawn also established that there was a risk of contamination if HDPE pipes were made in the same facility as PVC pipes. Dawn thus decided to mothball the two extruders.

[8] Although direct entry into HDPE pipe manufacturing through the acquisition of new generation extruders was a possibility, Dawn decided rather to acquire an interest in an existing business, which it did by acquiring a 49 per cent shareholding in Sangio. The latter's business had been started by WST's Mr Gary Warren in 1997. Although Warren's business showed good growth, it was a relatively small player, focused mainly on the markets in KwaZulu Natal and Gauteng. It had a very small presence in the Western Cape, and a substantial part of its Western Cape sales were to be Dawn group. In order to grow, Warren's business needed access to capital and to an efficient nationwide distribution system. A partnership with Dawn would enable these needs to be met.

The shareholders agreement

[9] Dawn's acquisition of a 49 per cent shareholding in Sangio took place in April 2007. The financial arrangements by which Sangio bought Warren's business and by which Dawn and WST acquired their 49 per cent and 51 per cent shareholdings respectively in Sangio do not appear from the papers but it is not the Commission's case that these arrangements were concluded otherwise then at fair value.

[10] The shareholders agreement concluded in April 2007 included among its terms the following:

(a) Dawn and WST were obliged to contribute R5.5 million each to Sangio on loan account to settle the cash component of the price payable by Sangio for the purchase of Warren's business.

(b) WST and Dawn were entitled to appoint three directors and two directors respectively to Sangio's board. At least one director from each camp had to be present in order for the board to be quorate.

(c) By way of typical minority protections, Sangio was precluded from taking certain actions unless Dawn consented in writing or unless the board unanimously agreed. Among the identified actions were the engagement by Sangio in business activities in fields other than those associated with the company's business as at the signature date or any material change in the nature or scope of its business.

(d) If Dawn or WST wished to sell its shares in Sangio, the other shareholder had a pre-emptive right buy them. A similar arrangement applied where Dawn or WST underwent a change of control.

(e) On the fourth anniversary of the effective date (or earlier if Warren ceased to be employed by Sangio), Dawn was entitled to buy WST's shares and loan account in Sangio.

(f) If, on or before the fourth anniversary, Dawn concluded that Sangio was not performing to its expectations, it was entitled to require WST to buy its shares.

(g) No shareholder was entitled to hold out to any third party that the relationship between the shareholders was a partnership, joint venture, consortium or other similar relationship.

[11] Clauses 19 to 21 contained restraint provisions, clause 20 being the one attacked by the Commission:

(a) Clause 19 applied if Dawn exercised its option to buy WST's shares. In that event, WST and Warren were restrained, for a period of three years from the date of exercise, from being interested or engaged in the manufacturing or distributing of plastic piping systems and components.

(b) Clause 20 applied as from the effective date and for as long as Dawn or its associates held shares in Sangio. During that period Dawn and its subsidiaries were not entitled to manufacture HDPE piping in South Africa and were required to procure all their South African HDPE piping requirements from Sangio. (Corrugated piping was excluded from this restraint.)[3]

(c) Clause 21 recorded that the shareholders, by virtue of their association with Sangio, would become possessed of and have access to Sangio's trade secrets and confidential information. In order to protect Sangio's proprietary interest in its confidential information, the shareholders were precluded – while they were shareholders and thereafter – from using or disclosing any of the confidential information other than as might be required to comply with the law or to enforce their rights as shareholders in terms of the agreement.

The issues

[12] Section 4(1) applies to an agreement between parties in a 'horizontal relationship'. The latter expression is defined as meaning 'a relationship between competitors'. One of the questions debated in the Tribunal and before this court was whether, when the shareholders agreement was concluded, a horizontal relationship existed between DPI and Sangio.

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[3] The clause reads thus:
'20. From the effective date and for as long as Dawn or its associates hold/s shares in the company, Dawn will procure that –

20.1 neither it nor any of its subsidiaries will manufacture HDPE piping, other than corrugated HDPE piping, in the Republic of South Africa;

20.2 Dawn and its subsidiaries will procure all their South African HDPE piping, other than corrugated HDPE piping, requirements from the company,

provided that the company is able to fulfil the said requirements timeously and in full at competitive prices.'

[13] The other main question on which counsel focussed their submissions was the characterisation of clause 20. In isolation, clause 20 could be seen as dividing markets because Dawn agreed that it and its subsidiaries (one of which, DPI, was involved in the manufacture of PVC pipes) would stay out of the market for manufacturing HDPE pipes. In *American Natural Soda Ash Corporation v Competition Commission of South Africa* 2005 (6) SA 158 (SCA) the Supreme Court of Appeal said, with reference to s 4(1)(b), that it was necessary to establish whether the character of the conduct complained of coincided with the character of the prohibited conduct, the former being a factual enquiry, the latter a matter of statutory interpretation. Conduct, which on its face may seem to contravene the prohibition, may be found not to do so pursuant to a proper process of characterisation. The process of characterisation was applied by this court in *Competition Commission v South African Breweries Ltd & others* [2014] 2 CPLR 339 (CAC) paras 25-47 with particular reference to the distinction drawn in United States antitrust law between per se violations and conduct tested by the rule of reason.

[14] Since the two competition law issues – the existence of a horizontal relationship and the characterisation of the impugned conduct – involve factual matters, a preliminary issue addressed by counsel was the approach to the evidence. In the present case I do not think, in the event, that much turns on this but it is necessary to touch on it because of the Tribunal’s approach.

The assessment of the affidavit evidence

[15] The Commission criticised Beukes’ answering affidavits for its supposed lack of detail and the absence of corroborating documents. Some of these criticisms found favour with the Tribunal. In my view, the Tribunal erred in rejecting parts of Beukes’ affidavits as unsubstantiated or improbable.

[16] Where a case is argued before the Tribunal solely with reference to the affidavits (other than a case for interim relief), the Tribunal should apply the same test as civil courts when final relief is sought on motion, namely that the respondent’s version is to be accepted unless a purported dispute of fact is not real or genuine or bona fide or unless the respondent’s version is so far-fetched or

clearly untenable that the court is justified in rejecting it on the papers (*Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 (3) SA 623 (A) at 634E-635C). In *National Director of Public's v Zuma* 2009 (2) SA 277 (SCA) Harms DP put the matter thus (para 26):

'Motion proceedings, unless concerned with interim relief, are all about the resolution of legal issues based on common cause facts. Unless the circumstances are special they cannot be used to resolve factual issues because they are not designed to determine probabilities. It is well established under the Plascon-Evans rule that where in motion proceedings disputes of fact arise on the affidavits, a final order can be granted only if the facts of erred in the applicant's . . . affidavits. Which have been admitted by the respondent . . ., together with the facts alleged by the latter, justify such order. It may be different if the respondent's version consists of bald or uncreditworthy denials, raises fictitious disputes of fact, is probably implausible, far-fetched also clearly untenable that the court is justified in rejecting them merely on the papers.'

[17] Complaint proceedings in the Tribunal are of a hybrid nature. They must be initiated by affidavit. Provision is made for answering and replying affidavits. In terms of the Tribunal's rules,[4] the founding and answering affidavits must contain a 'concise statement' of the grounds of the complaint or the grounds of opposition and 'the material facts or points of law' on which the party relies. An answering affidavit must also admit or deny each ground and each material fact contained in the founding affidavit. Usually the matter then goes to trial, preceded by directions for discovery, the filing of witness statements and so forth. Since a trial is envisaged, the affidavits rarely contain all the evidence or annex all the documents available to the litigant and it is doubtful whether a statement of the 'material facts' calls for all such evidence.

[18] In the present case the Commission could have insisted on the usual trial, in which case the respondents would have been required to make discovery and file witness statements. The Commission could have cross-examined Beukes and other witnesses. The Commission chose not to follow this course. Given the inquisitorial nature of the Tribunal's proceedings, the Tribunal – if it was sceptical or dissatisfied

[4] Rules 15 and 16.

about the answering affidavits – could have required oral evidence but it did not do so.

[19] Beukes' first affidavit was filed at a time when it was not known that the case would be argued on the papers and his second answering affidavit was filed only after the Commission's heads of argument were served. Apart from the fact that an assertion of fact cannot be rejected in motion proceedings merely because corroborating documents are not annexed, the affidavits in complaint proceedings, as I have said, cannot be expected to contain all the evidence which the party would adduce if there was a trial. Importantly, the Commission did not file replying papers. Although the Tribunal's rules provide that an applicant who does not file a replying affidavit is taken to deny the allegations in the answering affidavit,[5] that is a matter of pleading, which would be relevant if the case went to trial. The deemed denial does not constitute evidence.

Horizontality

[20] In his first answering affidavit, Beukes stated that negotiations with Warren began in early 2007. Warren was concerned that Dawn, by becoming a significant shareholder of Sangio, would gain insights into his business and access the skills, know-how and goodwill his business had developed and that Dawn might be able to use this to compete against Sangio. It was on his insistence that clause 20 was included. Beukes said that from Dawn's perspective clause 20 was unnecessary because it had decided, unilaterally, to withdraw from the manufacture of HDPE pipes and rather to invest in Sangio as its exclusive supplier. Warren nevertheless felt vulnerable and Dawn had no objection to the clause.

[21] Beukes denied that Dawn/DPI and Sangio were competitors. Dawn had decided to cease DPI's manufacture of HDPE pipes and had mothballed the two HDPE extruders. Although DPI made PVI pipes, Sangio was not in that market.

[22] Counsel for the Commission subjected Beukes' affidavit to close analysis on the question as to when exactly the mothballing decision was taken and when

[5] Rule 17.

exactly Dawn decided to invest in an existing HDPE business rather than buying new HDPE equipment. This was one of the respects in which his affidavit was said to be vague. It is clear enough, I think, that according to Beukes the mothballing decision was taken before Sangio was identified as a potential partner. There were operational reasons, unrelated to an investment in Sangio, which prompted the mothballing.

[23] Nevertheless, I am willing to assume in favour of the Commission that, immediately prior to making its investment in Sangio, Dawn/DPI were competitors of Warren's business and thus in a horizontal relationship. Both sides accepted, correctly, that the word 'competitor' includes a potential competitor. A potential competitor, of course, does not mean merely a company with sufficient resources to enter a market. The potentiality must be based on realistic grounds, not just a theoretical possibility. In the present case, Dawn was a distributor of plastic piping and was interested in backward-integration. It had the incentive and resources to enter the market. It had tried to do so through the acquisition of DPI, though the latter's business was focused on PVC piping rather than HDPE piping. If Dawn had not found a suitable business to invest in, its direct entry into the HDPE piping market would have been more than a mere theoretical possibility.

[24] However, Dawn's decision to invest in Sangio terminated its status as a potential competitor in the HDPE piping market, at least for as long as it remained a shareholder of Sangio. Having invested in Sangio and having committed to provide loan funding to that company, Dawn would have had no commercial incentive to undermine Sangio's business by competing with it. As Beukes said, Dawn had one of two options – to enter the HDPE piping market directly by acquiring new equipment or by investing in an existing HDPE piping manufacturer. Having chosen the latter, the former ceased to be a realistic possibility. Of course, if Dawn ceased to be a shareholder of Sangio, the potential for direct entry into the market would have re-emerged. That, however, is not relevant in the present case because clause 20 was only operative for as long as Dawn was a shareholder in Sangio.

[25] The Commission's counsel submitted that the toll manufacturing which DPI undertook for Sangio in 2012/2013, using the mothballed extruders, shows that DPI

was and remained a potential competitor. This was one of the points taken by the Commission in its heads of argument in the Tribunal with reference to the merger documentation. In his supplementary answering affidavit, Beukes denied that the toll manufacturing agreement supported a conclusion that DPI could and would have entered the market independently. In terms of the toll manufacturing agreement, Sangio provided all the raw material to DPI at its own cost and took ownership of all the HDPE piping produced by DPI. It was a risk-free arrangement for DPI, which was simply paid a fee. From Sangio's perspective, it hoped to reduce the cost of supplying HDPE piping to Western Cape customers by producing piping in Cape Town. This was a small market. DPI's production capacity, with its two old extruders, was only about 2 per cent of Sangio's production capacity. In the event, the toll manufacturing arrangement was short-lived: DPI's extruders were so inefficient that Sangio discontinued the arrangement, preferring to transport HDPE piping from KwaZulu Natal to the Western Cape.

[26] In the light of Beukes' uncontested explanation, the temporary toll manufacturing arrangement cannot support a conclusion that DPI remained an actual or potential competitor of Sangio after the conclusion of the shareholders agreement.

[27] Again, however, I am willing to assume in favour of the Commission that Dawn/DPI remained a potential competitor despite the taking of the decision to invest in Sangio. I thus turn to the question of characterisation.

Characterisation

[28] In several merger decisions, the Tribunal has found non-compete clauses in business sale agreements and joint venture agreements to be commercially reasonable and unobjectionable.[6] To the extent that in these and similar cases the parties to the agreement were potential competitors, the question arises as to the legal basis on which the non-compete clauses were found to be permissible. If they

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[6] In the context of sale agreements, see for example *Replication Technology Group v Gallo Africa* [2007] ZACT 99 paras 18-25; *Swanvest 120 (Pty) Ltd v RMB-SI Investments (Pty) Ltd* [2017] ZACT 36 paras 23-24. In the context of joint venture agreements, see *Compagnie Gervais Danone Clover Beverages and Clover SA (Pty) Ltd, Danone-Clover (Pty) Ltd* [2003] ZACT 13 para 8; *Heinz Foods South Africa (Pty) Ltd and Today Frozen Foods* [2003] ZACT 53 paras 13-15.

were a contravention of s 4(1)(b)(ii), the Tribunal would not have the power to approve them. The answer, it seems, must be found in the principle of characterisation. A restraint which is commercially reasonable in the context of the transaction is not characterised as violating s 4(1)(b)(ii).

[29] Support for this approach can be found in European Union competition jurisprudence. In *South Africa Breweries* this court observed that the distinction between the prohibitions in s 4(1)(a) and s 4(1)(b) of our Act broadly mirrors the distinction in United States antitrust law (judicially developed) between horizontal conduct to be tested by the rule of reason and per se violations. This distinction is also found in European Union competition law. Article 101(1) of the Treaty on the Functioning of the European Union (formerly article 81(3) of the European Community Treaty) prohibits horizontal agreements 'which have as their object or effect the prevention, restriction or distortion of competition'. An agreement which is restrictive by object rather than by effect corresponds broadly with the conduct prohibited by our s 4(1)(b).

[30] The European Commission's *Guidelines on the applicability of Article 101 of the Treaty on the Functioning of the European Union to horizontal co-operation agreements* 2011/C 11/01 explain restrictions on competition by object as follows (footnotes omitted):

'24. Restrictions of competition by object are those that by their very nature have the potential to restrict competition within the meaning of Article 101(1). It is not necessary to examine the actual or potential effects of an agreement on the market once its anti-competitive object has been established.

25. According to the settled case-law of the Court of Justice of the European Union, in order to assess whether an agreement has an anti-competitive object, regard must be had to the content of the agreement, the objectives it seeks to attain, and the economic and legal context of which it forms part. In addition, although the parties' intention is not a necessary factor in determining whether an agreement has an anti-competitive object, the Commission may nevertheless take this aspect into account in its analysis. Further guidance with regard to the notion of restrictions of competition by object can be obtained in the General Guidelines.'

[31] The ‘General Guidelines’ mentioned in the last sentence of the quoted para 25 are the *Guidelines on the application of Article 81(3) of the Treaty* 2004/C 101/08 issued by the European Commission on 27 April 2004. Although they relate to the previous treaty, para 19 of the European Commission’s guidelines on article 101 state that the 2004 General Guidelines ‘contain general guidance on the interpretation of Article 101’ and that the new guidelines must be read ‘in conjunction with the General Guidelines’. The provisions of the General Guidelines relating to ‘ancillary restraints’ are of particular relevance in the present case (footnotes omitted):

’29. In Community competition law the concept of ancillary restraints covers any alleged restriction of competition which is directly related and necessary to the implementation of a main non-restrictive transaction and proportionate to it. If an agreement in its main parts, for instance a distribution agreement or a joint venture, does not have as its object or effect the restriction of competition, then restrictions, which are directly related to and necessary for the implementation of that transaction, also fall outside Article 81(1). These related restrictions are called ancillary restraints. A restriction is directly related to the main transaction if it is subordinate to the implementation of that transaction and is inseparably linked to it. The test of necessity implies that the restriction must be objectively necessary for the implementation of the main transaction and be proportionate to it. . .

30. The application of the ancillary restraint concept must be distinguished from the application of the defence under Article 81(3) which relates to certain economic benefits produced by restrictive agreements and which are balanced against the restrictive effects of the agreements. The application of the ancillary restraint concept does not involve any weighing of pro-competitive and anti-competitive effects. Such balancing is reserved for Article 81(3).

31. The assessment of ancillary restraints is limited to determining whether, in the specific context of the main non-restrictive transaction or activity, a particular restriction is necessary for the implementation of that transaction or activity and proportionate to it. If on the basis of objective factors it can be concluded that without the restriction the main non-restrictive transaction would be difficult or impossible to implement, the restriction may be regarded as objectively necessary for its implementation and proportionate to it. If, for example . . . Similarly, if a joint venture is not in itself restrictive of competition, then restrictions that are necessary for the functioning of the agreement are deemed to be ancillary to the main transaction and are therefore not caught by Article 81(1). . ..’

[32] The approach reflected in the General Guidelines strikes me as sensible. The character of a non-compete clause is not to be assessed as if it stood on its own. It must be viewed in the context of the transaction as a whole and the circumstances of the parties when they concluded the agreement. The requirement that the restraint should be objectively ‘necessary’ may, however, be too strict. The appropriate test, in my view, is the following:

(a) Is the main agreement (ie disregarding the impugned restraint) unobjectionable from a competition law perspective?

(b) If so, is a restraint of the kind in question reasonably required for the conclusion and implementation of the main agreement?

(c) If so, is the particular restraint reasonably proportionate to the requirement served?

[33] This test is an objective one. The fact that the parties subjectively believed that a restraint was reasonably required does not suffice. Since the burden of proof in a s 4(1)(b) case rests on the referring party, it is for the Commission or private complainant to prove that these requirements are not met. In other words, where the characterisation of an agreement is in issue, the burden of proof is on the Commission or complainant to establish that the agreement, properly characterised, falls within the prohibition. Depending on the circumstances, there may be an evidentiary burden on the respondents to raise the issue of characterisation but it is unnecessary to go into this question because characterisation was squarely raised.

[34] In the present case, a member of the court asked the Commission’s counsel whether the Commission accepted that the shareholders agreement, leaving aside clause 20, was unobjectionable. Counsel confirmed this, which is in keeping with the Commission’s pleaded case. The same applies, a fortiori, to Dawn’s acquisition of a 49 per cent shareholding in Sangio. The Commission has never alleged that there was anything anti-competitive about that transaction.

[35] We thus have a main agreement which, for present purposes, can be taken to comprehend the sale of Warren’s business to Sangio, the acquisition by Dawn and WST of shareholdings of 49 per cent and 51 per cent respectively in Sangio,

and the conclusion of a shareholders agreement to regulate their relationship. The question then is whether clause 20 was reasonably required for the conclusion and implementation of the main agreement and proportionate to the requirement which the restraint served.

[36] It might be argued that if, as Beukes says, the clause was unnecessary because Dawn had no intention of competing in the HDPE market, the clause was not reasonably required for the conclusion and implementation of the agreement. If that argument were accepted, however, it would lead to the conclusion that, having concluded the main agreement, Dawn/DPI were neither actual nor potential competitors of Sangio, and for that reason the Commission's s 4(1)(b) case would fail.

[37] The more sensible approach, however, is to acknowledge that, although Dawn was unlikely to enter the HDPE pipe manufacturing market for as long as it remained a shareholder of Sangio, WST and Warren could not reasonably have been expected to place their trust solely in the good faith of their partner. They were opening up their business to a well resourced minority shareholder which could notionally go into competition with them. Although the circumstances prevailing at the time the shareholders agreement was concluded may not have made this at all likely, those circumstances might have changed with the passing years.

[38] The Commission's counsel argued that clause 21 contained a sufficient protection against the misuse by Dawn/DPI of Sangio's confidential information and know-how. However, a party which suspects misuse of its confidential information and know-how may struggle to prove that this has occurred. This is why the protection of confidential information has always been accepted in our law as a proprietary interest justifying the imposition of a restraint of trade. In *Reddy v Siemens Telecommunications (Pty) Ltd* [2006] ZASCA 135; 2007 (2) SA 486 (SCA) Malan JA, in the context of an employee restraint, quoted (in para 21) with approval the following passage from the judgment of Lord Denning MR in *The Littlewoods Organisation Ltd v Harris* [1978] 1 All ER 1026 (CA) at 1033c-d:

'It is thus established that an employer can stipulate for protection against having his confidential information passed on to a rival in trade. But experience has shown that it is not satisfactory to have simply a covenant against disclosing confidential information. The reason is because it is so difficult to draw the line between information which is confidential and information which is not; and it is very difficult to prove a breach when the information is of such a character that a servant can carry it away in his head. The difficulties are such that the only practical solution is to take a covenant from the servant by which he is not to go to work for a rival in trade. Such a covenant may well be held to be reasonable if limited to a short period.'[7]

[39] The relationship between Dawn and WST was not unlike the relationship between the Argus group and the Caxton group which featured in *CTP Ltd & others v Argus Holdings Ltd & another* 1995 (4) SA 774 (A), where reciprocal restraints of indefinite duration were found to be enforceable. In the unreported sequel to this litigation, which also found its way to the Appellate Division (*CTP Ltd & others v Argus Newspapers Ltd & another* (215/95) [1996] ZASCA 145 (29 November 1996)), Marais JA explained more fully why the restraint remained enforceable after the termination of the joint shareholding (in what follows, one could read, for the Argus and Caxton groups, the Dawn group and Sangio/WST/Warren respectively):

'Their [the Caxton group's controllers'] concern is easily understandable. By reason of Argus Holdings' acquisition of substantial equity in Afmed (Pty) Ltd, the parent company of Caxton Ltd, they were thenceforth both to be participants in the failure or success of Caxton Ltd. The 1980 agreement made provision for there to be directors from the Caxton group on the Argus group's boards of directors, and for directors from the Argus group to be on the Caxton group's boards of directors. The presence of such representative directors was stated to be essential to the existence of a quorum. It would follow that the Caxton group's confidential information and know-how would have to be shared with the Argus group. A competing enterprise launched by the Argus group, prompted by an ever growing confidence in its ability to stand on its own feet in the Caxton group's field of activity, could damage the Caxton group. . .

Once each was admitted to the fold of the other, the risk of subsequent harmful competition would increase as each learnt more about the operations of the other, and the longer the association between them persisted, the more would be learnt. If the Argus group were to seek to compete with Caxton Limited while the association between the groups persisted, it

[7] See also *BHT Water Treatment (Pty) Ltd v Leslie & another* 1993 (1) SA 47 (W); *International Executive Communications Ltd t/a Institute for International Research v Turnley & another* 1996 (3) SA 1043 (W) at 1055C-1057D.

could no doubt harm its own interest as a participant in the fortunes of Caxton Limited, but it was to be a minority shareholder and it might regard the harm it might suffer as a price worth paying for the profits it could make while so competing. If it sought to so compete after the association ceased, the potential damage to the Caxton group would be no less and, the Argus group's interest in Caxton Limited having ended, the Argus group would cause no harm to itself by so competing.'

[40] Mention may also be made of the European Commission's decision in the case of *Areva SA and Siemens AG* Case Comp/39376 (18 June 2012). Areva and Siemens established a joint venture through a company in which Siemens held 34 per cent and Areva 66 per cent. Because they pooled resources in a new company, the joint venture was notified to the Commission as a concentration and was duly approved in December 2000. In January 2009 Siemens terminated the joint venture by requiring Areva to buy its shares. The contentious issue was whether a non-compete clause, which was to operate during and after the termination of the joint venture, was enforceable when Siemens exited the joint venture. With reference to the ancillary nature of the non-complete clause, the Commission said the following regarding the clause's operation during the currency of the joint venture (para 45):

'Non-compete obligations applicable during the lifetime of the joint venture aim at protecting the individual parent companies' investments, which are "locked in" the joint venture during its lifetime. If the parent companies started to compete against their own joint venture, this could effectively eliminate the existence of the joint venture as such. Only one parent company starting to compete against the own joint venture would increase that parent company's share of profits to the detriment of the other joint venture partner. With the acquisition of sole control over the joint venture by one of its parents, the value of such investments is, however, no longer locked into the joint venture but "re-distributed" between the parent companies. Therefore, such protection then becomes obsolete.'

The Commission went on to hold that a limited restraint for a period of three years was reasonably ancillary to Areva's acquisition of sole control of the joint venture company in 2009.

[41] The Tribunal stated that the shareholders agreement 'put paid' to the argument that clause 20 was a restraint 'in the ordinary course of commercial transactions'. This was said to be so because clause 19, the restraint applicable to

WST and Warren if Dawn were to acquire sole control of Sangio, was an 'ordinary restraint' applicable for a limited period of time in a specified territory. This is a non sequitur. Clause 19 was indeed a commercially reasonable restraint. In the circumstances contemplated by that clause, WST would be selling its 51 per cent shareholding to Dawn. In purchasing sole control of Sangio, Dawn would be reasonably entitled to protect the goodwill of the purchased business by a limited restraint against the seller and by the seller's guiding spirit, Warren. Furthermore, Warren, as the managing director of Sangio, was an employee against whom a limited restraint was justified. The fact that a restraint was reasonably justified in those circumstances does not mean that no other restraints were reasonably required for the transaction. As I have said, the protection of confidential information and know-how is well recognised as a proprietary interest worthy of protection by a restraint of trade. That was the legitimate interest which clause 20 protected.

[42] I am satisfied, in the present case, that a non-compete clause was reasonably required for the conclusion and implementation of the shareholders agreement. Dawn, through its nominees to Sangio's board, would have access to Sangio's confidential information and know-how. Dawn could thereby acquire knowledge and insight into the successful conduct of the business of manufacturing HDPE piping, a business in which it had no experience and expertise at the time the transaction was concluded. The uncontested evidence is that Warren insisted on such a clause, and his conduct in so doing was reasonable, given his legitimate concerns about the potential abuse of Sangio's confidential information and know-how.

[43] As to whether the restraint was proportionate to the legitimate interests served thereby, the restraint was only to operate for as long as Dawn was a shareholder in Sangio. There can be no legitimate objection to the restraint in regard to its duration. Indeed, a restraint of limited duration after Dawn ceased to be a shareholder might also have been acceptable. As to geographic extent, Sangio supplied customers throughout South Africa, although its focus was KwaZulu-Natal and Gauteng. A countrywide restraint was not unreasonable. WST and Warren themselves accepted a countrywide restraint in the circumstances contemplated in clause 19.

[44] My reasoning thus far has focused on the justification for the restraint in clause 20 as a mechanism for protecting the confidential information and know-how mentioned in clause 21. The appellants' counsel submitted that the restraint was also justified on the more fundamental basis that partners are under a fiduciary duty not to compete with the partnership business and that this applies also where the joint venture is conducted through a company, as was the case in *Bellairs v Hodnett* 1978 (1) SA 1109 (A). It was argued that Sangio was effectively a vehicle for a joint venture between Dawn and WST.

[45] The Commission's counsel riposted by referring to clause 9 of the shareholders agreement, which states that no shareholder was entitled to represent or hold out to any third party that the relationship between the shareholders was a partnership or joint venture or other similar relationship. Clause 9 is, in my view, a boilerplate clause, typically inserted into an agreement to ensure that the one party does not attempt to bind the other's credit. I do not think it can affect the substance of the relationship between the parties in the present case, which is to be inferred from the agreement as a whole. The fact that the shareholders were not to hold out to the world that they were partners or joint venturers does not mean that they did not have fiduciary duties to each other.

[46] However, it is unnecessary to express a definite opinion on this additional ground of justification advanced by the appellants. As a fact, clause 20 – which was not a reciprocal restraint but one applicable only to Dawn – found its way into the shareholders agreement because of Warren's concern that Dawn, by being exposed to his business' confidential information and know-how, could be unfairly advantaged if in due course it chose to enter the market in competition with Sangio. That is a sufficient justification for the existence and terms of the restraint.

Conclusion

[47] The Tribunal considered that clause 20 prima facie contravened s 4(1)(b)(ii) and that the respondents had failed 'convincingly' to rebut the prima facie case. Apart from the supposed absence of corroborating documents, the Tribunal held against the respondents that Beukes had 'elected not to testify'. This was a

misdirection. The litigants agreed to argue the case on the papers and the Tribunal chose not to override that arrangement. This said, I do not think that clause 20, read in the context of the agreement as a whole, established a prima facie case of a contravention of s 4(1)(b)(ii). At any rate, having regard to the agreement as a whole and the uncontested evidence contained in Beukes' affidavit, the Commission did not discharge the onus of proving that clause 20, properly characterised, amounted to a contravention of s 4(1)(b)(ii). Since the Commission did not advance an alternative case based on s 4(1)(a), the Tribunal should have dismissed the complaint.

[48] The following order is made:

(a) The appeal succeeds with costs, including those attendant on the employment of two counsel.

(b) The decision of the Tribunal is set aside and replaced with an order in the following terms:

(i) The complaint is dismissed.

(ii) There is no order as to costs.

O L Rogers

Judge of Appeal

APPEARANCES

For Appellants	W Trengove SC (with him G Marriott) Instructed by Nortons Inc, Sandton
For Respondent	D Mpofu SC (with him TL Marolen and I Kentridge) Instructed by Ndzabandzaba Attorneys Inc, Bryanston