COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA

Case No: 54/FN/Oct03

In the matter between:

JOHNNIC COMMUNICATIONS LIMITED First Applicant

KAGISO MEDIA LIMITED Second Applicant

CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED Third Applicant

TERENCE DESMOND MOOLMAN Fourth Applicant

and

NEW AFRICA INVESTMENTS LIMITED First Respondent

INVESTEC BANK LIMITED Second Respondent

SAFIKA HOLDINGS (PTY) LIMITED Third Respondent

CAPRICORN CAPITAL PARTNERS HOLDING COMPANY (PTY) LIMITED
(previously known as NEWSHELF 730 (PTY) LIMITED) Fourth Respondent

MULTIDIRECT INVESTMENTS 180 (PTY) LIMITED Fifth Respondent

MINEWORKERS INVESTMENT COMPANY (PTY) LIMITED Sixth Respondent

PHAPHAMA HOLDINGS (PTY) LIMITED Seventh Respondent

THE COMPETITION COMMISSION Eighth Respondent

SHARES TRADED TOTALLY ELECTRONICALLY LIMITED Ninth Respondent

NEDBANK LIMITED Tenth Respondent

STANDARD CORPORATE AND MERCHANT
BANK LIMITED Eleventh Respondent

FIRSTRAND BANK LIMITED Twelfth Respondent

ABSA BANK LIMITED Thirteenth Respondent

SOCIÉTÉ GÉNÉRALE LIMITED Fourteenth Respondent

COMPUTERSHARE LIMITED Fifteenth Respondent

Reason for decision and order

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1. The applicants have brought an urgent application before us seeking a series of orders whose purpose is to interdict the second to sixth respondents ("the Tiso consortium" or "Tiso") from further implementing a series of transactions to purchase shares in the first respondent ("Nail"). The basis of the application is that the transactions constitute a scheme by the Tiso Consortium to implement a merger with Nail and that the scheme is unlawful because mergers may not be implemented until they have been approved by the relevant competition authority. It is common cause that the Tiso Consortium has not notified the transactions to the Competition Commission. The Tiso Consortium denies that its scheme constitutes a merger and hence alleges that it was under no obligation to notify.

Background

2. On 28 May this year Nail announced its intention to sell its media assets and invited interested parties to submit bids. The first to third applicants (the "Kagiso consortium") and the Tiso consortium made rival bids for Nail. Although we will not burden this decision with the detail of the bids, what is of significance is that the rival consortia invoked different procedural mechanisms to achieve their end. The Kagiso bid contemplated an offer conditional upon the acceptance of regulatory approval, which included approval of the merger in terms of the Competition Act. The rival Tiso bid was premised on a series of stages. The first stage, which constituted an offer to the shareholders of Nail for their shares at a price of R 10,50 per share, was not subject to such a condition. [1]

3. Each of the bidding consortia tried to woo Nail shareholders with the merits of its respective bid and the imperfections of its rival's. Central to Tiso's efforts was the fact that shareholders would get

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1 Note that this refers to their revised offer. The only condition was a requirement in respect of the level of the shareholding to be acquired and this it appears has been achieved.

cash soon without having to wait for the conclusion of a regulatory process of uncertain duration and outcome.

4. Thus the non-notification of the Tiso consortium's first stage of the process was crucial for securing shareholder approval and on the evidence thus far, this strategic choice has proved successful. By following a process where regulatory consent is part of the back-end, not the front-end, Tiso hopes to succeed in acquiring ownership of a sufficient critical mass of Nail shares so that its rival bidders have nothing left to bid for. Thus the non-notification at the front-end is crucial to achieve a strategy which, at least from the present papers before us, was designed not to evade ultimate competition scrutiny of the sale of the Nail assets, but to steal a march on its rivals. (Note that Tiso has an option, as part two of its strategy to acquire Phaphama's share in Nail and then as part three, via a series of agreements, to dispose of certain of the underlying businesses and holdings in Nail. These latter two parts of the scheme, it contends, if they meet the required thresholds, constitute notifiable transactions that will be notified in due course.)

5. The Kagiso consortium, concerned because its rival was buying up shares on a large scale in the open market and had made an offer to shareholders open for acceptance until Friday 24 October 2003, filed this application with the Tribunal on 7 October. The matter was originally set down for a hearing on 8 October but was at the request of all the legal representatives postponed to the following day to allow for more time for the filing of answering and replying affidavits.

6. To deal with the problem of urgency, the applicants framed their relief in two stages. The Part A relief which was sought on Thursday 9 October provided for a series of orders to interdict the further implementation of the alleged merger until the issues which might justify the Part B relief could be determined. [2] The

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2 **Part A prayers**:

i) the first respondent, and the second to sixth respondents (together, the "Tiso Consortium"), shall be and are hereby interdicted and restrained from implementing the transaction set out in the circular dated 2 October 2003 attached marked "**PMJ1**" to the applicants' founding affidavit (the "transaction");

ii) the Tiso Consortium shall be and is hereby interdicted and restrained from acquiring any further ordinary shares and/or ordinary "N" shares in the first respondent.

iii) the Tiso Consortium shall be and is hereby interdicted and restrained, where it has not already done so, from taking transfer of, or paying for, such ordinary shares and/or ordinary "N" shares in the first respondent as it may have accepted pursuant to the offer contained in the aforementioned circular.

iv) the Tiso Consortium shall be and is hereby interdicted and restrained from voting, or otherwise exercising any rights attached to, any ordinary shares and/or ordinary "N" shares it may have acquired in the first respondent pursuant to the offer contained in the aforementioned circular.

v) the Tiso Consortium shall be and is hereby interdicted and restrained from acting, in any manner whatsoever, in accordance with the special arrangements and agreed plan reflected in paragraph 8 of the aforementioned circular.

Part B relief duplicates in most respects the interdictal relief sought in Part A, but it also includes two additional prayers.[3] The first is for a declaration that the transaction constitutes a notifiable merger and the second a prayer that the first to sixth respondents be ordered to notify the merger to the Commission in accordance with the Act. In the Part B relief, the interdicts would operate until such time as the final approval of the transaction, if any, was granted by the appropriate competition authority, whether with or without conditions.

7. The Tiso consortium and the seventh respondent, Phaphama Holdings, opposed the application. Phaphama Holdings is the owner of more than half of the Nail ordinary shares and thus at the moment holds, because of Nail's dual share capital structure, the right to exercise the majority of votes in the company. Phaphama has indicated that it has assessed the competing bids and considers that Tiso's bid is the superior one. Phaphama has entered into two agreements with the Tiso consortium, one known as the "Consortium agreement" and the other the "Consortium arrangement". Despite this Phaphama contends that it is not a member of the Tiso consortium and has no equity participation in the Tiso consortium. The applicants allege however that Phaphama's two major shareholders, Hollard and Safika, which collectively hold seventy percent of its equity in equal shares are also associated with the Tiso consortium; Safika directly and Hollard through its interest in Capricorn.

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[3] Part B prayers**:**

i)the transaction set out in the circular dated 2 October 2003 attached marked "PMJ1" to the applicants' founding affidavit (the "transaction") constitutes a large, alternatively intermediate merger which is required to be notified to the eighth respondent in terms of the Competition Act (No 89 of 1998) (the "Act");

ii)the first respondent, and the second to sixth respondents (together, the "Tiso Consortium"), are directed to notify the transaction to the eighth respondent as a large, alternatively intermediate merger, in accordance with the requirements of the Act;

iii)pending the final approval, if any, of the transaction (with or without conditions) by the Competition Tribunal or the Competition Appeal Court in terms of the Act;

iv)the first respondent, and the second to sixth respondents (together, the "Tiso Consortium"), shall be and are hereby interdicted and restrained from implementing the transaction set out in the circular dated 2 October 2003 attached marked "PMJ1" to the applicants' founding affidavit (the "transaction");

v)the Tiso Consortium shall be and is hereby interdicted and restrained from acquiring any further ordinary shares and/or ordinary "N" shares in the first respondent;

vi)The Tiso Consortium shall be and is hereby interdicted and restrained, where it has not already done so, from taking transfer of, or paying for, such ordinary shares and/or ordinary "N" shares in the first respondent as it may have accepted pursuant to the offer contained in the aforementioned circular;

vii)the Tiso Consortium shall be and is hereby interdicted and restrained from voting, or otherwise exercising any rights attached to, any ordinary shares and/or ordinary "N" shares it may have acquired in the first respondent pursuant to the offer contained in the aforementioned circular;

viii)the Tiso Consortium shall be and is hereby interdicted and restrained from acting, in any manner whatsoever, in accordance with the special arrangements and agreed plan reflected in paragraph 8 of the aforementioned circular.

8. Although some criticism is made in the papers of the independence of Phaphama and hence the bidding process, these are not issues within our jurisdiction. The issue of Phaphama and its nexus to the Tiso consortium is relevant, in the competition context, only to an assessment of the allegation that Tiso and Phapahama may exercise joint control over Nail as a result of implementation of the Tiso offer (and then only as part of a broader factual matrix that would appear to include an evaluation of the agreements with Tiso).

The objections

9. The Tiso consortium and Phaphama, although separately represented, have adopted a common approach to the application. In the first place they object to the competence of the relief from a procedural aspect. In the second place, on the merits, they deny that the transactions constitute a notifiable merger.

10. We do not need to go into the detail of the procedural objections at this stage. In brief the contention is that the Tribunal does not have the jurisdiction under the Act to the grant the kind of relief sought and secondly that the applicants have failed to join third parties who have accepted the Tiso offer but have not yet been paid and accordingly have an interest in the outcome of the application.

11. We will assume for the time being, without deciding, that we have jurisdiction to grant the orders sought.

Issues that must be decided

12. At the outset we need to indicate that in this decision we are only concerned with whether to grant the relief sought in Part A of the Notice of Motion. During the hearing, applicants' counsel suggested that if we were so inclined, it might be appropriate to grant relief in the form of an order declaring that the transaction was notifiable. This suggestion was strenuously opposed by counsel for Tiso who argued that they had only come to deal the Part A relief and were entitled to be heard and make additional submissions later in relation to the Part B relief. As the declarator was part of the Part B relief in the Notice of Motion, not Part A, we have to have regard to this concern. It would be unfair to expect the respondents who opposed this application on little more than twenty-four hours' notice to be prepared to

deal with anything more. We have therefore not decided at this stage whether the Tiso transaction in respect of Nail constitutes a notifiable merger.

13. In addition we would want to hear the views of the Competition Commission, the body charged with being the watchdog of the interests which the Act protects, which has thus far not participated in the proceedings. At the hearing we asked the Commission's stance on the matter. The Commission's representative informed us that it was going to investigate the matter and would be able to come to some conclusion in a few days. He tentatively suggested that at least in one respect the transactions might constitute the acquisition by the Tiso consortium of more than 50% of the beneficial shareholding in Nail. This may constitute the acquisition of control by Tiso of Nail for the purposes of section 12(2)(a) of the Act. If this is so, he argued, Tiso was under an obligation to notify the transaction as a merger.

Finding

14. Since the Commission stated it needed only a few days to conduct this investigation we have ordered it to file answering papers in these proceedings to address at least the issue of whether a notifiable merger has occurred.

15. We have decided not to grant the relief sought in Part A. We have done so based on our conclusion that the alleged harm apprehended cannot be cured by the orders sought. In doing so we leave open an opportunity for the applicants to pursue the relief set out in Part B, subject to the other parties being given an opportunity to respond. As the relief sought, if competent, is urgent we have expedited the hearing by directing truncated time periods for further filings. If the applicants elect to abandon their application we will then decide the issue of costs at some future date.

Reasons for not granting the relief set out in Part A

16. Our reason for not granting relief in Part A is premised on the conclusion that we cannot grant an order that will be effective. At this stage it appears that the Tiso consortiuim has effectively bought up to 81.9 % of the "N" shares in Nail and 31.8 % of the ordinary shares.If this purchase of shares was harmful, it is too late to be remedied. It may well be that ironically the application itself may have led to the sales. At the hearing, counsel for the

applicants stated that Investec was aggresively buying shares on the open market, “even as we sit here”. Uncertainty about this application may have persuaded some hold-out shareholders to sell. Regardless of how these sales may have come about they do not detract from the essential fact that, in the words of the respondents, “the horse has already bolted”.

17. The applicants seek to persuade us that relief in terms of Part A is still required because the horse “though bolted can still be tethered” i.e. that although implementation on their version is taking place, it is in its incipiency, and can still be checked. The applicants have failed to satisfy us that the harm they apprehend and which has been formulated for the most part in the most general terms, (i) has either not already occurred, in which case the order is futile or that (ii) the order that they seek cannot be delayed until the 29th October when the matter will be enrolled for consideration of final relief.

18. Some originally apprehended harm cannot be redressed as the applicants abandoned their prayers against the ninth to the fifteenth respondents, those responsible for registering share transfers.

19. We must concede that two specific instances of harm may have been established, but here too, the need for urgent relief has not been established.

20. One fear of the applicants was that Phaphama would vote against their (ie the Kagiso consortium’s) offer to shareholders in terms section 228 of the Companies Act, as Phaphama had agreed to do this as one of its undertakings described in the Tiso offer. Phaphama has indicated in its papers that it will vote to block the Kagiso offer, regardless of whether the interdict is granted or not. Thus this relief will not be effective.

21. The one other apprehension of harm that the applicants had greater reason to fear in the short term and placed great reliance on, was the suggestion that the Tiso consortium may, if it acquired 90 % of the shares in Nail as it plans to do, expropriate the remaining minorities in terms of section 440K of the Companies Act. Subsequent to our hearing, this concern has been ameliorated because of a letter to the Tribunal from Tiso’s attorneys in which they undertook that:

> *“ the Tiso consortium would not acquire shares in such a manner as to trigger the provisions of section 440K.”*

22. We received, subsequent to this letter, further letters from the applicants' and the respondents' attorneys taking issue with one another. The contents of these letters does not concern us at the moment as it appears that both the applicants and Tiso accept that the section 440K offer cannot be triggered for certain technical reasons.[4]

23. We are satisfied that the undertaking, or at least the understanding that expropriation under section 440K will not take place in the interim, deals with the remaining issue of harm that may occur before we consider the application for relief in terms of Part B.

24. As the remaining apprehension of harm to the applicants is expressed in a vague and generalised sense, we are not persuaded that the order can be effective. It is trite law that if an interdict will serve no purpose it should not be granted [5].

25. In respect of any alleged harm that implementation of the transaction may cause to the public interest, here again without deciding, we find that if such harm exists, nevertheless the balance of convenience favours delaying relief until the respondents have been given a more adequate opportunity to be heard.

26. It would be imprudent of us, notwithstanding our reticence at this stage to decide any of the other points in issue, not to point out to the first to the sixth respondents that if the transactions are notifiable as the applicants and, it appears, tentatively at least, the Commission contends, they would be regarded as parties to the merger with an obligation to notify. As the consequences for failing to notify may involve both administrative penalties and divestiture, the boards of the firms concerned should reflect carefully on their position in relation to notification in the period until the matter is finally resolved.

27. We accordingly make the following orders:

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4 In the ordinary course the panel would not have had any regard to such further correspondence received in this manner, however due to the urgency of the situation and the fact that papers in respect of both parties were prepared in haste and the fact that the issue of section 440K had been referred to by both counsel at the end of their argument, we decided that it was appropriate to have regard to the correspondence on this point, as it provided clarity on certain submissions made by counsel.

5 See "*The Law and Practice of Interdicts*", C.B. Prest, 1996, Juta at page 65-66 where the learned author states that: " Where the damage that can be sustained is non-continuing or purely hypothetical or the order is not in any way beneficial to the applicant or anyone else, an interdict will not be granted."

1. that Part A of the application is dismissed;

2. in respect of Part B of the application we direct the parties to comply with the following timetable for the filing of further papers:

2.1 the Commission is required to file answering papers by no later than **Wednesday 15 October 2003**, in which it must state its considered view whether the transaction constitutes a notifiable transaction or not;

2.2 the Applicants are to file supplementary papers, if they so wish, by no later than **Monday 20 October 2003**, in amplification of the relief sought in Part B of the application;

2.3 the Respondents are to file supplementary answering papers, if they so wish, by no later than **Friday 24 October 2003;**

2.4 the Applicants to are file supplementary replying papers, if they so wish, by no later than **Monday 27 October 2003;**

2.5 the matter be set down for hearing on **Wednesday 29 October 2003,** at 10h00.

3. costs are reserved pending the further proceedings outlined above. In the event that the applicants do not proceed with the matter, any party may apply to the Registrar of the Tribunal, to determine a date for a hearing as to costs.

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N Manoim

13 October 2003

Date

Concurring: P Maponya, L Reyburn

For the Applicants:	Adv. A Subel SC Adv. J Wilson Adv. A Gotz Webber Wentzel Bowens
For the 2nd –6th Respondents:	Adv. D Unterhalter SC Adv. J Blou

	Moss Morris Inc.
For the 7th Respondent:	Adv. R Bhana Knowles Husain Lindsay Attorneys.
For the Commission:	M. Worsley, M. Sebothoma, Legal Services Division.