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south africa

COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: LM012Apr16/INT039May17

In the intervention application:

Caxton and CTP Publishers and Printers Limited	**First Applicant**
And	
Media24 Proprietary Limited	**First Respondent**
Novus Holdings Limited	**Second Respondent**
The Competition Commission	**Third Respondent**

In re the large merger between:

Media24 Proprietary Limited	**Primary Acquiring Firm**
And	
Novus Holdings Limited	**Primary Target Firm**

Panel	:	N Manoim (Presiding Member) A Wessels (Tribunal Member) M Mazwai (Tribunal Member)
Heard on	:	7 June 2017
Decided on	:	22 June 2017

REASONS

[1] This is an application by Caxton and CTP Publishers and Printers Limited ("Caxton") to be given leave to intervene in the merger hearings concerning the merger between Media24 Proprietary Limited ("Media24") and Novus Holdings Limited ("Novus").

[2] The Competition Commission ("Commission") has recommended the approval of this merger subject to certain conditions tendered by the merging parties. While the merging parties oppose the intervention application, the Commission has indicated it will abide by the decision of the Tribunal.

[3] In terms of the Competition Act, no 89 of 1998, (the "Act") the Tribunal has a discretion to allow any party whom it recognises to participate in a hearing. Several cases discuss the nature of this discretion but they are not in issue here as both parties understand the discretion similarly.

[4] When it brought the application, Caxton sought to intervene with full procedural rights of participation on three grounds.[1]

[5] These grounds were that it was necessary for it to intervene because it had concerns that:

(1) A firm that should have been notified as an acquiring firm in the transaction had not been so notified. We will refer to this as the "control" issue;[2]

(2) Certain printing contracts between Media24 and Novus would result in post-merger exclusionary effects; and

(3) Management agreements in place could result in possible post-merger coordinated effects.

[6] However, Caxton has since limited the basis for its intervention to (1) the control issue. The reason for this is that during the exchange of pleadings the merging parties filed a supplementary answering affidavit.[3] In this affidavit the deponent Mr Abduraghman Mayman, the chief financial officer of Media24, agreed to tender additional conditions on behalf of the merging parties that were designed to address the concerns set out in (2) and (3) above.

[7] During the hearing, Caxton presented a revised version of these conditions to address issues (2) and (3). The merging parties responded by partial acceptance of some of Caxton's proposals but they remained in disagreement on others. At the end of the hearing the panel invited both Caxton and the merging parties to each submit draft conditions to address concerns (2) and (3).

[8] On the following day, Caxton's attorneys wrote to the Tribunal enclosing their client's draft conditions. In this letter they stated that given the conditions that the merging parties had now tendered, and the fact that the Tribunal now had its (Caxton's) proposed draft, it no longer sought intervention in respect of issues (2) and (3).

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[1] The term intervenor is the one used in the Tribunal rules (see rule 46) and the one commonly used for a third party wanting to participate in such cases. The Act however makes use of the term participant. See section 53(1)(c)(v).

[2] We set this issue out more fully below.

[3] This was filed only a day prior to the hearing and thus after the filing of Caxton's replying affidavit.

[9] The only issue it still wished to intervene on was the control issue set out in paragraph (1).

[10] For this reason it is only necessary for us to consider the control issue as a ground for intervention now.

[11] As is required in intervention applications Caxton set out the subject matter of its intervention as well as the procedural rights it wanted to exercise in relation to the subject matter.

[12] Caxton revised its Notice of Motion for this relief in a draft order handed out at the beginning of our hearing. It is this draft of their relief that we consider in these reasons and which we set out below:

> *"(i) the question whether or not the acquiring firms for purposes of the proposed merger include Naspers Beleggings Ltd ("Nasbel), Keeromstraat 30 Beleggings Ltd ("Keerom"), Wheatfields 221 (Pty) Ltd ("Wheatfields"), Sholto Investments BVI, De Goedgedacht Trust, Sanlam Limited and/or Messrs Stofberg and Bekker... in the context of the proposed merger."*[4]

[13] In paragraphs 3 to 5 of the same draft order Caxton set out the procedural rights it seeks to exercise in relation to ventilating the control issue. Since they are lengthy we have not set them out in full but it would not be inaccurate to observe that they embrace the fullest rights of participation. Two which are relevant, as they caused the most anxiety for the merging parties, was the right to call for further discovery and to call upon the Tribunal to summons witnesses.

[14] Some background is necessary to understand the context in which the control issue has arisen as a concern for Caxton.

BACKGROUND

[15] Media24 is the publishing subsidiary of the Naspers Group. Naspers' interests extend to other media interests most notably in this country private television and internet service provision.

[16] Novus is a printing company listed on the JSE. It is the legal successor of the companies in the Paarl Group.

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[4] Sholto Investments BVI, De Goedgedacht Trust, Sanlam Limited and Messrs Stofberg and Bekker are all alleged controllers of Wheatfelds, but for convenience we later in these reasons refer simply to Wheatfields.

[17] Caxton asserts, and the merging parties do not contradict this, that the merger entails the largest publishing company in the country (Media24) acquiring sole control over the largest printing company (Novus).

[18] Ordinarily, such a vertical relationship would attract close competition authority scrutiny. However, there is nothing ordinary about the present merger. In the first place the merger has already happened. This means it is being notified at a time after it has already been implemented and not, as is required by the schema of the Act, prior to implementation.[5] There is a further unusual feature which is central to the present decision. At the heart of merger analysis performed by competition authorities is the acquisition of control over a firm and its competition and public interest implications. But in this case the merging parties whilst notifying, albeit belatedly, an acquisition of control are at the same time proposing to relinquish it.[6] They term this a de-merger.

[19] In short, the merging parties are contending that you no longer need to perform the conventional merger analysis because the merger before you in which Media24 acquired control is a matter of history. In terms of the de-merger Media24 is forfeiting control and hence a detailed control analysis is unnecessary.

[20] For Caxton, however, history matters. It sets all this out in the founding affidavit deposed to by its Executive Chairperson Mr Paul Jenkins.

[21] In 2000 Media24 acquired its first foothold in the businesses referred to as the Paarl Group that now underpin Novus as we presently have it.[7] Although this was notified as an acquisition of joint control Media24 contended that the late controller of the Paarl Group, Mr Lambert Retief, would be the dominant partner as he was the chief executive officer of the Paarl group, and its (Media24's) role, was largely that of an investor.

[22] Some years later, Retief decided he wanted to retire. However retirement was not that straight forward given that he was not merely an employee but a joint controller of the Paarl Group. If he was to retire he would forfeit control. Since changes of control from joint to sole require merger notification this would require the approval of the competition authorities.

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[5] See section 13A(3) read with 13A(1).

[6] Control is relinquished as the merging parties agree to a condition to divest its shareholding in Novus to 19 percent.

[7] The Paarl Group is the shorthand in the founding affidavit used to describe the Paarl Media Holdings (Pty) Ltd and Paarl Coldset (Pty) Ltd. See founding affidavit of Paul Jenkins record page 8.

[23] Accordingly, in January 2014 Media24 and the Paarl Group notified a merger on the basis that Media24 was acquiring sole control over the Paarl Group. The Commission recommended approval. Since it was a large merger it required the approval of the Tribunal. However, when the merger came before the Tribunal, Caxton applied to intervene in those proceedings. In almost a mirror application of the current one, Caxton asserted that the merging parties had not disclosed all the parties that had controlled Media24. The panel, in that application, permitted Caxton to intervene on the issue of control. At the same time the panel issued a request to the Commission and the merging parties to provide it with further information; *inter alia* it requested from the merging parties documents pertaining to the control structure of Naspers. Specifically mentioned amongst these whose relationships needed to be revealed, were Nasbel, Keerom, Wheatfields and the latter's controllers.[8] The same firms were required to disclose any interests they might hold in the printing and publishing industries.[9]

[24] A few days after this order had been given and the request for information made, the merging parties on 22nd August 2014, notified the Commission that they were abandoning the proposed merger. In the letter to the Commission, the merging parties' attorney remarked, that as a result, the order of intervention and subsequent directive were *"... no longer of force and effect."*

[25] No reason was given in the letter as to why the proposed merger had been abandoned. However on the same day Retief released a press statement saying he had pulled the plug on the transaction as he was impatient with the length of the process.[10] Jenkins in his affidavit suggests the real reason was that Naspers was reluctant to reveal its control structure and thus the competition implications of the merger.[11]

[26] The next stage of the saga was when the Paarl Companies decided to list on the JSE as Novus. Jenkins speculates that the ostensible reason for this was to allow Retief to retire and to do so in a manner that would not require merger notification.[12] Recall that since the 2014 merger had been abandoned the two parties had resumed their status quo position i.e. that of joint control over the Paarl Group.

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[8] See paragraph 12.
[9] See letter from the Tribunal dated 18 August 2014, record page 59, in particular, and paragraphs 1-3 of the request to the merging parties.
[10] Record pages 63-4.
[11] See Jenkins affidavit, record page 19.
[12] Jenkins supra page 19.

[27] When Caxton learned of the listing proposal, in early 2015, it applied for an urgent order from the Tribunal to interdict the parties from implementing the listing plans until the transaction was notified as a merger to the competition authorities. The essence of Caxton's theory was that the listing was a pretext to ensure Retief's exit from the Paarl Group without the inconvenience of having to notify the re-arrangement as a merger. Media24 and Retief denied there had been a change of control insisting that he retained some form of management control via a revised management agreement.[13]

[28] The panel that heard the application came to the conclusion that the restructuring did not amount to a merger. Caxton appealed the decision to the Competition Appeal Court ("CAC") which decided it was a merger.[14] It is not necessary for the purpose of this decision to go into the CAC's rationale for why it found it was a merger. What is relevant to the history of this case is that Media24 and Novus were now obliged to notify their restructuring transaction as a merger.

[29] This they did in February 2016. Given the prior finding of the CAC it meant the merger was notified after it had already been implemented. However, in a further surprising twist to the tale Retief passed away in January 2017. On his passing certain rights that he had enjoyed by way of the revised management agreement he had with Media24, had on Media24's version lapsed, or on Caxton's version, may not have fully lapsed.

[30] Retief's death was not the only surprising development after the merger was notified. In the course of the merger investigation Media24 told the Commission it intended to sell down its stake in Novus from the existing 93.8%, to 19%, a level at which it asserts it will no longer control Novus.[15] This is what it refers to as a de-merger. This de-merger has not been implemented but it is a condition offered to the Commission for the approval of the transaction. The Commission has since forwarded its recommendation to the Tribunal after an investigation of the merger for more than a year and it accepts that the de-merger is genuine.

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[13] The restructuring to form Novus had led to a revised management agreement between Retief and what was now Novus. The comparison of its terms with the prior management agreement was a key part of the consideration whether the restructuring was a merger.

[14] These decisions are in respect of the Tribunal's decision in Caxton and CTP Publishers and Printers Limited and Media24 (Pty) Ltd and others OTH225Mar15 and the CAC's decision in Caxton and CTP Publishers and Printers Limited and Media24 (Pty) Ltd and others 136/CAC/Marh2015.

[15] The figures come from the answering affidavit of Mayman record page 149.

[31] The Commission was alive to the control controversy, but has accepted Media24's explanation of who Naspers' controllers are. It is also aware of Wheatfields' existence and the nature of its shareholding in Naspers. We know this because it is mentioned in the recommendation.[16] However it does not appear that the Commission disputes the merging parties' version that Wheatfields is not a controller of Naspers.

CAXTON'S ARGUMENTS

[32] As we go on to consider, Caxton argues that the issue of who controls Media24 remains a live issue notwithstanding the conditions tendered by the merging parties. The merging parties argue that the de-merger condition renders the issue of who might control Media24 moot.[17]

[33] Caxton does not dispute that the condition, if imposed, would mean that Media24 would cease to control Novus. It remains to consider whether, despite this, it has offered a cogent reason to intervene on the issue of control.

[34] Media24 contends that since Caxton does not contest that the de-merger would lead to Media24 and hence Naspers ceasing to have control over Novus, Caxton has no basis left to seek intervention.

ANALYSIS

[35] Caxton's argument is that without determining the issue of control, as it arises by virtue of the notification, as opposed to its consequences if the condition takes effect, the full competition effects of a merger have not been properly evaluated. This is what it accuses the Commission of failing to do in its investigation. It does not ask us on the present papers to decide whether Wheatfields is indeed a controller of Naspers.[18] Rather it contends that the issue of who may control an acquiring firm is central to proper merger evaluation. Since this is not clear in this case, it is one requiring further investigation. It offers itself as the only party in a position to assist the Tribunal on this issue, given that the Commission has accepted Naspers' version of the control structure.

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[16] Commission's recommendation at page 12-13 and at page 36-38.

[17] Note that Media24 in any event argues that Wheatfields is not a controlling shareholder and Caxton has not been able to show that it is.

[18] Note that on the papers Caxton does not actually make out a case that Wheatfield's controls Naspers. Rather it relies on past statements of Naspers that Caxton alleges are contradictory and implausible and thus raise eyebrows about the truth of the averments. Hence given the Commission's passivity on this issue the Tribunal would benefit from having Caxton in the room.

[36] Caxton argues that we do not need to decide for the purpose of the intervention application whether or not Wheatfields might control or be a controller of Naspers and hence Media24, but rather whether it is an issue that requires further investigation.

[37] Let us first examine its argument for why the issue is one worthy of further investigation. For unless Caxton can make out a case on this point its basis for intervention fails.

[38] Caxton argues that the Act imposes on merging parties the obligation to disclose the identities of all firms who are *"... a party to a merger".*[19] A party to the merger has an extended meaning in the Act. It is not limited to the primary acquiring firm i.e. the firm that directly acquires control over the target business. It includes all firms who may control the primary acquiring firm. Media24 on these facts is the primary acquiring firm. Naspers controls Media24 and so it constitutes an acquiring firm. So too do any firms that may control Naspers. There is no dispute that the merger as notified complies with this. Naspers is listed as an acquiring firm so too are two entities allegedly controlling it, Nasbel and Keerom. But the dispute turns on the relationship of Wheatfields to Naspers. If Caxton's suspicion proves correct and Wheatfields is a controller of Naspers, this fact has not been properly notified and hence its possible effect on the competition analysis has not been evaluated by the Commission in its recommendation. The reason Caxton suspects Wheatfields may be a controller of Naspers is because of what it considers to be past inconsistent explanations by Naspers itself on its status. In another merger case involving Caxton and the Naspers group,[20] this time involving the latter's television subsidiary Supersport, an employee of Naspers had described Wheatfields together with Nasbel and Keerom as forming part of the *"locus of control of Naspers".*

[39] This remark has since been contradicted by another employee of Naspers in more recent proceedings.[21] Caxton is suspicious about the lack of apparent explanation for the contradiction and why no more senior person, in particular Messrs Becker and Stoffberg, at whom the Caxton finger accusingly points, have not deposed on the issue since they would be best placed to confirm or deny the status of Wheatfields.

[40] This is not a point we have to decide for purposes of the present application.

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[19] Section 13A(1).

[20] Caxton and CTP Publishers and Printers Limited v Naspers & Others case no 23/LM/Feb07.

[21] In Caxton and CTP Publishers and Printers Limited and the Natal Witness Printing and Publishing case number FTN190Dec15/OTH135Sep16.

[41] Let us assume in favour of Caxton that Wheatfields is an acquiring firm and that this fact had not been taken into account by the Commission in its investigation. If before us was simply an acquisition of control by Media24 over Novus, and no simultaneous de-merger, it would have been relevant to the competition analysis of the merger to ascertain whether Wheatfields had other media interests, i.e. publishing and/or printing interests, in South Africa outside of Novus and Naspers. If this was the scenario Caxton would be correct.

[42] However, the commitment by the merging parties to the de-merger takes this issue off the table. It is no longer relevant to the competition analysis, because if the Commission and Media24 are correct, at 19% of the equity, and with the undertakings tendered, Media24 ceases to be a controller of Novus. If Media24 ceases to be a controller of Novus, then going higher up the ladder any firm that might control Media24 would also cease to be in a position to control Novus. (Recall Caxton does not dispute that the de-merger would lead to Media24 forfeiting control as contemplated in the proposed conditions).

[43] If this is so, as Media24 contends, it renders the issue of putative controllers moot.

[44] Nevertheless, Caxton argued it remains necessary for a proper analysis of the factors in section 12A of the Act to examine who the controllers are for the purpose of notification.[22] We cannot see why this should be so, given the simultaneous de-merger. Were the merger to result in the control of Novus by Media24 going forward this would be a cogent argument for unmasking putative controllers, but we repeat, because of the de-merger it is not.

[45] Merger assessment is designed to be expeditious so that merger considerations are not unavoidably delayed. Competition authorities for this reason adopt a pragmatic approach. It is not necessary to pontificate on issues for the sake of them if they bear no relevance to the outcome of whether the merger should be cleared or not. So by way of example although substantive merger analysis requires the authority to assess *"the strength of competition in the relevant market"* frequently the authority does not take a precise view of what the relevant market is. Rather it might say; the market might be either product A, or product A + product B, but, if adopting either scenario, no competition concerns arise, it is unnecessary to determine the correct market definition candidate from the two possible options, merely for the sake of form.

[22] Section 12A is the section in the Act that deals with the factors that must be taken into account in the consideration of a merger.

A precise delineation of the relevant market might be required if that conclusion determines the outcome of the case. Where it doesn't, the pursuit of precision is a pointless exercise that saps both private and public resources.

[46] The same point made about delineating the perfect relevant market can be made about defining precisely the identity of all potential controllers. If control is forfeited, as in this case, the consideration of the possible effects that candidate controllers might have over the target becomes academic. The answer is simple, if they no longer control the target we have no interest in issues such as overlaps.

[47] Whilst we have not previously had to consider this question, the pragmatic approach to control in this manner is one that has been followed by the European Commission ("EC") in one of its decisions. Here the control of a company, well known to the South African reader, the Anglo American Corporation, was similar to that of Naspers, shrouded in Byzantine complication. The question for the EC, was whether the Oppenheimer family had the possibility of exercising decisive influence over the acquiring firm. The EC's queries to the merging parties were not satisfactorily answered. However, it had no problem of leaving this question open as it explains because of a concession made by the merging parties:

> *(10) AAC has subsequently stated that EOS and CHIL are not controlled by the Oppenheimer family and that 'nothing contained in [the referred submission] was intended to imply that they are so controlled'. In view of the shareholdings, directorships and historical presence of the Oppenheimer family, in both AAC and DBCM, the Commission has, in several questionnaires, addressed to CHIL and the Oppenheimer family sought to establish the complete nature of the Oppenheimer family's relationships with, and the question of whether the family has the possibility of exercising decisive influence over, CHIL, AAC and DBCM.*
>
> *(11) As most of these questions have not been fully answered, the Commission can only conclude that a possibility remains that further links and holdings of relevance to this assessment may exist. However as AAC, following the receipt of the Commission's statement pursuant to Article 18 of the Merger Regulation, has conceded that, based on contractual arrangements, is able to procure that CHIL will vote its shares in Lonrho as instructed by AAC, the question as to the complete nature of the Oppenheimer family's holdings can be left open. (Our emphasis).*[23]

[48] In prior decisions we have noted that we consider the merger in its final form where parties offer conditions.[24] Thus the question of the ultimate controllers of Naspers can

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[23] See Case M 754 *Anglo American Corporation/Lonrho*, decision of 23 April 1997.

[24] Allied Technologies (Pty) Ltd and NamITech Holdings Limited 37/LmJul03 at para 16 and Anheuser- Busch InBev Sa/NV Lm211Jan16 at para 17.

in the present case be left open given the concessions the merging parties have made by tendering the de-merger. Accordingly, Caxton has not made out a basis to intervene on this point.

[49] Caxton also argued that the Tribunal in the abandoned proceedings had requested documents from Media24 regarding the control of Naspers. Caxton seemed to be arguing that because this had been the approach then, it should be the one followed now. However, the major difference is that in the abandoned merger, Media24 was assuming control, and hence the identity of parents and grandparents was potentially relevant; in the present case it is not because control over Novus has been relinquished.

[50] The next reason offered for the intervention on the control issue was that it was relevant to the determination of the prior implementation of the merger.[25] This may be so. However, prior implementation is not the issue presently before us. That may be decided in a separate application brought by the Commission.[26] Thus, this issue also does not justify Caxton's intervention in the present matter.

CONCLUSION

[51] We conclude that Caxton has raised an issue of control that is not relevant to the merger consideration that will serve before the Tribunal given the merging parties' tendered condition in relation to the de-merger. Given that the control issue is no longer relevant there is no basis for it to intervene. As stated earlier, Caxton has conceded that the other issues on which it sought intervention have been resolved through the undertakings given by Media24.

[52] Media24 has sought costs if Caxton's application proved unsuccessful. However, given that Caxton has been partially successful in obtaining certain undertakings from the merging parties, but unsuccessful on the control issue, we do not think an award of costs to either party is warranted.

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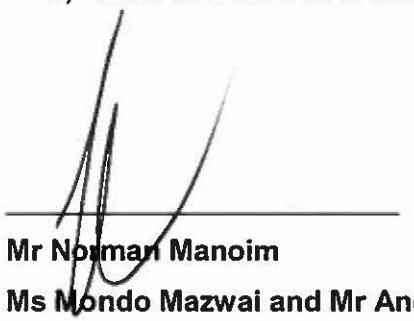
[25] There is now no dispute that when originally conceived the 2014 transaction was a merger. The Competition Appeal Court as noted has decided this.

[26] The Commission's existing practice is to bring an independent application for enforcement of breaches of Chapter 3 obligations such as those related to failure to notify a merger or to implement it without prior approval.

ORDER

We make the following order;

1) The application for intervention is dismissed.
2) There is no order as to costs.



22 June 2017

Mr Norman Manoim **DATE**

Ms Mondo Mazwai and Mr Andreas Wessels concurring

Tribunal Researchers:	Aneesa Ravat and Hayley Lyle
For the applicant:	Adv. Jerome Wilson SC, and Adv. Gavin Marriott, instructed by Nortons Inc.
For the respondent:	Adv. D. Unterhalter SC, and Adv. R. Pearse, instructed by Werksmans Attorneys