

competitiontribunal
SOUTH AFRICA

**COMPETITION TRIBUNAL
REPUBLIC OF SOUTH AFRICA**

Case No: CR294Feb18/SA036May19

In the matter between:

The Competition Commission

Applicant

And

Mail and Guardian Media Ltd

Respondent

Panel : A Wessels (Presiding Member)
: A Ndoni (Tribunal Member)
: F Tregenna (Tribunal Member)

Heard on : 19 June 2019
Addendum filed on : 18 July 2019
Decided on : 24 July 2019

Consent Agreement

The Competition Tribunal hereby confirms the consent agreement as agreed to and proposed by the Competition Commission and Mail and Guardian Media Ltd annexed hereto marked "A", together with the addendum annexed hereto marked "B".

**Presiding Member
Mr Andreas Wessels**

24 July 2019

Date

Concurring: Ms Andiswa Ndoni and Prof. Fiona Tregenna

" A "

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

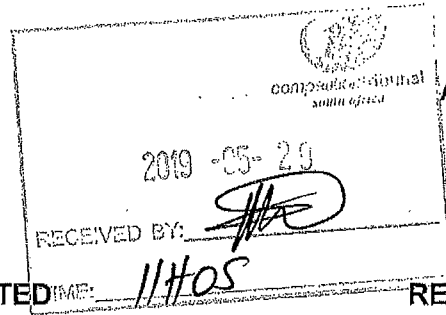
CT Case No. CR294Feb18/SA036May19
CC Case No. 2011Nov5779 / 2015Dec0695/ 2017Oct0028

In the matters between:

THE COMPETITION COMMISSION

and

MAIL AND GUARDIAN MEDIA LIMITED



APPLICANT

RESPONDENT

CONSENT AGREEMENT IN TERMS OF SECTION 49D AS READ WITH SECTIONS 58(1)(a)(iii) AND 58(1)(b) OF THE COMPETITION ACT, NO. 89 OF 1998 (AS AMENDED), BETWEEN THE COMPETITION COMMISSION AND MAIL AND GUARDIAN (PTY) LTD IN RESPECT OF A CONTRAVENTION OF SECTIONS 4(1)(b)(i) OF THE COMPETITION ACT, NO. 89 OF 1998

The Competition Commission and Mail and Guardian Media Limited hereby agree that an application be made to the Competition Tribunal for the confirmation of this Consent Agreement as an order of the Tribunal in terms of Section 49D as read with Sections 58(1)(a)(iii) and 58(1)(b) of the Competition Act, No. 89 of 1998, as amended, in respect of contraventions of section 4(1)(b)(i) of the Act, on the terms set out below.

1. DEFINITIONS

For the purposes of this consent agreement the following definitions shall apply:

- 1.1 "Act" means the Competition Act, No. 89 of 1998, as amended;
- 1.2 "Accredited Media Agents" means advertising agents endorsed by MCC through Corex and have provided security to MCC. MCC holds securities for its

members (media owners) on behalf of an accredited media agency.

- 1.3 **"Black People"** bears the same meaning as that set out in section 1 of the Broad Based Black Economic Empowerment Act 53 of 2003 as amended;
- 1.4 **"Commission"** means the Competition Commission of South Africa, a statutory body established in terms of section 19 of the Act, with its principal business address at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;
- 1.5 **"Commissioner"** means the Commissioner of the Commission, appointed in terms of section 22 of the Act;
- 1.6 **"Complaints"** means the complaints initiated by the Commissioner in terms of section 49B(1) of the Act under case numbers 2011Nov5779 and 2015Dec0695 and 2017Oct0028;
- 1.7 **"Consent Agreement"** means this Agreement duly signed and concluded between the Commission and Mail and Guardian Media Limited;
- 1.8 **"CoreX"** means Corexalance (Pty) Ltd, a company duly incorporated under the laws of the Republic of South Africa with its principal place of business at Building A, Office 103, Cresta Junction, Cnr of Beyers Naude and Judges Street, Cresta, Gauteng;
- 1.9 **"Economic Development Fund"** means the fund referred to in paragraph 7.2 below;
- 1.10 **"Economic Development Fund Manager"** means Media Development and

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Diversity Agency;

- 1.11 "**Mail and Guardian**" means Mail and Guardian Media Limited, a company duly incorporated under the laws of the Republic of South Africa with its principal place of business at 195 Smuts Avenue, Rosebank, Gauteng;
- 1.12 "**MCC**" means the Media Credit Co-ordinators, a non-profit company duly incorporated under the laws of the Republic of South Africa with its principal place of business at Building A, Office 103, Cresta Junction, Cnr of Beyers Naude and Judges Street, Cresta, Gauteng;
- 1.13 "**MCC Members**" means media owners that have subscribed with MCC and are active in the provision of advertising space and/or airtime;
- 1.14 "**MDDA**" means Media Development and Diversity Agency a juristic person established in terms of section 2 of the Media Development and Diversity Agency Act, No. 14 of 2002, as amended, with its principal place business address at 1st Floor, 5 St Davids Place, Parktown, Johannesburg, Gauteng;
- 1.15 "**Qualifying Small Agencies**" means those agencies which meet the criteria set out in the Broad Based Black Economic Empowerment Act 53 of 2003 and the codes of good practice issued thereunder;
- 1.16 "**Small Agencies**" means media or media related agencies or organisations with a turnover not exceeding R50 000 000 (fifty million rand) and which are majority owned by Black People;
- 1.17 "**Tribunal**" means the Competition Tribunal of South Africa, a statutory body established in terms of section 26 of the Act, with its principal place of business



at 3rd Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

2. THE COMMISSION'S INVESTIGATIONS AND FINDINGS

- 2.1 In November 2011, the Commission initiated a complaint in terms of section 49(B)(1) of the Act (under case number 2011Nov5779) against Avusa Media Limited ("**Avusa**"), Caxton Community Newspapers Limited ("**Caxton**"), Independent Newspapers Proprietary Limited ("**Independent News**"), Media24 Limited ("**Media 24**"), Radmark Proprietary Limited ("**Mediamark**") (collectively, the "respondents") and MCC.
- 2.2 In December 2015 (under case number 2015Dec0695) the Commission expanded the initial complaint to include 24 additional respondents. In October 2017 the Commission further expanded the initial complaint to include another respondent.
- 2.3 The allegations against the respondents are that:
- 2.3.1 through the medium of the MCC, the respondents agreed to offer similar discounts and payment terms to advertising agencies that place advertisements with MCC members. For accredited agencies, the discount offered is 16.5% for all payments made within 45 days of the date of the statement while for the most part the discount offered to non-accredited agencies is 15% for payments made within the same period.
- 2.3.2 The respondents also agreed to charge a 50% cancellation fee in

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respect of all adverts that the advertising agencies withdraw 24 hours before publication.

2.3.3 The respondents as members of the MCC employ services of an intermediary company called Corex to perform the risk assessment on advertising agencies for purposes of imposing the above settlement discount structure and terms on advertising agencies.

2.3.4 The Commission found that the above mentioned practices by the respondents gave rise to a restriction of competition amongst competing respondents in that respondents did not independently determine an element of price in the form of discount or trading terms. These practices amount to price fixing and the fixing of trading conditions in contraventions of section 4(1)(b)(i) of the Act.

3. ADMISSION OF LIABILITY

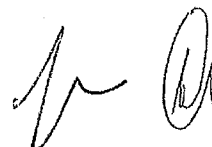
Mail and Guardian admits that it engaged in the prohibited practices set out in clause 2 above in contravention of sections 4(1)(b)(i) of the Act.

4. CO-OPERATION

Insofar as the Commission is aware, Mail and Guardian:

4.1 has provided the Commission with truthful and timely disclosure, including information in its possession or under its control, relating to the prohibited practices;

4.2 has provided full and expeditious co-operation to the Commission



concerning the prohibited practices;

- 4.3 has ceased to engage in the prohibited practices and has also ceased to be a member of the MCC;
- 4.4 has not destroyed, falsified or concealed information, evidence and documents relating to the prohibited practices; and
- 4.5 has not misrepresented or made a wilful or negligent misrepresentation concerning the material facts of any prohibited practice or otherwise acted dishonestly.

5. FUTURE CONDUCT

Mail and Guardian agrees and undertakes to:

- 5.1 provide the Commission with full and expeditious co-operation from the time the Consent Agreement is concluded until the subsequent proceedings in the Tribunal or the Competition Appeal Court are completed. This includes, but is not limited to:
 - 5.1.1 to the extent that it is in existence and has not yet been provided, providing evidence, written or otherwise, which is in its possession or under its control, concerning the contraventions in this Consent Agreement; and availing its employees to testify as witnesses for the Commission in any cases regarding the contraventions contained in this Consent Agreement;
 - 5.1.2 prepare and circulate a statement summarising the content of this

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agreement to its employees, managers and directors within 30 (thirty) days of the date of confirmation of this Consent Agreement as an order of the Tribunal;

5.1.3 refrain from engaging in conduct which contravenes section 4(1)(b) of the Act, and from engaging in any prohibited practice in future;

5.1.4 develop, implement and monitor a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management, directors and agents do not engage in future contraventions of the Act. In particular, such compliance programme should include mechanisms for the identification, prevention, detection and monitoring of any contravention of the Act;

5.1.5 submit a copy of such compliance programme to the Commission within 60 (sixty) days of the date of confirmation of the Consent Agreement as an order by the Tribunal;

5.1.6 actively endeavour to put in place measures to facilitate the ability of Small Agencies to transact with Mail and Guardian, as set out in paragraph 7 of this Consent Agreement.

6. ADMINISTRATIVE PENALTY

6.1 Having regard to the provisions of sections 58(1)(a)(iii) as read with sections 59(1)(a), 59(2) and 59(3) of the Act, Mail and Guardian is liable to pay an administrative penalty.



- 6.2 Mail and Guardian agrees and undertakes to pay an administrative penalty in the amount of **R286 846.39 (two hundred and eighty-six thousand, eight hundred and forty-six rand and thirty-nine cents)** which does not exceed 10% (ten percent) of Mail and Guardian's annual turnover in the Republic of South Africa for its financial year ended 2016.
- 6.3 Mail and Guardian undertakes to pay the administrative penalty in 3 (three) equal payments of **R95 615.46 (ninety-five thousand, six hundred and fifteen rand and forty-six cents)**. The first contribution is payable within 3 (three) months from the date of confirmation of this Consent Agreement and thereafter make the second and third contributions at the anniversary of the first.
- 6.4 The administrative penalty shall be paid into the Commission's bank account, details of which are as follows:
- Name: The Competition Commission Fee Account**
- Bank: Absa Bank, Pretoria**
- Account Number: 4050778576**
- Branch Code: 323 345**
- Ref: 2015Dec0695/Mail and Guardian**
- 6.5 The administrative penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

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7. OTHER REMEDIES

SMALL AGENCY PARTICIPATION

- 7.1.1 Mail and Guardian undertakes to provide 25% (twenty five percent) in bonus advertising airtime for every Rand of advertising space bought by all Qualifying Small Agencies. The bonus advertising airtime will be utilised at times scheduled at the discretion of Mail and Guardian, which discretion shall be reasonably exercised, taking into account the advertising space package purchased, the target audience and advertising requirements of the clients of Qualifying Small Agencies. Mail and Guardian will offer these terms for a period of 3 (three) years from the date of confirmation of this Consent Agreement, subject to a total annual advertising space cap of **R700, 000 (seven hundred thousand)**
- 7.1.3 Mail and Guardian undertakes to publish the terms in paragraph 7.1 of the Consent Agreement using national media that has a reach to Qualifying Small Agencies within 10 (ten) business days from the date of confirmation of this Consent Agreement as an order of the Tribunal, inviting all Qualifying Small Agencies to participate. Mail and Guardian will thereafter publish these terms every year on the anniversary of the first publication for a period of 3 (three) years.
- 7.1.4 Mail and Guardian undertakes to provide the Commission with a written report in respect of the utilisation of the 25% bonus advertising



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space by Qualifying Small Agencies. Such report shall include information on the number of Qualifying Small Agencies who have utilised the bonus advertising space, as well as the names, contact details and the Rand value of the bonus advertising space received by each Qualifying Small Agency.

- 7.1.5 Mail and Guardian shall submit such report 1 (one) month after every 6 (six) month period from the date of confirmation of this Consent Agreement, for a period of 3 (three) years.

7.2 ECONOMIC DEVELOPMENT FUND

- 7.2.1 Mail and Guardian undertakes to contribute an amount of **R103 264.60 (one hundred and three thousand, two hundred sixty-four rand and sixty cents)** over a period of 3 (three) years from the date of confirmation of this Consent Agreement to the Economic Development Fund to enable the development of Qualifying Beneficiaries.

- 7.2.2 Mail and Guardian undertakes to make 3 (three) equal contributions of **R34 421.56 (thirty four thousand, four hundred and twenty one rand and fifty-six cents)** into the Economic Development Fund. The first contribution is payable within 3 (three) months from the date of confirmation of this Consent Agreement and thereafter make the second and third contributions at the anniversary of the first.



- 7.2.3 These contributions shall be made into an account created and managed by MDDA.
- 7.2.4 The Qualifying Beneficiaries are Black People and include the following:
- 7.2.4.1 students requiring bursaries to study media or advertising qualifications at tertiary institutions;
 - 7.2.4.2 individuals requiring assistance to acquire necessary post-qualifications experience to participate in the advertising industry;
 - 7.2.4.3 individuals requiring assistance with sponsorship for mentoring or training in areas of media and/or advertising business fundamentals including working capital management, capitalisation and HR processes;
 - 7.2.4.4 black owned small media or advertising agencies requiring assistance with start-up capital;
- 7.2.5 The Economic Development Fund will be managed and administered by the MDDA and will be subject to annual audits by an auditing firm. MDDA shall submit an audited report relating to the management and administration of the activities of the Economic Development Fund to the Commission within 3 months of the completion of the audit.

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7.2.6 In addition, the MDDA shall provide the Commission with a written report in respect of the utilisation of the contributions made by Mail and Guardian to the Economic Development Fund, including the number of Qualifying Small Agencies who derived benefits from such contributions, as well as the names, contact details and the Rand value of the benefits received by Qualifying Small Agencies. Such report shall be submitted every 6 (six) months for a period of 3 (three) years.

7.2.7 In accordance with clause 4.1 of the MDDA agreement, MDDA shall publish the terms in paragraph 7.2 of this Consent Agreement using national media that has a reach to Qualifying Small Agencies within 3 (three) months from the date of confirmation of this Consent Agreement as an order of the Tribunal.

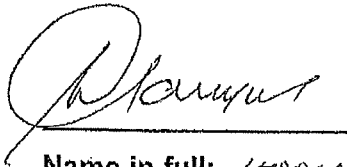
8. FULL AND FINAL SETTLEMENT

This agreement is entered into in full and final settlement of all conduct engaged in by Mail and Guardian with its competitors as set out in paragraph 2 of this Consent Agreement and, upon confirmation as an order by the Tribunal, concludes all proceedings between the Commission and Mail and Guardian in this regard.

For MAIL AND GUARDIAN MEDIA LTD



Date and signed at JOHANNESBURG on the 22nd day of MAY 2019

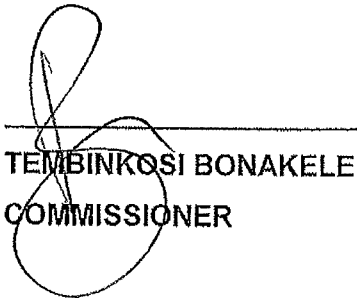


Name in full: MORDIAN KARDIUKA

Designation: CHIEF EXECUTIVE

For the Commission

Date and signed at TSHWANE on the 22nd day of MAY 2019


TEMBINKOSI BONAKELE
COMMISSIONER

"B"

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No. CR294Feb18

CC Case No. 2011Nov5779 / 2015Dec0695/ 2017Oct0028

In the matters between:

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APPLICANT

and

MAIL AND GUARDIAN MEDIA (PTY) LTD

RESPONDENT

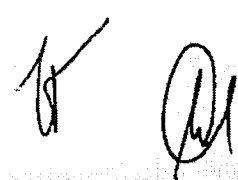
CONSENT AGREEMENT IN TERMS OF SECTION 49D AS READ WITH SECTIONS 58(1)(a)(iii) AND 58(1)(b) OF THE COMPETITION ACT, NO. 89 OF 1998 (AS AMENDED), BETWEEN THE COMPETITION COMMISSION AND MAIL AND GUARDIAN (PTY) LTD IN RESPECT OF A CONTRAVENTION OF SECTIONS 4(1)(b)(i) OF THE COMPETITION ACT, NO. 89 OF 1998

It is hereby recorded, by agreement between the parties, that the consent agreement concluded between the Competition Commission and Mail And Guardian (Pty) Ltd, signed on 3 May 2019 and presented for confirmation by the Competition Tribunal on 19 June 2019 (the "Consent Agreement"), is amended as follows:

1. AD PARAGRAPH 7.1.3 (SMALL AGENCY PARTICIPATION)

1.1 The following paragraph is amended as follows:

Mail and Guardian undertakes to publish the terms in paragraph 7.1 of the Consent Agreement using national media that has a reach to Qualifying Small Agencies within 10 (ten) business days from the date of confirmation

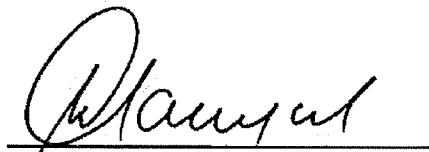


of this Consent Agreement as an order of the Tribunal, inviting all Qualifying Small Agencies to participate. Mail and Guardian will thereafter publish these terms every year on the anniversary of the first publication for a period of 2 (two) years.

2. This addendum shall be deemed to be incorporated into and form part of the Consent Agreement and, unless otherwise stated, the words and phrases used in this addendum shall bear the meaning ascribed to them in the Consent Agreement.

For MAIL AND GUARDIAN (PTY) LTD

Date and signed at PRETORIA on the 19th day of JUNE 2019.



Name in full: NORMAN GARDNER

Designation: CHIEF EXECUTIVE

For the Commission

Date and signed at PRETORIA on the 16th day of JULY 2019



TEMBINKOSI BONAKELE

COMPETITION COMMISSIONER