Case No 418/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

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| CTP LIMITED | First Appellant |
| TERRENCE DESMOND MOOLMAN | Second Appellant |
| NOEL MALCOLM COBURN | Third Appellant |
| MEREDITH DAVID WILLIAM SHORT | Fourth Appellant |

and

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| ARGUS HOLDINGS LIMITED | First Respondent |
| ARGUS NEWSPAPERS LIMITED | Second Respondent |

CORAM: CORBETT CJ, EM GROSSKOPF, SMALBERGER,
NIENABER JJA et NICHOLAS AJA

HEARD: 21 FEBRUARY 1995

DELIVERED: 29 MARCH 1995

JUDGMENT

/NIENABER JA

NIENABER JA:

The parties to this litigation are parties to a joint business venture. That venture was the product of a catenation of agreements of which two, one entered into in 1980 and the other in 1985, are central to this litigation. Clause 2 of the 1985 agreement which is headed "Recordal and agreement" reads:

"2.1 The parties record that:

2.1.1 they are all intimately involved in the business of printing and publishing;

2.1.2 they have all acquired and will acquire considerable expertise in the business of printing and publishing;

2.1.3 Caxton, Afmed, Modern Media, Hortrio and Horpak [the appellant by its former name] are all closely associated with The Argus [the first respondent] and its subsidiary and associated companies;

2.1.4 Moolman [the second appellant] and Coburn [the third appellant] are the joint managing directors of Caxton and Short [the fourth appellant] is the chairman of Caxton.

2.2 For these reasons the parties agree that it is fair and reasonably necessary for the protection of their business and proprietary interests that they should be restrained from competing with each other in respect of the undermentioned activities for a reasonable period."

The issue in this litigation, brought by way of notice of motion, is whether the publishing restraints which are contained in both the 1980 and the 1985 agreements in substantially similar terms and which purport to bind the first respondent in favour of the appellants and certain other parties, are enforceable at the instance of the appellants. The Court a quo (Goldstein J sitting in the Witwatersrand Local Division) decided that issue in favour of the respondents. This is an appeal, with leave of the Court a quo, against that Ending.

The second respondent was not a party to either of the agreements but it was common cause that in 1988 it assumed all the rights and obligations of the first respondent under both agreements. The second respondent is described in the papers as the wholly owned chief operating subsidiary of the first respondent. For purposes of this litigation nothing hinges on the separate corporate identities of the two respondents and I shall henceforth refer to them simply as the respondents, even in respect of events preceding 1988. The respondents published nespapers. They had an indirect interest

in the Sunday Times, a weekly newspaper sold nationwide. They published The Star, a daily newspaper sold and circulating mainly in what was then known as the PWV region, the Cape Argus, sold and circulating mainly in the Cape Peninsula, and the Sunday Tribune and the Natal Daily News, respectively a weekly and a daily newspaper, sold and circulating mainly in the Durban area.

Caxton Ltd ("Caxton"), in which the second and third appellants were both substantial shareholders and directors, was the proprietor, printer and distributor of an assortment of publications described in the affidavits as "knock and drop" free sheets. These are publications in tabloid form consisting chiefly of advertising, but containing also news items and features relating to specific areas or suburbs, which were distributed free of charge in those areas, mainly by leaving them in private post boxes. There was a network of these publications throughout South Africa and Namibia. Caxton also published what are described in the appellants' affidavits as "local newspapers". These were also targeted at specific localities but were

distributed and sold in the ordinary course. The Sandton Chronicle was referred to as a specific example. Caxton's main source of revenue from both types of publications came from advertising.

Some time before 1980 the respondents resolved to increase their participation in that sector of the advertising market. This was accomplished through an intricate series of manoeuvres, recorded in the 1980 agreement, involving the sale and exchange of shares in various companies, including Caxton, the outcome of which, somewhat simplified, was that the second, third and fourth appellants and the first respondent became shareholders in a company, Afmed (Pty) Ltd ("Afmed"). Afmed became the holding company of Caxton. The respondents thus acquired, through the first respondent's shareholding in Afmed, a substantial interest in Caxton's business. The 1980 agreement contained reciprocal restraints, the overall purpose of which was to preserve, for each of the parties vis-à-vis the others, their separate spheres of operation within the Geld of printing, publishing and distributing newspapers.

Clause 16 of the 1980 agreement provides in particular:

"16.5 ARGUS undertakes and warrants that it shall not itself or through any company controlled by it or through any third party except with the written consent of M&C [second and third appellants respectively] and AP [Amalgamated Press (Pty) Ltd] -

2.1.5 Publish a separate free newspaper (i.e. a newspaper for which the recipient does not pay) anywhere in the Republic of South Africa or South West Africa; or

2.1.6 Publish a local newspaper in the areas presently described as the magisterial districts of Germiston, Elsburg, Boksburg, Benoni, (including Petit and Brentwood Park), Brakpan, Springs, Florida, Sasolburg, Meyerton, Vanderbijlpark and Vereeniging, Roodepoort, Krugersdorp and Randfontein

PROVIDED however that all the provisions of this Clause and its sub-clauses shall not be interpreted as a restraint on the ARGUS publishing a national or regional daily newspaper, or a national or regional weekly newspaper, provided that such regional newspaper does not circulate only or mainly in the areas described above in clause 16.7."

The restraints, it is to be noted, are not limited in time. During the period 1980 to 1985 Caxton continued to publish its free sheets and, in the areas demarcated in clause 16.7 of the 1980 agreement, its

local newspapers. There were some exchanges between some of the parties about some of the respondents' publishing activities but in general the respondents adhered to the restraints.

Early in 1985 there was, once more, a rearrangement of the corporate kaleidoscope. Caxton sold its business to a company Hortors Trio Rand Limited ("Hortors Trio") "for the benefit of its wholly owned subsidiary, Horpak ...". Horpak subsequently changed its name to CTP Limited. CTP Limited is the first appellant. Its business operations are administered by the second and third appellants. The second, third and fourth appellants have substantial equity stakes in the business of the first appellant. The first respondent, through its shareholding in various other companies, acquired control of 50% of the equity in the first appellant.

Some of these developments are reflected in the 1985 agreement. The second and third appellants as well as Afmed and the first respondent who were all parties to the 1980 agreement were again signatories to the new agreement. Some of the other original parties did not, however, survive the

transition. The first and fourth appellants as well as Caxton and Hortors Trio were introduced as new parties.

Clauses 1.2 and 1.3 of the 1985 agreement read as follows:

"1.2 In terms of an Agreement between Moolman [the second appellant], Coburn [the third appellant], The Argus [the respondents] and various other parties dated January 17, 1980, Amalgamated, Moolman and Cobum have given certain restraints to The Argus and The Argus has given certain restraints to Moolman and Cobum.

1.3 The parties wish to extend these restraints in the manner set out below."

Clause 2 of the 1985 agreement has been quoted at the beginning of this judgment.

Clause 3.1, recording the restraints on the second, third and fourth

appellants, reads:

"3.1 Moolman, Cobum and Short each undertake that they shall not either themselves or through any company or otherwise except with the written consent of The Argus -

3.1.2 publish a national or regional daily or national weekly newspaper in the Republic of South Africa as it was constituted

on May 31, 1961, or in South West Africa/Namibia. 3.2 The restraints contained in 3.1 shall apply individually to Moolman, Coburn and Short from the effective date until 5 years after the date on which each of them ceases to be employed by Caxton, Hortrio or Horpak or ceases to be a shareholder of Caxton, Modern Media or Afmed, whichever is the later."

Clause 4 contains a similar restraint on Caxton, Armed, Modern

Media, Hortrio and the first appellant in favour of the first respondent.

The crucial clause is clause 5. It reads:

"5. Restraint on the Argus

5.1 Subject to the provisions of 5.2, The Argus undertakes to each of the other parties that it shall not from the effective date, without the written consent of the other parties, be interested or engaged, whether directly or indirectly and whether as proprietor, partner, shareholder or otherwise, in any company, partnership, firm, business venture or undertaking which carries on the activity of publishing a separate free newspaper (i.e. a newspaper for which the recipient does not pay), a local newspaper or a magazine, anywhere in the Republic of South Africa as it was constituted on May 31, 1961 or in South West Africa/Namibia or elsewhere, or from continuing any business activity or undertaking being carried on by The

> Argus or any of its subsidiaries at the effective date. 5.2 The restraints contained in this clause shall not restrain The Argus from publishing a national or regional daily newspaper, or a national or regional weekly newspaper, anywhere in the Republic of South Africa as it was constituted on May 31, or in South West Africa/Namibia, or elsewhere, or from continuing or recommencing any business activity or undertaking being carried on by The Argus or any of its subsidiary companies at the effective date."

Clause 5 of the 1985 agreement is wider in scope than clause 16 of the 1980 agreement. It reincorporates the restraint on the publishing of "separate free newspapers" and broadens the restraint on the publishing of "local newspapers" to cover the entire country instead of certain designated areas only. But the parties to the two agreements were not the same. The later restraint accordingly did not displace or novate the earlier one. Either could support a claim for relief.

During 1990 to 1991 the respondents embarked on a new series of publications with the cognomen "Focus". These were to be distributed in conjunction with The Star on a regular monthly basis. In May 1991 the

respondents distributed to potential advertisers a promotional letter advising

them that:

> "Over the years, The Star has regularly been asked to bring out special area guides to focus on certain areas and allow local advertisers to reach a specifically targeted area. Until now the choice of advertising medium in Sandton has been limited to local Caxton papers."

During July 1991 the following report appeared in the Argus News, an in-

house publication which was circulated to all Argus employees:

> "June saw the launch of five regional supplements to The Star, which will hopefully attract advertising from smaller retailers who cannot afford to advertise in the constantly growing newspaper ... [t]here has been an enthusiastic reaction from advertisers to the Western Focus, Northern Focus, Eastern Focus, Southern Focus and Focus on Sandton. The copy for these Caxton-like supplements is being written by editorial staffers on a free-lance basis ... The regional supplements are competition for the Caxton 'knock and drops' ... and retailers are pleased with being offered an alternative ... Supplements are obviously sent only to the region that each covers. For example, the Northern Focus goes only to the northern suburbs, and the Eastern Focus only to Edenvale, Bedford View, Germiston, Kempton Park, etc."

In the edition of The Star of 31 July 1991 a paragraph appeared which

advised readers that copies of the Northern Focus could be obtained from The Star newspaper itself at its address at Sauer Street, Johannesburg if it was not distributed in their area. A similar notice also appeared in the newspaper of 28 August 1991. That issue also contained an advertising extract which, inter alia, read:

> "June 1991 saw the launch of five Regional newspapers to The Star. This has offered local retailers the opportunity of low cost advertising directed at a specific geographical area. Regional newspapers carried by SA's largest daily paper give credibility and offers an alternative to local free sheet newspapers."

During this period different editions of The Star included different inserts being the Northern Focus, Eastern Focus, Western Focus, Southern Focus and Sandton Focus. Each "Focus" was separately paginated and contained, in tabloid form, news, features, and advertising pertaining to its particular area of distribution.

These events prompted the appellants, through their attorneys, to address a letter dated 2 September 1991 to the respondents demanding an

undertaking that the respondents "immediately desist from publishing any and all of the newspapers referred to ... or any similar type newspapers", failing which they would move for an urgent interdict. In reply the respondents' attorneys disputed that the inserts were

> "either local newspapers or separate free newspapers, as claimed by you. The publications are supplements to copies of The Star newspaper which are delivered or sold in specific geographic areas".

It was accordingly denied that "its action in publishing regional supplements is unlawful or in breach of the restraint agreement". The undertaking sought was refused but a concession was nevertheless made in these terms:

> "Notwithstanding the above, and in view of the close relationship which exists between your client and ours, our client will not, without prejudice to its rights, make the supplements available separately and free of charge to readers at any CNA branches in Johannesburg."

Thereafter different editions of Focus continued to be distributed in different areas as insertions in The Star. In the "Northern Star" of 12 September 1991, a copy of which had been made available to this Court, the following notice to readers appears:

"Northern Star is at your service. There will be five new Stars in the firmament by the end of this month. The first was the Sandton Star, which launched the cluster of 'stars' which will be appearing regularly in the suburbs from now on. Now readers in the northern areas will have their own 'Northern Star' twice a month.

We hope that the Northern Star, and the other regional Stars (Sandton, Southern, Eastern and Western), will reflect the views of the community. We want you to talk to us and let us know what you think. We will try to see things from your angle rather than from Sauer Street".

According to this announcement it was envisaged that each Focus might adopt its own distinctive approach, not necessarily in conformity with that of the main paper.

The threat of litigation led to protracted negotiations between the parties in an endeavour to resolve this internecine dispute but all efforts ultimately proved to be unsuccessful and the present proceedings ensued.

In it the appellants, as applicants, sought an order in paragraph 1 of the Notice of Motion that the respondents

"be interdicted and restrained from directly or indirectly publishing: 1.1 a separate free newspaper (i.e. a newspaper for which the recipient does not pay) anywhere in the Republic of South

Africa/Namibia;

1.2 a local newspaper anywhere in the Republic of South Africa/Namibia,

other than with the prior written consent of the Applicants";

and in paragraph 2, an interdict against the publication of the

> '"Southern Star/Focus', the 'Sandton Star', the 'Eastern Star/Focus', the 'Northern Star/Focus' and the 'Western Star/Focus', either together with or separately from The Star newspaper".

In each case the interdict sought is unlimited in point of time.

On behalf of the respondents it was contended that the appellants were not entitled to the relief sought:

2.1.7 because the restraints, if to endure in perpetuity, would be void for offending against public policy; and if to endure for a reasonable time, would be void for vagueness;

2.1.8 because the Focus inserts were not (i) newspapers which were (ii) separate or (iii) free or (iv) local.

I deal in turn with each of these contentions.

The duration of the restraints

The 1980 restraint was silent as to its duration. As such it is indefinite.

Whether the 1985 restraint is likewise indefinite depends on how clause 2.2 thereof, quoted at the outset of this judgment, is to be construed. It refers to "a reasonable period". Is that a term of the agreement? Or is the clause merely a preamble, a declaration of how the parties themselves view the respective restraints imposed upon them in the clauses to follow? If it is a term it would mean that the restraint, by agreement, is to endure for a reasonable time. Then the issue would arise whether such a term is either enforceable or void for vagueness.

In my opinion clause 2.2 was not intended as a term in the sense referred to in Design and Planning Service v Kruger 1974 (1) SA 689 (T) 695C-F i.e. as a contractual provision constituting an obligation. It is no more than a recordal, as its caption indicates, that the parties acknowledge in advance that the terms referred to in the body of the agreement will not

be open to attack as being unreasonable. (The weight which may be accorded to such an acknowledgement is not now germane (cf Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874(A) 905B-C; Basson v Chilwan and Others 1993 (3) SA 742 (A) 767J-768E)). That clause 2.2 is introductory and not declaratory also appears from the body of the agreement where a distinction is drawn between restraints imposed on individuals (such as the second, third and fourth appellants) and restraints imposed on corporations (such as the first appellant and the first respondent.) In the one category the restraints are limited in time, in the other not. So, for instance, clause 3.2 binds the second, third and fourth appellants

> "from the effective date until 5 years after the date on which each of them ceases to be employed by Caxton, Hortrio or Horpak or ceases to be a shareholder of Caxton, Modem Media or Afmed, whichever is the later".

Clauses 4 and 5, by way of contrast, contain no similar limitation when it comes to the first appellant or the first respondent. The implication is that the first appellant and the first respondent are bound by their respective

restraints for an indefinite and not merely a reasonable period. Properly construed, clause 2.2 does not therefore mean that the restraints are to persist only for a reasonable time; and that being so it is not necessary to examine the subsidiary question whether a term to that effect would be void for vagueness.

It was next argued on behalf of the respondents that a restraint for an indefinite period is so far-reaching as perforce to clash with public policy. I disagree. The cases both here and in England suggest the contrary. (See, for instance, for South Africa, Wilkinson and Another v Wiggill 1939 NPD 4, 16; Vermeulen v Smit 1946 TPD 219, 222; Weinberg v Mervis 1953 (3) SA 863 (C), 870H-871A; Wohlman v Buron 1970 (2) SA 760 (C), 763D-F; and, for England, Archer and Others v Marsh (1837) 6 Ad&E 959, 112 ER 366; Connors Brothers Ltd and Others v Connors [1940] 4 All ER 179 (PC), 195.) A restraint would be adverse to public policy if its enforcement would be contrary to the public interest. It would most likely be contrary to the public interest if unreasonable (Magna Alloys and

Research (SA) (Pty) Ltd v Ellis supra 898A-B). It would be unreasonable if and to the extent that it does not seek to protect a legitimate interest of the one party; or if it does purport to protect an interest, such interest is eclipsed by the interest of the other party not to be so restrained (cf Basson v Chilwan and Others supra 767G-I).

Whether a restraint is in conflict with the public interest is to be assessed in the light of the circumstances prevailing at the time when it is sought to be enforced (Magna Alloys and Research (SA) (Pty) Ltd v Ellis supra 898D). In the instant case the various restraints were reciprocal ones. They were agreed to between the parties concerned as part of the consideration for the restructuring of their respective businesses. Their purpose was to preserve the commercial status quo. Each side sacrificed part of its own competitive edge as a hedge against attack from the other. Where the restraints formed part of the overall consideration and were designed to protect comparable interests of the respective sides, they cannot be said to be mere covenants against competition and as such to run contrary

to the public interest.

The two sets of parties, although business associates, were nevertheless in competition on opposite sides of the same line of business. The purpose of the reciprocal restraints was to define each side's territory. Although the restraints binding the respondents are indefinite, the appellants conceded in argument that this purpose would be served only while the parties continued to conduct their respective businesses in association with each other; differently stated, that their protectable interest would only last for as long as they remained so affiliated. In turn, the respondents conceded in argument that as matters stood at the time when the Court a quo considered them, it could not be contended that the appellants lacked an interest worthy of protection. (Different considerations may of course apply if circumstances should in future change.)

In short, the restraints, ostensibly indefinite in time, will not necessarily operate in perpetuity; and judged on the strength of the interests served by the restraints at the time when their enforcement was sought,

cannot be said to be against the public interest and as such at variance with public policy.

Whether the Focus inserts were "newspapers"

On behalf of the respondents it was argued that the Focus inserts distributed as part of The Star were not "newspapers" because they had not been registered as such in terms of the Newspaper Registration Act, 63 of 1971. The contention is formulated in the following terms in the respondents' answering affidavit:

> "[t]he representatives of each of the parties knew and accepted that the term 'newspaper' would bear its ordinary grammatical meaning in the industry and that to qualify as a newspaper such publication would require registration in terms of the Act. The term 'newspaper' did not and was not intended to extend to regional supplements in their present form." (My underlining)

Registration is not part of the ordinary meaning of "newspaper". The Oxford English Dictionary (1933 edition), for instance, defines it as

> "a printed, now usually daily or weekly, publication containing the news, commonly with the addition of advertisements and other matters of interest".

The Act itself, incidentally, defines a newspaper as

> "a periodical publication published at intervals not exceeding one month and consisting wholly or for the greater part of political or other news or of articles relating thereto or to other current topics, with or without advertisements, and with or without illustrations, but does not include any publication not intended for public sale or public dissemination".

In terms of this definition the Focus inserts are newspapers.

If the underlined phrase "in the industry" in the passage cited from the respondents' answering affidavit was intended to suggest that the parties had a special or technical meaning in mind, the suggestion must fail for lack of any evidence to support it (cf Richter v Bloemfontein Town Council 1922 AD 57, 70).

In my opinion it cannot be said that the inserts were not newspapers for purposes of the two agreements. Whether the Focus inserts were "separate"

According to the appellants the Focus inserts although enfolded in and distributed as part of The Star were nevertheless "separate newspapers";

according to the respondents they were merely supplements to The Star and hence not separate. The Court a quo held that they were not separate inasmuch as they were not "separately published", which is the terminology used in the restraint clauses. Perhaps it would be more accurate to say that they were not "separately distributed". Physically each insert was, of course, not separated or detached from the rest of the paper as it would have been if a copy had separately been handed over to a buyer at the same time as The Star itself. In my opinion it is nevertheless arguable that, contextually at any rate, each Focus was a separate publication. It is in tabloid form whereas The Star is a broadsheet; it is separately paginated; it has its own approach, news items and advertising; and it is capable of being distributed as a separate entity, as indeed happened before the respondents undertook to discontinue such distribution. But it is not, for present purposes, necessary to pursue this topic in view of the conclusion which I have reached on the next issue viz. whether these publications, distributed as part of The Star, were "free".

Whether the Focus inserts were "free"

In both the 1980 and the 1985 agreements "free" is defined as "a newspaper for which the recipient does not pay". It is the intention of the recipient which is important. When a recipient purchases The Star, in which the publication in question is enfolded, he pays for a single article consisting of different parts. Even if the Focus may conceptually be regarded as a separate paper it is still part of the merx and thus part of the bargain. The recipient in effect gets two papers for the price of one - as he will in the rare instance where he is anxious to acquire a Focus rather than a Star. In either case he pays for both. Neither is free (cf Minister of Mineral and Energy Affairs v Lucky Horseshoe (Pty) Ltd 1994 (2) SA 46 (A) 53A-J).

The onus on this leg of the restraints is on the appellants to prove that the respondents contravened the restraint clauses. To succeed the appellants had to show that the Focus inserts complied with all three of the requirements mentioned i.e. that the inserts were separate and free and newspapers. Failure to prove any one of these requirements would be fatal.

The appellants proved that the inserts were newspapers; I am prepared to assume that they were separate; but by no stretch of the imagination can they be said to be free.

But that is not the end of the matter. There is still the other leg of the restraints. Even if the appellants should fail to prove that the Focus inserts were free newspapers, the restraints would apply if the appellants could show that the inserts were "local" newspapers. Then it would not matter whether the disputed publications were distributed free of charge.

Whether the Focus inserts qualified as "local" newspapers

The restraint clauses in the two agreements draw a distinction between different categories of publications - some the respondents are permitted to publish and distribute, others not. Those categories are:

(i) national newspapers, the distribution of which is not prohibited;

(ii) regional newspapers, likewise permitted;

(iii) separate free newspapers, the distribution of which is prohibited

throughout South Africa and Namibia; a contrario the distribution of

such a publication is not prohibited if the newspaper concerned is neither separate nor free, unless its distribution is prohibited under any of the categories to follow;

(iv) local newspapers under the 1980 restraint: their distribution was prohibited within the designated areas only. Outside those areas a local newspaper could still be distributed but not if it took place free of charge. In that event such publication could run counter to (iii) above;

(v) local newspapers under the 1985 restraint: the prohibition was now extended countrywide. Under that category it no longer matters whether the distribution is free. The only question is whether a newspaper which is not regional is local. If it is, it offends against the 1985 restraint.

Categories (iii) and (iv) might have overlapped but they were not coextensive. In (iii) the emphasis was on the conditions of distribution ("separate, free"), in (iv) on the area of distribution of the publication in

conjunction with its focus of attention (a particular locality). A non-regional newspaper could therefore escape both restraints - under (iii) because it was, for example, not free; under (iv) because it was published and distributed outside the designated area. But once the restraint was broadened in 1985 to cover the whole country the distinction between the two types of restraint became largely irrelevant. Thereafter the restraint of (iii) could only function if the paper complained of was free and separate and neither regional (permitted under (ii)) nor local (prohibited under (v)). But if "local" ends where "regional" begins (an issue to which I shall return in a moment), category (iii) no longer has its own sphere of operation. Its function would then have been usurped by (v).

The Court a quo held that the restraint clauses referred to in (iv) and (v) could not be enforced since it is impossible to determine, as a matter of interpretation, where the exact line lies between a region (and hence a regional newspaper, which is not prohibited) and a locality (and hence a local paper, which is). The learned judge proceeded to say,

"The papers before me attempt at some length to show how the parties themselves understood and applied the terms I have just interpreted. I do not intend referring to the evidence in this regard in detail since the factors contained in such evidence and favouring my interpretation are at least as strong, and probably stronger, than those against it."

The reasoning, if I understand it correctly, is that the Court a quo considered the criteria in the clauses to be incapable of application; consequently, that this aspect of the restraint clauses was void for vagueness.

With respect I disagree. Viewed in vacuo the precise line between the concepts "regional" and "local" is doubtless difficult to define. But does that make the restraint clauses void for vagueness? Three points need to be made. One, the words in a contract must not be interpreted in the abstract and out of context (cf Swart en 'n Ander v Cape Fabrix (Pty) Ltd 1979 (1) SA 195(A), 202C). Two, a restraint which in general terms may be unduly wide or imprecise can be trimmed to fit the common understanding and perceptions of the parties in the light of the circumstances prevailing at the time of its enforcement (cf Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A), 896A-E, 898D). Three, a conclusion of

invalidity will only be reached as a last resort (cf Haviland Estates (Pty) Ltd and Another v McMaster 1969 (2) SA 312 (A) 337H; Lewis v Oneanate (Pty)Ltd and Another 1992(4) SA 811 (A), 819E-J).

The parties to the respective agreements were men knowledgeable and experienced in the business of printing and publishing newspapers; they were in the process of re-arranging and re-aligning their existing businesses; and there were in existence at the time publications conforming to the descriptions "national", "regional" and "local" used in the agreements. Those publications fell easily into the various categories mentioned in the restraint clauses. In my view there can be little doubt that when drafting the agreements concerned the parties had in mind, when referring to national newspapers, newspapers such as the Sunday Times; when referring to regional newspapers, newspapers such as The Star, the Cape Argus and the Natal Daily News; and when referring to local newspapers, newspapers such as those published by Caxton. In that sense local newspapers would be newspapers that were not national or regional. Of course, one can conceive

of circumstances where these guidelines as to what the parties had in mind

might give rise to insuperable difficulties of application. But this, in my

opinion, is not such a case. In Hira and Another v Booysen and Another

1992 (4) SA 69 (A) 77B-H Nicholas AJA said:

> "The territory which lies between in public on the left side and in private on the right is largely uncharted, and it is difficult to define the position of the boundary between them. Clearly a mass public meeting (or publication in a large-circulation newspaper) is located on the left and a conversation between two people (or a private written communication) is located on the right. At what stage does in public become in private? The problem is of a recurrent and familiar kind. (See the discussion on 'drawing the line' by R E Megarry in Miscellany at Law at 121.) In Boyse v Rossborough [1856-57] 6 HLC 3 at 46 (10 ER 1192 at 1210) the Lord Chancellor had to consider whether the alleged testator was a person of sound mind at the time of the execution of a will. He said:
>
> > '...[T]he difficulty to be grappled with arises from the circumstances that the question is almost always one of degree. There is no difficulty in the case of a raving madman or of a drivelling idiot, in saying that he is not a person capable of disposing of property. But between such an extreme case and that of a man of perfectly sound and vigorous understanding, there is every shade of intellect, every degree of mental capacity. There is no possibility of mistaking midnight for

noon; but at what precise moment twilight becomes darkness is hard to determine.'

In Hobbs v London and South Western Rail Co (1875) LR 10 QB 111, Blackburn J said at 121:

'It is a vague rule, and ... it is something like having to draw a line between night and day; there is a great duration of twilight when it is neither night nor day; but on the question now before the court, though you cannot draw the precise line, you can say on which side of the line the case is.'

Lord Coleridge CJ expressed himself similarly in The Southport Corporation v Morriss [1893] 1 QB 359 at 361:

'The Attorney-General has asked where we are to draw the line. The answer is that it is not necessary to draw it at any precise point. It is enough for us to say that the present case is on the right side of any reasonable line that could be drawn."'

Here too the Focus newspapers, inserted into The Star and comparable to the Caxton publications in appearance and content, were clearly local and not regional, although distributed in selected localities together with and as part of a regional paper. It mattered not that a publication like the Western Focus was distributed in 38 areas in which only five of the first appellant's publications circulated. The mere fact that a publication of the respondents covered a considerably wider area than one of the first appellant does not

make the respondents' publication a regional rather than a local one. What does matter is that the Western Focus and other like newspapers were distributed by the respondents in substantially smaller geographical areas than The Star, which by common consent is a regional publication. It is in that sense that the Western Focus and its sister Focus publications can properly be described as "local newspapers" for purposes of the restraint clauses. As such their publication and distribution offended against the second leg of the restraints referred to above.

In my view the Court a quo was accordingly wrong in refusing the appellants any form of relief.

The form of the relief

The order sought in the notice of motion is not limited in time or in circumstance. For the reasons mentioned above, more particularly under the topic "The duration of the restraint", the appellants are not entitled to an interdict in the form of a declarator operating in perpetuity. Things change. The interests of the appellants which the restraints seek to protect might no

longer be worthy of protection in future; or the circumstances of the respondents might so alter as to necessitate a review of the terms of the order. It would therefore be prudent to build a qualification into the proposed order permitting the respondents to approach the Court below for an amendment of its terms should the equilibrium in the respective interests of the competing parties undergo a significant change.

The appeal is accordingly allowed with costs including the costs of two counsel. The order of the Court a quo is set aside. Substituted for it is the following order:

2.1.9 The respondents are interdicted and restrained from directly or indirectly publishing their newspapers known as the "Southern Star/Focus", the "Sandton Star", the "Eastern Star/Focus", the "Northern Star/Focus", the "Western Star/Focus" or any newspaper substantially similar in nature and circulation.

2.1.10 Leave is granted to the respondents, jointly or severally, to approach the Court, on due notice to the other parties, and on

good cause being shown that circumstances have materially

changed, for an order rescinding or amending the above order.

3) The respondents are ordered to pay the applicants' costs, jointly

and severally, the one paying the other to be absolved, such

costs to include the costs of two counsel.

P M Nienaber Judge of Appeal Corbett CJ ) EM Grosskopf JA) Concur Smalberger JA ) Nicholas AJA )