COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 95/IR/Oct05

In the application for interim relief:

Nedschroef Johannesburg (Pty) Ltd	**Applicant**
and	
Teamcor Limited	**First Respondent**
Waco International Limited	**Second Respondent**
CBC Fasteners (Pty) Ltd	**Third Respondent**
Avlock International (Pty) Ltd	**Fourth Respondent**

Decision

Introduction

The applicant, Nedschroef Johannesburg Pty Ltd (Nedschroef), has brought an application against the respondents in respect of a restraint of trade clause in its sale of business agreement, that it says contravenes section 4(1)(b) of the Competition Act. ('Act'). Only the third respondent, CBC Fasteners (Pty) Ltd ("CBC"), opposes the application. We have granted the order sought for the reasons set out below.

Background

1. The applicant is a wholly owned subsidiary of Koninklijke Nedschroef Holding NV, a Dutch company. The applicant carries on business in South Africa, *inter alia*, as a manufacturer and distributor of fasteners for the automotive industry. It currently employs 112 people.

2. According to the applicant, the term 'fastener' is used in the industry to describe a wide range of products which include nails, screws, bolts, sockets and zips, irrespective of their size and sophistication. Their common denominator is that they are used to hold things together, hence, the term "fastener". Prosaic as these products may seem to the layperson, certain of them are highly intricate and subject to intellectual

property protection. The greater fastener market is itself segmented into the specialised manufacture of fastener products that meet the needs of particular industries such as automotive, mining and agricultural.

3. The applicant also carries on what it describes as a cold forged product operation for the mining, railway and associated industries. It claims however that the main focus of its business is its automotive fastener operations and it is this aspect of its business to which this application relates. [1]

4. The first respondent, Teamcor, used to own a division known as National Bolts, which produced standard nuts and bolts as well as lock bolts and collars. It also owned an automotive manufacturing division, which sold and produced fasteners. It appears that during the 1990's, due to the poor performance of National Bolts, a decision was taken by Teamcor to sell the assets of that business as well as the automotive business to CBC. According to Robert Pietersma, the managing director of CBC and an erstwhile employee of Teamcor, subsequent to negotiations, it decided to acquire only National Bolts' nuts and bolts division, since in his opinion the automotive division was not viable.

5. Teamcor, according to Pietersma, continued to operate the National Bolts automotive division, but it continued to lose money and a decision was taken to close it down. Pietersma, who at this time was both managing director of the automotive division of National Bolts, as well as the managing director of CBC, was mandated by Waco International Ltd., the second respondent and the owner of Teamcor, to implement the closure. A notice was sent to the customers informing them. One of the customers to receive this notice turned out to be Koninklijke Nedschroef Holding NV, the parent of the applicant which contacted Pietersma and expressed an interest in acquiring the National Bolts automotive business. According to Pietersma the Dutch parent was then a *'customer (not a competitor) of Teamcor's National Bolts automotive division"*. [2]

6. Pietersma then entered into discussions with representatives of the Dutch parent, who he alleges, despite his warning them that the business was not viable, were determined to go ahead. Negotiations took place in August 2000 and an agreement was entered into in September that same year.

7. According to Pietersma, at this time, the applicant was either not in existence or not trading. It would seem that this is common cause, as in its replying affidavit the applicant states that it:

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[1] See Founding affidavit of Boyne Peter Bellew paragraph 39.3, Record page 74. An automotive fastener is a product manufactured to a specific drawing provided by a customer. They vary widely in sophistication. (See founding affidavit paragraph 30, record page 70.)

[2] See affidavit of Pietersma, paragraph 12, Record page 159.

"*has conducted business continuously since acquiring the assets in terms of the sale agreement on 28 September 2000*. [3] (Our emphasis).

8. This is important to CBC's case, as we see later, when we examine the legal arguments advanced.

9. Despite the fact that its parent conducted the negotiations, it was the applicant which entered into the agreement. When the applicant concluded the sale agreement in September 2000 it subjected itself to a restraint of trade, but also received a restraint undertaking from Teamcor in its favour.

10. The restraints both turn around a list of products that are contained in an annexure to the Sale agreement, labelled annexure F. The applicant undertook to the seller, Teamcor, to restrain itself to manufacturing only the type of fasteners listed in annexure F. (See Clause 16 of the agreement below) In return Teamcor undertook not to manufacture any of the products listed in annexure F. (See Clause 15 of the agreement below). What is material to this application is that the applicant also undertook to extend the benefit of the restraint, contained in clause 16, to CBC.[4] In other words the applicant undertook to CBC to manufacture only the fasteners listed in annexure F. CBC accepted the benefits of this restraint and was a signatory to the agreement in this respect.[5] As to the relationship between Teamcor and CBC, it appears from the agreement that Teamcor was a shareholder of CBC.[6]

11. It is this restraint in favour of CBC that is the subject of the present case. Since the applicant now wants to trade in these products and CBC seeks to hold it to its contract, the dispute exists only between these two firms and not Teamcor, which in any event appears to no longer trade. We set out the restraint clauses that we have referred to below:

> *15. "RESTRAINT UNDERTAKING BY THE SELLER*
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> *The seller:**[i.e Teamcor]***
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> *15.1 undertakes that for a period of 10 (ten) years from the effective date ("the restraint period"), it shall not directly or indirectly, at any place within the Republic of South Africa, Angola, Congo, Malawi, Mauritius, Mozambique, ……., whether for its own account or as a principal, agent, partner, representative, shareholder, member, consultant, adviser, financier or in any other like capacity whatsoever in relation to any person, syndicate,*

[3] See Bellew replying affidavit, para 37.2, Record page 285.
[4] Clause 16 of the agreement, record pages 30-33.
[5] Clause 16.7 of the agreement record page 33.
[6] Clause 16.1.2.3 of the agreement record page 32.

partnership, joint venture, corporation or company, and whether for its direct or indirect benefit or otherwise, and whether for reward or otherwise and whether formally or otherwise be interested in or concerned in any business which manufactures or distributes those products listed or described in annex "F" hereto, provide that the aforegoing provisions of this clause 15 shall not preclude or prevent the Avlock division of the seller with the consent of the purchaser from continuing to market and distribute those products listed in annex "F" hereto upon such terms as may be agreed upon and shall not preclude the seller from retaining its shareholding in CBC Fasteners (Pty) Limited….

16. RESTRAINT UNDERTAKING BY THE PURCHASER

*The purchaser:**[i.e the applicant]***

16.1.1 undertakes in favour of the seller and CBC Fasteners (Pty) Limited that for a period of 10 (ten) years from the effective date ("the restraint period"), it shall not directly or indirectly, at any place within the Republic of South Africa, Angola, Congo, Malawi, Mauritius, Mozambique, ……., whether for its own account or as a principal, agent, partner, representative, shareholder, member, consultant, adviser, financier or in any other like capacity whatsoever in relation to any person, syndicate, partnership, joint venture, corporation or company, and whether for its direct or indirect benefit or otherwise, and whether for reward or otherwise and whether formally or otherwise be interested in or concerned in any business which manufactures and/or distributes and/or imports any fasteners apart from those types of fasteners which are listed in annex "F" hereto, and where applicable, upon terms set out in annex "F" hereto…."[7]*"*

12. Why was the restraint also made in favour of CBC? It appears, as best as we can glean from the papers, that when CBC bought its assets from Teamcor, it paid a premium on the basis that the remaining assets would not be sold to a competing interest. When the applicant later bought the assets it apparently received a discount on the purchase price for agreeing to the restraint. This much appears from Pietersma's affidavit when he is explaining why the balance of convenience favours CBC.

[7] See Agreement between Teamcor Limited and Nedschroef Johannesburg (Pty) Ltd at page 9 of record.

"CBC Fasteners will suffer irreparable harm if the restraint is breached and the balance of convenience favours it. When it purchased its assets from Teamcor, it did so on the basis that similar equipment would not be sold by Teamcor to others at a substantial discount unless that party was restrained. This was the rationale behind the restraint. I have already pointed out that it is highly unlikely that Nedschroef Johannesburg will be in a position to compete effectively during the period of the interim relief. On the other hand, Nedschroef Johannesburg has demonstrated its propensity to cut corners inter alia by resorting to unlawful conduct. If Nedschroef Johannesburg was permitted to use the equipment which it obtained at a substantial discount, to compete with CBC Fasteners, this would defeat the rationale and purpose of the initial transaction (pursuant to which CBC Fasteners acquired its equipment). ..."[8]

13. The sale, as we indicated, was an asset sale. The most significant assets sold were machines that are apparently capable of manufacturing a wide range of fasteners, hence the need for the restraint. The machinery is thus capable of manufacturing fasteners that the applicant is entitled to manufacture in terms of the agreement, as well as those which it is restrained from manufacturing in terms of clause 16.

14. The commercial essence of the transaction was that Teamcor was selling equipment to two firms which, but for the restraints, could have been used for manufacturing the same products.[9] By dividing the products between who could or could not manufacture as per the list, competition between the buyers was eliminated. One received a discount and the other paid a premium on the price of the equipment for this restraint.

15. The restraint is to operate for a period of ten years, and since the agreement was concluded in September 2000, we are thus at the time of hearing the application, approximately half way through the restraint period. It appears that although the applicant is restrained from manufacturing a number of fasteners, the one product it intends to manufacture if the order is granted is a fastener classified as a "short lock bolt".

16. The applicant launched these proceedings only on the 6th October 2005. It would appear that the applicant is presently under pressure from its Dutch parent to diversify into more lucrative markets, including the restrained short bolt market, due to the present poor performance of the applicant's business. It is suggested by the applicant that its Dutch parent has given it an ultimatum till the end of 2005, to meet its

[8] See paragraph 125 page 217
[9] See paragraph 124 record page 217.

performance targets; otherwise it will be closed down. The application for interim relief has been instituted to enable it to escape the restraint until such time as the Commission has had a chance to investigate the complaint and either refer it to the Tribunal, or give the applicant an opportunity to do so itself, directly, if the Commission chooses not to refer the complaint. [10]

Relief sought

17. The applicant seeks the following relief.

1. *"That the respondents be and are interdicted and restrained from enforcing clause 16 of the Sale Agreement (a copy of which is annexed hereto and marked X) and/or from requiring that the applicant abide by the aforesaid clause 16 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) or Act No. 89 of 1998.*

2. *That the relief sought in paragraph 1 above operates and/or remains in force until the earlier of-*

   2.2 *A final determination of the applicant's complaint in terms of Act No. 89 of 11998 (and which complaint will be lodged with the Competition Commission simultaneously herewith) that clauses 15, 16 and 19 of the aforesaid Sale Agreement constitutes restrictive and/or prohibited practices as contemplated in terms of section 4(1)(a) alternatively section 4(1)(b) and section 5(1) of Act No. 89 of 1998; or*

   2.3 *A date that is 6 (six) months after the date of the granting of the relief sought in paragraph 1 above.*

3. *That the costs of this application be paid by the third respondent save that in the event of any other respondent (s) opposing this application then the applicant will seek an order that the third respondent, jointly and severally with such opposing respondent(s) the one paying the other to be absolved, pay the costs of this application.*

4. *Granting the applicant such further and/or alternative relief as the Honourable Tribunal deems fit.*

18. Initially the relief was sought against all four of the applicants, but the application was withdrawn against fourth respondent. The first and second respondents have not opposed the application, but CBC has. It

[10] Note that the complaint had been lodged with the Commission at the time of the institution of this application. (See paragraph 17 of the founding affidavit page 65.)

seems that this is because CBC is the only respondent with a commercial interest in enforcing the restraint against the applicant.

19. At the hearing of the application the applicant in addition tendered to ensure that those profits that would accrue to the applicant during the period of the interim relief order, pursuant to it engaging in business as a result of the interdict that is issued, would be kept in trust separately. Secondly, it tendered damages to CBC, in the event that CBC is successful in due course opposing main application, and provided it were able to show that it had suffered loss in the interim.

Requirements for interim relief

20. The requirements for interim relief are set out in section 49(C)(2)(b) of the Act which states that the Competition Tribunal:

> *"..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*

21. CBC alleges that not only has the applicant failed to make out a case on any of the three enumerated factors, but that it has also, due to the dilatory approach in bringing the application, become non-suited on this latter ground alone. We deal with the latter issue first and then go on to consider the strength of the applicant's case in the light of the remaining three factors. Finally, when we deal with the nature of the relief, we address a jurisdictional argument raised by CBC about whether we can make this form of relief in an interim order.

22. At the outset we wish to make certain observations in relation to the proper interpretation of the section. Prior to the amendment of the Act in 2000, the equivalent section in the Act, which was then section 59(1), read as follows:

59. Interim relief

> *(1) At any time, whether or not a hearing has commenced into an alleged prohibited practice, a person referred to in section 44 may apply to the Competition Tribunal for an interim order in respect of that alleged practice, and the Tribunal may grant such an order if –*
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> *(a) there is evidence that a prohibited practice has occurred;*
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> *(b) an interim order is reasonably necessary to –*
>
> *(i) prevent serious, irreparable damage to that person; or*

(ii) to prevent the purposes of this Act being frustrated;

(c) the respondent has been given a reasonable opportunity to be heard, having regard to the urgency of the proceedings; and

(d) the balance of convenience favours the granting of the order.

23. The Tribunal has previously observed in National Wholesale Chemists (Pty)(Ltd) and Astral Pharmaceuticals (Pty)(Ltd) et al, [11] (a case considered shortly after the Act was amended to provide for the present section 49), that:

> *"…, in terms of Section 49C(2), the Tribunal no longer has to consider whether each of the requirements has been established in isolation, but rather looks at all the factors listed in Section 49(2)C as a whole to see whether a case for interim relief has been established. This feature of Section 49C(2) distinguishes it from the old Section 59 where interim relief could only be granted where each of the listed requirements had been satisfied. Section 49C(2) follows the approach at common law as applied by Appellate Division in the case of Eriksen Motors (Welkom) Ltd v Protea Motors, Warrenton 1973 (3) 685 (A). The court held that in deciding whether to exercise its discretion to grant interim relief the court should not look at the prerequisites in isolation but should consider all of them in conjunction with each other. The court went on to state that these prerequisites*
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> > *"... are not individually decisive, but are interrelated, for example, the stronger the applicant's prospects for success the less the need to rely on prejudice to himself. Conversely, the more the element of "some doubt", the greater the need for the other factors to favour him."* [12]

24. Therefore, what the Tribunal found in NWC is that although the sections may appear similar, in terms of language used and the nature of the factors to be considered, there has been a decisive shift in the way it is to be applied. The old section required proof of each of the various constituents; the new starts off 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, not as separate building blocks, but rather as a collective set of criteria that can be weighed and balanced through the lens of what is "reasonable and just".

25. The implication of this shift, is that an application may meet the three factors, but there may be reasons why granting the application is not reasonable and just. Conversely, an applicant may not make out a

[11] Case number 98/IR/Dec00
[12] See paragraph 34.

strong case on all three of the factors, but the Tribunal may nevertheless consider that an order for interim relief is nevertheless reasonable and just following an Eriksen type approach.

26. Note that the Competition Appeal Court (CAC) was of the view that even in terms of the old section, if the requirements were met, the adjudicator still had the discretion to refuse to grant an order. In the case of National Association of Pharmaceutical Wholesalers (NAPW) et al v Glaxo Wellcome (Pty) Ltd et al it held:

> *"The above requirements are however not determinative and even where all these requirements are present a court has a discretion to refuse an interim interdict."*[13]

27. Applied to the facts of this case, this means that a delay in bringing an application may constitute grounds why it is not *'reasonable and just'* to grant interim relief. Note that although these applications are implicitly urgent, as they are in the language of the common law actions *pendente lite*, there is no express requirement in the statute that the applicant must show urgency. Nevertheless, implicit in this section is an obligation on an applicant to show why interim relief should be granted, given that a complaint referral is still to follow, either at its own behest, or that of the Commission. For this reason, while urgency is not an explicit element that an applicant must prove to establish a right to interim relief, that does not mean that an applicant may bring this type of action at any time it pleases - an undue delay in bringing an application may well justify the Tribunal finding that it is not reasonable and just to grant an applicant interim relief.

28. CBC's complaint about dilatoriness in the bringing of the application must then be assessed by evaluating it through the *"reasonable and just "* requirement, and not through any explicit requirement that the applicant must prove urgency.

29. CBC argues that there have been two forms of delay in the bringing of this application. In the first place there is the delay of five years between the time of bringing the application and the conclusion of the agreement in September 2000. Secondly, CBC argues that even once the applicant had served the application, it was dilatory in prosecuting the action. We do not think the second contention has any substance. From the time of the service of the application to date of hearing a period of approximately two months elapsed. This is not in our view long, given the complexities of interim relief matters and the standards of proof we have thus far required. A cautious, but diligent applicant might well take this time to bring a matter to hearing without any suggestion of tardiness.

[13] See CAC Case No: 29/CAC/Jul03 unreported at paragraph 8.

30. The first complaint has more substance. The applicant has an explanation for this, although CBC disputes its veracity. Bellew, the applicant's Marketing and Sales director, states that for some time the applicant has been concerned about the agreement, but was not aware that the restraint clauses were in contravention of the Act. Only while consulting with its attorneys on a related matter, (a recent Anton Piller action brought by the fourth respondent against the applicant, in which it alleged that the applicant was about to enter the short bolt market, by making unlawful use of its intellectual property) did the applicant's management become aware of this, and having been so advised, it duly took action. Pietersma disputes this version and alleges that on several occasions, going back over two years, Bellew had informed him that the restraint contained in clause 16 was unlawful and anti-competitive. [14] Bellew in reply admits conversations with his counterpart complaining about the unfairness and one-sidedness of the restraint, but he always thought at the time that Nedschroef had been *"burdened by a bad bargain."* [15]

31. This is not a dispute that can be resolved on the papers. Indeed it is possible that it is not a dispute at all. Bellew may indeed have muttered to Pietersma at times in the past about the anti-competitive nature of the restraint, but meant it as a pronouncement on its commercial effect and may not have been aware that it was potentially a violation of the Act.

32. Bellew's knowledge of the unlawfulness of the provision in terms of the Act and when that came about, seems subsidiary to two more important issues that we must consider under the rubric *"reasonable and just to do so."*

33. The first, and which is one that is not directly raised by CBC although there are traces of it in its papers, is whether the fact that the applicant entered into this restraint of its own volition, should bar it from relief. The answer to that is in the negative. The Act recognises that prohibited practices may often take the form of contracts, whether of a horizontal or a vertical nature, and if all parties to contracts were to be barred from interim relief on the ground that it is *reasonable and just* to hold them to their bad bargain, it would do a major disservice to competition enforcement.

34. This raises then the second and more difficult question of whether the five year delay should constitute a bar to the granting of interim relief. CBC, relying on some of the well-known cases on relief *pendente lite* (interim relief) in the High Court, suggests that it is.[16] However the two types of proceedings are not analogous. The difference is that in the

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[14] Record page 153 paragraph 5.11. Pietersma attaches as annexure RJP 2 what purports to be a note of one of these conversations. The note is undated.

[15] Record page 278-9 paragraph 19.3

[16] Juta & Co Limited v Legal and Financial Publishing Co (Pty) Limited 1969 (4) SA 443 at 445F; Crossfield & Son Limited v Crystallizers Limited 1926 WLD 216 at 223, 224

civil action, the applicant for relief *pendente lite* (interim relief) remains *dominus litis* in respect of the subsequent main action and hence it may be appropriate to confine it to the latter action and deny it interim relief if it has been unduly dilatory in seeking it. In section 49(C) proceedings, the applicant is not certain when the complaint referral will be made as the Commission has the prerogative for at least one year to make that determination. Hence, we may look less strictly at the consequences of delay than might a civil court. This is not to say that delay may not serve as a basis to deny interim relief in the appropriate case.

35. In the NAPW case the CAC, in passing, has suggested that this may well be the case.

> *"The legislature clearly intended, and continues to intend, that interim orders should serve only to ameliorate an urgent situation and to be of limited duration. To grant interim relief after such a long passage of time defeats the very object of interim relief pendente lite."*[17]

36. But although the court makes reference to the long passage of time it appears to be addressing itself to the complicated facts of that case which involved the bringing of a second interim relief application after the first order had been set aside on review. The complaint the court had was in how long the applicants had taken to "bring to finality" the subsequent application and not the delay between the occurrence of the prohibited practice and the commencement of the application, as this extract from the decision shows:

> *"I do not wish to delve further into the tardiness of the wholesalers in bringing the application for interim relief to a finality or whether the manufacturers may have adopted dilatory tactics save to state that approximately three years elapsed before the matter was reheard by the Lewis tribunal and a decision given."* [18]

37. Although much time has elapsed between the time of the conclusion of the agreement and the bringing of the present application, there has not been unreasonable delay in bringing the matter to finality once the application was launched. For that reason and given the strength of evidence of the applicant's case on other aspects, it would not be reasonable and just to deny it interim relief merely because of the delay in bringing the action.

38. The objections on the ground of dilatoriness fail.

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[17] See National Association of Pharmaceutical Wholesalers et al v Glaxo Wellcome (Pty) Ltd et al CAC Case No: 29/CAC/Jul03 unreported at para 11.
[18] See at para 10.

39. We now turn to examine the application in light of the three factors enumerated in section 49(C).

(i) Evidence of a prohibited practice.

40. There is no dispute about the terms of clause 16. The parties to it, and its terms, are all common cause. The parties are in dispute about its legal implications.

41. The applicant contends that clause 16 contravenes section 4(1)(b)(ii) of the Act, in that it constitutes a market allocation between competitors, namely, the applicant and CBC. Clause 16 operates to divide the greater fastener market because it precludes the applicant from participating in the market in respect of those fastener goods not listed in annexure F.

Section 4(1)(b)(ii) states:

" 4(1) An agreement between or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if –
(a) …
(b) it involves any of the following restrictive horizontal practices :
(i) …
(ii) dividing markets by allocating customers, suppliers, territories, or specific goods or services; or…"

42. We must read with this section the Act's definition of a horizontal relationship:

" horizontal relationship means a relationship between competitors"

43. CBC raises two defences. Firstly, it alleges that the applicant is not its competitor as it was not a competitor of CBC at the time of the restraint. The evidence on the papers, as we noted, is that the applicant had not yet commenced business at the time of the sale agreement in September 2000.

44. Yet market division does not require that both firms be competitors prior to the act of division. If they are potential competitors this will suffice. Frequently firms will divide a market before they become de facto competitors precisely to avoid that outcome. Anticompetitive outcomes are no less serious as a result of such an outcome than if the firms were pre-existing competitors prior to the market division. Case law supports this approach as well. In the United States the Supreme Court has addressed this issue in the case of Jay Palmer et al v BRG of Georgia, INC et al.[19]

[19] 498 U.S. 46, 111 S.CT. 401

> *"The defendants in Topco had never competed in the same market, but had simply agreed to allocate markets. Here, HBJ and BRG had previously competed in the Georgia market; under their allocation agreement. BRG received that market, while HBJ received the remainder of the United States. Each agreed not to compete in each other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other…"*[20]

45. We find that there is no requirement in terms of the Act that firms must have been prior competitors for them to transgress section 4(1)(b).

46. The second defence invoked is that market division requires that there be reciprocity between competitors i.e. if I take market A, I must give you market B. In this case, CBC argues that the restraint is not reciprocal as although the applicant has given a restraint in favour of it, CBC has not given restraint in return. (Note that the reciprocal restraint in favour of the applicant is given in clause 15 by the seller of the business, Teamcor, and not CBC).

47. The applicant argues that a lack of reciprocity in this sense does not detract from the fact that there has been market division. The applicant has contracted to not compete in a market in which the assets would otherwise allow it to compete even though it has not got similar *quid pro quo* from CBC. The fact is that market division has occurred and competition in that market is lessened as a result of that. That is the test in 'characterising' the agreement, and an absence of reciprocity does not detract from that. [21] Furthermore, although reciprocity is absent in the conventional sense we have suggested above, it is not absent altogether in these arrangements. We know from CBC's version that the applicant received a discount on the equipment for agreeing to the restraint. Thus, on the facts, an act of market division has occurred and the applicant has received a capitalised benefit as a result, while the other, CBC, has received the benefit of an allocated market, free from the other's competitive presence.

48. But even in the absence of this latter variant of reciprocity, we find that reciprocity is not a requirement for market division to occur. At best, the absence of reciprocity may be an element in characterising whether an arrangement is one that is between competitors or not, but to elevate it to a legal requirement goes too far - and as the facts of this

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[20] At page 403

[21] The Supreme Court of Appeal has suggested in *American Natural Soda Ash Corporation and CHC Global (Pty) Ltd v Botswana Ash (Pty) Ltd*, a case involving alleged price fixing, that conduct alleged to be in violation of that per se prohibition needs to be "characterized" before it can be regarded as falling into the category of behaviour to which one would apply the label of per se unlawful. (See pages 35-7, paragraph 46-51 of the decision.)

case suggest, would be to allow anticompetitive arrangements to be successfully immunised from the operation of the Act.

49. The applicant has established the nature of the agreement and the essential elements of section 4(1)(b), namely that it is between parties in a horizontal relationship, and that it involves market division in that it limits the applicant to the fastener sub-markets for those goods set out in annexure F to the agreement, thus excluding it from sub-markets in which it is willing and able to compete, *inter alia*, the market for the manufacture of short lockbolt fasteners.

50. We find that the applicant has, *prima facie*, established evidence of an alleged prohibited practice.

(ii) The need to prevent serious and irreparable harm to the applicant.

51. The applicant has spent much time in its papers alleging that third parties and consumers are being harmed by the alleged prohibited practice. The applicant has filed an affidavit from a firm known as Bearing Man, a large distributor of hardware products, including the various species of fasteners at issue in this case. Bearing Man thus buys from manufacturers of these goods and sells to customers who then make use of these products. Robert Campbell, the deponent for Bearing Man in these proceedings, has outlined his firm's difficulties in getting into the market for the distribution of short lock fasteners, which he alleges is being monopolised by CBC and Avlock. CBC correctly queries the relevance of these allegations, which seem to amount to a complaint about an alleged abuse of dominance perpetrated, *inter alia*, by CBC. Nevertheless the existence of Bearing Man as a customer willing and ready to enter the market to distribute the applicant's products if the restraint is removed is evidence of an alleged harm to competition caused by clause 16 - and harm at least to consumers. Insofar as we have a discretion in this matter, evidence of the alleged harm that a practice may have on consumers is relevant to how we should exercise that discretion, as it removes an application from the realms of the speculative to the actual.

52. As for harm to the applicant itself, that evidence is less direct. The applicant alleges that at present, its business is troubled and that the Dutch parent is considering imminent closure of its business with the consequent loss of jobs if its performance does not improve. An obvious market for entry is that for short bolt fasteners from which, as we have seen, the applicant is contractually precluded. The applicant and its parent are confident that if it was allowed to enter the market for short bolt fasteners, its business prospects would improve and closure would not be necessary or at the very least, would be more remote. Much was made in the papers on whether the applicant was in a position to enter the market period in the six month period for which an

order for interim relief at the most could run, unless extended in terms of section 49(C)(5) on good cause shown.

53. CBC sought to show how long it takes to enter this market and speculated that the applicant could not yet be in a position to do so. Thus, even if the applicant were suffering damage, a fact that CBC denies, the granting of relief would be academic. In reply, the applicant was able to demonstrate what steps it had already taken and hence its readiness to enter. Since on these facts the applicant was able to give direct evidence, whilst CBC relied on speculation, as well as the odd bit of gossip it had received in the market, we prefer to rely on the applicant's version on this point. We also know that the applicant is already a player in related markets, has technical expertise in its workforce, and a major customer in Bearing Man, all of which remove its entry prospects from the speculative to the probable. If, as the papers suggest, the short bolt market has CBC as the only domestic player, then the prospects for a new entrant are reasonable. Thus the applicant has at least made out a case that if it were able to enter the market, it could do so within a reasonable period, and that it could do so effectively. Whether or not this amounts to long-term survival is more speculative. CBC may well counter its entry through aggressive pricing and thus entry may not meet the profit expectations of the Dutch parent.

54. However, whatever weaknesses there are in the applicant's case in proving irreparable harm to itself, these are balanced by the strength of its case on the evidence of the prohibited practice and the fact that it has demonstrated a *prima facie* harm to competition.

(iii) Balance of convenience

55. The applicant contends that if the restraint is unlawful then the balance of convenience favours both it and the market because at worst, if we grant the order, there will be competition for so long as the order operates. CBC argues that the balance of convenience can never favour a party to a contract that seeks to extricate itself therefrom in circumstances where a definite finding of unlawfulness can only be made at a later stage. CBC would be without a remedy, it argues, because the *"Tribunal would have sanctioned the release of Nedschroef Jhb from its contractual obligations."*[22]

56. In response to the latter issue, the applicant has undertaken to maintain separately in trust, the profits arising from any business it engages pursuant to the lifting of the restraint, and secondly, it has tendered that no order which the tribunal may make will preclude CBC from recovering damages for the period during which the order operated provided that it can prove that it has suffered loss. This

[22] See third applicant's Heads of argument paragraph 44.

tender, as supplemented by our order, which incorporates a duty to hold separate the profits and a duty to account, in our view, shifts the balance of convenience in favour of the applicant, as CBC would be able to monitor and calculate any damages it suffered during the period of the order.

57. Since we are satisfied that there is evidence of a prohibited practice, if we were not to grant the order, we would be depriving both the applicant and, more importantly, the market, of the benefits of competition. The balance of convenience clearly favours the granting of the order.

Relief sought

58. The essence of the relief sought is the suspension of the operation of clause 16 of the agreement, pending a final determination of the complaint. CBC argues that this type of relief is not competent as interim relief. It argues that the Tribunal cannot relieve a contracting party of its obligations on an interim basis. In addition, it argues that the order would have an irreversible effect, since for at least during the period of non-operation, CBC would not be able to claim damages on account of what amounts to a breach of the agreement. The source of this argument is based around section 65(1) of the Act, which states:

59. Section 65(1) states:

"Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void."

60. CBC argues that although the terms of the order sought refer only to interdicting the enforcement of the clause during the period of the order, it amounts to the same thing as voiding the clause. If this legal contention is correct, it argues, the clause can only be voided in terms of an order made under section 65(1). But a section 65(1) order can only be granted pursuant to final, not interim relief, because it involves the declaration that a contractual provision is void.

61. CBC further argued that if relief is final in nature, it cannot be granted under section 49(C) because of the provisions of section 49(C)(8) which states:

"The respondent may appeal to the Competition Appeal Court in terms of this section against any order of the Competition Tribunal that has a final or irreversible effect."

62. The applicant argues that CBC has misconstrued the import of section 65(1). Its purpose is to regulate the civil implications of Tribunal orders.

At civil law, a party cannot assert the invalidity of a contractual provision in terms of the Act until there has been a determination to that effect by the Tribunal or the Appeal court.

63. We agree with the applicant's argument in respect of the import of section 65. That section 65(1) is about the civil implications of Tribunal orders is further strengthened by the context of the provision in the statute. It is located in a section that regulates the consequences of findings in terms of the Act, for civil courts, and conversely, how civil courts must deal with competition issues that are raised in their proceedings. These provisions are necessary to regulate the consequences of a regime where civil courts have no jurisdiction over competition issues and competition authorities none over the civil law. Section 65 is meant to serve this purpose and that is the context in which we should understand section 65(1). Thus section 65(1), correctly understood in term of its context, does not preclude other forms of contractual relief in the form prayed from the operation of interim relief. If CBC's argument is correct, interim relief could never be used as a remedy against cartels, perhaps one of the most egregious forms of prohibited practice – because they are bound together by contract. This clearly cannot be the legislative intention. The distinction between voiding an agreement and suspending it for an interim period must be one that the Act contemplates and treats differently for the purpose of relief.

64. The order sought is not one that voids the agreement in the manner contemplated in section 65. On expiry of the interim order, clause 16 remains enforceable. As the applicant correctly argues, interim suspension of operation and voiding are not the same thing, albeit they may have the same practical effect during the period of suspension.

65. Nor is CBC's contention that the relief is of a final nature correct. But this is not a point that we need to decide, because even if it is, CBC is wrong in its premise that 49(C)(8) can be interpreted as precluding any form of relief that is of a final nature. Rather, what the provision describes, are the circumstances when a respondent may appeal against an interim relief order. A respondent does not ordinarily have the right to appeal against an interim relief order unless the order is of a final nature. It thus speaks to what is susceptible to appeal, not the competence to grant an order.

66. Accordingly we are satisfied that we can grant this form of relief.

Conclusion

67. We are satisfied that the applicant has established a *prima facie* case that clause 16 of the agreement contravenes section 4(1)(b) of the Competition Act. The strength of the applicant's case on this aspect and the balance of convenience compensates for any deficiency in other respects, such as the delay in the bringing of the action and proof

of the extent of harm to the applicant, and for this reason we deem it reasonable and just to grant the order.

68. As the application was withdrawn against the fourth respondent no order is made against it. There is furthermore no evidence that the second respondent is able to or intends to enforce clause 16. It was only a party to the agreement in respect of other clauses not relevant to the present matter. Accordingly the order is restricted to the first and third respondents. Costs are only awarded against the third respondent, as the first respondent did not oppose the application.

ORDER

We make the following order:

1. That the first and third respondents be interdicted and restrained from enforcing clause 16 of the Sale Agreement (annexed as Annexure X to the Notice of Motion) and/or from requiring that the applicant abide by the aforesaid clause 16 and/or from implementing such clause;

2. That 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 the Competition Act, no 89 of 1998, (the 'Act') that clause 16 of the aforesaid Sale Agreement constitutes a prohibited practice as contemplated in terms of section 4(1)(a) alternatively section 4(1)(b) of the Act and is declared void; or

   2.2 A date that is 6 (six) months after the date of the granting of the relief sought in paragraph 1 above.

3. That during the period of the interdict –

   3.1 any profits that accrue to the applicant as a result of this order will be put into a separate trust account (the 'trust account') to be held by the applicant in favour of the third respondent; and

   3.2 the applicant must keep a record of all sales of any goods referred to in Annexure F, including the customer to whom it was sold, the purchase price and the date of sale (the 'record').

4. If the final order contemplated in 2.1 is not granted, or if the applicants' complaint is not brought to a final hearing, either at all or within a reasonable time –

   4.1 the trust account must continue to be retained until the resolution of any civil action that may be brought by the third respondent for damages; and

4.2 the record must be provided to the third respondent within seven business days of a demand to produce it.

5. That the costs of this application be paid by the third respondent, including the costs of two counsel.

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1 February 2006

N. Manoim

Concurring: M. Moerane, D. Lewis

For the applicant:	Adv. D. Unterhalter S.C. and Adv G W Amm, instructed by Deneys Reitz Attorneys
For the respondent:	Adv. A. Subel S.C. and Adv J Blou, instructed by Fluxmans Inc. Attorneys