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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR023May15

In the matter between:

THE COMPETITION COMMISSION	**Applicant**
And	
DAWN CONSOLIDATED HOLDINGS (PTY) LTD	**First Respondent**
DPI PLASTICS (PTY) LTD	**Second Respondent**
UBUNTU PLASTICS (PTY) LTD	**Third Respondent**
SANGIO PIPE (PTY) LTD	**Fourth Respondent**

Panel	: Yasmin Carrim (Presiding Member) Imraan Valodia (Tribunal Member) Mondo Mazwai (Tribunal Member)
Heard on	: 22 July 2016 and 28 October 2016
Order issued on	: 23 March 2017
Reasons issued on	: 23 March 2017

Decision and order

Introduction

[1] This case concerns a complaint referral brought by the Competition Commission ("the Commission") against Dawn Consolidated Holdings (Pty) Ltd ("Dawn"), DPI Plastics (Pty) Ltd ("DPI"), Ubuntu Plastics (Pty) Ltd ("Ubuntu") and Sangio Pipe (Pty) Ltd ("Sangio").

[2] When we heard the complaint, the Commission was no longer pursuing its case against Ubuntu, as Ubuntu was not involved in the relevant markets. The respondents before us were therefore Dawn, DPI, and Sangio.

[3] The complaint referral arises from a merger transaction that was filed with the Commission in 2014, wherein Dawn wished to acquire 51% of Sangio. At the time of the merger filing, Dawn already held 49% of Sangio which it had acquired in 2007.

[4] The Commission investigated the transaction and approved it unconditionally. However, during the course of its investigation of the merger, it discovered the shareholders' agreement between Dawn and Sangio, which is the subject of this complaint.

[5] Clause 20 of the shareholders' agreement concluded between Dawn and Sangio during April 2007 (when Dawn acquired its 49% shareholding) reads as follows:

"20 UNDERTAKING BY DAWN

From the effective date and for as long as Dawn or its associates hold/s shares in the company[1], 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 Africa 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."

[1] "Company" in the shareholders' agreement was defined as Turnover Trading 132 (Proprietary) Limited (registration number 2006/032457/07), a private company duly incorporated in terms of the Act, to be re-named "Sangio Pipes (Proprietary) Limited.

[6] The Commission alleges that because clause 20 seeks to prevent Dawn from entering the market for the manufacture of regular HDPE pipes nationally, it amounts to market allocation as contemplated in section 4(1)(b)(ii) of the Competition Act, 89 of 1998, as amended ("the Act").

[7] On the face of it, clause 20 clearly precludes Dawn from competing in any HDPE piping market other than corrugated piping. The respondents justified the shareholders' agreement on the basis that: Dawn and Sangio were not actual or potential competitors at the time the shareholders' agreement was concluded; Dawn and Sangio operated in different geographic markets; clause 20 properly characterised, was not an agreement designed to avoid competition but was a normal restraint in joint ventures to protect the investments in the joint venture; and clause 20 had no effect on competition in the market.

[8] The respondents' version was attested to by Mr Jan Andries Beukes ("Mr Beukes") the Chief Risk and Compliance Officer of the Dawn Group and Director of Dawn Limited, the holding company of DPI. He deposed to both answering affidavits before us. Mr Beukes did not testify at the hearing. No witnesses were led by either the Commission or the respondents.

[9] The parties submitted that we should decide the matter on the papers before us.[2] In particular, the respondents submitted that the Tribunal had no cause to exercise its inquisitorial powers to call for oral evidence as the Commission had elected not to call any witnesses. Doing so would be to impermissibly conflate our inquisitorial powers with that of the Commission's prosecutorial powers.[3]

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[2] In this regard, the record comprises of the founding affidavit, the respondents' answering and supplementary affidavits, the shareholders' agreement, the competitiveness report filed by Dawn and Sangio with the Commission in 2014 when they notified their merger, the Commission's heads of argument, including its supplementary heads, and the respondents' heads of argument, including their supplementary heads.

[3] See transcript dated 28 October 2016, page 59.

[10] The parties were also in agreement that the only issue for us to decide was whether the respondents had contravened section 4(1)(b)(ii) of the Act, with the question of the appropriate penalty to be decided at a later stage.

Background

[11] In October 2006, Dawn acquired DPI from the construction company, Group Five. At the time, DPI manufactured both regular and corrugated HDPE pipes at its facility located in the Western Cape.

[12] HDPE pipes are used in a variety of applications in the civil and engineering; building; mining; agricultural; industrial; and telecommunications sectors. Corrugated HDPE is a specialised pipe used in the agricultural sector for drainage applications.

[13] After Dawn acquired DPI it apparently took a decision to mothball the extruders used to manufacture regular HDPE pipes. According to Dawn, the extruders were out-of-date and inefficient.[4] Dawn did not dispose of these assets but retained them and at a later point in time re-commissioned them to manufacture regular HDPE pipes exclusively for Sangio.

[14] Six months later (in April 2007), Dawn acquired 49% in Sangio. At that time, Sangio was a manufacturer of regular HDPE pipes only. It supplied them from its plant in Kwa-Zulu Natal and Gauteng. Sangio also supplied regular HDPE pipes in the Western Cape.[5] It has never manufactured corrugated HDPE pipes.

[15] Sangio was operated by Mr Gary Warren who had established the firm in 1997. Dawn's acquisition in Sangio was structured in a manner whereby the business

[4] There was no clarity as to when these were actually mothballed.
[5] See answering affidavit, page 20 of the record, paragraph 14.2.

of Sangio was transferred to a new shelf company[6] to be renamed Sangio (Pty) Ltd (the fourth respondent in this matter). Dawn would acquire 49% of that company while Mr Warren through his trust,[7] would acquire the remaining 51%.

[16] The shareholders' agreement between Dawn and Sangio was concluded in April 2007. During the subsistence of the shareholders' agreement, Dawn did not manufacture regular HDPE pipes until 2012 when it re-commissioned the mothballed extruders to manufacture these exclusively for Sangio. The relevant period for the alleged conduct is therefore between 2007 (when Dawn first acquired 49% of the shares in Sangio), and 2012 when it increased its shareholding to 100%.

The Parties' Submissions

[17] The Commission submitted that at the time of concluding the shareholders' agreement, Dawn and Sangio were actual or potential competitors in the market for the manufacture and supply of regular HDPE pipes nationally, or at the very least in the Western Cape. This is because a relatively short time prior to the shareholders' agreement, Dawn manufactured regular HDPE pipes for supply in the Western Cape.

[18] Dawn alleges that at the time that the shareholders' agreement was concluded, it had stopped manufacturing regular HDPE pipes but had retained its extruders. According to the Commission, since Dawn had retained the productive assets that could manufacture regular HDPE pipes, Dawn was a potential competitor to Sangio nationally or, at the very least, in the Western Cape.

[19] Mr Marolen, who appeared for the Commission, submitted that the re-commissioning of the extruders by Dawn in 2012 was evidence that it could re-

[6] Turnover Trading 132 (Pty) Ltd.
[7] Warplas Share Trust.

enter the market relatively easily. The fact that Dawn had subsequently manufactured these pipes exclusively for Sangio for supply in the Western Cape was nothing but a manifestation of the agreement struck in clause 20.

[20] The respondents persisted with their defences namely that Dawn and Sangio were not actual or potential competitors at the time the shareholders' agreement was concluded; that Dawn and Sangio operated in different geographic markets; that clause 20 properly characterised, was not an agreement designed to avoid competition but was a normal restraint in joint ventures to protect the investments in the joint venture; and that clause 20 had no effect on competition in the market.

[21] Furthermore it was argued that the Commission had not discharged its onus to prove that clause 20 contravened section 4(1)(b)(ii) of the Act.

The Nature of Clause 20

[22] In order to determine whether or not clause 20 contravenes section 4(1)(b)(ii) of the Act it, let us consider the shareholders' agreement in its full context to see what it purports to be or not to be.

[23] Mr Unterhalter on behalf of the respondents referred to the Tribunal's and Competition Appeal Court's decisions in the *SAB*[8] matter where the concept of "characterisation" was applied, following the Supreme Court of Appeal's decision in *Ansac*[9]. The purpose of characterisation is to establish whether the conduct complained of under section 4(1)(b) coincides with the character of the prohibited conduct. It is a two-stage enquiry that embodies determining the scope of the prohibition (which is a matter of statutory interpretation) and the nature of the conduct (which is a factual enquiry).

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[8] See Tribunal decision in Competition Commission v South Africa Breweries Limited & Others [2014] 1 CPLR 265 (CT), and CAC decision in Competition Commission v South Africa Breweries Limited & Others [2014] 2 CPLR 339 (CAC).

[9] American Natural Soda Ash Corporation and Another v Competition Commission of SA and others 2005 (6) SA 158 (SCA).

[24] The CAC said the following of characterisation in the SAB matter:

> *"The purpose of the characterisation principle, is reflective that the per se prohibitions contained in s 4(1)(b) are the most serious legislative prohibitions against a defendant. There is no defence which can be offered, if the requirements are met. The animating idea of the characterisation principle is to ensure that s 4(1)(b) is so construed that only those economic activities in regard to which no defence should be tolerated are held to be within the scope of the prohibition. Whether conduct is of such a character that no defence should be entertained is informed both by common sense and competition economics."*

[25] It is apparent, on a plain reading of clause 20, that Dawn had undertaken not to manufacture HDPE piping (other than corrugated pipes) in the entire Republic of South Africa, for as long as it or its associates held shares in Sangio. Dawn also undertook to procure all its South African HDPE piping (other than corrugated pipes) from Sangio.

[26] In practice, this meant that Dawn was precluded by the operation of clause 20 to manufacture regular HDPE piping throughout the country, which would include the Western Cape. Furthermore, Dawn was under an obligation as provided in clause 20.2 to purchase all its South African (not only in the Western Cape) regular HDPE piping from Sangio.

[27] The purpose of clause 20 was clearly to keep Dawn out of the market for the manufacture of regular HDPE piping (at a national level). Both Dawn and Sangio had agreed to this as evidenced by the signatures to the document. On the face of it, this amounted to market division in the regular HDPE piping market and required an explanation by the parties in rebuttal of a *prima facie* case.

[28] Before considering further the various submissions put up by the parties, we note that there was some elision in the various submissions as to whether the relevant product market was the market for the manufacture of regular HDPE or all HDPE piping (other than corrugated). In the agreement, clause 20 seeks to limit Dawn from the manufacture of any HDPE other than corrugated HDPE. The factual matrix that was presented to us however clarified that Sangio had never been in the market for any other type of HDPE other than regular. For purposes of analysis we assume therefore that the relevant product market was the manufacture of regular HDPE piping, a line of business in which both Dawn and Sangio were active prior to the conclusion of the shareholders' agreement.

Is clause 20 a restraint of trade?

[29] Relying on the *Danone*[10] and *Heinz*[11] cases before the Tribunal, Dawn argued that where a shareholder acquires a share in a business through a joint venture arrangement, the restraints imposed pursuant to that joint venture do not constitute market division.

[30] Mr Beukes submitted that clause 20 was *"commercially reasonable for parties entering into a joint venture in order to protect their investment."* He submitted that the restraint was to protect Mr Warren, the seller of Sangio as he was concerned that Dawn would gain insights into his business as well as access to skills, know-how and goodwill that had been developed by Sangio, which Dawn could potentially use to compete with it.

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[10] Compagnie Gervais Danone,Clover Beverages and Clover SA (Pty) Ltd,Danone-Clover (Pty) Ltd; case number; 04/LM/Jan03.

[11]Heinz Foods South Africa (Pty) Ltd VS Today Frozen Foods (a business unit of Pioneer Foods (Pty) Ltd),John West (a division of Heinz SA (Pty) Ltd),Heinz Wellington (Pty) Ltd; case number; 42/LM/Aug03.

[31] The Commission, however, pointed out that clause 9.1[12] of the shareholders' agreement expressly states that the arrangement between Dawn and Sangio is not a joint venture and *Danone* & *Heinz* were of no assistance to the respondents.

[32] We agree with the Commission. Clause 9 of the shareholders' agreement, entitled "Relationship of the Shareholders and Voting Support" states unequivocally that the relationship between the parties is not a joint venture, or partnership or any similar relationship.

[33] Hence clause 20 cannot be interpreted to be a restraint consequent to a joint venture simply because the parties were not in such a relationship.

[34] Is clause 20 a restraint of trade as argued by the respondents, inserted due to commercial necessity? Restraints of trade in the ordinary course of commercial transactions are usually justified when the seller sells a business (in part or in whole). The seller is thereafter restrained from competing with the buyer in the same line of business for a relatively short period of time and in a prescribed territory so as to permit the buyer to recoup his or her investment in the business.

[35] Clause 20 is clearly not such a restraint. In the first instance, it seeks to restrain the buyer, Dawn, from competing with the seller in the national market for the manufacture of regular HDPE piping. In the second instance, clause 20 is not a restraint of a relatively short period of time but is of long duration subsisting for the entire duration of the shareholders' agreement.

[36] But in any event, the respondents' own shareholders' agreement puts paid to the argument that clause 20 is a restraint of trade in the ordinary course of

[12] Clause 9.1 of the shareholders' agreement reads as follows: "No shareholder shall be entitled or empowered to represent or hold out to any third party that the relationship between the shareholders is a partnership, joint venture, consortium or other similar relationship."

commercial transactions. Clause 19 of the shareholders' agreement can be considered such an ordinary restraint, contemplated in the cases cited by Dawn and seeks to restrain Mr Warren in the event that Dawn would exercise its call option for all of the shares.[13] The restraint in clause 19 is for a limited duration (three years), over a specified territory and describes in detail the type of commercial activities Mr Warren is restrained from engaging in.[14]

[37] Thus clause 20 is not a restraint of trade inserted in the ordinary course of commercial necessity nor does it follow on a joint venture because the respondents' agreement tells us this is not so.

[38] Clause 20 is clearly limiting of competition between Dawn and Sangio in the national market for regular HDPE piping. This leaves us to consider whether this restriction of competition is in contravention of section 4(1)(b)(ii) of the Act.

The legal enquiry: is clause 20 a contravention of section 4(1)(b)(ii)?

[39] The elements of section 4(1)(b)(ii) that the Commission is required to prove are: an *agreement*[15] between competitors; and a division of markets between them.

[40] There is no dispute that the shareholders' agreement was an agreement as contemplated in section 4(1)(b)(ii). It was in writing and signed by all the parties thereto.

[41] The issue to be determined, and much of the hearing was focused on this, was whether the parties, at the time the shareholders' agreement was concluded, were competitors, actual or potential – the factual enquiry.

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[13] As set out in clause 13 of the shareholders' agreement.
[14] See clauses 19.1 to 19.5 of the shareholders' agreement.
[15] In terms of the Act, the word agreement is define as follows; "when used in relation to a prohibited practice, includes a contract, arrangement or understanding, whether or not legally enforceable".

[42] The Commission seemingly accepted that Dawn had in fact mothballed its regular HDPE pipe machinery *prior* to the conclusion of the shareholders' agreement. Its contention was that even though Dawn had mothballed its extruders, those assets remained capable of producing regular HDPE pipes. Therefore, even if Dawn and Sangio may not have been actual competitors by the time the shareholders' agreement was concluded, they remained potential competitors. The fact that Dawn subsequently re-commissioned the machinery, albeit as an agent for Sangio, served to confirm that Dawn had the *ability* to re-enter the market for regular HDPE piping, at the very least in the Western Cape if not nationally.

[43] Relying on the Tribunal decision in *United Pharmacies*[16], Mr Marolen on behalf of the Commission submitted that it was sufficient that Dawn and Sangio were in the same line of business to qualify as actual or potential competitors. He submitted further that *United Pharmacies* was authority for the proposition that Dawn and Sangio need not have been in the same geographic market to be considered actual or potential competitors.

[44] Mr Unterhalter submitted that the question whether parties are competitors is a factual enquiry. He submitted that the Commission had failed to show that Dawn and Sangio were competitors (actual or potential) in the manufacture of regular HDPE pipes because although Dawn had previously manufactured them, it had taken a decision to mothball its regular HDPE machinery by the time the shareholders' agreement was concluded. Furthermore the mere ability to produce a product is not sufficient to qualify a firm as a potential competitor.

[45] He submitted that the appropriate test to be applied is that contained in the European Guidelines on Horizontal Co-operation Agreements ("EU guidelines"). The EU guidelines provide that a firm is treated as a potential competitor, *"if there is evidence that, absent the agreement, this firm could and would be likely to undertake the necessary additional investments or other necessary switching*

[16] Commission v United Pharmacies 04/CR/Jan02 22/01/03.

costs so that it could enter the relevant market in response to a small and permanent increase in relative prices".

[46] Mr Unterhalter submitted that the evidence of Mr Beukes, who said in his supplementary answering that DPI has *"never had any plans to invest in new HDPE extruders or HDPE management capacity following the decision to mothball its existing extruders"*, was uncontradicted. For that reason, Dawn was not a potential competitor of Sangio.

[47] He argued that the re-commissioning of the regular HDPE machinery by Dawn to manufacture regular HDPE pipes for Sangio was the result of a toll manufacturing agreement between them, not a manifestation of the shareholders' agreement as the Commission contends. He submitted that the toll manufacturing agreement was vertical in nature, not horizontal.

[48] He also contended that the Commission had not discharged its onus in defining the geographic market. Nevertheless, he conceded that the Tribunal did not have to make a finding on the geographic market as the determinative issue was whether the respondents were competitors in any market, whether regional or national. [17]

[49] With this in mind, we reconsider the material facts to determine whether the character of the conduct complained of, falls within the prohibition, before considering whether the conduct falls within the scope of the prohibition.

The factual enquiry - were Dawn and Sangio competitors?

[50] There is no dispute that at some stage between the two acquisitions by Dawn – its acquisition of DPI and its later acquisition of 49% in the business of Sangio – that it competed with Sangio in the market for regular HDPE piping in the Western

[17] See transcript 28 October 2016, page 116, lines 19-25 and page 117, lines 1-3.

Cape. According to Mr Beukes, Sangio was a relatively small competitor in the Western Cape, whose supply was largely accounted for by Dawn or its subsidiaries. This however does not detract from the fact that Sangio was a supplier of regular HDPE pipes in the Western Cape, albeit a small competitor as alleged by Mr Beukes.

[51] In order to understand the nature of clause 20 it seems necessary to consider the background facts put up by Mr Beukes in relation to how the provision came into existence.

[52] These facts are important because within a period of six months, Dawn did all of the due diligence processes and then made the decision to purchase DPI Plastics, which had the capacity to produce both corrugated and regular HDPE pipes; made the decision subsequently to then mothball its only recently acquired capacity to manufacture regular HDPE pipes; made a decision to instead acquire an interest in a third party's capacity to manufacture regular HDPE pipes; and purchased a 49% interest in Sangio. The sequence, inter-relationship, and commercial bases for these decisions are all important considerations for this case.

[53] We are told by Mr Beukes that when Dawn acquired DPI it undertook a review of the business and identified two key concerns, namely the fact that the HDPE extruders were out of date and inefficient. Dawn was also concerned about the risk of cross contamination if it continued to manufacture regular HDPE and Polyvinyl Chloride ("PVC") pipes in the same facility. Hence Dawn took the decision "in order to minimize its losses and this risk [of contamination]" as it had "resolved that it had no use for these two extruders, as it would not itself compete as a manufacturer of "regular" HDPE pipes". [18]

[18] Paragraph 8 of Answering Affidavit.

[54] In paragraph 9 of his answering affidavit, Mr Beukes explains that Dawn, some time *prior to 2006* had pursued a strategy of backward integration into the supply chain, however, having mothballed regular HDPE extruders, backward integration in regular HDPE was no longer possible. Therefore, Dawn had to either invest in new generation extruders, or acquire an interest in an existing manufacturer.

[55] Dawn ultimately decided to pursue the latter strategy and had identified Sangio Pipe as a potential partner. Dawn then entered into discussion with Mr Warren in early 2007.

[56] None of Mr Beukes' assertions were supported by contemporaneous documents. No financial statements were put up and, no board or management minutes or due diligence documents in support of Dawn's allegations were provided.

[57] Significantly, no indication was given of *when* the decision to mothball the extruders was taken by Dawn.

[58] Mr Unterhalter argued that this was *prior* to the conclusion of the shareholders' agreement in April 2007.

[59] But this is not what Mr Beukes says. He gives us no clear time lines and provides a vague picture of the course of events.

[60] At most, it is suggested in paragraph 13 of his supplementary affidavit that the decision to mothball was taken in 2006.

[61] In paragraph 13 of his answering affidavit, Mr Beukes simply makes the assertion that Dawn had already "unilaterally decided to exit its manufacture of "regular" HDPE" and that "Dawn had no intention of manufacturing "regular" HDP (sic) piping either itself or through DPI" when the shareholders' agreement was

concluded. Again we are left in the dark as to when Dawn formulated this intention.

[62] Nor does Mr Beukes tell us when the mothballing of the extruders *in fact* took place. Was it prior to Dawn identifying Sangio as a potential partner? Was it after? We have no indication – and Mr Beukes does not make it clear – that when Dawn started engaging with Mr Warren in "early 2007" it had *in fact* mothballed its extruders.

[63] Nothing is said about when production ceased or when the last orders or sale took place. No documents were put up in support of the assertion that Dawn had *in fact* ceased manufacturing regular HDPE pipes *prior* to it engaging with Mr Warren in early 2007.

[64] Hence even though the Commission for purposes of arguing its case, accepted that the mothballing took place *prior* to the conclusion of the shareholders' agreement, no corroborating evidence to that effect has been put up by the respondents.

[65] What we do know however, from Mr Beukes' affidavit, is that contact with Sangio had already been made in 2006[19] when Dawn allegedly offered to sell its extruders to Sangio, and before Dawn engaged Sangio in early 2007 to acquire 49% of Sangio. Mr Warren would certainly have, as a result of those discussions, gained knowledge about its competitor, Dawn's business, and the existence of the regular HDPE extruders in 2006 and not in early 2007.

[66] We also know from Mr Beukes' affidavits that all of these events took place within a relatively short period of six months – between October 2006 when Dawn acquired DPI and April 2007 when it acquired 49% of the shares in Sangio and concluded the shareholders' agreement.

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[19] Paragraph 13.2 of Mr Beukes' supplementary affidavit.

[67] But we are not told by Mr Beukes when precisely, in that short period of six months, a decision to mothball the regular HDPE extruders was taken and when these *in fact* were mothballed. The imprecise and vague explanations by Mr Beukes on these crucial dates beg the very question they were meant to answer, namely whether Dawn had independently and prior to commencing discussions with Sangio, decided to mothball its HDPE extruders. On Mr Beukes' own version, the parties were in contact and negotiation with each other about the very line of business they competed in (regular HDPE piping) from at least October 2006 when Dawn acquired DPI.

[68] The only reasonable inference to draw is that the parties were still *de facto* actual competitors in regular HDPE at a point in time in the period October 2006, when they had discussions regarding Dawn's proposed sale of its extruders to Sangio, and April 2007, when they concluded the shareholders' agreement.

[69] However, even if we were to assume in favour of the respondents, and accept that the extruders were mothballed some time *prior* to the approach to Mr Warren in early 2007, the fact that Dawn had *retained* the extruders certainly gave rise to apprehension on the part of Mr Warren. Mr Beukes confirms that Mr Warren felt "vulnerable" [20] and insisted on the inclusion of clause 20 because he did not want Dawn to gain know-how and insights from Sangio's business to compete against him.

[70] When asked what exiting the market meant economically, where a firm retains its productive assets as in this case, Mr Unterhalter accepted that although a firm that was previously in a market may not be providing services in the market, if actual competitors in that market have reason to believe that the firm will be back in the market, this will govern their conduct.[21]

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[20] Paragraph 13 Answering Affidavit.

[21] See transcript dated 28 October 2016, page 75, lines 8-25 and page 76, lines 1-16.

[71] It appears that Sangio's conduct in requiring this non-compete clause was governed precisely by the fact that Dawn had retained its productive assets, which Sangio was aware of. Indeed, as confirmed by Dawn in its answering affidavit, Sangio's insistence on the non-compete clause was governed by the fact that it regarded Dawn as a competitor. Mr Beukes' affidavits tells us that Mr Warren was concerned about Dawn competing with his business, a reasonable concern considering his knowledge of the existence of the mothballed extruders. On this basis alone, the element of showing that Dawn and Sangio were, at the very least potential competitors, has been met – this is aside from the question whether or not the re-commissioning of the extruders proves that Dawn re-entered the market, which we consider later.

[72] Nevertheless Mr Unterhalter insisted, relying on the EU guidelines, that no evidence had been adduced by the Commission to show that, absent the agreement, Dawn could have and would have re-entered the market. He submitted that, to the contrary, Mr Beukes' explanation of the toll manufacturing agreement is evidence that Dawn could and would not have entered the market.

[73] Mr Beukes submitted, in the first instance, that there was substantial expansion in HDPE capacity in South Africa of about 90% between 2006 and 2012; second, that technology had advanced rapidly, rendering DPI's extruders even more out-dated in 2006 than they were in 2012; and third, that DPI had been focused exclusively on PVC production for some years before 2012, therefore re-entry into regular HDPE would have required scale, skill and capital which Dawn was not prepared to invest in.

[74] As to the first reason, no details or documents in support of how the 90% growth in HDPE was calculated were attached and no details as to whether it was only regular or all HDPE or whether it included local and imported product were provided.

[75] In relation to the third reason, we were told that DPI had undertaken to stop manufacturing regular HDPE when it decided to mothball its extruders and agreed to clause 20 with Sangio. It is unsurprising therefore that its operations would be more focused on PVC than HDPE.

[76] The second reason, namely that the extruders would have been extremely out-dated by 2012 simply does not hold true because on Dawn's own version, it did in *fact* re-commission them into active production, and notwithstanding that this was nearly six years later, the extruders were capable of producing regular HDPE pipes (albeit it for Sangio and not for the market as was the case prior to the shareholders' agreement).

[77] Dawn further justified the re-commissioning of the extruders in the alleged toll manufacturing agreement on the basis that DPI did not to take any risks. All that Dawn received was a conversion fee per kg for producing the regular HDPE. Sangio carried all the production risk. Mr Unterhalter submitted that this arrangement cannot be regarded as entry by Dawn since no competitor can enter a market on a risk free basis as was the case with Dawn.

[78] In our view, the alleged toll manufacturing agreement did not serve to prove that Dawn had re-entered the market for regular HDPE as the Commission suggested. It only served to prove the *relative ease* with which Dawn was able to re-deploy the alleged out-dated extruders into active production, which no doubt created anxiety on the part of Mr Warren. The fact that it did this on behalf of Sangio, some five to six years after the non-compete clause (using allegedly out-dated machinery) was because Dawn was bound by clause 20 not to manufacture for the market.

[79] As mentioned earlier, on Dawn's own version, Mr Warren of Sangio was aware that Dawn had retained the machinery to produce regular HDPE pipes which affirmed his apprehension that Dawn was still, at the very least, a potential competitor. Hence Mr Warren's requirement for the non-compete clause. If

indeed it were the case that they were not competitors there would have been no need for them to include a clause of this nature in their agreement.

[80] Moreover, the fact that Dawn could re-commission its allegedly seriously outdated and inefficient extruders in active production in 2012 (some five to six years later) serves to support the inference that the retention of the productive assets by Dawn at the time the shareholders' agreement gave rise to warranted apprehension on the part of Mr Warren that Dawn was a potential competitor. As mentioned, the requirement by Sangio for the non-compete clause alone suffices to indicate that Sangio regarded Dawn a potential competitor.

[81] The reasons advanced by Mr Beukes in his affidavit as to why Dawn could not have re-entered the market are self-perpetuating. It is precisely because Dawn had agreed not to compete in regular HDPE pipes that it had not kept up with the alleged developments. Therefore, even if we were to take the EU guidelines into consideration, which we are not bound to do,[22] our conclusion would remain that, Dawn and Sangio on the facts before us were potential competitors in regular HDPE piping at least in the Western Cape because Dawn already had the machinery to produce regular HDPE pipes. The argument that they were unlikely to invest in the skills and capital required to re-enter (since they had not kept up with market developments), ignores the fact that it was the very non-compete clause 20 that prevented it from doing so.

[82] We have assessed the textual meaning of the shareholders' agreement and the facts put up by the respondents in Mr Beukes' two affidavits. In light of the evidence before us, we find the non-compete clause to fall with the scope of the prohibition contemplated in section 4(1)(b)(ii).

[22] We note, as held by the Competition Appeal Court in *Ansac* and another v Competition Commission of South Africa, case no.: 12/CAC/Dec01, that while we are to give consideration to foreign jurisprudence in applying the Act, foreign jurisprudence serves as a guide not the law.

[83] A further difficulty with Mr Beukes' explanations is that these matters were peculiarly within his knowledge, yet he elected not to testify. The respondents contended correctly that the onus was on the Commission to prove its case. Having adduced *prima facie* evidence, however, the onus shifted to the respondents to rebut what seemed to be a market division.

[84] Relying on *Gericke v Sack*[23], the Commission submitted that where facts are peculiarly within the knowledge of a party, the onus is on that party to put up the evidence. Since it had made out a *prima facie* case, it had discharged its onus as far as it reasonably could, since it could not be expected to know the respondents' business affairs. Mr Unterhalter accepted the legal principle set out in this decision.[24]

[85] He argued however, that the case did not apply in this case. This was because the respondents have put up *"all the evidence that is necessary to set out their defences and plead all the material facts that they are required to plead which have not been contradicted".*[25]

[86] In our view however, the facts and defences pleaded do not go far enough in rebutting the *prima facie* case put up by the Commission. We have already mentioned certain material facts which are missing from Mr Beukes' affidavits. We have also mentioned that no supporting contemporaneous documents, such as financial statements; board, management or strategy documents, or the due diligence documents on which they relied, were provided. Nor was the toll manufacturing agreement provided.

[87] Mr Unterhalter stated that the documents had not been provided because the respondents envisaged that there would be discovery[26] in due course. However, in circumstances where the information is peculiarly within the respondents'

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[23] Gericke v Sack 1978 (1) SA 821 (A).
[24] See transcript 28 October 2016, page 55, lines 18-25, and page 56, line 1.
[25] See transcript 28 October 2016, page 56, lines 20-22.
[26] See transcript 28 October 2016, page 48, line 14-15.

knowledge, as in this case, and they elect not to testify, the respondents ran the risk of an adverse finding against them. Especially since they knew, when they filed the supplementary affidavit (dated 29 July 2016), that no witnesses would be called, having advised the Commission as such, in a letter dated 22 June 2016.

[88] It is well established both in criminal and civil law that, while an accused or defendant is under no obligation to testify, failure to do so is not without consequence.[27] In motivating for the onus being squarely on the Commission, Mr Unterhalter submitted that while the proceedings before us under section 4(1)(b) and the penalties that can be imposed in that regard are not criminal, the gravity of a contravention of section 4(1)(b) is significant.

[89] This, however, cuts both ways. Knowing the gravity associated with cartel conduct, the respondents should have made every effort to support the claims they made in rebuttal, so as to not leave any questions unanswered, particularly where they elected not to testify.

[90] Mr Beukes elected not to testify. The affidavits of Mr Beukes were unsupported by contemporaneous documents. His explanations as put up in the two affidavits did not convincingly rebut the *prima facie* inference that clause 20 amounted to market division.

[91] This leaves us to consider Dawn's final defence that clause 20 was pro-competitive, which we do below.

[27] See S v Boesak [2001] JOL 7785 (CC) at paragraph 24. Osman and another v Attorney-General, Transvaal 1998 (11) BCLR 1059 CC; 19998 (4) SA 1224 (CC). See also Omnico (Pty) Limited & Another v The Competition Commission & Others; case number; 142/CACJune16 and 143/CACJune16.

Clause 20 had no effect on competition and was commercially justifiable

[92] Dawn submitted that since it and Sangio were not actual or potential competitors, a restraint between them would not have had any effect on competition.

[93] They submitted to the contrary that Dawn's investment in Sangio had been beneficial to competition as it allowed Sangio to grow from having a regional to a national presence in the market.

[94] It is well established that section 4(1)(b) contraventions in our Act are *per se* prohibitions. The Commission is not required to show any anti-competitive effects of the agreement as the anti-competitive effects are presumed.

[95] Conversely, the respondents are not permitted to justify their conduct by showing the pro-competitive effects of their conduct. At best for the respondents, any pro-competitive effects alleged may be considered as a mitigating factor in determining the appropriate administrative penalty, but they do not expunge liability by the respondents.

[96] As observed by the CAC in the *SAB* matter referred to above, *"whether conduct is of such a character that no defence should be entertained is informed both by common sense and competition economics."*

[97] On the face of it, clause 20 limits competition between Dawn and Sangio in HDPE piping (other than corrugated) throughout the country. Common sense and competition economics tell us that this would amount to market allocation between actual or potential competitors. Having assessed the textual meaning of the shareholders' agreement and the explanations for it, we are not persuaded that the respondents' rebuttal of the case, on the balance of probabilities, vindicates them.

[98] We have therefore found the non-compete clause to fall with the scope of the prohibition contemplated in section 4(1)(b)(ii).

Conclusion

[99] For the reasons discussed above, we conclude that Dawn and Sangio contravened section 4(1)(b)(ii) of the Act in the period 2007 to 2012.

ORDER

1. Dawn, through DPI, contravened section 4(1)(b)(ii) of the Act.
2. Sangio has contravened section 4(1)(b)(ii) of the Act.
3. A pre-hearing will be convened in due course to determine the conduct of the matter in relation to a hearing on remedies.
4. There is no order as to costs.

Ms Mondo Mazwai

23 March 2017
Date

Ms Yasmin Carrim and Prof. Imraan Valodia concurring

Tribunal Researcher:	Caroline Sserufusa
For the Commission:	Mr T. I Marolen and Mr T. Ngcukaitobi instructed by Ndzabandzaba Attorneys Inc.
For the Respondents:	Mr DN Unterhalter SC instructed by Nortons Inc.