CASE NO. 215/95

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

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

and

ARGUS NEWSPAPERS LIMITED	First Respondent
OMNI MEDIA CORPORATION LIMITED	Second Respondent

COURT: Van Heerden, Nestadt, Eksteen, Marais et Scott JJA HEARD: 11 November 1996 DELIVERED: 29 November 1996

J U D G M E N T

MARAIS JA/

MARAIS JA:

On 29 March 1995 this Court substituted on appeal for an order made by the Witwatersrand Local Division an order interdicting and restraining Argus Holdings Limited ("Argus Holdings") and Argus Newspapers Limited ("Argus Newspapers") 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 newspapers substantially similar in nature and circulation. The successful appellants were CTP Limited ("CTP"), one Moolman, one Cobum, and one Short. However, leave was granted at the same time to Argus Holdings and Argus Newspapers to apply jointly or severally to the Witwatersrand Local Division for an order rescinding or varying the interdict "on good cause being shown that circumstances have materially changed".

Argus Newspapers lost no time in so applying, citing as respondents CTP, Moolman, Cobum, Short and Omni Media Corporation Limited. Omni Media Corporation Limited is the name to which Argus Holdings had in the meantime changed its name. For ease of reference and because it was referred to in the earlier judgment of this Court as Argus Holdings, I shall continue to refer to it by that name. The application was launched two days after this Court had delivered its judgment. In the result the matter was heard on 11 April 1995 and the Court a quo (Heher J.) rescinded the interdict and ordered CTP, Moolman, Coburn and Short jointly and severally to pay the costs, including the costs of two counsel. It is against those decisions that CTP, Moolman, Cobum and Short now appeal, leave to do so having been granted by the Court a quo.

The circumstances which existed when this Court

concluded in March 1995 that the granting of the interdict was appropriate and justified are set out in the judgment of the court which has been reported (1995 (4) SA 774), and I shall not repeat them. The gravamen of that part of the judgment which is relevant to the present appeal was that Argus Holdings and Argus Newspapers had contracted not to do that which they were interdicted from doing and that the attack made by them upon the enforceability of those contractual undertakings as being in unreasonable restraint of trade because they were to endure in perpetuity, had to fail. More specifically, this Court held that the restraints in question were reciprocal and part of the consideration given by each of the parties to them for the restructuring of their respective businesses; that their purpose was to preserve the commercial status quo; that they were designed to protect comparable interests of the respective parties to the

restructuring by recognising and defining the areas in which each held sway and by prohibiting each from encroaching upon the other's "territory"; and consequently that they were not "mere covenants against competition", and thus not contrary to the public interest. It was said that "(e)ach side sacrificed part of its own competitive edge as a hedge against attack from the other" (at page 784 D). A factor which had a material influence upon the outcome of the appeal was that the parties to the litigation were business associates in the sense that they were so positioned vis-a-vis one another by virtue of shareholdings that each faction stood to benefit by the trading success of companies in which they were jointly interested, yet they were also in a position to compete with one another unless restrained from doing so. (See page 784 E). The only ground upon which the enforceability of the restraints had been attacked as being contrary to

public policy, was their indefinite duration. Having indicated earlier in its judgment that that alone would not be inimical to public policy (at page 783 I), the Court later returned to the issue and said at page 784 E:

> "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.)
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> 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."

The present application rested in broad upon the assertion that this Court had held, with binding effect upon the parties, that the continued enforceability of the restraints would exist only for as long as the parties conducted their respective businesses in association with one another or remained affiliated in the way in which they were at that time; that they were no longer so affiliated by reason of Argus Holdings having sold its entire shareholding in Argus Newspapers to a third party who had no desire to maintain the business association which had existed between Argus Newspapers and the appellants; and that it followed that circumstances had changed materially within the meaning of this Court's order so that good cause had been shown for the discharge of the interdict.

Contrary to the view taken by the Court a quo, I do not understand the passage quoted from this Court's earlier judgment to

amount to a definitive and binding finding by the Court that absent any such affiliation to one another and regardless of the circumstances in which that might occur, there would be no

> legitimately protectable interest which could justify the enforcement of the restraints. The concessions which it thought had been made were not concessions of fact but concessions of law. They were not the subject of any argument before the Court. (Indeed, it was common cause in the Court a quo that no such concession had been made.) The Court was not called upon to consider precisely what changes in the association between the parties to that case would render continued enforcement of the restraints repugnant to public policy, nor was it called upon to consider whether a change in affiliation would have that result irrespective of the circumstances in which it occurred. The Court referred to the concessions of law thought to have been

made, merely to reinforce its primary conclusion that there was nothing objectionable to public policy in a perpetual restraint as long as the then existing circumstances prevailed, that if circumstances did change, a reappraisal of the changed situation might result in the continued enforcement of the restraints being regarded as contrary to public policy, and that, if that were to occur, the restraints would not operate perpetually. All of which was no more than a logical consequence of the principle laid down in Magna Alloys and Research (SA) (Pty) Ltd v Ellis 1984 (4) SA 874 (A) at 898 D that the question whether a contractual restraint of this kind 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. It is important to emphasise that in attacking the enforceability of the restraints when that issue was first before this

Court, Argus Holdings and Argus Newspapers had not contended that there was no interest legitimately deserving of protection. It was common cause that there was. The attack was confined to the contention that the perpetual duration of the restraints was contrary to public policy. That was the only issue which had to be determined. As I read the decision of the Court, it amounted to no more than this. Given the then prevailing circumstances, there was nothing contrary to public policy in the indefinite duration of the restraint for so long as those circumstances endured, however long a period that might prove to be. However, if circumstances should change to such an extent that the continued operation of the restraints would be contrary to public policy, then they would no longer be enforceable. The Court catered for that possibility by granting an interdict of potentially unlimited duration, but at the same time granting the

following additional order:

> "Leave is granted to the respondents, jointly and 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."

It is in the nature of things highly unlikely that the Court would have been prepared to decide in anticipando what particular changes in circumstance would result in the continued operation of the interdict being contrary to public policy. Had it intended to embark on so speculative an enquiry, it would not have done so without requiring argument to be addressed to it before attempting to delineate precisely what particular changes in circumstance would bring about unenforceability of the restraint. For if it did not invite argument, the result would be that the parties would be bound by its delineation of those circumstances without having been heard. I cannot imagine that

any such thing was intended. I think it is obvious that the Court assumed that if it was alleged later that circumstances had so changed, the court seized of the matter would embark upon a fresh evaluation of the situation in the light of the established principles of law applicable to it.

Argus Newspapers' contention that the appellants are estopped by reason of the previous judgment of this Court and the doctrine of res judicata from asserting that the changes which have occurred since in the relationship between itself, Argus Holdings, and appellants are not such as to render the restraint unenforceable, must therefore fail.

The question which has to be answered therefore is whether such changes as have occurred in the relationship between the parties render the continued operation and enforceability of the

restraint against Argus Holdings and Argus Newspapers contrary to public policy. The Court a quo concluded that the changes are of such a nature that they do. In reaching that conclusion it set great store by the result of changes in shareholding and concomitant changes in representation on the boards of directors which occurred. It is unnecessary to detail them in all their minutiae; it is their result which impressed the Court a quo. What it amounted to was this. Argus Holdings divested itself of all its shares in Argus Newspapers. The Independent Newspaper Group of Ireland acquired the shares and Argus Newspapers is now listed on the stock exchange and is no longer the chief operating and wholly owned subsidiary company of Argus Holdings. Argus Holdings therefore no longer has an association with or a beneficial interest in Argus Newspapers.

Coburn is no longer a director of Argus Newspapers.

While Moolman is still a director of Argus Holdings, he can no longer influence what happens in Argus Newspapers because it is no longer a subsidiary company of Argus Holdings. None of Argus Holdings' other directors are on the board of Argus Newspapers. Nor are any of Argus Newspapers' directors on the boards of either CTP or Argus Holdings. While Argus Holdings holds some shares in Argus Newspapers in trust for the benefit of option holders in terms of the Argus Holdings Limited Share Option Scheme, it is not the beneficial holder of those shares. Argus Newspapers' only remaining association with appellants is confined to an indirectly held 33,3% equity holding in the Highway Mail (Pty) Ltd ("Highway Mail") (a company publishing weekly newspapers in Pinetown and areas in and adjacent to Durban), an indirectly held 37,5% equity holding in the Zululand Observer (Pty) Ltd ("Zululand Observer") (a company publishing a

weekly newspaper in Empangeni and neighbouring areas), and an indirectly held 25% shareholding in Capital Media (Pty) Ltd ("Capital Media") (a company publishing certain free sheets in Pretoria). These interests were acquired, in the case of the first two companies, in February 1984 prior to the 1985 agreement, and in the case of the third company, in November 1986. These shareholdings relate to business interests in areas outside the Witwatersrand which is the only area within which Argus Newspapers distributes the newspapers hit by the interdict. The latter newspapers do not compete with any of the publications of the three companies in which Argus Newspapers has an indirectly held interest.

Counsel for Argus Newspapers contended that the changed situation contrasted materially with that which existed when the interdict was sought and granted, so much so that there was no

longer any justification for the continued existence of the interdict. He submitted that what justified the enforcement of the restraint when the matter was last before this Court were the following factors:

1. The existence of Argus Holdings' equity interest in CTP's local and separate free newspaper and magazine business, which rendered it pro tanto a joint venture.

2. It was said that Argus Newspapers benefited as a consequence of Argus Holdings' equity interest in CTP. Argus Newspapers had been designated by its parent company, Argus Holdings, as its chief operating subsidiary in the sphere of printing, publishing, and distributing national and regional daily and weekly papers. I interpolate here that this aspect of Argus Holdings' business had initially been the responsibility of a particular division of Argus Holdings but in 1988 Argus Newspapers was incorporated as a subsidiary company and, as it was put in the founding affidavit filed by Argus Newspapers, that company "assumed the rights and obligations of [Argus Holdings] (including the obligations in terms of the restraint provisions contained in the 1980 and 1985 agreements)". Just how Argus Newspapers benefited is not made entirely clear by its spokesman, but that it did benefit is said to be common cause in the heads of argument filed on its behalf. It was submitted in the heads of argument filed by the appellants (CTP et al) that Argus Newspapers benefited from its participation in

the joint venture, first, by way of dividends from the three companies in which it indirectly held shares together with CTP (Highway Mail, Zululand Observer and Capital Media), and secondly, by being able to preserve and protect its own goodwill and profits in the field in which it operated by reason of its acquisition from its parent company, Argus Holdings, of the right to enforce the restraints against the other group should it seek to intrude upon Argus Newspapers' sphere of operation. That seems to be so. 3. The cross directorships which existed gave Argus Holdings and Argus Newspapers access to the operations of the other group in the local and separate free newspaper and magazine businesses - an entrée which would not normally have been available to a potential or would-be competitor.

The current position, on the other hand, is submitted to differ in the respects I have set out earlier in this judgment. Do these differences mean that the appellants no longer have any legitimately protectable interest and that the continued existence of the interdict would be contrary to public policy? In my view they do not.

Preoccupation with the structure and shareholdings and

commonality of directors of the various corporate entities which interacted with one another tends to obscure certain fundamental commercial realities. I shall concentrate for the moment on the latter. When the 1980 agreement was concluded what I shall call the Argus group were novices in the field in which, what I shall call the Caxton group, were established and experienced operators, namely, the field of printing, publishing, and distributing local newspapers and separate and free newspapers. When the Argus group decided to venture into that specialised field of activity it was apparently not confident enough of its ability to do so successfully on its own, for it sought instead to conclude a contract with the Caxton group which would give it not only an entree into this particular variety of publishing enterprise via participation in the fortunes of Caxton companies already active and proficient in the field, but also an opportunity of familiarising itself

with the Caxton group's techniques and modus operandi in that field. The Caxton group were only willing to provide that entrée and to allow participation by the Argus group in their activities at a price, and against the giving of appropriate undertakings by the Argus group to restrict any subsequent forays by its own companies into that particular field of activity. Having purchased a stake in the fortunes of the Caxton group, the Argus group required reciprocal undertakings to be given by the Caxton group, the effect of which was to prevent expansion of its activity in the publishing field without the consent of the Argus Group. The Argus group was a large and powerful publishing and printing group which had considerable expertise in the field of producing, printing, and publishing national and regional daily and weekly newspapers, but virtually none in the field of producing, printing, publishing and distributing free or purely local newspapers of

the kind in which the Caxton group specialised. The Caxton group was a smaller printing and publishing group. It did not produce or market national or regional daily or weekly newspapers. It produced free newspapers of the colloquially styled "knock and drop" variety. These were essentially vehicles for advertisements and they were distributed mainly by placing them in private postboxes in particular localities. It also produced local newspapers (as opposed to national or regional newspapers). Their raison d'etre was the generation of income from the placing in those newspapers of advertisements. It was also involved in the publishing and acquisition of magazines. A more detailed description of the activities of both groups will be found in the previous judgment of this Court at pages 778 H - 779 B.

The Argus group had no established goodwill in any business of the kind conducted by the Caxton group. The Caxton

group did have such goodwill. It was inherent in the situation that if the Argus group was to be given entry to the Caxton group's fold, it would not only share in the fortunes of the Caxton group, but would acquire an opportunity of familiarising itself with every aspect of the Caxton group's modwa operandi in conducting this particular kind of activity, and that it might in due course rival the Caxton group in expertise and then seek to compete with it. The Caxton group on the other hand would acquire no expertise in that particular field which it did not already have. It was not in the business of producing, printing and publishing national or regional daily or national weekly newspapers and the joint venture contemplated by the 1980 agreement did not comprehend either direct or indirect participation by the Caxton group in the fortunes of the Argus group in that particular enterprise. Nonetheless, the Argus group wanted to be assured that no

person or company in the Caxton group would enter the field in which the Argus group had traditionally operated or, if there had already been an entry into that Geld, that it did not proliferate. It wanted to be assured too that the Caxton group would not extend its own specialised activities to other areas without its consent. Restraints predicated upon the circumstances which existed in 1980, and designed to achieve, inter alia, these ends, were embodied in clause 16 of the 1980 agreement.

Before quoting clause 16 a word of explanation is necessary. The abbreviation AP stands for Amalgamated Press (Pty) Ltd ("Amalgamated Press"), a company in which all the shares were held by William Haigh Hills and William Edward Haigh Hills and/or companies which they controlled. M & C stands for Moolman and Coburn. Amalgamated Press (50%) and Moolman and Coburn (50%)

held all the shares in a company known as Afmed (Pty) Ltd. Afmed (Pty) Ltd in turn held 51% of the shares in Caxton Limited. Nearly all the shares in Caxton Limited were held by Moolman and Coburn and Amalgamated Press, with Moolman and Coburn holding more than five times as many shares as Amalgamated Press. The resultant position amounted to Moolman and Coburn and the Hillses virtually owning Caxton Ltd through their shareholdings in it and in companies which held shares in it, but with Moolman and Coburn having a substantially greater participation than the Hillses.

That was the position prior to the entry of the Argus group into the picture in 1980 and clause 16 was designed to recognise and protect the respective commercial interests which each of the groups had, by restraining each group from undermining the position of the other in its respective Geld of operation. Their concern is easily

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

publication of local newspapers was inimical both to the Argus group's interest as a shareholder in Afmed (Pty) Ltd and, through it, in Caxton Limited, and to its overall interest in preserving its goodwill as a publisher of regional newspapers which also covered local areas. Those regional concerns would exist whether or not the two groups continued to operate in concert with one another through the medium of Afmed (Pty) Ltd and Caxton Ltd. Once each was admitted to the fold of the other, the risk of subsequent harmful competition would increase as each learnt more about the operations of the other, and the longer the association between them persisted, the more would be learnt. If the Argus group were to seek to compete with Caxton Limited while the association between the groups persisted, it could no doubt harm its own interest as a participant in the fortunes of Caxton Limited, but it was to be a minority shareholder and it might regard

the harm it might suffer as a price worth paying for the profits it could make while so competing. If it sought to so compete after the association ceased, the potential damage to the Caxton group would be no less and, the Argus group's interest in Caxton Limited having ended, the Argus group would cause no harm to itself by so competing. And so to clause 16 of the 1980 agreement.

"16 COMPETITION

AP for itself and the HILLS undertakes and warrants that it shall not itself or through any associated company except with the written consent of M & C and ARGUS and save as hereinafter stipulated.

3. Publish any 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, save however that this restriction shall not apply to and AP shall have the right so to publish any such free newspaper in the areas presently described as the magisterial district of Germiston, Elsburg, Boksburg, Benoni (including Petit and Brentwood Park), Brakpan, Springs, Sasolburg, Meyerton, Vanderbijlpark and Vereeniging;

4. Publish a new daily newspaper other than in the areas

presently described as the magisterial districts of Germiston, Elsburg, Boksburg, Benoni (including Petit and Brentwood Park), Brakpan, Springs, Sasolburg, Meyerton, Vanderbijlpark and Vereeniging;

5. Commence any new publishing and/or advertising venture and/or related undertaking in the areas presently described as the magisterial districts of Johannesburg, Verwoerdburg, Alberton, Kempton Park, Randburg, Sandton and Edenvale.

6. M & C undertake and warrant that they shall not either themselves or through any company or otherwise except with the written consent of AP and ARGUS:

16.4.1 Commence any new publishing and/or advertising venture and/or become interested directly or indirectly whether as principals, employees and shareholders in any such existing business in the areas presently described as the magisterial districts of Germiston, Boksburg, Benoni (including Petit and Brentwood Park), Vanderbijlpark, Brakpan, Elsburg, Vereeniging, Sasolburg, Meyerton and Springs save, however, that nothing herein contained shall prevent M & C from being or becoming interested in any manner in outdoor advertising, hoardings and advertising signs on vehicular transport in

any of the aforesaid areas and elsewhere. 16.4.2 Publish a new national or regional daily newspaper.

7. 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 and AP-

8. 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

9. 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."

What happened thereafter during the period 1980 to 1985

is conveniently summarised at pages 779 H to 781 B of the previous judgment of this Court and need not be repeated in greater detail than in what follows. As a consequence of Hortors Trio Rand Ltd ("Hortrio") acquiring "for the benefit of its wholly owned subsidiary, Horpak" the local and free (separate) newspaper businesses of Caxton Ltd and five of its subsidiary companies, an agreement entitled "Restraint Agreement" was concluded in 1985 between Argus Holdings, Moolman, Coburn, Short, Caxton Ltd, Afrmed, Modern Media Promotions (Pty) Ltd ("Modern Media"), Hortrio and Horpak. Modern Media was a company owned by Moolman and Coburn. Moolman, Coburn, Afmed, and Argus Holdings were also parties to the 1980 Agreement. In due course Horpak changed its name to CTP Ltd.

The position in 1985 is summed up by one Featherstone,

the deponent to Argus Newspapers' launching affidavit, in this way. The effect of the 1980 agreement was that Argus Holdings, whose business was in national and regional daily and weekly newspapers, acquired through its shareholding in Afmed an interest in Caxton Ltd's business in the local and separate free newspapers. "A close and inter-linked commercial relationship was arranged and would continue to exist as between the parties to the 1980 agreement". In 1985 Caxton Ltd, Afmed and CTP were "closely associated with" Argus Holdings and its subsidiary and associated companies. Argus Holdings owned all the shares in Argus Newspapers and the affairs of the latter "were substantially intertwined with the affairs of [CTP]". "The effect of the 1985 agreement was that [Argus Holdings], through its shareholding in Afmed, acquired an effective direct and indirect shareholding of about 50% of the equity in [CTP], and thereby an interest in Caxton's

local newspaper and separate free newspaper business". Coburn was a director of both CTP and Argus Newspapers and also a director of Armed, Caxton Ltd, and CTP Holdings Ltd. Moolman was also a director of both CTP and Argus Newspapers and of Argus Holdings, Afmed, Caxton Ltd, and CTP Holdings Ltd. Argus Newspapers, in its capacity as Argus Holdings' chief operating subsidiary, "had assumed the rights and obligations of [Argus Holdings] (including the obligations in terms of the restraint provisions in the 1980 and 1985 agreements)".

The relevant terms of the 1985 agreement and their import are set out at pages 780 B - 781 B of this Court's previous judgment. It suffices to observe that, far from the 1980 restraints being curtailed, they were retained and even extended in some respects.

When Argus Newspapers assumed all Argus Holdings'

rights and obligations under the 1980 and 1985 agreements in 1988 there was no pre-existing connection in law between Argus Newspapers and Caxton Ltd. Argus Newspapers was a subsidiary of Argus Holdings. Aigus Holdings held shares in Caxton Ltd but Argus Newspapers did not. Despite the absence of any direct or indirect shareholding in Caxton Ltd by Argus Newspapers, this Court held both Argus Newspapers and Argus Holdings bound to the restraints. Argus Holdings, through its shareholding in Afmed still has, to quote Featherstone (at one time seconded by the Argus group to serve as CTP's managing director and now chief executive of Argus Newspapers), "an effective direct and indirect shareholding of about 50% of the equity in CTP and thereby an interest in Caxton's local newspaper and separate free newspaper business". Argus Newspapers still has no direct or indirect interest in Caxton's business save for its

indirect minority interests in the Highway Mail, the Zululand Observer, and Capital Media. What then has changed? All that has happened is that a third party has acquired all the shares in Argus Newspapers. That has had some impact upon who sits on what board of directors but it leaves fundamentally unaltered the contractual relationship between Argus Newspapers and Caxton Ltd. Argus Newspapers retains the rights and remains subject to the obligations of Argus Holdings by reason of the 1988 agreement, and if it chooses not to assert them, that does not mean that the appellants may not assert the rights against Argus Newspapers which they acquired by reason of their acceptance of the assignment of Argus Holdings' rights and obligations under the 1980 and 1985 agreements to Argus Newspapers. I should add that such acceptance was common cause.

The very fact that Argus Holdings no longer controls

Argus Newspapers is, in my view, a good reason why the enforcement of the restraints should continue. When Argus Newspapers was owned and controlled by Argus Holdings, it was in Argus Holdings' interests to ensure that Argus Newspapers respected the restraints because the participation of Argus Holdings in the profits of the joint venture with the Caxton group, and Argus Holdings' own interest in having the reciprocal restraints which burdened the Caxton group observed, gave it an incentive to do so. Once Argus Newspapers was free of Argus Holdings' control, and because it would not participate directly or indirectly in the profits of the joint venture between Argus Holdings and the Caxton group, it would have an incentive and be in a position to exploit the entree which it had been given to the Caxton group's methods and confidential business information, by competing with the Caxton group. But for its designation while it was still a subsidiary

of Argus Holdings, as the latter's chief operating subsidiary, and the opportunities thereby created of gaining access to those methods and that business information, Argus Newspapers would never have had access to those methods and that business information. Subjecting it to an appropriate restraint was one way in which the Caxton group could protect itself against such exploitation in the event of Argus Holdings disposing of its shares in Argus Newspapers. I see nothing which is contrary to the public interest in that.

It must be remembered that these restraints were negotiated by astute businessmen who were not in an unequal bargaining position. They had legitimate reciprocal interests to protect and the restraints which they fashioned are not to be declared unenforceable simply because one of the parties no longer wishes to remain a party to the business relationship which gave rise to the

restraints. Before that is done, it must be convincingly demonstrated that the public interest requires that to be done. The bald invocation of expressions such as "naked restraints against competition" takes the matter no further. No statute having any bearing on the matter was relied upon in the papers filed by the appellants. The onus was upon the appellants to show that changed circumstances justified the discharge of the interdict. That was what they had claimed. There was no attempt to provide any factual foundation in the papers which could support an alternative claim for a declaration that the interdict should endure only for a particular period of time to be fixed by the court, nor was there any such claim made.

The use by this Court in its earlier judgment of the words "should the equilibrium in the respective interests of the competing parties undergo a significant change" at page 789 C of the judgment

was relied upon by appellants. It was contended that this meant that any material change in circumstances which altered the balance would suffice to entitle the appellants to a rescission of the interdict. I cannot agree. In my view, the use of the word "equilibrium" was never intended to be taken so literally that any tilt in the balance would have that consequence. It was not used in a precise scientific sense but simply to convey the notion that a future disturbance in the existing balance of interests (which were not necessarily precisely equipoised even in 1980 and 1985) might alter the position.

1. The appeal is upheld with costs, including the costs of two counsel.

2. There is substituted for the order of the Court a quo the following order:

"The application is dismissed with costs, including the costs of two counsel".

10. First Respondent is ordered to pay the costs of the application for leave to appeal, including the costs of two counsel.

11. No order is made against Second Respondent. (It was joined simply because of its possible interest in the matter, and did not participate in the litigation.)

R M MARIAS

VAN HEERDEN JA) NESTADT
JA) EKSTEEN JA) CONCUR
SCOTT JA)