# COMPETITION TRIBUNAL
## REPUBLIC OF SOUTH AFRICA

**Case No: 16/FN/Mar04**

**In the matter between:**

CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED Applicant

**and**

NASPERS LIMITED First Respondent

ELECTRONIC MEDIA NETWORK LIMITED Second Respondent

SUPERSPORT INTERNATIONAL HOLDINGS LIMITED Third Respondent

THE COMPETITION COMMISSION Fourth Respondent

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## Reasons

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**Introduction**

1. The applicant has brought this application because it alleges that a scheme of arrangement in terms of which the first respondent Naspers Limited ('Naspers') will acquire further shares in the second, Electronic Media Network Limited ("M-Net") and third respondent, SuperSport International Holdings Limited ('SuperSport') constitutes a merger, which should have been notified to the Competition Commission. The applicant seeks an order from us declaring that the transaction constitutes a notifiable merger.

**Background**

2. The applicant is a listed company involved in the paper and printing industry and considers itself to be Naspers' major competitor in that industry. It alleges that the scheme of arrangement (the' transaction') constitutes a merger which raises competition concerns that ought to be considered by the competition authorities. It is not necessary for us to consider whether these competition concerns are valid. At this stage

of the proceedings we are only called upon to consider whether the transaction is notifiable. Competition concerns are only scrutinised if transactions are notifiable.[1] It follows that the motive for a transaction, which may have a bearing on the question of whether the merger is anti-competitive, has no relevance at this stage of the enquiry. For this reason we make no comment on whether Naspers' stated rationale for the merger is valid or whether the applicant has suggested a more probable alternative, an issue fiercely debated by the parties.[2]

3. Prior to the transaction, the structure of Naspers' interest in M-Net looked like this.[3]

***Structure prior to the transaction***

4. In terms of the scheme of arrangement Naspers will purchase all the shares of the minority shareholders other than those of Johnnic Communications Limited ('Johncom'). As part of the scheme Johncom has an option to acquire up to 39.1% of the shares. The date for that option to be exercised is after that of our hearing so we must consider what the permutation of shareholdings will be if the option is exercised and if it is not.
5. Thus, post merger, if Johncom does not exercise the option the structure would look like this:

***Structure after transaction, Johncom not exercising its option***

1 Bulmer SA (Pty) Ltd and Seagram Africa (Pty) Ltd and Distillers Corporation SA Limited and others. Case no. 94/FN/Nov00 and 101/FN/Dec00 at page 18.

2 Phuthuma Futhi, which owns 10.42% of the shares in M-Net/SuperSport, is an empowerment share scheme. Naspers submits that the rationale for the transaction arose from a request by the trustees of the Phuthuma Futhi Share Scheme to allow the participants of the scheme to realise value for their shares as soon as possible. According to Naspers it would not make sense to keep M-Net and SuperSport listed, without the Phuthuma scheme, hence the offer to minorities by way of the schemes of arrangement in terms of section 311 of the Companies Act. The applicant contends that if this is the rationale for the transaction then Naspers could simply have acquired Phuthuma's shares by agreement. Instead, it argues, Naspers seeks to acquire control over M-Net and SuperSport by expropriating all the minority shares through the proposed section 311 schemes. The applicant believes that this will enable Naspers to cross-subsidise and bundle its activities in the subscription television market for the benefit of its activities in the print and electronic media markets. The minority shareholders and the JSE listing requirements currently constrain this ability. Naspers denies this.

3 The SuperSport shares are linked to those of M-Net, which means that the same persons have the same holdings in each company. It is also common cause that the MNH98 shareholders' agreement applies in the same way to SuperSport as it does to M-Net and that the articles of association are virtually identical. Thus, it is common cause that the same facts apply to both and the issues in respect of SuperSport mirror those of M-Net. In the interest of simplicity, for the rest of this decision we will refer only to the effect on M-Net.

6. Whether or not Johncom exercises the option post merger, Naspers' total interest in M-Net will exceed 50%.[4] If Johncom does not exercise the option Naspers' direct and indirect interest will be 72.65%. This is made up as follows:

directly held by Naspers – 35.87%

indirectly through MNH98 – 26.33%

indirectly through Multi-Choice – 10.45%

7. If Johncom does exercise the option Naspers' direct and indirect interest will be 60.11%, made up as follows:

directly held by Naspers – 23.33%

indirectly through MNH98 – 26.33%

indirectly through Multi-Choice – 10.45%

8. MNH98 will continue to own 52% of the shares in M-Net and thus its stake remains unchanged. Nor does the relationship between MNH98's shareholders alter in any way as a result of the transaction.

9. Naspers does not control MNH98, although it is the largest shareholder with a 50% interest. Naspers, Johncom and the Natal Witness have entered into a shareholders' agreement in respect of MNH 98, which also regulates their relationships in respect of M-Net. Briefly, for our purposes, the salient points of this agreement are as follows:

   - Each shareholder is entitled to appoint at least one director to the board of MNH. The director in turn is entitled to a vote in proportion to the interest of the shareholder who appointed the director. Thus the Naspers appointee could exercise 50 % of the votes at the board.[5]

   - A resolution of the directors, or of the shareholders, requires a 75% majority in order to be valid. Thus, Naspers cannot, without the support of Johncom, have a resolution passed and vice versa.[6]

   - As long as MNH controls more than 50% of M-Net and Naspers owns at least 25% of MNH, the shareholders must procure that

     i) Naspers can appoint at least 25 % of the M-Net board and
     ii) that no decision of the M-Net board can be taken

4 If Johncom exercises the option its direct and indirect interest will be 38.57%, made up of a direct interest of 13.56% and its indirect interest through MNH98 of 25.01%. If it does not exercise the option its direct and indirect interest will be 26.03%, made up of a direct interest of 1.02% and its indirect interest through MNH98 of 25.01%.

5 Clauses 7.1 and 7.8.

6 Clauses 7.9 and 8.

without the approval of at least 75% of the directors.[7]

- No shareholder may hold more than 50% of the issued shares in MNH.[8]

10. The spirit of the shareholders' agreement is mirrored in the Articles of Association of M-Net and SuperSport where we find consistent provisions.

11. Thus:

- The articles of association provide that directors' resolutions require the support of at least 75 % of the directors.[9]

- There can be no quorum without a representative of the company's holding company i.e. MNH98.[10]

12. We are advised that the shareholders' agreement will persist notwithstanding the scheme of arrangement.

13. The common cause facts from these documents and arrangements are that Naspers does not have sole control of MNH98 but controls it jointly with Johncom. It would appear from the facts that Naspers would still not enjoy sole control of MNH98 even if there were no shareholders' agreement. As noted, Naspers owns 50% of the shares of MNH98. Accordingly, even it were not constrained by the terms of the shareholder's agreement, in order for its will to prevail, it would still have to secure the support of one of the other shareholders of MNH98 (that is, either Johncom or Natal Witness) and, as such, there is joint control over MNH98, with or without the shareholders' agreement.

14. The facts of the case, in so far as we need to decide them, appear to be common cause. The difference is the legal interpretation to be put on the state of affairs before and after the merger. In order to allege a change in control, the applicant relies on the fact that Naspers has, through the aggregate of its direct and indirect interests, including those acquired as a result of this transaction, an interest in M-Net amounting to at least 60.11%. The respondents allege that

7 Clause 7.13 as amended

8 Clause 9.7

9 See articles 52.2 of the M-Net articles and 21.2 of the SuperSport articles, giving expression to clause 7.13 of the shareholders agreement.

10 See articles 22 of the M-Net articles and 12.1 of the SuperSport articles.

the status quo, in so far as control is concerned, remains unaltered – prior to the merger MNH98 controlled M-Net and it continues to do so afterwards. The fact that Naspers has increased its economic interest in M-Net in excess of 50% does not amount to the acquisition or establishment of control.

**Procedural issues**

15. Initially the applicant sought relief in two parts. In terms of Part A, the applicant sought interim relief in the form of an interdict to preclude the respondents from implementing the transaction, pending a final determination of whether the transaction constituted a notifiable merger in terms of the Act.

16. Part B concerned final relief. Here the applicant sought three prayers. Firstly, that the transaction be declared a notifiable merger, secondly, that the first to third respondents be directed to notify the merger to the Commission and thirdly, to interdict the first to third respondents from implementing the transaction pending final approval of the transaction, if any.

17. After the application had been served the respondents provided the applicant with an undertaking in terms of which they agreed not to proceed with the schemes of arrangement pending the outcome of the Tribunal hearing. Both parties agreed that as a result of this undertaking we did not have to hear the application for interim relief i.e. Part A, and that, accordingly, the only relief we needed to determine was that sought in Part B. In its answering affidavit Naspers agreed that in the event of a final determination that the transaction is notifiable, it would abide by the statutory requirements.[11] At the hearing, in response to a question from the chairperson, the parties agreed that in view of this subsequent undertaking we only had to determine whether the merger was notifiable or not.

**Analysis**

18. As we noted earlier, the only issue we are required to decide is whether the transaction constitutes a notifiable merger.

19. In order for a transaction to be notifiable it must:

11 See paragraph 74.2 of Naspers answering affidavit at page 316 of the record.

i. Conform to the definition of a merger set out in section 12(1) of the Act; and

ii. meet the required threshold for notification.

20. It is common cause that if the transaction is a merger it would fall within the notification thresholds, so the only issue that remains is whether it meets the definition of a merger.

**21. According to section 12(1)(a):**

***"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."***

22. Section 12(2) then lists instances of when a person controls another firm.

*"12(2) A person controls a firm if that person —*

*(a) beneficially owns more than one half of the issued share capital of the firm;*

*(b) is entitled to vote a majority of the votes that may be cast at a general meeting of the firm, or has the ability to control the voting of a majority of those votes, either directly or through a controlled entity of that person;*

*(c) is able to appoint or to veto the appointment of a majority of the directors of the firm;*

*(d) is a holding company, and the firm is a subsidiary of that company as contemplated in section 1(3)(a) of the Companies Act, 1973 (Act No. 61 of 1973);*

*(e) in the case of a firm that is a trust, has the ability to control the majority of the votes of the trustees, to appoint the majority of the trustees or to appoint or change the majority of the beneficiaries of the trust;*

*(f) in the case of a close corporation, owns the majority of members' interest or controls directly or has the right to control the majority of members' votes in the close corporation; or*

*(g) has the ability to materially influence the policy of the firm in a manner comparable to a person who, in ordinary commercial practice, can exercise an element of control referred to in paragraphs (a) to (f)."*

*23. Previous decisions of the Competition Appeal Court (the 'Court') and the Tribunal have indicated that this list is not to be viewed as exhaustive of all the possibilities for acquiring control, but rather in the language of the Court, that it lists "instances" of where there is a change of control.[12] There is thus room to argue that a change of control has taken place even where it has followed a form not provided for in section 12(2). We have observed before that the acquisition of a business by way of a sale of assets may be one such example.[13]*

24. The relevance of this to the present application is that the applicant does not confine its assertion that there has been a change of control, to the instances set out in section 12(2). It argues that even if those provisions are found to be inapplicable there has still been a merger within the contemplation of section 12(1).

25. We have no difficulty with this approach. The applicant has correctly applied past decisions and is entitled to assert that if a transaction fails to find a label to fit in section 12(2) it may still be a merger if it falls within the

12 Distillers Corporation SA Limited and Stellenbosch Farmers' Winery Group Limited / Bulmer SA (Pty) Ltd and Seagram Africa (Pty) Ltd. Case no 08/CAC/May01 at page 19.

13 Bulmer SA (Pty) Ltd and Seagram Africa (Pty) Ltd / Distillers Corporation SA Limited and others. Case no's. 94/FN/Nov00 and 101/FN/Dec00 at page 13.

definition of section 12(1)(a). As we do not understand the Commission or Naspers to have challenged this aspect of the case, we need not deal with it further.[14]

26. As we have observed, the applicant relies on three sections of the Act for alleging that there has been a change of control. These are sections 12(1)(a), 12(2)(a) and 12(2)(g). We will first consider the case made out in terms of section 12(2)(a).

***Section 12(2)(a)***

27. Irrespective of whether or not Johncom exercises its option, it is common cause that after the transaction is implemented:

1. Naspers' economic interest in M-Net will exceed 50%[15]; but
2. Naspers' direct shareholding in M-Net will not exceed 50%;
3. MNH98 will continue to own and vote 52% of shares in M-Net i.e. will both own and be able to vote a majority of the M-Net shares;
4. Shareholding arrangements in MNH98 remain unaltered.

28. It is thus clear from these facts that MNH98 controlled M-Net, and will continue to do so post transaction. The applicant does not dispute this. What the applicant does is to rely on some of our past decisions particularly that in ***Ethos Private Equity Fund IV / The Tsebo Outsourcing Group (Pty) Ltd*** **(case no. 30/LM/Jun03)** as authority for the following propositions:

- That more than one party can exercise control over a firm simultaneously;
- That the same party can simultaneously be regarded as a sole controller and a joint controller of a firm in respect of different 'instances' of control;
- That if the same party which controlled a firm jointly later also acquired sole control, albeit simultaneously with the continued joint control, this would amount to an obligation to notify in terms

14 What Naspers did challenge was whether the case in terms of section 12(1)(a) had been made out in the papers.

15 See paragraphs 6 and 7 at page 3 above, for details as to how this amount is calculated.

of the Act;

- That if a party beneficially owns more than 50% of the issued shares of a firm it is deemed, by virtue of section 12(2)(a), to control that firm regardless of whether they confer the right to vote the majority of shares in that firm. [16]

29. In ***Ethos*** the Tribunal explained why merger policy is not confined to an assessment of control via the legal form. We made the point that control can also be exercised by virtue of a party's economic leverage over another and that this formed the rationale for the language of section 12(2)(a) which emphasises ownership of shares as something distinct from voting rights.[17]

30. The applicant argues that a logical extension of the policy issues identified in the ***Ethos*** case is to find that there has been acquisition of control where a party acquires a majority 'interest' in another, irrespective of whether that interest is directly held or exercised by the acquirer.

31. Naspers and the Commission argue that the distinction between the present case and ***Ethos*** is that in ***Ethos*** the acquirer directly owned the shares in question. Furthermore, they argue that as a matter of company law there is a settled and important distinction between a beneficial 'interest' and beneficial 'ownership'. Naspers may have acquired a majority interest but it does not have majority ownership, and only the latter suffices for the purpose of section 12(2)(a), which as we have seen, makes use of the word "ownership", not "interest".

32. The applicant in response asserts that not only are the company law cases not settled, they are not in point in relation to a statute that is concerned less with legal form than issues of control.[18] Since the Act and the

16 In Ethos the acquirer had purchased shares in the target firm so that it went from holding just below 50% of the issued shares to just above. The Tribunal found that for this reason a change of control had occurred notwithstanding the fact that in terms of a shareholders' agreement the acquirer did not exercise voting control over the target, but enjoyed joint voting control, as the agreement provided that a two-thirds majority was required for any resolution to be valid, and the acquirer held less than that.

17 See Ethos paragraph 32.

18 In an English case, Rodwell Securities Ltd v Inland Revenue Commissioners [1968](Ch D),

Court has recognised this takes a very broad view of control we should eschew any approach that slavishly follows narrow conceptions of company law.

33. We do not believe that in this decision we need resolve the debate about whether section 12(2)(a) is confined to beneficial ownership or whether it can be extended to include a beneficial interest. That is because this is not the only issue that the applicant has to succeed in to prove that there has been a change of control in terms of 12(2)(a).

34. This case is not about how to add up shares, but rather when they can be counted for the purpose of establishing control. In other words, what species of economic interest can legitimately be counted in order to decide whether the threshold in section 12(2)(a) has been crossed? To succeed in extending the ***Ethos*** rule, the applicant has to establish two propositions. The first is that for the purpose of section 12(2)(a) beneficial ownership is not confined to direct ownership by the putative controller, but may include an interest held indirectly via some other firm. The second proposition is that one can include in one's sums an indirect interest, even if the indirect interest is itself not controlled by the putative controller. Both these propositions must hold in order for the applicant to succeed in terms of section 12(2)(a).

35. In the present case, Naspers may have an interest of more than 50% in M-Net depending on how one does one's sums. As we have seen earlier, the applicant, by aggregating direct and deemed indirect holdings, arrives at a figure of above 50% as a result of the transaction. But Naspers does not enjoy sole control of all of that interest. At least 26,5% of that, the MNH98 holding, remains the subject of joint control. The

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the court was concerned with interpreting the meaning of ownership of shares in relation to whether a holding company qualified for an exemption in a stamp duty statute in respect of a subsidiary that it controlled, but only indirectly, through another directly owned subsidiary. The exemption from stamp duty was available to a company where *"not less than 90% of the issued share capital of each of companies is in the beneficial ownership of a third company."* The court held that for the purpose of that statute having a controlling interest was something different to having beneficial ownership. This is the passage that the respondents rely on. However the court in passing also observed that the matter might have been different if the statute had used the words "directly or indirectly". The applicant relies on this latter to distinguish the finding for the purpose of the present case because as we have seen in section 12(1) the controlling definition uses the words direct and indirect.

transaction has not changed Naspers' relationship to that interest. It is not subject to the sole whim of Naspers. Recall that what the applicant is arguing is that there has been a change from sole to joint control in order to activate section 12(2)(a). That Naspers may own a third more of M-Net shares does not detract from the fact that some of the shares that the applicant must count to get the desired total remain subject to joint control. In our view there must be limits to the arithmetic of control. Let us for the time being, assume in the applicant's favour that indirect holdings may be counted. That does not end the matter. The putative acquirer should, at the very least, on its own, *control* the indirect holding. If it does not, then it is not able to use the holding to exercise either political or economic control over the whole interest, in the sense in which these terms were used in ***Ethos***.

36. Whilst Naspers' interest in M-Net via MNH98 is not passive, it is nevertheless the subject of joint control. As we have already indicated, this is so because Naspers only owns 50% of the shares of MNH98 and, additionally, because of the restraints imposed by the agreement in place between the shareholders of MNH98.[19] The transaction does not alter its legal or economic relationship to this portion of its interest in M-Net. At least what the applicant needed to show was that all of Naspers' interest in M-Net was now post transaction subject to its sole control. It is, after all, advancing a theory that Naspers has acquired sole control to assert why notification is required. It has not done this and therefore cannot count the 26,5% in its sums. Without the 26.5% the change of control does not add up.[20]

37. Recall that we are dealing with a section whose primary purpose is to identify lines of control – to lump together interests that are *not* controlled by the firm (because they are jointly controlled with another entity) with those that are solely controlled leads to error and ends up mixing the wheat with the chaff.

38. In ***Ethos*** the acquirer had sole control of the interest

19 Note that clause 9.7 of the agreement prevents the shareholding of any single shareholder from exceeding 50%.

20 Without the 26,5% included Naspers holdings in M-Net would not exceed 50%.

that exceeded the threshold percentage of 50% and that is the difference.

39. We thus find that the applicant has failed to establish the second proposition and thus its argument under this section fails. We want to make it clear that we have made no finding on the correctness of the first proposition – it is thus unnecessary on the facts of this case to determine whether an indirect holding or an interest, that the acquirer controls, may be counted in terms of section 12(2)(a).

40. Naspers' acquisition of the scheme shares therefore does not lead to a change of control of M-Net or SuperSport in terms of 12(2)(a).

***Section 12(2) g and 12(1)(a)***

41. We now consider the argument that there has been a change of control for the purposes of section 12(2)(g) or section 12(1). For these latter two grounds the applicant relies on similar argument to found control, so, for convenience, we can deal with them together.

42. The applicant suggests that as a result of the transaction Naspers on its own or in its alliance with MNH98 will be able to materially influence M-Net. This argument seems to be based on the fact that, post merger, the two will command an 80% majority of the votes in the target firms. They can therefore be certain of implementing a special resolution, something they could not do on their own prior to the merger. [21]

43. There are two problems with this approach. In the first place, the applicant has not shown how Naspers, acting on its own, can materially influence the policy of M-Net. A mere increase in economic ownership on its own is insufficient to make a showing in terms of this sub-section. Whilst an increase in economic ownership beyond a threshold is deemed to constitute a form of control in terms of 12(2)(a) as we have seen, the assumption does not necessarily hold for the purpose of the other provisions. Here the party alleging that there has been a change of control will have to show that with

21 Prior to the merger the collective MNH98, Naspers, Johncom (i.e. their non-MNH vote) and Multi-Choice vote amounted to 67.95%.

the increase in economic interest has come a concomitant ability to materially influence the firm in the manner of a controller. The applicant has not established a nexus between the increase in Naspers' interest and a new ability to solely exercise a material influence. It assumes this rather than proves it.[22]

44. Secondly, the theory of joint control with MNH98 is not a new form of control. It remains a joint control with Johncom albeit over a larger block of shares. The implication of the applicant's argument is that for the purpose of section 12(2)(a) we should peer behind the corporate veil to see who owns the interests in MNH98, but for the purpose of section 12(2)(g) we should look no further than MNH98 and find a new alliance. This is wholly artificial. There is no new alliance; Naspers continues to control M-Net jointly with Johncom, with MNH98 as the vehicle to achieve this.

45. Nor do we accept the argument that the increase in shareholding gives a 'qualitatively' new form of control to that which was previously there. If this is the case then every company that has control at 51% and increases that control to beyond 75% must notify that transaction to the Commission. This interpretation of the legislation seems neither warranted by the language of the statute nor sensible policy. Indeed as we stated in ***Ethos*** once a firm has notified, it is not required to notify again.[23] Granted there may be degrees of enhanced quality in forms of control, but the Act cannot be interpreted to make merger notification so burdensome that every increment in shareholding requires an inquest into whether there has been a corresponding increment in the 'quality' of control.

46. The final ground alleged by the applicant for establishing a change of control was reliance on section

22 Thus by way of example a firm may have acquired a 30% holding in a target and may qualify under section 12(2)(g) as a controller if it can be shown that that stake might allow it to de facto exercise the majority of the voting rights in a firm or remove and appoint a majority of the board. See Anglo American Holdings Limited/ Kumba Resources Limited (case no.46/LM/Jun02) and the European Commission's decision in the Anglo American/ Lonrho case (case IV/M.754).

23 In the Ethos decision at paragraph 37, the Tribunal stated that *"A change of control is a once-off affair. Even if a firm has notified sole control at a time when that control is attenuated in some respects by other shareholders and it later acquires an unfettered right, provided that sole control has been notified and that this formed the basis of the decision, no subsequent notification is required*."

12(1). We indicated earlier that, as a legal proposition, reliance on this section to establish a change of control is, in principle, sound. Despite having laid this perfectly plausible foundation the applicant fails on the facts. In this respect the argument around section 12(1)(a) is the same as that advanced in terms of 12(2)(g) and must founder for the same reason. We have found that argument fails to make out a case for a change of control for the purpose of section 12(2)(g) and it follows for the same reasons that it does not do so in respect of section 12(1)(a). Lurking behind both arguments in respect of these two sections is a failed attempt to resurrect what could not be achieved under section 12(2)(a).

47. Accordingly, we find that there has been no change of control and that the scheme of arrangement as set out in annexure TDM 1 to the applicant's founding affidavit, on the facts before us, does not constitute a notifiable merger between the first respondent and either the second or the third respondent.

48. As the application is unsuccessful the first to the third respondents are entitled to costs. The Commission has not sought costs.

49. Accordingly, we make the following order:

1. The application is dismissed with costs,

2. *The applicant is to pay the costs of the 1st to the 3rd respondents, inclusive, including the costs of two legal representatives.*

_____ 13 April 2004

N Manoim Date

Concurring: D Lewis, M Moerane.

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| For the Applicant: | Adv. A Subel SC<br>Adv. J Wilson<br><br>Fluxmans Attorneys |
| For the 1st –3rd Respondents: | Adv. S F Burger SC<br>Adv. D N Unterhalter SC<br>Adv. P B J Farlam<br>Adv. T Motau<br><br>Cheadle Thompson & Haysom Inc. |
| For the Commission: | Adv. R O Petersen SC<br><br>State Attorney |