COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No. 27/AM/Mar00

In re: Request for Consideration of Intermediate Merger

Nasnuus, a division of Nasionale Media Limited **Applicant**

and

The Competition Commission of South Africa **Respondent**

Case No. 34/AM/Mar00

In re: Request for Consideration of Intermediate Merger

C T Media Publications (Pty) Ltd **Applicant**

and

The Competition Commission of South Africa **Respondent**

Decision of the Competition Tribunal

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1. In this matter the Competition Commission has prohibited two mergers, one between CT Media Publications (Pty) Limited and Caxton Publishers and Printers Limited, and the other between Nasionale Media Limited and Penrose Holdings. Penrose Holdongs is a subsidiary of Caxton Publishers and Printers Limited and CT Media is a subsidiary of Nasionale Media Limited. The applicants have requested the Tribunal to consider the prohibitions of the Commission in terms of section 15 of the Competition Act 89 of 1998 (the Act). At the outset the applicants indicated that they wished to raise certain procedural points challenging the validity of the prohibitions which, if resolved in their favour, would obviate the need for any further inquiry. Since both mergers involve the same set of procedural facts we are deciding them together.

2. The question we have to decide is whether the Commission's decisions to prohibit were made within the time period required by section 14(2) of the Act. If not, since these are intermediate mergers they are deemed to have been approved regardless of the merits of the Commission's decision on competition grounds. If, however, the prohibitions were made within the period contemplated then the Tribunal has jurisdiction to hear whether the Commission's decisions were correct on substantive grounds.

Background

3. In March 1999 Caxton and its subsidiary Penrose entered into two transactions with Nasnuus, a division of Nasionale Media Limited, and its subsidiary CT Media. The mergers involved sales of regional newspaper titles.

4. In April that year the Act was amended to provide that mergers entered into between the date on which the Act was published (30th October 1998) and the date on which the Act came into effect (1st September 1999) would be regarded as mergers in contravention of the Act unless they had been approved by the Competition Board in terms of the since repealed Maintenance and Promotion of Competition Act 96 of 1979 or they had been notified to the Competition Commission in terms of a procedure set out in item 4B of the third Schedule to the Act. Firms electing to follow this latter procedure had until 30 November 1999 to notify the Commission of their merger.

5. The mergers in question were notified in terms of item 4B on 30th November 1999. In terms of section 14(1) of the Act the Commission has 30 days to approve or prohibit the merger, failing which the Commission is deemed to have approved the merger. A *proviso* to section 14(1) allows the Commission within the 30 days to extend their period of consideration by a period of up to 60 days. This the Commission did in the present case by serving an extension certificate on the parties on the 20th December 1999. The Commission indicated in the extension certificate that the period for consideration had been extended until the 27th February 2000. Significantly, the Commission had extended the period not by a specified number of days but to a specified date. That date, namely the 27th February 2000, happened to fall on a Sunday.

6. On Monday the 28th February at 18h00 the Commission faxed a certificate to the merging parties indicating that they had decided to prohibit the mergers. The applicants have asked us to reconsider these decisions.

Grounds for Consideration

7. The applicants argue that the prohibitions are ineffective because they came a day after the Commission's self-imposed deadline. The Commission must be deemed to have approved the mergers in terms of section 14(2) of the Act. The applicants also sought to rely on two other grounds for the invalidity of the purported prohibitions but because of our decision on section 14(2) it is not necessary for us to consider them.

8. The relevant portions of section 14 of the Act are the following:

> **(1) "Within 30 days after receiving notice of an intermediate merger, the Competition Commission must either –**
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> **a) extend the period in which it has to consider the proposed merger by a period not exceeding 60 days, and in that case, issue an extension certificate to any party that notified it of the merger; or**
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> **b) after considering the merger in terms of section 16 –**
>
> **(i) Approve the merger by issuing a clearance certificate;**
> **(ii) Approve the merger subject to any condition;**
> **(iii) Prohibit the implementation of the merger.**
>
> **(2) If, upon the expiry of the 30 day period provided for in subsection (1), the Competition Commission has not issued any of the certificates referred to in that subsection, or upon the expiry of an extension period contemplated in subsection (1)(a), the Commission has not issued a certificate referred to in subsection 1(b), the Commission will be deemed to have approved the merger, subject to subsection (5)."**

9. The Commission argues that the provisions of section 14 are inapplicable to the cases before us. They rely on two methods of time computation, one in the Interpretation Act and one in their Rules, which in essence, say that if a time period for the doing of an act is prescribed in days and the period expires on a Sunday the act may validly be performed on the next day. A *fortiori* according to the Commission, although the extension period ended on the 27th since that day was a Sunday they were entitled to issue the prohibitions on the following day.

10. The first provision the Commission relies on is section 4 of the Interpretation Act 33 of 1957. This section provides as follows:

> **"When any particular number of days is prescribed for the doing of any act, or for any other purpose, the same shall be reckoned exclusively of the first and inclusively of the last day, unless the last day happens to fall on a Sunday or any public holiday, in which case the time shall be reckoned exclusively of the first day and exclusively of the also of such Sunday or public holiday."**

11. The applicants say that the Interpretation Act applies only where the time period is prescribed as a "particular number of days" and not a "specific date". Had the Commission extended the period in question by 59 days and the 59th day was a Sunday the Commission would have had the benefit of the Monday, as the Interpretation Act would have applied. By naming a specific date not a specific number of days the Commission rendered inapplicable the saving provisions of section 4 of the Interpretation Act. At first blush this argument seems overly formalistic. A matter of the choice of labeling has placed these mergers out of the bounds of the Commission. But that is to misinterpret not only the ordinary language of section 4 but also its purpose. As a matter of language it is clear that the section applies only to time periods expressed as a numeration of days not the denomination of a date. The clear wording is "any particular number of days".

12. But there is more to this than mere semantics. There is a purpose in limiting the scope of the section to time periods calculated in days. Section 4 of the Interpretation Act is designed to obviate controversy over the counting of periods specified in days since our law recognizes different methods of counting time[1]. It does so in two ways. Firstly it specifies the method of counting to apply and secondly it specifies when the last day may be excluded from the calculation i.e. Sundays and public holidays. Without this guidance two people interpreting when a period of sixty days ends might use different methods and thus come to different conclusions.[2] The Interpretation Act provides a compass so that they can reach the same destination. These problems do not arise when a particular date is specified. The 27th February is the same date for all observers albeit a Sunday. No ambiguity over its expiry can arise and hence we find the applicants are

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1 See Joubert (ed) The Law of South Africa (Vol 27). The civil method of computation differs from that in the Interpretation Act in relation to the inclusion and exclusion of the first and last days that can lead to different results. The learned author indicates that at least six different methods are known although in present times we recognize only four.

2 Precisely this problem occurred in this case. In their heads the Commission argued that they had extended the period by the maximum permissible 60 days. In fact, as pointed out by the applicants in argument, the 27th is the 59th day.

correct to argue that the Interpretation Act does not apply.

13. Secondly, the Commission seeks to rely on the Rules for the conduct of Proceedings in the Competition Commission (the Commission Rules). We quote the relevant ones below:

> **"4. TIME LIMITS**
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> **1) When a particular number of days is prescribed for doing an act, the number of days must be calculated by excluding the first day and including the last day.**
>
> **2) When the time for doing an act expires on a public holiday, Saturday or a Sunday, the act may be done on the next day that is not a public holiday, a Saturday or a Sunday.**
>
> **3) When a particular number of business days is prescribed for doing an act, the provisions of sub-rule (1) apply, but public holidays, Saturdays and Sundays must not be included in the calculation of the time limit.**
>
> **4) On good cause shown the Commissioner may condone the late performance of an act in respect of which these rules prescribe a time limit, other than a time limit that is binding on the Commission itself."**

14. The applicants once again argue that these rules provide no refuge for the Commission. Firstly, they contend that the time periods in the Rules do not apply to periods specified in the Act. They refer us to how an analogous problem was approached in the High Court. In several cases the Court was faced with the question of deciding whether the time periods for the calculation of days set out in the Supreme Court Rules, which exclude weekends and public holidays, apply to the calculation of time periods in days set out in the Supreme Court Act. The courts, with one exception not otherwise followed, have said they do not. The best rationale for this is found in a decision by Didcott J, as he was then:

> **"The effect of ss 1 and 4 of the Interpretation Act is that the latter's provisions govern the calculation of days prescribed for any purpose in other legislation which contains nothing to indicate that a different method was meant to be employed. No such indication is to be found in s 27 of the Supreme Court Act, of (sic) anywhere else in it. The computation of the days specified (in) that section is therefore dictated**

by s 4 of the Interpretation Act. Rule 1, on the other hand, cannot enter the picture. It did not exist when the Supreme Court Act came into force, or indeed before 1965. That Parliament meant one of its own enactments to be interpreted in accordance with subordinate legislation, is an incongruous thought. It may at least be a notionally feasible one with reference to subordinate legislation already operating and thus known. But it is plainly not when it is related to the unknown and unascertainable terms of the subordinate legislation of the future. When it passed the Supreme Court Act, Parliament knew nothing whatsoever about the category of Court days subsequently devised by Rule 1. It therefore could not have intended the days that it specified in s 27 of the Act to be those. Nor is it conceivable that they were transformed into such when Rule 1 afterwards came into operation. In the first place the power to issue the Rules, which was derived from s 43 (2) (a) of the Act, self-evidently did not include the power to amend the Act itself. In the second, no attempt to do this was, in fact, made. For Rule 1 applied the definitions which it contained only to the language of the Rules themselves. It did not purport to extend their influence any wider."

15. This approach applies equally to the relationship between the Competition Act and the Commission Rules. The legislation here too had preceded these Rules. There is no indication that the legislature in enacting the time periods intended any further modification by the Rules or indeed any indication that the Rules were intended to supplement time periods in the Act. The legislature intended the time periods to be adhered to strictly, hence the deeming provision and the absence of any form of condonation for the Commission in the Act. They could not have intended that the Commission through its rules could ameliorate the guillotine imposed by the Act.

16. However, even if we hold that the Rules do apply they do not help the Commission. As the applicants point out, the language in the Rules is similar to that in the Interpretation Act, that is, it applies to time periods in which a particular number of days is specified not as in the instant case where a specific day is specified. Sub-rule 4(2) of the Commission Rules cannot be read in isolation from the rest of the Rule. The time for ***doing an act*** must mean time expressed in ***a particular number of days*** which is the wording used in sub-rule 4(1). For the same reason we rejected the Commission's argument regarding section 4 of the Interpretation Act their argument must fail here as well.

17. If the Commission Rules and the Interpretation Act do not assist the Commission the common law offers less comfort. Cameron, writing in Lawsa, says:

"It is a well established general rule that the incidence of Sundays and public holidays does not affect the effluxion of time. This applies whether the Sundays or public holidays fall at the beginning, at the end or in the course of running of the period."[3]

18. In *Somdaka v Northern Assurance* 1961(4) SA 764 (D) Henochsberg J at 769 says:

"**In *Craig's* case, as in this case, there is nothing to indicate a clear intention on the part of the lawgiver to depart from the ordinary civil rule of computation, i.e., the rule that results in the period expiring on a Sunday. The last Sunday cannot be excluded from the computation, any more than any other Sunday can be because there is no implication that the period of prescription is only to expire on a day when offices or places of business are open. It is to expire at the end of a specified period and prescription is only interrupted if summons is served before that period expires. Furthermore it is noteworthy that *Craig's* case, supra, was followed in an unreported case of *de Vos v Datt*, decided by DE WAAL, J.P., and GRINDLEY-FERRIS, J., in the T.P.D. in April, 1937, when the Court held that a period of six weeks expired on Easter Monday and that an appeal set down for the following day was out of time. *De Vos's* case is referred to in *Herold v Clur*, 1937 T.P.D. 329 at p. 333. Mr. *Gurwitz* sought to derive assistance from the provisions of the Interpretation Act, but that statute cannot help him for the period in question here is not a number of days but a period of years."**

19. In rare instances the courts have extended a time period ending on a Sunday or public holiday to the next business day but these cases appear to turn on the fact that the parties intended the benefit of the full time period to be extended and that the final day was a *dies non*.[4]

20. In this case although the time period expired on a Sunday the question of impossibility of performance on that day does not arise as it was open to the Commission to issue its certificate on that day[5], or indeed if this was not convenient, at anytime before that date. Furthermore, as we indicated above, this time period was not one contractually agreed upon between parties, it was unilaterally imposed by the Commission.

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3 See Joubert (ed) The Law of South Africa (Vol 27: page 219 paragraph 248)

4 See *Davis v Pretorius 1909 TS 868* where the Court extended until the next business day the obligation of a party to make a payment where the payment according to the contract had to be made on the first business day of each month and which in that month fell on a Sunday. Here the court was dealing with a contractually imposed time period and could impute the extension to one contemplated by the parties. This distinguishes that case from the instant one.

5 Since no formality for communication of its decision is set out in the Act, other than a requirement in section 14(2) that it be "issued", a term not defined in the Act, the transmission of a fax to the applicants would have sufficed.

Finding

21. We find that the Commission's purported prohibitions of the mergers are invalid. The mergers are deemed to have been approved in terms of section 14(2). We direct the Commission to issue clearance certificates to the parties and to otherwise comply with Rule 33(2) of the Commission Rules.

N.M. Manoim — **26 May 2000 Date**

Concurring: U. Bhoola, C. Qunta