IN THE COMPETITION APPEAL COURT OF SOUTH AFRICA

CASE NO: 259/CAC/Oct24

In the matter between:

CAPITAL NEWSPAPERS (PTY) LTD	First Applicant
CAXTON & CTP PUBLISHERS & PRINTERS LTD	Second Applicant

And

MEDIA 24 HOLDING LTD	First Respondent
NOVUS HOLDINGS LTD	Second Respondent
NOVUS PRINT (PTY) LTD	Third Respondent
FREE 4 ALL (PTY) LTD	Fourth Respondent
INTREPID PRINTERS (PTY) LTD	Fifth Respondent
VICTORY TICKET 376 (PTY) LTD	Sixth Respondent
MEDIA 24 (PTY) LTD	Seventh Respondent
THE COMPETITION COMMISSION	Eighth Respondent
THE MINISTER OF TRADE AND INDUSTRY	Ninth Respondent

JUDGMENT

DAVIS AJA

Introduction

[1] This is an application for an interim interdict brought on an urgent basis pending the final adjudication of the relief sought in part B of the application. The first applicant, Capital Newspapers (Pty) Ltd publishes six community newspapers including the Witness in the Pietermaritzburg and Midlands area of KwaZulu Natal. The second applicant, Caxton & CTP Publishers and Printers Limited, a company listed on the Johannesburg Stock Exchange (JSE) holds 45% of the shares in the first applicant.

[2] The first respondent is Media 24 Holdings Limited and part of the Naspers Limited media group. Media 24's subsidiary, Media 24 Proprietary Limited (the seventh respondent) publishes and distributes several print newspapers including inter alia Beeld, Rapport, Daily Sun, City Press, Soccer Laduma and Kick Off, and Community Newspapers circulating in the Western Cape. It prints and distributes these publications through its Media Supply Chain Division, On the Dot (the target firm).

[3] The second respondent is Novus Holdings Limited, and its subsidiary, Novus Print (Pty) Limited is the third respondent. Novus Holdings Limited is controlled by

Paarl Media Holdings (Pty) Ltd and provides printing services to a range of customers other than newspapers.

[4] The fourth to sixth respondents are Free 4 All (Pty) Ltd, Intrepid Printers (Pty) Ltd and Victory Ticket 376 (Pty) Ltd). They are wholly owned subsidiaries of the second respondent, collectively referred to as “the acquiring firms”.

[5] On 5 August 2024, Media 24 (Pty) Ltd (the seventh respondent) concluded three sale of business agreements with (a) Free 4 All (Pty) Ltd (fourth respondent) for the sale of On the Dot, (b) Intrepid Printers (Pty) Ltd (fifth respondent) for the sale of some community newspapers, and (c) Victory Ticket 376 (Pty) Ltd (sixth respondent) for the sale of soccer publications known as Soccer Laduma and Kick Off. In terms of clause 1.2.30 read with clause 3.1 of these agreements the agreements had a long stop date; that is the date by which the suspensive conditions were required to be fulfilled or waived by 31 October 2024. On 30 October 2024, the Commission approved the intermediate merger subject to certain conditions.

[6] As Part A, of the interim relief, the applicants sought to interdict first to seventh respondents from taking any steps to implement the proposed merger between third respondent, fourth respondent and fifth respondent together with Media Supply Chain Management Division operated by seventh respondent and which is referred to as ‘On the Dot’. They also seek an order to suspend a decision by the eighth respondent (Commission) to approve what is referred to in a notice of motion as “the merger”.

[7] Part B envisages final relief which would seek to set aside the Commission's approval of the merger as being inconsistent with the Constitution and invalid, thus justifying its being reviewed and set aside on cognizable competition grounds.

The Competition Commission's Decision

[8] On 6 August 2024, following the conclusion of the three sale of business agreements referred to above, the Commission received a notice of the intermediate merger whereby second respondent through its wholly owned subsidiaries fourth, fifth and sixth respondents sought to acquire a series of businesses from seventh respondent, being the media distribution and supply chain management business known as 'On the Dot' and a portfolio of twenty community newspapers circulating in specific geographic areas within the Eastern Cape, Free State, Northern Cape and Western Cape, together with the national soccer newspapers titles known as Soccer Laduma and Kick Off which cover local and international soccer news.

[9] In evaluating the merger, the Competition Commission found that competition concerns may be triggered if the merged entity required its customers to either:

1. Exclusively procure cold set printing services and distribution services from merged entities; or
2. Procure printing / distribution on condition that the customer also procures distribution / printing services.

In addition, the Commission found that there were public interest considerations that required protection of employees against merger specific retrenchments.

[10] The Commission and the merging parties therefore agreed that for three years after the merger, the merging entities would offer customers cold set printing and On the Dot's distribution services separately, the terms and conditions of which were set out in an annexure to the ruling of the Competition Commission.

[11] Once these conditions had been accepted the Commission concluded that the merger was unlikely to result in substantially lessening or preventing of competition in the relevant market. The Commission was concerned that certain employment issues were raised and therefore the merging parties tendered certain commitments which were accepted by the Commission.

[12] Regarding these conditions the merging parties agreed not to retrench any employees as a result of the merger for a period of three years from the implementation date. The agreement also provided that for the avoidance of doubt the merger specific retrenchments did not include:

1. Voluntary retrenchment and/or voluntary separation agreements;
2. Voluntary early retirement packages;
3. Unreasonable refusals to redeploy in accordance with the provisions of the Labour Relations Act;
4. Resignations or retirements in the ordinary course of business;

5. Retrenchments lawfully effected for operational requirements unrelated to the merger; and
6. Terminations in the ordinary course of business including but not limited to dismissal as a result of misconduct or poor performance.

[13] According to the respondents, once the merger approval was granted on 30 October 2024, the merging parties acted in terms of their contractual commitments to implement the merger.

[14] When the Commission approved the merger on 30 October 2024 immediate steps were taken including the fulfillment of the suspensive conditions, and the acquiring firms paying the purchase price on 31 October 2024 in accordance with Clause 7 of the respective sale agreements. On 31 October 2024 notices in terms of s 187 of the Labour Relations Act were issued to the relevant employees. As such, in accordance with Clause 6 of the sale agreements, full risk, reward and ownership of the acquired businesses transferred to the acquiring firms were also assumed together with the liabilities of the respective businesses. As was claimed by Raj Lalbahadur, the interim Chief Executive Officer of the seventh respondent in the answering affidavit, the merger had been fully implemented and it was not competent in law to interdict the implementation of the merger in circumstances where the merger had already been implemented.

The essence of the applicant's case

[15] The applicants contend that the transaction which was notified to the Commission, and which was visited with approval represents but one component of a strategic plan adopted by the seventh respondent which also includes the closure of numerous long standing printed titles such as the City Press, Rapport, Beeld and the Daily Sun together with a series of what is described as iconic magazines such as Drum and True Love. Applicants aver that seventh respondent waited until the decision on 31 October 2024 before it commenced with the implementation of its overall strategic decision which was to close this series of newspapers and retrench staff.

[16] The applicants have approached this Court on the basis that the transaction which was notified to the Commission was merely part of a broader strategic plan, the implications of which were not considered by the Commission when it made its decision to approve the merger subject to certain conditions. The applicant contends that on 12 April 2024 the board of the seventh respondent considered 'a redesign proposal' which included both the closure of what is referred to as the terminating newspapers (being the titles which would cease being published in print form) and the divestiture of On the Dot.

[17] On 8 May 2024 first applicant was approached by the CEO of the seventh respondent, Mr Ishmet Davidson, who informed first applicant that the seventh respondent was considering a potential sale of On the Dot as part of a broader

restructuring of its operations. The First applicant (Capital Newspapers) was invited to purchase On the Dot and he proposed that the Media 24 portfolio of Western Cape community newspapers and soccer titles be bundled into the transaction. Following this approach, a series of negotiations took place between Capital Newspapers and Media 24 over a period of four weeks. According to the first applicant, on 7 June 2024, it was suddenly informed by Media 24, without any explanation, that Media 24 decided to end the negotiations with Capital Newspapers and was proposing to sell the relevant businesses to Novus. There is a dispute on the papers as to whether the reason that seventh respondent did not sell the terminating newspapers to first applicant was because the latter insisted on purchasing the terminating newspapers as part of a deal which seventh respondent did not want to sell. By contrast, the first applicant contends that it made an offer on 13 June 2024 for On the Dot business and community newspapers alone.

[18] Applicants have placed great emphasis on a presentation entitled 'Planned Closure and Divestments' which was made to the seventh respondent on 5 August 2024. This presentation expressly and directly referred to "the plan" which showed that:

1. The closure of terminating newspapers;
2. The transition of these titles to digital; and
3. The sale of On The Dot and community newspapers

were inextricably linked steps in a composite process.

[19] Focusing on the closure of the terminating newspapers the applicants contend that this would have two direct and drastic consequences being:

1. Severe employment consequences for the printed newspaper industry; and
2. Significant increases in the per unit costs of distribution of On the Dot which is an essential distributor of the remaining major “paid for” newspaper titles in South Africa, including the Sowetan, the Sunday Times, the Citizen, the Witness, the Daily Maverick and the Mail and Guardian.

[20] According to the applicants the net effect of the respondents’ plan would be that On the Dot will lose approximately 60% of its volumes and a considerably higher percentage of revenues. Accordingly, it would have to significantly increase its distribution costs to rival newspaper publishers which are dependent on On the Dot for the cost-effective distribution of the newspapers. In turn, these increases will compromise the survival of various publishing enterprises in South Africa and harm both competition and freedom of expression in that it will retard, if not significantly reduce, the diversity of media coverage for the public.

[21] In essence therefore the applicants case is that the Commission made a decision to approve a transaction which approval constituted a fundamental reviewable misdirection in that it had failed to properly assess both the competition and public interest implications of the notified transaction as a composite strategy and

hence failed to apply the broader merger decision making process as required in terms of the Competition Act 89 of 1998 ('the Act').

[22] Applicants also referred to a series of affidavits deposed to by Mr Hoosain Karjieker on behalf of the Mail and Guardian and by Ms Susan White on behalf of the Daily Maverick. These align with the same claim, namely that they share concerns about the proposed merger and that they concur with Mr Jacobs' assessment that the Competition Commission failed to perform an investigation of the proposed merger which included the composite plain. Beyond these bald assertions, these affidavits add nothing to the evidence provided by applicants.

[23] The other material evidence provided by the applicants was that in the early hours of 31 October 2024 employees of seventh respondent were informed that the latter was implementing the transaction that day and that 'the decision by the Commission to pave the way for Media 24 to take the necessary steps are a strategic journey to establish and cement a viable and sustainable model for independent digital journalism in line with irreversible consumer trends and preferences.' It also stated that the final publication date for the Beeld, City Press, Daily Sun, Rapport would be 31 December 2024.

[24] On the basis of all this evidence the applicants maintain that it is clear that:

> '(1) The notified transaction (the sale of On the Dot and other assets…) form an integral part of a broader strategic plan and decision-making process by Media

24 that involved the closure of the Terminating Newspapers and the migration of their readers to Media 24's digital platform;

(2) The closure of the terminating newspapers and the negative consequences thereof for employment and the costs structure of On the Dot was dependent on the approval of the notified transaction by the Commission. The words of Media 24 itself the approval "paved the way" for the closure of the terminating newspapers and entrenchment of employees.'

The applicant's constitutional argument

[25] Applicants case focused upon the reasoning adopted by the Commission in respect of the impact of what it referred to as the strategic plan on entrenched constitutional rights; in particular where the Commission stated:

'The merger transaction in this case therefore involved a garden variety competition and public interest analysis which did not animate any lofty constitutional principles.'

[26] According to Mr Marcus who appeared together with Mr Wilson, Ms Pudifin-Jones, Ms Maharaj –Pillay and Mr Sive on behalf of the applicants, this approach was fundamentally wrong in that it flew in the face of the clear judgment of the Constitutional Court in *Competition Commission of South Africa v Mediclinic South Africa (Pty) Ltd and another* 2022 (4) SA 323 (CC). In his view, this judgment had established two fundamental principles within the context of merger proceedings being that:

1. regard must be had to the requirements of s 39 (2) of the Constitution which requires that the interpretation of all legislation promote the spirit, purport and objects of the Bill of Rights; and
2. regard must be had to the obligation under s 7 (2) of the Constitution to respect, promote and fulfil the rights in Chapter 2 of the Constitution (the Bill of Rights).

[27] A central basis of this argument was located at para 55 of the Constitutional Court's judgment in *Mediclinic* in which in overturning the decision of the majority of the Competition Appeal Court Moegeng CJ said:

> 'In its interpretation of section 12 A (1) (a) and (2) of the Act, the majority overlooked sections 7 (2) and 39 (2) of the Constitution, thus failing to adopt the correct interpretative approach to statutes as set out in this Court's judgments. Its approach fails to advance the purpose of the Act and to promote the spirit, purport and object of s 27 of the Constitution.'

[28] The majority judgement of the Constitutional Court in *Mediclinic* provides, in the view of Mr Marcus, the link between freedom of expression as enshrined in s 16 of the Constitution and the facts of the present dispute and thus the Commission's incorrect approval of the merger. It is therefore necessary in assessing the constitutional argument of the applicants to analyze the *Mediclinic* judgment.

[29] Briefly stated, *Mediclinic* involved a merger in terms of which *Mediclinic* intended acquiring a controlling share in Matlosana Medical Health Services (Pty) Ltd which owns two multi-disciplinary hospitals in Klerksdorp.

[30] The Competition Tribunal found that the proposed merger would have held a significant effect on the healthcare costs of both insured and uninsured patients living in the rural Potchefstroom / Klerksdorp region. In its view, it would lead to an adverse public interest effect with no countervailing positive public interest grounds and accordingly the Tribunal prohibited the merger. On appeal to the Competition Appeal Court these findings were reversed.

[31] In overruling the Competition Appeal Court's decision to permit the merger the majority of the Constitutional Court confirmed the importance of the Constitution in the interpretive exercise required of the Competition Appeal Court. The key paragraph employed by Mogoeng CJ at para 72 is instructive:

> 'That approach to this interpretive exercise gives context to how the Tribunal and the Competition Appeal Court should have practically embraced their obligation to promote the spirit, purport and objects of the right to have access to health care services. In doing so, the pre-existing difficulty to enter that market, and the high and ever rising tariffs consumers of medical services already have to contend with in the private sector, would necessarily have had to be factored into that process.'

[32] The Chief Justice then went on to apply this dictum to the proposed merger stating:

> '*Mediclinic*'s predicted post-merger tariff hike, in this country of huge inequalities and in this distressed economy, would not have been understood and treated as insignificant or minuscule as the Appeal Court seems to have perceived it. To a wealthy South African, the percentage by which tariffs would go up after the merger is understandably negligible and inconsequential. But not so to an average South African who is not even a member of any medical scheme, not that members of medical schemes necessarily find these high tariffs any easier to live with. Maintaining or increasing the scope for choice of essential and much-needed services with particular regard to the plight of financially under-resourced or the vulnerable, should always be at the back of the decision-makers' minds when dealing with mergers. This is, after all, one of the key demands of the Preamble and purpose of the Act.' (para 73)

[33] In short, the approach which was adopted by the Constitutional Court in *Mediclinic* to s 39 (2) was directly coupled to the facts of the dispute. The Court's approach was that in the case of a merger which was to have significant effects on the medical costs, particularly of the poorer sections of South African community, it was imperative that the merger should be analyzed through the prism of s 27 of the Constitution.

[34] The importance thus of *Mediclinic* to the present dispute is inextricably linked to whether a merger has taken place in the present case; that is a merger which not only encompasses the sale of On the Dot and 20 community newspapers but involves a composite plan which encompassed both the sale of On the DOT and the community newspapers and the decision to close down a series of printed titles and only publish them in digital form. In short, the question is whether this significant component of

the factual matrix of this case constitutes the merger which the Commission was obliged to consider in terms of s12 read together with s12A of the Competition Act. If applicant's contention is correct then manifestly, on the basis of the majority decision of the Constitutional Court in *Mediclinic*, recourse would have to be made to s 16 of the Constitution and hence view the merger through the prism thereof in the same fashion as did the Constitutional Court majority in *Mediclinic*.[1]

The implications of the Mediclinic judgment

[35] Before dealing with the primary question that is, whether this Court is confronted with a merger as described by applicants, it is instructive to pause to provide some interpretive guidance as to the implications of the *Mediclinic* judgment for competition jurisprudence.

[36] Mogoeng CJ suggests that s 27 of the Constitution was implicated in the *Mediclinic* merger in three separate ways. The first is the most obvious namely that the merger took place in the healthcare sector, albeit that in her minority judgement Theron J correctly observes that: 'This in itself does not mean that our jurisdiction is engaged.' (para 100)

[1] The minority judgment of Theron J in *Medic*linic is instructive to this extent that on the facts as the minority analysed then, there had been no trenching upon s 27 rights. In short, the minority emphasises the importance of the prior factual determination as to the nature of the merger being considered by the Competition adjudicator.

[37] The second way in s 27 might be implicated is through a s 12A(3) analysis. This entails an examination as to whether s 27 rights are adversely affected because the merger will increase concentration in the relevant healthcare and increase prices. The third possibility is that s 27 would impact *Mediclinic* by way of the interpretation of s 12A(1) of the Act.

[38] Section 12A(1) requires the Competition Commission or Competition Tribunal to initially determine whether or not the merger is likely to substantially prevent or lessen competition. Section 12A(2) provides a series of guidelines to the Commission or the Tribunal in the determination of whether or not the merger is likely to substantially to prevent or lessen competition. The practical effect of s 27 of the Constitution in this regard must be carefully examined If the prices in the case of medical services increase that would clearly trigger a cognizable concern that the merger substantially prevents or lessens competition. There would be no need for s 27 to come into play. The role of the constitutional right must mean that if the merger would have no overall significant effect on the vast majority of consumers of healthcare in the relevant market but that it would effect a segment of that market, being those who are financially under resourced or vulnerable, the overall inquiry into substantially lessening or preventing of competition must take account thereof and interpret the phrase through the prism of s 27. [2] That in itself is a factual enquiry.

[2] Viewed in this way the enquiry entails a variation of the Kaldor –Hicks definition of efficiency in that in this case the result does not provide for the possibility of the poorer consumers being recompensed.

[39] What cannot be the case is that s 27 becomes a self-standing competition issue. After all there is no basis to conclude that there is a direct application of s 27 to a competition dispute. Rather the Mediclinic judgment itself points clearly to an indirect application through the interpretive prism of s 39(2) of the Constitution in an enquiry that is necessitated to determine whether a constituent part of the market who are the most vulnerable and under resourced will be detrimentally affected by the merger. If so s 12A(1) may be invoked in circumstances where otherwise, if the product or service did not trench upon a constitutionally entrenched right, a different result might apply.

It must be emphasized that in Mediclinic the court was confronted with a merger as defined in s12. Viewed in this context the implications of the Mediclinic judgement are uncontroversial in this case in that there is a vital prior question to be determined: is there a merger of the kind contended for by the applicants.

The merger question

[40] Ms Hofmeyr who appeared together with Mr Mbikiwa and Mr Quinn for respondents, submitted that it was important to contextualize the enquiry as to whether this case entailed a merger as advocated by the applicants. As she noted, the evidence between 2014 and 2023 showed a drastic and irreversible decline in the sale of print newspapers. For example, in 2014 the average print circulation of City Press was slightly less than 120 000; it is now less than 12 000. The average print circulation of Beeld in 2014 was almost 62 000 and a decade later it is approximately 10 000. In 2014 the average print circulation of Rapport was more than 176 000 and a decade

later it has plunged to 37 000. Not only has this radical decline affected readership but it has drastically reduced advertising revenue. [redacted].

[41] The seventh respondent's analysis of the present and future projections indicated losses of the following order: [redacted].

[42] The dynamic developments of the market for public media call into play the argument of Joseph Schumpeter ("Capitalism, Socialism and Democracy" (1942) at 84 – 85):

> 'What counts is competition from the new commodity, the new technology, the new source of supply, the new type or organization – competition which commands a decisive cost or quality advantage and which strikes not at the margins of the profits and the outputs of existing firms but at their foundations and their very lives.'

[43] There is considerable authority which can be derived from a dynamic competition perspective and which accepts that innovation promotes competition and shapes market structures.[3] Almost two decades ago a similar insight was set out by

[3] See for example David J Teece "The Dynamic Competition Paradigm: Insights and Implications" 2023(1) Columbia Business Law Review 374

the Competition Tribunal in *Pharmaceutical Wholesalers v Glaxo Welcome* [2003] ZACT 37 at para 44:

> 'We have found it necessary to elaborate these seemingly self-evident truths because, whether blinded by self-interest or hubris, they are not sufficiently appreciated by the applicants in this matter. They appear to have forgotten that great markets – and with them great products and services – have disappeared before and will do so again. Great companies have frequently been victims of this, the competitive process. Still greater companies, spurred by the competitive process, have repositioned themselves – they have found new value-adding services to offer their customers, they have developed new products, and, at times, they have entered new markets.'

[44] Understandably at a Media 24 Board meeting of 12 April 2024 the following appears:

> 'Given the catastrophic FY 24 performance of newspapers, closure has become inevitable and urgent action is needed. Management should present a definite plan for the closure of these publications by no later than June 2024.'

[45] It was this insight, which as Ms Hofmeyr noted, prompted seventh respondent to seek the route of opting for migration of these printed titles rather than their discontinuation. The applicants agreed that there was brand value in these printed titles. Manifestly, once the decision to migrate had been taken, On the Dot, which was effectively a printed distribution business, was no longer central to seventh respondent's business strategy. The impact of the almost catastrophic decline in readership of print media was reflected in the radical decline in the profits on On the Dot and its modest EBITDA for the 2024 financial year.

[46] With this background in mind, Ms Hofmeyr submitted that seventh respondent sought to sell both On the Dot and community newspapers. She conceded that negotiations took place between seventh respondent and first applicant at the same time that similar negotiations were taking place between seventh respondent and second respondent. Her argument was that the negotiations with the first applicant did not succeed because the latter was only interested in a deal if it included the sale of the migrating titles. It must be noted however, that applicants have opposed this particular version claiming that first applicant had made an offer for the purchase of On the Dot and the community newspapers unconnected to the acquisition of the migrating titles.

[47] It is to the papers filed by the parties to which this Court must thus turn. There can be no question that, in the founding affidavit, Mr Jacobs on behalf of first applicant made it clear that first applicant was invited 'to purchase the On the Dot business from Media 24 and as sweetener / inducement recorded that the Media 24 Western Cape community newspaper titles were bundled into the same proposed transaction. The sweetener / inducement was necessary because it was explained to me that numerous titles that Media 24 currently distributed would be closed by Media 24 and therefore no longer require On the Dot distribution services.'

[48] In the same affidavit Mr Jacobs did note:

> 'Caxton also supported my offer to acquire the Media 24 newspaper titles and my attempts to assist Media 24 to ensure the survival of these titles.'

[49] In the answering affidavit Mr Raj Lalbahadur states that Mr Jacobs:

> 'fails to identify the central reason for the misalignment between the parties: Capital/Caxton was originally only interested in acquiring On the Dot if Media 24 were to retain the newspapers in print. Thereafter, it made a pitch to acquire the titles that Media 24 had already decided to migrate, namely Beeld, Rapport, Sun and City Press. But these titles were not for sale because Media 24 had decided to retain the titles and to migrate from print to digital.'

[50] Mr Roets, in a replying affidavit on behalf of the first applicant[4], claims that Mr Jacobs had certainly made it clear in the founding affidavit that first applicant explored ways in which it could 'ensure that the newspapers could continue to be printed' and that 'the majority of the newspaper titles that were earmarked for closure could be saved.' By contrast, the seventh respondent adopted the view that it did not want to sell the printed titles as such but rather wished to migrate them to a digital media in that the titles themselves had considerable brand value which could be exploited through the digital medium. This claim is supported by a letter from applicants' attorneys to the Competition Commission on 24 June 2024 in which they make it clear that the 'initial and subsequent proposals made by Capital Newspapers could potentially avoid the cessation of printing of the newspaper titles. The seventh

[4] Mr Roets is an attorney acting on behalf the applicants

respondent did not want to sell the newspapers in that the titles had value which it intended to employ but now in the digital format.

A return to the core question: what was the merger as defined in the Act

[51] Given this context it is now possible to turn to the fundamental question as to whether the merger included the elements alleged by applicants, namely the allegation that seventh respondent's strategic plan which included the cessation of the terminating newspapers in print form and their transition to digital form constituted part of the merger which should have thus been considered by the Commission.

[52] The applicants urged this Court to take a broader approach to merger control and to construe s 12 to ensure that there was an examination of 'the widest possible range of potential merger transitions (in order) to examine whether competition was impaired. See *Bulmer SA (Pty) Ltd and another v Distillers Corporation (SA) Ltd* [2001 - 2002] CPLR 36 (CAC) at para 24. In order to evaluate this argument, it is necessary to turn to s 12 (1) (a) of the Act which provides:

> 'For the purposes of this Act a merger occurs when one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm."

[53] Section 12 (1) (b) provides that a merger can be achieved in any manner including through purchase or lease of the shares, an interest or assets of the other firm or by way of an amalgamation or combination with the other firm in question. This provision must be read together with s 12 (2) which defines the term' control 'and provides a range of ways in which control may be acquired.

[54] Without traversing the comprehensive jurisprudence which has been built up in respect of these sections, it suffices to say that a merger must always involve one firm acquiring control over a part or the whole of the business of another firm. No acquisition or control, no merger. As the Commission noted:

> 'The merger before the Commission contemplates the Novus Group acquiring sole control over the target firms from Media 24. It bears emphasis that the target firms constitute OTD, Soccer Laduma, Kick Off and the Community Newspapers. The merger does not include the Media 24 Publications or the termination of the printed version of the Media 24 Publications.'

[55] So, the question therefore arises as to how the applicants sought to deal with this particular requirement.

[56] Mr Wilson emphasized what he referred to as the blinkered approach contended for by the merging parties who had failed to question whether events that had taken place even before the notified mergers constituted part of the broad merger decision making process which would accordingly be sufficiently closely related to the

merger as notified to the Commission to warrant investigation. In essence, Mr Wilson contended that the Commission had failed to analyze the transaction whereby the closure of the print form of the terminating newspapers and the sale of On the Dot formed part of a single decision-making process.

Evaluation of this argument

[57] This argument is based both on a legal and factual basis. The legal arguments advanced by Mr Wilson were predicated effectively on two cases, being *Goldfields Limited v Harmony Gold Mining Company Limited* (2005) 1 CPLR 74 (CAC) and *Minister of Economic Development and others v Competition Tribunal and others, South African Commercial, Catering and Allied Workers Union (SACCAWU) v Walmart Stores Inc and another* [2012] ZACAC 2.

[58] *Goldfields* concerned an application in which an order was sought to prevent the first respondent from implementing a merger. Briefly, first respondent offered to acquire up to 34.9 % of the share capital in appellant. It stated that it would not acquire any further shares at the stage of this acquisition and that, if more shares were tendered, a pro rating mechanism would be used to scale back the shares to this number. Upon the closure of acceptance of the early settlement offer a subsequent offer would commence the day after the consideration was settled in respect of the early settlement offer.

[59] The crisp question before the Tribunal was whether the acquisition of 34.9% of the shares of appellant constituted the acquisition of control which would trigger a merger enquiry. The Tribunal held that it had not been established that these two offers formed part of a single offer to acquire control which decision prompted an appeal to this Court. The critical question as defined by this Court was different, being whether there was a proposal to implement a transaction that, when implemented, would involve the acquisition of control by first respondent either on its own or with another party over the whole or part of the business of appellant. Critical to this evaluation of this case was an undertaking given by a 20% shareholder to support the conduct of the first respondent, now the holder of 34.9% of the shares in the target company. Thus, the acquisition of 34.9 % by the first respondent together with an irrevocable undertaking by the holder of 20% of the shares constituted an assumption of control in terms of s 12 of the Act.

[60] This is an entirely different situation to that which confronts this Court. In *Goldfields* the court had to determine whether the acquisition of a significant parcel of shares which did not give it control coupled with an irrevocable undertaking by another shareholder to cooperate with the acquirer sufficed to bring the entire transaction within the definition of merger. In this case there is no change of control in relation to the terminating newspapers. They remain under the total control of the seventh respondent both before and after the notified transaction took place insofar as On the Dot and Community Newspapers are concerned.

[61] Similarly in Walmart the question was whether certain retrenchments which took place prior to the notified transaction consummated formed part of the merger decision making process. In Walmart the question arose as to the retrenchment of 574 employees of the target company, being Massmart. To this the Court at para 140 said:

> 'An examination of the reasoning does not automatically support the argument that, because the retrenchment took place prior to the merger, it cannot be merger specific, a conclusion which was central to its finding in the present case. A retrenchment, which takes place shortly before the merger is consummated may raise questions as to whether this decision forms part of the broad merger decision making process and would accordingly be sufficiently closely related thereto.'

[62] In Walmart it was clear that the 574 retrenchments were designed in part 'to maneuver the business into a situation' where it would be attractive to Walmart to acquire.

[63] The only way in which Walmart could be applicable to the present dispute is if the evidence justified a similar conclusion. By contrast, citing cases as support for a submission where the factual matrix is palpably different is unhelpful.

[64] To the extent that there is any doubt about the fact that the jurisprudence employed by counsel for the applicants is inapplicable to the present dispute, reference can be made to the Constitutional Court in *Coca Cola Beverages Africa (Pty)*

Ltd v Competition Commission and another [2024] ZACC 3 which engaged with this very question of causation. The Constitutional Court was required to ask whether but for the merger, would a particular event have occurred. If the answer was in the affirmative, then the Court was required to ask whether the merger was an approximate or dominant cause of that event. See *Coca Cola* at paras 58-61 or as Dodson AJ stated at para 68: 'Textually, the exclusion in condition 9.4.5 from the prohibition on retrenchments of those that are not "merger-specific" points to the need to link the retrenchments directly, or at least predominantly, to the merger for there to be a breach:' In short, the enquiry in the case of *Coca Cola* concerned the true reason for retrenchments; in the instant case it was the decision to migrate from print to digital.[5]

[65] In essence therefore, the applicant's case must stand or fall on the interconnectedness of the migration decision and the transaction to sell On the Dot and 20 Community Newspapers which was the subject of merger approval by the Commission.

[66] Much of this case is based on statements that seventh respondent made regarding the migration; in particular the kind of statement made by Mr Davidson on 12 July 2024 in a newspaper article published on the News 24 website that the sale of

[5] Mr Marcus sought to apply the seminal minority judgement of Schreiner JA in *Collins v Minister of the Interior* and Another 1957 (1) SA 552 (A) at 574 to the effect that the proper approach is that "the parts of a scheme take their character from the whole" There can be no disagreement with this dictum which after all is a variation of the substance over form doctrine which was referred to with approval in Harmony v Goldfields .But as with the balance of the applicants case the question arises as to the factual basis for the existence of what can be termed the composite merger.

On the Dot was a “direct consequence” of the intention of seventh respondent to close the terminating newspapers and for this reason ‘Media 24 required regulatory certainty on whether it can sell the logistics business before ending the printing of the papers’.

[67] In his answering affidavit, Mr Lalbahadur emphasized that these statements were linked to the timing of the migration rather than being part of an overall merger. Thus,

> ‘when I sent the email to Media 24 staff on the morning of 31 October 2024 notifying them of the merger approval when I said that the approval “paved the way” for Media 24 to take the next steps in implementing the original migration decision I was updating the business about the timing of the decision and the migration of the printed titles. The need to update the business about this timing were raised because of the manner in which the applicants had been dealing with Media 24 even before our notification of the merger in this case.’

[68] This passage from the answering affidavit is designed to answer a series of letters generated by applicant’s attorneys. For example, on 3 July 2024 applicants’ attorneys wrote to Mr Davidson referring to the announcement of the sale of On the Dot and various community newspapers and describing this transaction as forming ‘a composite part of and is inextricably linked to Media 24’s announced restructuring of its newspaper publishing business (which also entails a discontinuation of a number of titles and its ceasing to print certain other titles)’. A demand was thus made by applicant’s attorneys that seventh respondent’s “composite transaction” must be

notified to the Commission as a merger and that no further steps would be taken to implement any aspects of a composite merger until the composite transaction was approved.

[69] A barrage of further letters followed including one on 7 July 2024 in which applicants' attorneys made it clear that if the undertaking sought would not be given an application would be launched which would include the summonsing of Mr Koos Becker to testify in order to compel the competition authorities to deal with 'the composite transaction.' As a result of this aggressive response by applicants' attorneys, the seventh respondent 'decided to give an undertaking not to implement any retrenchments nor to migrate the print titles until after the completion approval process was committed'. Nonetheless in letters of 9 and 10 July 2024 the seventh respondent made it clear that these undertakings did not entail acceptance of the applicants' characterization of the proposed transaction. In short, as Mr Lalbahaudur stated:

> 'We gave the undertakings… not because we accepted the characterization of the transaction but to avoid having to fight urgent proceedings about a notification that had not yet even been placed before the Commission. We therefore decided to give an undertaking not to proceed with the implementation of the migration or the associate retrenchments until the competition investigation process was completed.'

[70] It was only after the Commission had approved the merger on 30 October 2024 that seventh respondent decided that the migration steps could now be implemented.

In short, rather than engage in litigation threats, an undertaking was given motivated solely by the need to obviate legal proceedings.

[71] This approach of the seventh respondents accords with the series of answers which it had previously provided to the Competition Commission. Thus, to the question concerning the restructuring and possible demise of a number of newspaper titles the answer by the seventh respondent was 'the closures will be implemented regardless of whether the merger takes place. These will still be available digitally (except Beeld)'. To the question regarding the allegation that the restructuring and the proposed transaction would have a significant impact on the media sector the answer which was provided was that 'the closures will be implemented regardless of whether the merger takes. In other words, the plans for the newspapers described above and the impacted disassociation of their editions are not contingent on the merger. However digital versions of these newspapers will remain available (except Beeld) and Media 24 plans to retain all sixty-six journalists from the newspaper by integrating them into Netwerk 24, News 24 and the Daily Sun website'.

[72] The applicants insisted that the decision to sell On the Dot was inextricably linked to the next step: the migration of a number of newspapers from print to digital. The evidence, read as a whole, indicates that the applicants have conflated a timing question, with their argument concerning a composite plan .In other words there is a clear distinction to be drawn between the sale which took place before the migration, and a composite plan in terms of which the sale of On the Dot was but a first step in the composite plan which could arguably be classified as the merger.

Conclusion in respect of the composite transaction

[73] The key to the disposition of this case depends on the evidence made available to this Court. The consistent theme of the evidence provided by seventh respondent regarding the migration decision reflects the dynamic characteristics of a media market in which the vast majority of those who are consumers in that market have shifted their allegiances from print to digital.

[74] To the extent that there remains a market for the print media and in particular with reference to the possible jeopardy to the poorer segment of the consumer market which does not have access to digital, there are two responses. In the first place no evidence was provided in this regard by the applicants. Secondly, there was evidence placed before this court by the respondents to the effect that access to information by way of the digital mechanism is far cheaper than the costs of purchasing newspapers. It may well be that the declining print market is inhabited by poorer consumers. But it may also be that much of the print circulation can be accounted for by free distribution of newspapers at hotels and airports, being far more likely to be inhabited by more affluent sections of the community. The sharp point is that no evidence was placed before this court to the effect on the media market of the migration to digital and which consumers would be directly affected thereby.

[75] The applicants warn that the increased cost of distribution of print media as a result of the sale of On the Dot and the radically reduced print media as a result of the migration of titles from print to digital will cause the closure of print newspapers. That

the cost of distribution may be increased is one factor, that it would result in closure is another question to which only bald statements are forthcoming from applicants.

[76] In the final analysis it is the dynamic character of the market which has created the impetus for the migration decision and hence the continuing decline of print media requiring distribution. The decision to migrate which does not entail a change of control would not have necessitated a different form of authorization by the Commission, nor on the evidence can it be suggested that there was a composite transaction that would have necessitated a different form of authorization by the Commission.

[77] It is not necessary in the light of this finding to engage with the compelling argument raised by Ms Hofmeyr of the changing manner in which the applicants sought to characterize the transaction in response to the jurisprudential shoe pinching at various stages of this litigation.

[78] In addition, it is clear on the basis of the cases cited that there is not a sufficiently closely related link between the migration and the sale of On the Dot and the community newspapers to justify any of the variations of the theme of a composite transaction proposed by the applicants. Once, as this court has found, that the migration decision must be considered to be a separate commercial decision taken by seventh respondent, the competition authorities merger jurisdiction is not triggered in this case. There was thus no merger to review outside of that which concerned On the Dot and Community Newspapers, there is simply no basis by which to grant interim

relief for there is no other transaction which falls within the jurisdiction of the Competition Commission. Simply put, the separate migration decision does not fall within the definition of merger and therefore within the jurisdiction of the Commission. On the basis of this finding, there is no reason to traverse the extensive arguments made about freedom of expression in that this constitutional right would only be implicated in a case of this nature in the event that there was a merger of the kind as envisaged in *Mediclinic*.

The application to adduce further evidence

[79] A week after the conclusion of the hearing, applicants filed an application to adduce additional evidence that they contended was material to the disposition of this case. On behalf of applicants Mr Gill stated that:

> 'During this meeting, we were informed that On the Dot's proposed increase in distribution costs for Caxton's newspapers for 2025 would be [redacted] - nearly *double* the increase in distribution costs that the applicants had predicted in their founding affidavit. They also informed us that there would be a 15% reduction in the distribution footprint of On the Dot. We were also informed that we had to indicate our acceptance of these terms by 20 December 2024.'

[80] Mr Gill then claimed:

'I confirm that, as far as Caxton is concerned, an increase of [redacted] in its distribution costs may spell the end of its printed paid for newspapers distributed by On the Dot, and that based on my extensive knowledge of the industry, the low margins of all newspaper publishers in South Africa mean that few will be likely to survive an increase in distribution costs of this extent. The likely demise of competing newspaper publishers as a consequence of a significant increase in distribution costs was made in the founding affidavit even when the increase was anticipated to be 15%. It now transpires that the harm will be significantly greater, and the death spiral will be even quicker now, absent the granting of interim relief.'

[81] In answer to this application in which first to seventh respondent opposed the application to admit further evidence, the applicants were accused of misrepresenting the facts of the meeting of 11 December in that only the Citizen would be subjected to a [redacted] increase in distribution costs:

'[redacted], when compared to the other newspaper publishers that operate on the same distribution network because of the historical pricing issue. If On the Dot simply continues to maintain the extremely favorable costing to The Citizen, it would need to be subsidised by other publishers such as Arena, Independent and Daily Maverick which would be unfair. As a result of Media24's migration decision, all the remaining publications have to pick up their fair share of the increased cost of distributing fewer print publications, including The Citizen.'

[82] Notwithstanding an attempt to justify the contents of the initial affidavit in a reply from applicants' attorney Mr Roets, the nature of the contents of the initial unqualified claim of a [redacted] increase is disturbing.

[83] Be that as it may, on the basis of the finding of this Court that no merger as advanced by applicants had taken place the additional evidence is not relevant to this finding and thus stands to be dismissed.

[84] For all of these reasons therefore the application is dismissed with costs including the costs of two counsel.

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DAVIS AJA

Judge of Appeal

NUKU JA and **SIWENDU AJA** concurred

APPEARANCES

For the appellant: Gilbert Marcus SC, Jerome Wilson SC,

Sarah Pudifin-Jones, Pranisha Maharaj-Pillay and Daniel

Sive

Instructed by: Nortons Inc

For the 1st to 7th respondents: Kate Hofmeyr SC, Michael Mbikiwa and Shannon Quinn

Instructed by: Edward Nathan Sonnenbergs

Date of hearing: 5 December 2024

Date of judgment: 24 December 2024