IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

Case NO 92/IR/Sep07

REPLICATION TECHNOLOGY GROUP (PTY) LTD Applicant

Versus

GALLO AFRICA LIMITED Respondent

Heard on : 23 November 2007

Decided on : 10 December 2007

Panel : D Lewis (Presiding Member), M Moerane (Tribunal Member) and M Madlanga (Tribunal Member)

DECISION

D LEWIS

INTRODUCTION

[1] This is an application for interim relief brought under section 49C of the Competition Act, 1998 by the Replication Technology Group (Pty) Ltd (**"RTG/the applicant"**) against Gallo Africa Limited (**"Gallo/the respondent"**). Central to this application is a restraint of trade agreement entered into between RTG and Gallo, which RTG contends constitutes market division in contravention of Section 4(1)(b)(ii) of the Competition Act. In arriving at this conclusion, the applicant has placed much reliance on the decision of the Tribunal in *Nedschroef Johannesburg (Pty) Ltd v Teamcor and Others*.[1]

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[1] Case NO. 95/IR/Oct05.

[2] The restraint of trade agreement in question is contained in a Sale Agreement whereby RTG disposed of its shareholding of approximately 40% in Compact Disc Technologies (Pty) Ltd (**'CDT')** to Gallo. Gallo already owned the remaining 60% of CDT, although the company was effectively managed by RTG. Arising from the sale of the shares, CDT thus became a wholly owned subsidiary of Gallo which assumed responsibility for its management.

[3] The relevant portions of Clause 13 of the Sale Agreement read as follows:

> *"13. RESTRAINT*
>
> *13.1. Subject to the Purchaser acquiring not less than the total number of sale shares in terms of this agreement, the Seller undertakes to the Purchaser that for a period of 24 (twenty four) months after the effective date, it will not, without the prior written consent of the Purchaser, render any competing services to such prescribed customer.*
>
> *13.2. The area of restraint referred to in clause 13.1 shall be the Republic of South Africa.*
>
> *13.3. The restrained party acknowledges-*
>
> *13.3.1. that the seller would not have entered into the purchase of the sales shares and the sale claims unless the restrained party had agreed to the restraint contained in the clause;*
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> *13.3.2. that the restraint is the minimum restraint required by the seller to provide protection against unfair competition and that in the circumstances it is fair and reasonable, and necessary that for the protection of the interest of the Seller that the restrained party should be restrained in the manner set out in this clause...."*[2]

[4] In terms of the Sale Agreement *competing services* and/or *prescribed services* mean services which are the same as, similar to or compete with those services rendered by CDT, while *prescribed customer* means any person who is listed as a customer of CDT in Annexure B to the Sale Agreement and who were effectively all customers of CDT at the time the sale agreement was concluded. Clause 13 thus

[2] Although this is an accurate rendition of the restraint clause in the sale of shares agreement, it is obvious that the references to 'the seller' in clauses 13.3.1 and 13.3.2 should be references to 'the purchaser'.

restrains RTG, the seller of the shares in CDT, from competing with CDT, now a wholly owned subsidiary of Gallo, in respect of the sale of designated services to a list of specified customers. Gallo, the purchaser of the shares, thus concluded the restraint in favour of its wholly owned subsidiary, CDT. The 'effective date' is the 31 July 2006. Thus the two year period of the restraint ends on 31 July 2008.

[5] In its Notice of Motion RTG seeks relief in the form of an order interdicting and restraining Gallo from enforcing clause 13 of the Sale Agreement. It asks that the interdict remain in force until the earlier of the final determination of a complaint which RTG has lodged with the Commission or until a date six (6) months from the granting of the relief. The complaint lodged with the Commission alleges that Clauses 2.9 and 13 of the Sale Agreement constitutes a restrictive and/or prohibited practice in terms of section 4(1), alternatively sections 4(1)(b) and 5(1) of the Act. RTG also seek costs.

[6] The Notice of Motion in this application for interim relief formulates the relief sought in the following terms:

> "1. That the respondents be and are interdicted and restrained from enforcing clause 13 of the Sale Agreement...*and/or* from requiring that the applicant abide by aforesaid clause 13 *and/or* from implementing such clause on the basis that such clause constitutes a restrictive *and/or* prohibited horizontal practice as contemplated in section 4(1)(b) of Act No. 89 of 1998.
>
> 2. The relief sought in paragraph 1 above operates and/or remains in force until the earlier of-
>
> > 2.1. a final determination of the applicant's complaint in terms of Act No. 89 of 1998 (and which complaint will be lodged with the Competition Commission simultaneously herewith) that clauses 2.9 and 13 of the aforesaid Sale Agreement constitutes a restrictive *and/or* prohibited practice as contemplated in section 4(1)(a), *alternatively* section 4(1)(b) and 5(1) of Act No. 89 of 1998; or
> >
> > 2.2 a date that is 6 (six) months after the date of the granting of the relief sought in paragraph 1 above.
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> 3. That the costs of this application be paid by the respondent in the event of it opposing this application.
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> 4. Granting the applicant such further *and/or* alternative relief as the Honourable Tribunal deems fit."

BACKGROUND

[7] The applicant is RTG. When RTG was founded in 2000 its management held 50.1% of its issued share capital while RMB Corvest, a subsidiary of the FirstRand Group, held the remaining 49.9%.

[8] From its inception RTG focused principally on the market for the manufacture of analogue audio-visual formats (that is, VHS and audio cassettes). Its entry into the market came through the acquisition of the analogue manufacturing and replication business of Abacus Technology Holdings. In an effort to enhance its presence in the analogue market, an agreement was reached on 7 December 2001 between RTG and Gallo, represented by Johncom, its holding company, whereby RTG acquired 100% of Gallo's analogue business. The imperative underlying Gallo's disposition of its analogue business is understood to have been the rapid obsolescence of analogue technologies and Gallo's desire to focus on the newer technological formats, namely, Compact Discs ("CDs") and Digital Versatile Discs ("DVDs"), which were rapidly replacing the analogue formats.

[9] The respondent is Gallo, a music and entertainment company located within the Johnnic Communications Limited Group ("Johncom"). The Gallo Group comprises Gallo Music Group, Gallo Record Company, Gallo Music Publishers and CDT. Gallo's interest in the CD and DVD manufacturing, replication, editing, authoring, printing and packaging market resides in CDT. CDT was formed in February 1999 when key players in the South African music content industry, namely Gallo, EMI, and Warner Music, formed a joint venture – CDT - to manufacture CDs in South Africa. In due course all other parties withdrew from the joint venture and CDT became wholly owned by Gallo.

[10] On 13 March 2002, RTG acquired a 28.55% shareholding in CDT from Gallo. In due course RTG acquired a further 12%, bringing its shareholding in CDT to approximately 40%. Gallo continued to hold the remaining 60% of CDT. Prior to RTG's acquisition of its interest in CDT it did not participate in the DVD and CD market. Indeed, as is confirmed by the affidavit of Hermanus Carel Trollip, RTG expressly acquired a shareholding in CDT in order to gain exposure to the CD and DVD market. Although Gallo continued to control a majority of the shares in CDT, managerial responsibility was effectively assumed by its joint venture partner, RTG, whose CEO, Shimon Henry Teperson, was appointed the CEO of CDT.

[11] During 2004 RTG decided to sell its 40% stake in CDT in order to redeem its shareholders' investments. Various explanations are offered for RTG's decision to exit CDT. It is claimed that the decline of the analogue format market underpinned financial problems in RTG. There is also evidence that the management of RTG wished to pursue interests in the digital format market in Australia. What is clear is that the management of (and majority shareholders in) RTG had decided to exit the South African CD and DVD market. Accordingly, Teperson and his fellow shareholders concluded an agreement to sell RTG's 40% shareholding in CDT to RMB Corvest. However, Gallo elected to exercise a pre-emptive right to purchase RTG's interest in CDT and so displaced RMB Corvest as the purchaser of RTG's shareholding. CDT thus became a wholly owned subsidiary of Gallo.

[12] Gallo, through CDT, is the largest domestic participant in the South African market for CD and DVD manufacturing, replicating, DVD authoring, editing, printing, packaging, marketing and sales with focus on music and film home entertainment ("the South African CD and DVD Market").

[13] The Sale Agreement entered into between Gallo and RTG contained a restraint clause forbidding RTG from furnishing CD and DVD manufacturing, replication, marketing, packaging and sales services to approximately 592 CDT customers for a period of two (2) years. Put differently, RTG was free to remain in the market and furnish its services to any customer, except to those customers specifically identified as CDT customers. It is interesting to note that the identical restraint clause is to be found in the aborted sale agreement concluded between RTG and RMB Corvest.

[14] Note that RTG has not exited the digital format market, nor is this required by the terms of the restraint which is limited to specified customers. Indeed, it appears that RTG utilised part of the proceeds of its sale of its share of CDT to purchase the equipment necessary to remain in this market. Hence, it is active in the adult entertainment niche of the market which Gallo/CDT eschews. It also appears to have serviced customers not listed in the annexure to the sale agreement and therefore not subject to the restraint. It has also undeniably continued to service certain customers whose custom is indeed subject to the restraint.[3]

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[3] The dishonesty of RTG and of Teperson, its CEO and the deponent to its affidavits, is comprehensively dealt with in the Heads of Argument submitted by Gallo's counsel and the

[15] Central to this application is the desire on the part of RTG – which appears to have abandoned its Australian ambitions soon after concluding the sale of CDT - to extend its digital services to customers from whom it is precluded under clause 13 of the Sale Agreement. RTG has accordingly now approached us seeking an interim order interdicting and restraining Gallo from enforcing clause 13 on the ground that the clause constitutes market division by allocating customers in contravention of section 4(1)(b)(ii) of the Competition Act. Gallo opposes the application. These are the contending positions upon which the Tribunal must adjudicate.

INTERIM RELIEF

[16] Section 49C(2)(b) of the Competition Act provides:

> "*The Competition Tribunal-*
> *....*
> *(b) may grant an interim order if it is reasonable and just to do so, having regard to the following factors:*
>> *(i) the evidence relating to the alleged prohibited practice*
>> *(ii) the need to prevent serious or irreparable damage to the applicant; and*
>> *(iii) the balance of convenience."*

[17] We have previously decided that section 49C(2)(b) properly construed does not require that each of the listed factors be independently and separately satisfied

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evidence referred to therein is uncontroverted. In summary, in December 2006 RTG approached Gallo's attorneys alleging that it, RTG, had been approached by several of the Gallo customers who were subject to the restraint but who had requested that RTG perform certain of the prescribed services required by these customers. In at least one of these cases investigations revealed that this account was false – that is, one of the customers in question denied ever having approached RTG. Despite this falsehood, Gallo nevertheless agreed to meet RTG in order to discuss the latter's request. At this meeting, which took place in March 2007, Teperson admitted that RTG had already been supplying competing services to prescribed customers. Teperson however undertook to comply with the terms of this restraint and this undertaking was repeated in writing by RTG's then attorneys. In the replying affidavits filed in this matter Teperson denied an allegation in Gallo's answering affidavit to the effect that it, RTG, was continuing to violate the restraint. However, further investigations conducted by Gallo reveal that RTG was continuing to violate the restraint – indeed it appears that since the filing of the replying affidavit RTG has again violated the restraint, despite its contractual commitment, its express undertakings and those of its attorneys, and its averments in affidavits placed before this Tribunal. Again none of these allegations are denied. While counsel for Gallo argues that Teperson's dishonesty, including in his submissions to us, is sufficient to deny the application for interim relief on the grounds that to do so would not be 'just and reasonable', we have not based our finding on these grounds. However, this conduct is, at very least, relevant in assessing the credibility of a witness whose affidavit is relied upon in these proceedings.

before interim relief is granted. In *National Wholesale Chemists (Pty) Ltd and Astral Pharmaceuticals (Pty) Ltd et al,*[4] also an application for interim relief, we held that in terms of section 49C(2)(b) the Tribunal is not required to establish that each of the requirements has been established in isolation, but must rather consider all the factors listed in section 49C(2) as a whole to see whether a case for interim relief has been established. That is, a weak case on, say, irreparable harm may be counterweighted by a very strong case on the balance of convenience or particularly persuasive evidence of prohibited practice. In *Nedschroef* we observed that the section starts of by making the threshold requirement that the granting of the order is '*reasonable and just*' and then requires that the Tribunal has regard to the constituent factors which must again be balanced and weighed through the prism of what is 'reasonable and just'. Section 49C therefore confers a discretion on the Tribunal to grant interim relief having regard to what is reasonable and just in the circumstances. Indeed the Competition Appeal Court took a similar view in *National Association of Pharmaceutical Wholesale et al v Glaxo Wellcome (Pty) Ltd*[5] where it held: "*The above requirements are however not determinative and even where all these requirements are present a court has discretion to refuse an interim interdict."*

EVIDENCE OF A PROHIBITED PRACTICE

[18] As noted above, the complaint lodged by RTG with the Commission alleges that Clause 13 of the Sale Agreement is a market sharing arrangement between RTG and CDT in contravention of Section 4(1)(a) of the Competition Act, alternatively Section 4(1)(b) and Section 5(1) thereof. This application has focused on an alleged violation of Section 4(1)(b)(ii) which provides for a *per se* prohibition of agreements between firms in a horizontal relationship which divide markets by *'allocating customers'.* It is from this alleged contravention that RTG seeks interim relief.

[19] However, as we shall demonstrate, we are, in fact, here dealing with a common garden variety restraint of trade normally associated with the sale of a business. Indeed to the extent that it differs from a typical restraint of trade, its distinguishing features are to be found in the limited nature of the restraint imposed.

[4] Case No. 98/IR/Dec00.

[5] Case No. 29/CAC/Jul03 at paragraph 8.

[20] Firstly, it is limited as to duration – as noted above, it is a two year restraint that has a little over six months to run. This stands in stark contract with the 10 year restraint encountered in *Nedschroef* upon which the applicant places much reliance. As we observed at the time that the *Nedschroef* matter was decided the restraint still had another 5 years to run.

[21] Secondly, the restraint before us does not, as is normal in restraints of this sort, require that the restrained party refrain from participation in the market altogether. As stated above, RTG is free to participate in the adult entertainment market in which CDT does not compete and it is free to compete for the business of customers who are not listed in the pertinent annexure to the sale agreement. While we acknowledge that the restraint covers the most significant consumers of the relevant services and products, the evidence is that it is an expanding market. Moreover, as already mentioned above, the restraint is not absolute insofar as the restrained party is entitled to compete in the restricted part of the market with the prior written consent of its contracting partner. In fact RTG did approach Gallo with just such a request, although, as observed above, it appears, that at the time that this approach was made, it had, contrary to its contractual commitment, already provided certain of the services in question to some of the prescribed customers. RTG and Gallo could not agree on the terms of the compensation to be paid by RTG in exchange for Gallo's permission for it to operate outside of the terms of the restraint. RTG offered compensation by way of a portion of the revenue generated from customers subject to the restraint, whereas Gallo, consistent with its view that the sale price was, in significant part, constructed on the basis of the restraint, proposed that the sale price be adjusted in order for RTG to be freed from the restraint.

[22] However, our essential point is that the specific terms of the restraint imposed upon RTG do not seem unduly restrictive relative to restraints of this type.

[23] Counsel for RTG has attempted to distinguish this restraint from those 'normal' restraints which are characteristically cast as mechanisms for protecting the 'goodwill' acquired by the purchaser. He argued that goodwill properly resides in CDT which is, as a result of the sale, now in the sole ownership and control of Gallo. RTG, or so its Counsel appears to argue, cannot appropriate the goodwill of CDT - only its managers and part-owners and Teperson, in particular, are able to do this and they are not the subject of the restraint. However, this argument is without merit.

[24] Prior to the sale RTG managed CDT. Its CEO – Teperson – was also the CEO of CDT. It is admitted that Teperson – and the RTG management generally – are intimately familiar with the business secrets and strategies of CDT and, but for the restraint, would have unhindered access to the customer base which they were instrumental in creating. There can be no doubt that the commercial merit of Gallo's purchase of RTG's interest in CDT would be severely compromised if RTG, part-owned and managed by Teperson and his colleagues, was permitted to act without restraint in the immediate aftermath of the transaction. Gallo avers that this was the basis for the agreed price and this is indeed confirmed by those sub-clauses of the restraint clause in which both parties accept that the transaction would not have taken place but for the restraint and, moreover, that the restraint is 'fair and reasonable'. While it may have arguably been more appropriate to impose the restraint on Teperson and other RTG managers, subsequent evidence of their flagrant disregard for contractual commitments and for basic honesty in the conduct of their business affairs establishes that a restraint of this sort would have been even more difficult to enforce than that imposed on the corporate entity, RTG, which they control and which was the entity that managed CDT. Moreover, RTG argues that any restraint imposed on Teperson would have 'borne no connection to the sale'. The mere fact that an unrestrained Teperson finds it necessary to participate in the market through the medium of RTG indicates that the restraint is correctly located. And so whether or not the restraint conforms in all its aspects to a 'traditional' restraint of trade is beside the point. What is clear is that the restraint was necessary to protect the value of the investment made by Gallo and was a precondition for RTG being able to realise its investment in CDT.[6] We note again that this concern to protect its investment in this way was not unique to Gallo. RMB Corvest sought an identical restraint in order to protect the investment that it considered making before Gallo exercised its pre-emptive rights.

[6] Note the following comments made by the Tribunal in other matters dealing with restraints of trade. In Compagnie Gervais Danone and Clover Beverages and Clover SA(Pty)Ltd and Danone-Clover(Pty)(Ltd) (Case No. 04/LM/Jan03): *'We accept the parties' contention that such a restraint is commercially reasonable for parties entering into joint venture in order to protect their investment. There is no history of Clover and Danone competing with each other in the South African market. When Danone entered the SA market in 1996 it did so in joint venture with Clover and this has been the relationship ever since'.* And then in Ruenert Ltd and African Cables Ltd (Case No. 59/LM/Aug04): *'In the light of the fact that Pirelli has sensitive information on the business of African Cables it has agreed to a restraint from being directly or indirectly engaged or interested in the manufacturing of or trading in the products offered by African Cables for a period of three years. After expiry of the period Pirelli can immediately enter the South African market as a potential competitor to African Cables.'*

[25] This discussion does serve to focus attention on the counter-factual. That is, what would have happened in the absence of the restraint? The answer is, we repeat, that RTG would have been stuck with its interest in CDT – as with RMB Corvest and Gallo, no investor with any modicum of commercial sense would have purchased RTG's share in CDT without restraining RTG. The chilling effect that a far-reaching decision of this sort would have had, not only on investment in CDT but also on the market for corporate assets, would ill serve the objectives of competition.

[26] Moreover there is every reason to believe that the sale of RTG's interest in CDT coupled with the former's ability and desire to remain active in the DVD and CD market, albeit under a partial and temporary restraint, ultimately promotes rather than retards competition. In our view, and despite claims of imminent irreversible harm, there can be little doubt that by the middle of next year, the market will have an additional robust and unrestrained competitive presence in the shape of RTG. If RTG's claim that established customers of CDT are clamouring to be served by it are true today, then there is every reason to believe that they will still be true in seven months' time and, even if their claims of current hardship are true, they should have no problem financing their continued presence in the market for the limited period for which the restraint is still effective.

[27] This discussion has reference to the contention by Mr. Unterhalter, Counsel for Gallo, that the agreement in question has not been concluded between two parties in a horizontal relationship and thus could not fall foul of the provisions of Section 4 of the Act, the section which the restraint is alleged to contravene. RTG has been quick to point out that while Gallo may not be in direct competition with RTG, it is contracting on behalf of its wholly owned subsidiary, CDT, in order to constrain RTG, a competitor, or, at least, a potential competitor of CDT. While this is undoubtedly true and we would be loathe to accept Gallo's argument in the form presented, it does assist in elucidating the true nature of the restraint. It is an agreement entered into between the seller and purchaser of shares in a company. At worst, the temporary and partial restraint is ancillary to the sale agreement which, we repeat, would not have been concluded but for the restraint. For RTG to press for this restraint to be construed as a hard-core cartel is not only to elevate form over substance, it is to opportunistically abuse the provisions of the Competition Act simply so that one party to a standard commercial agreement may escape its obligations whilst simultaneously enjoying it fruits.

[28] We have, through the duration of this matter, been referred to the Tribunal's decision in *Nedschroef* in which a restraint of trade contained in a sale agreement was successfully interdicted. Counsel for RTG insists that this matter is on all fours with the *Nedschroef* matter. It is decidedly not, neither factually nor conceptually. As already pointed out, the restraint in *Nedschroef* was to be operative for 10 years whereas the restraint in the present matter is operative for 2 years. As outlined above, the restraint is subject to other limitations as regards its scope and it can be avoided with the prior written consent of the purchaser, Gallo. More important for present purposes, the restraint in *Nedschroef* is precisely a prime example of an attempt to present a hard core market allocating cartel as an 'ordinary' restraint of trade which derives from a sale agreement. We note that in the *Nedschroef* case the sale was of machinery to which no semblance of goodwill or any other such commercial value attached and which required no protection in order for the sale to be concluded. Furthermore, and most pertinently, in *Nedschroef* the agreement to restrain trade was concluded *between two purchasers* of machinery who agreed to divide the market between themselves as purchasers by each undertaking to the other to utilise the machinery for distinct specified purposes. The interim relief application in *Nedschroef* was then brought by the one purchaser against the other purchaser and, in stark contrast with the present matter, not by the seller against the purchaser. It is, for this reason, that it is the *Nedschroef* restraint that is unusual in its terms and that appeared to the tribunal panel to constitute a market division agreement dressed up as a standard restraint of trade.

[29] While as stated above, we are required to balance the three factors listed in Section 49C(2)(b) and, so, it is possible that strong evidence of likely irreparable harm may, in undertaking this balancing, counterweigh a weak finding on, say, the balance of convenience or on evidence relating to a prohibited practice, we have previously held that we would be loathe to grant interim relief in the event that we find no evidence of a prohibited practice. In this instance it appears to us that there is no evidence of a prohibited practice and this would be sufficient reason for refusing the application for interim relief. We have held on a number of occasions that we will be extremely reluctant to grant interim relief in the face of unconvincing evidence of a prohibited practice.[7] We will however examine the applicant's contention concerning the

[7] In *York Timbers Ltd v SA Forestry Company Ltd* (1) [2001–2002] CPLR 408 (CT) at paragraph 64 the Tribunal held: "...we must first establish if there is evidence of a prohibited practice, which is the Act's analogue of a prima facie right..." The Tribunal, at paragraph 101, further held: ... *we would, regardless of the prospect of damage or of the balance of convenience, be*

irreparable damage that, it alleges, will eventuate should we refuse to grant the interdict asked for.

IRREPARABLE DAMAGE

[30] RTG alleges that it will be irreparably damaged if the restraint is not lifted. As already noted, although the belated introduction of a limited auditor's report has been filed in support of this allegation, it is ultimately the averments in Teperson's affidavit regarding the state of the company and the market that constitute the essential evidence upon which we must rely. However Teperson's evidence is, in our view, fatally tainted by clear evidence of his dishonesty, and, in particular, evidence that he has perjured himself in the very affidavit deposed to for the purposes of these hearings.

[31] But, more important, RTG's claim of irreparable damage flies in the face of other facts and averments. RTG received a considerable sum of money for the shares sold to Gallo. It appears to have immediately used part of the money received from the sale in order to purchase assets that would allow it to compete in the CD and DVD market. If these assets were purchased in order to compete in violation of the restraint, then it only has itself to blame. It avers that the *Nedschroef* judgment had alerted it to the illegal nature of the restraint so certainly at the time that it purchased the machinery in question it had no reason to believe that it would be entitled to compete in the restricted portion of the market. In any event, it has never been totally excluded from the market. Indeed it seems to have had unhindered access to the adult entertainment market. There is also evidence that the general DVD/CD market is growing and new customers are not subject to the restraint. Moreover, the restraint has fewer than eight months to run. As already noted, RTG would have us believe that large and important customers of CDT are clamouring to be served by it in preference to CDT. If this is indeed true, then there is no reason to believe that this business will not be available to RTG when, in eight months' time, it is permitted to enter the restricted portion of the market.

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hard pressed to grant interim relief in the absence of evidence of a restrictive practice. See also *Nationwide Airlines (Pty) Ltd and Others v SAA (Pty) Ltd and Others* [1999-200] CPLR 230 (CT) at page 13, *Nkosinauth Ronald Msomi t/a Minnie Cigarette Wholesalers v British American Tobacco South Africa(Pty) Ltd* [2001–2002] CPLR 383 (CT) at paragraph 13, *National Association of Pharmaceutical wholesalers and others v Glaxo Wellcome (Pty) Ltd and others* [2003] 2 CPLR 402 (CT) at paragraph 28, *Dumpit Waste Removal (Pty) Ltd v City of Johannesburg and Another* 2004 (1) CPL'R 189 (CT) at paragraph 29, and *Nuco Chrome (Pty) Ltd v Xstrata SA (Pty) Ltd and another* [2004] 2 CPLR 34 (CT) at page 5.

[32] We emphasise that RTG is not in the same position as many other restrained entities: it has remained active in the market and it has, in the relatively recent past procured assets to support this activity; it has maintained contact with key customers, and, indeed, has served certain of these customers despite the restraint. RTG is, in short, ready to hit the ground running and so its claims of irreparable damage and imminent demise ring hollow. Hence, even if we have erred in concluding that it appears to us that there is, in this restraint of trade, no evidence of a prohibited practice, features of the actual restraint, in particular its limited nature, will ensure that any damage caused will itself be limited.

CONCLUSION

[33] Having regard to the above, we have come to the conclusion that it is not reasonable and just to grant interim relief in the circumstances. Accordingly, we dismiss the application with costs.

THE ORDER

[34] We make the following order:

1. The application for interim relief is dismissed
2. Costs of the application shall be borne by the applicant, including the costs of two counsel.

____________ **10 December 2007**

D Lewis **Date**

Concurring: M Madlanga and M Moerane.

Tribunal Researcher: P S Munyai

For the applicant: Adv. A Subel S.C and Adv. J Blou (instructed by Deneys Reitz Attorneys)

For the respondent: Adv. D Unterhalter S.C and Adv. J Wilson (instructed by Webber Wentzel Bowens)