COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: 020974

In the matter between:

CAXTON AND CTP PUBLISHERS AND PRINTERS LIMITED	Applicant
And	
MEDIA 24 (PTY) LTD	First Respondent
NOVUS HOLDINGS LIMITED	Second Respondent
ADBAIT (PTY) LTD	Third Respondent
LAMBERT PHILIPS RETIEF	Fourth Respondent
THE COMPETITION COMMISSION	Fifth Respondent

Panel	: N Manoim (Presiding Member)
	: A Wessels (Tribunal Member)
	: M Mazwai (Tribunal Member)
Heard on	: 20 March 2015
Order Issued on	: 23 March 2015
Reasons Issued on	: 17 April 2015

Reasons for Decision

Introduction

[1] This is an urgent application brought by Caxton and CTP Publishers and Printers Limited ("Caxton") against Media24 (Pty) Ltd ("Media24") and the second to fourth respondents ("collectively the respondents")[1].

[2] Caxton seeks an interdict prohibiting the respondents from, inter alia, implementing an agreement amongst them in terms of which Novus Holdings Ltd ("Novus"), the second respondent, will be listed on the Johannesburg Stock Exchange Limited ("the JSE"), pending notification of the agreement and its approval by the appropriate competition authority. It also seeks an order directing the respondents to notify the Competition Commission ("Commission") of a change of control that will allegedly result from the implementation of the mentioned agreement, as well as an appropriate cost order.

[3] Caxton alleges that the agreement pursuant to which the listing will occur (called the restated agreement), constitutes a merger as defined in the Competition Act, 1998 ("the Act") and ought therefore to receive competition approval before it can be implemented.

[4] The listing was scheduled to take place on 26 March 2015. We heard the application on 20 March 2015 and dismissed it on 23 March 2015 with no order as to costs. The reasons for dismissing the application follow.

The Parties

[5] The applicant is Caxton, a company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, with its head office at 368 Jan Smuts Avenue, Craighall, Johannesburg.

[6] Caxton is a listed company and is a publisher and printer of books, magazines, newspapers and commercial print in South Africa. It is involved in various fields of the publishing and printing business, including newspapers, magazines, commercial print and book printing.

[1] The Competition Commission is cited as the fifth respondent, however, no relief is sought against the Commission.

[7] The first respondent is Media24, a company with limited liability, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, which has its principal place of business at 40 Heerengracht Street, Cape Town. Media24's activities include the publishing of magazines and newspapers, including the electronic provision of news and magazine content of the internet.

[8] The second respondent is Novus Holdings Limited ("Novus") (formerly Paarl Media Group (Proprietary) Limited ("PMG") as explained in paragraphs [17] - [19] below), a public company, duly registered and incorporated in accordance with the company laws of the Republic of South Africa, which has its principal place of business at 10 Freedom Way, Milnerton, Cape Town. Following a recent "*flip-up"* transaction, explained in paragraph [19], Novus owns all of the shares in two subsidiaries (previously subsidiaries of PMG), Paarl Coldset (Pty) Ltd ("Paarl Coldset" or "PCS") and Paarl Media Holdings (Pty) Ltd ("PMH"), collectively referred to as the "Paarl Group" or the "Paarl Group companies".

[9] The third respondent is Adbait Proprietary Limited ("Adbait"), a private company duly registered and incorporated in accordance with the laws of the Republic of South Africa, which has its registered office at 272 Boschenmeer Straat, Paarl. Adbait appears to be ultimately controlled by Mr Lambert Philips Retief ("Mr Retief") and/or his family trusts.

[10] The fourth respondent is Mr Retief, an adult male businessman, with identity number 521125017085. Mr Retief's principal place of business is the principal place of business of the second respondent. Mr Retief was cited on account of any interest he may have in the relief sought.

[11] The fifth respondent is the Commission, an administrative body established in terms of section 19 (1) of the Act, which has its offices at Block C, Mulayo, Mapungubwe Building, DTI campus, 77 Meintjies Street, Sunnyside, Pretoria. No relief is sought against the Commission in this application.

Relevant provisions of the Act

[12] Section 13A(1) provides that: *"A party to an intermediate or large merger must notify the Competition Commission of that merger in the prescribed manner and form."*

Section 13A(3) provides that: *"The parties to an intermediate or large merger may not implement that merger until it has been approved, with or without conditions, by the Competition Commission, in terms of section 14(1)(b), the Competition Tribunal in terms of section 16(2), or the Competition Appeal Court in terms of section 17".*

[13] Section 12(2)(a) provides that: "*For purposes of this Act, a merger occurs when one or more firms directly or indirectly acquire or establish control over the whole or part of the business of another firm."* Section 12(2) provides that: "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 firm;
(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 61 of 1973);
(e) … (applies to trusts);
(f) … (applies to close corporations);
(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)."

The premise of Caxton's application

[14] Caxton's application is premised on three main grounds:

a. We have already indicated that Caxton alleges that the restated agreement ("the restated or 2008 agreement") amongst Media24, Novus and Mr Retief, constitutes a merger as defined in the Act. According to Caxton the restated agreement will result in an acquisition of sole control over Novus by Media24. Caxton alleges that prior to the restated agreement, Media24 has *de iure* control of Novus, as contemplated in sections 12(2) (a)-(d) of the Act, while Mr Retief has *de facto* control, as contemplated in section 12(2)(g) of the Act, by virtue of a management agreement concluded in 2008 ("the

management or 2008 agreement") amongst *inter alia* himself and Media24. Caxton submits that the restated agreement, if implemented, will strip Mr Retief of his powers as a joint controller with Media24 under the management agreement, resulting in Media24 acquiring sole control of Novus).

b. Caxton submits that this application should be seen against the backdrop of a proposed merger in 2014 in terms of which Media24 intended to acquire Mr Retief's minority shareholding in Novus over which he had management control, as Mr Retief was intent to retire. Media24 notified this proposed acquisition to the Commission on the basis that it would result in a move by Media24 from joint to sole control. However, that transaction was abandoned by Media24, following the Tribunal's decision to allow Caxton to intervene in the scheduled merger hearing concerning that transaction. According to Caxton, the restated agreement seeks to avoid merger notification requirements and thereby avoid scrutiny by the competition authorities.

c. Caxton also relies on Media24's statements in numerous proceedings before the competition authorities where it submitted that Media24, although a *de iure* controller of Novus, did not have *de facto* control of Novus, this being the terrain of Mr Retief as per the management agreement between him and Media24, which confers *de facto* control on Mr Retief. According to Caxton, Media24 has portrayed its role in the business of Novus as that of a passive investor with no management or operational control.

d. Caxton submits that it has *locus standi* to bring this application. As a competitor of Media24, it has an interest in any prior implementation of the merger that may occur unlawfully as a result of the listing.

Media24's counter to the application

[15] Media24 counters Caxton's application on the following main grounds:

a. It denies that the restated agreement constitutes a merger as defined in the Act. This is because there is nothing in the management agreement of 2008

that grants Mr Retief autonomy in the management of the group, as alleged by Caxton in its papers. In any event, to the extent that he may have a form of *de facto* control, the restated agreement does not materially change this. To the contrary, contends Media24, the listing will result in a dilution of any powers conferred by Media24 in terms of the management agreement and the shareholders' agreement of the Paarl Group companies. Moreover, says Media24, it does not follow that any loss of control enjoyed by Mr Retief under the management agreement will automatically be acquired by Media24.

b. Regarding the 2014 merger, Media24 submits that the 2015 restated agreement is fundamentally different to the abandoned 2014 merger in numerous respects that we will discuss later.

c. On the prior submissions made by it previously before the competition authorities regarding Mr Retief having *de facto* management control and thus joint control with itself, Media24 says this is not borne out by the management agreement. How Media24 may have understood the control stages at various times in the past is not dispositive of the issue.

d. Regarding the relief sought by Caxton, Media24 submits that the order sought, in essence, constitutes a final interdict as it will derail the listing. Media24 submits that Caxton has not fulfilled the requirements for the relief it seeks. Caxton's application should therefore be dismissed with costs.

[16] Prior to considering the parties' submissions, let us look at the shareholding and control structure of Media24, pre- and post the listing.

Media24's control structure pre- and post-listing

Pre-listing

[17] Media24 is an indirect subsidiary of Naspers Limited[2], a JSE-listed holding company of a diversified portfolio of e-commerce and media platforms. Its immediate holding

[2] Naspers Ltd holds 85% of the shares in Media24 Holdings (Pty) Ltd, the balance of 15% is held by Welkom Yizani Limited, an empowerment entity.

company is Media24 Holdings (Pty) Ltd[3]. Media24 itself has a wholly owned subsidiary, PMG (re-named Novus Holdings Limited, the entity to be listed).

[18] PMG has two subsidiaries: PMH, in which it owns 90% of the shares, the balance being held as to 5% by Mr Retief and his Trusts, and as to 5% by an employee incentive share trust; and Paarl Coldset, in which it holds 87.37%, the balance of 12.63% being held by Mr Retief and his Trusts.

[19] In order to facilitate the listing, Novus was established as a newly formed entity for this purpose. A flip-up transaction was concluded amongst the shareholders of the Paarl Group companies, in terms of which these Group companies' shareholders would relinquish their shareholdings in the Paarl Group companies (previously subsidiaries of PMG) for shares in the new Novus prior to listing. Accordingly, PMG has been renamed Novus. Mr Retief and entities controlled by him became shareholders in Novus, holding 6.12% of the shares, having relinquished their shareholdings in PMH and Paarl Coldset. Media24 is the majority shareholder of Novus (in the order of some 65%).

[20] Pre-listing there is the management agreement as mentioned between Media24 and Mr Retief concluded in 2008 in terms of which Mr Retief would have management control over Novus. It is this management agreement that is at the heart of the control dispute between the parties, as discussed later.

Post-listing

[21] Post the listing, the management agreement will be replaced by the 2015 agreement currently under challenge by Caxton. Media24 has explained in its answering affidavit that the 2015 agreement has been concluded "*because the JSE required greater certainty that Mr Retief's rights and responsibilities would not place him beyond the scrutiny of and accountability to each board of the Novus group*"[4]. In particular, the JSE Listings Requirements require that a company must have "*a policy evidenc[ing] a clear balance of power and authority at board level to ensure that no one director has unfettered powers*".[5] The JSE Listings Requirements also

[3] Media24 Holdings (Pty) Ltd holds 96.66% of the shares in Media24, and an employee share incentive trust holds the balance of 3.01% of the shares.
[4] See Answering Affidavit, page 434 of the record, paragraph 108.3.
[5] Section 3.84(b) of the JSE Listings Requirements, Annexure PMJ18 to the Founding Affidavit.

require that listed companies comply with the King Code[6], which provides in respect of listed companies that that the "*companies should be headed by a board that directs, governs, and is in effective control of the company*."

[22] Section 66 of the Companies' Act, 2008 ("the Companies' Act") which came into force in 2011, provides that the "*business and affairs of a company must be managed by or under the direction of its board, which has the authority to exercise all of the powers and perform any of the functions of the company, except to the extent that the Companies Act of the company's memorandum of incorporation provides otherwise*". The memorandum of incorporation ("MOI") of Novus repeats the provisions of section 66.[7]

[23] There is no dispute between the parties that the above legal provisions will apply to Novus as a listed entity. Where the dispute lies between them is whether Mr Retief will be dispossessed of *de facto* control, which he enjoys pre-listing. Put differently, the dispute is whether Mr Retief's rights under the management agreement are materially equivalent to those under the restated agreement. If not, then whether any powers lost by him will vest with Media24. To determine the answer to these, it must first be established whether Mr Retief has *de facto* rights currently.

[24] There are three material points on which the parties differ in this regard. Prior to considering these, we set out some common cause facts between the parties.

Common cause facts

[25] It is common cause between the parties that pre- and post-listing Media24 is a controller of Novus:

a. In terms of section 12(2(a) of the Act, in that it beneficially owns more than one half of the shares in Novus (and its subsidiaries, PMH and PCS). Pre-listing Media24's shareholding in Novus is 93.88% (the balance is held by Adbait, one of Mr Retief's entities). Post-listing, Media24 will own approximately 64.34% of the shares in Novus (while Adbait will have 5.63% of the shares).

[6] See JSE Guidance letter, dated 30 September 2014, page 297 of the record.
[7] See the memorandum of incorporation, page 716 clause 35.1.

b. In terms of section 12(2)(b) of the Act, in that it is entitled to cast the majority of the votes at a general meeting of Novus. This will remain unchanged.

c. In terms of section 12(2)(d) of the Act, in that it is the holding company of Novus. This will not change.

[26] Whether Media24's control rights under section 12(2)(c) of the Act will remain post-listing was a controversial issue at the hearing. Mr Unterhalter who appeared for Media24 argued strenuously that while Media24 is entitled to appoint seven of the eleven directors on the Novus board pre-listing, post-listing, Media24 will lose this right (despite being able to nominate the majority of the directors). This is because post-listing, Media24 can only nominate directors for election to the board, not appoint them as is currently the case.

[27] According to Mr Unterhalter, there is a difference between a "nominee" director and a director who is nominated and is independent as contemplated in the King Code. This is because a "nominee" director can and does accept instructions from the shareholder as long as the "nominee" director does not breach his or her fiduciary duties to act in the best interest of the company. However, an independent board cannot and may not accept instructions from the shareholder. Consequently, post-listing Media24's powers will be diluted as it will no longer have the ability to appoint its representatives on the board.

[28] We are not persuaded by this argument. As Mr Trengove for Caxton, points out, the distinction drawn by Mr Unterhalter is not warranted in law. A director, whether nominated or appointment is subject to fiduciary duties under the Companies Act, irrespective of the manner in which he or she got on the board. We will therefore not discuss this point further. Our decision does not turn on this in any event.

What then changes from the 2008 management agreement ("2008 agreement") to the restated 2015 agreement ("the 2015 agreement")?

[29] A great deal of time was spent during the hearing comparing Mr Retief's powers under the two agreements. The fundamental differences between the parties boil down to the following themes:

a. The alleged loss of Mr Retief's veto rights under the 2008 agreement, including the alleged loss of his powers in respect of the strategic direction of the firm;

b. The operational independence of Mr Retief under the respective agreements; and

c. The effect of the listing on Media24 (which will allegedly result in a dilution of some of Media24's powers under the 2008 agreement, such as the ability to appoint the majority of the directors on the Novus board). For the reasons mentioned in paragraphs [26]-[28], we will not discuss this aspect any further.

[30] We set out the main provisions of the 2008 agreement which underpin the respective submissions of the parties before considering the submissions.

[31] In terms of the 2008 agreement, Mr Retief was appointed as non-executive chairman of the Novus board (having been CEO of Novus since 2000 when Media24 (then Nasmedia) acquired Paarl Post, now the Paarl group). Mr Retief's powers in terms of the 2008 agreement include the authority:

a. in consultation with the executive committee of the Novus board, to appoint and dismiss the Chief Executive Officer ("CEO") and Chief Financial Officer[8];

b. to oversee and supervise the CEO who is responsible for the day-to-day management of the Novus group[9];

c. in consultation with the CEO, to procure that the CEO formulates and prepares the annual budget and business plan of the group for approval by the board[10];

d. to monitor the implementation of the approved business plan and budget[11]; and

e. in consultation with the board, is responsible for the planning and implementation of the strategic direction of the group[12].

[32] The management agreement also provides that "…*Mr Retief shall exercise his duties and responsibilities in terms of this agreement and arrange the conducting of the*

[8] Clause 3.4.1 of the 2008 management agreement.
[9] Clause 3.4.2
[10] Clause 3.4.3
[11] Clause 3.4.4
[12] Clause 3.4.6

business of the Group on the basis of operational independence in principle from the Board, Media24 and the Shareholders, provided that it is exercised in consultation with the Board and further subject to his ultimate accountability to the Board;"[13]

[33] In case of any dispute between the parties regarding the duties and responsibilities of Mr Retief as summarised above (which according to the agreement, include "*a dispute whether the operational independence of Retief is materially on an ongoing basis impaired, or a refusal by the board to approve the consolidated annual budget or consolidated business plan without good cause shown by the board for such refusal"*), such dispute shall be referred to an expert for determination.[14]

Caxton's submissions regarding Mr Retief's veto, strategy and other powers

[34] According to Caxton, Mr Retief enjoys a veto over the budget and business plan in terms of clause 3.4.3 of the 2008 agreement. As mentioned above, the clause provides for the consolidated budget and business plan of Novus to be prepared by the CEO in consultation with Mr Retief and to further be submitted to the Board for approval. Caxton argues that the provision that the budget be submitted to the Board for approval must be read together with clause 3.10 of the 2008 agreement. This clause as mentioned provides that the Board may not refuse to accept the budget or business plan without good cause. If there is a dispute in that regard, the dispute is referred to an expert for determination.

[35] Mr Trengove submits that the words "*in consultation with*" means that there must be an agreement between the parties. Absent an agreement between them, then the dispute resolution provision in clause 3.10 is triggered. These provisions thus give Mr Retief (and similarly the board) a veto over these decisions.

[36] Caxton argues further that when the dispute resolution mechanism is triggered, the expert is enjoined to consider whether the refusal by the Board would "*impair the operational independence of Retief*" as contemplated in clause 3.10.

[37] According to Caxton, the 2015 agreement removes this veto right currently enjoyed by Mr Retief. Clause 4.3.3 merely provides that Mr Retief shall procure that the CEO prepares a budget and business plan for submission to the Board for approval. The

[13] Clause 3.4.5
[14] Clause 3.10, read with clause 8.

requirement for a consultation (and concomitant agreement), the basis for the veto, is no longer there.

[38] Regarding the strategic direction of Novus, clause 3.4.6 of the 2008 agreement provides that Mr Retief shall, "*in consultation with the Board primarily be responsible for the planning and implementation of the strategic direction of the Group"*. The restated agreement, in clause 4.3.6, merely provides that Mr Retief shall "*oversee the strategic direction of the Group and monitor its implementation by the CEO".*

[39] Caxton also argues that, whereas under the 2008 agreement, Mr Retief had the authority in consultation with Exco to appoint the CEO and CFO, this will no longer be the case as the pre-amble in the 2015 agreement makes it clear that the management authority of Novus will lie with the Board.

[40] According to Caxton, the above provisions read as a whole, clearly show that pre-listing, Mr Retief enjoys veto rights over important matters as discussed above, including the powers regarding the strategic direction of Novus. As such, he enjoys *de facto* control as contemplated under section 12(2)(g) of the Act, a position that will change post-listing, as Mr Retief will no longer enjoy such powers, which will vest in the Board of Novus as required by law. Mr Trengove argues that it is clear from the above provisions that Mr Retief's powers "*have now been watered down to merely an administrative function"*.

Operational independence of Mr Retief under the respective agreements

[41] Caxton submits that the 2015 agreement must be viewed in light of section 66(1) of the Companies' Act, Novus' MOI, the JSE Listing Requirements and the King Code, discussed in paragraph [22] above, all of which are "antithetical" to control being exercised by one person[15] as is the case under the 2008 agreement (where Mr Retief enjoys operational independence from the board).

[42] Caxton argues, the preamble to the 2015 agreement is indeed evidence of this shift (from Retief's powers to operate independently of the board, to these powers vesting in the board). Caxton submits that the pre-amble to clause 3.4 of the 2008 agreement makes it plain that the 2008 agreement overrides the shareholders'

[15] Caxton's heads of argument, page 39-40, paragraph 97.

agreement between the shareholders of Novus subsidiaries (PMH and PCS) (Media24 being the majority shareholder, and Mr Retief the minority).

[43] Caxton submits further that other than the requirement that Mr Retief should comply with his fiduciary duties as a director, the pre-amble in the 2008 agreement, does not require that he exercises his duties subject to the oversight of the Novus board. According to Mr Trengove, this "*bland preamble has now been replaced by a far more potent preamble"* which provides that Mr Retief's powers are conferred on him only insofar as they are compatible with section 66(1) of the Companies' Act.

[44] Caxton submits that to date, the unanimous assent of all the shareholders of the Novus group, which confers autonomous managerial and operational independence on Mr Retief (as reflected in the management agreement, and the PMH and PCS shareholders' agreements), has enabled these companies to overcome section 66(1). However, this will no longer be possible post-listing, as congruent with section 66(1), the JSE Listings requirements and the new Novus MOI, managerial and operational control of the Novus business will be in the hands of the Novus board. Mr Retief will be but one director on the board whose powers will be subject to the board as a whole. Mr Retief will therefore be divested of the control over the operations and management of Novus that he currently enjoys under the 2008 agreement.

[45] Clause 4.3 of the restated agreement makes it clear that Mr Retief's powers are subject to section 66 of the Companies' Act, the JSE Listings Requirements and Novus' new MOI (which simply echoes section 66(1))[16]. According to Caxton, the restated agreement does not confer on Mr Retief control of the operations independently of the Novus board, irrespective of what it may state.

[46] Caxton argues that there is a fundamental difference between the 2008 agreement and the restated agreement on the operational independence of Mr Retief. While the 2008 agreement does not define operational independence, according to Caxton, it is nevertheless clear from a reading of the agreement that Mr Retief is empowered to operate independently of the Novus board.

[47] Caxton argues that clause 3.4.5 of the 2008 agreement gives Mr Retief operational independence, not only of Media24 as controlling shareholder, but also of the Novus board. Mr Retief is required, in terms of this clause, only to consult with the Novus

[16] Paragraph 35.1 of the MOI, page 296 of the record.

board for its input, but he alone is empowered to make the management and operational decisions of the business.

[48] For convenience we repeat clause 3.4.5 of the 2008 agreement, which states: *"It is intended that Retief shall exercise his duties and responsibilities in terms of this agreement and arrange the conducting of the business of the Group on the basis of operational independence in principle from the Board, Media24 and the Shareholders, provided that it is exercised in consultation with the Board and further subject to his accountability to the Board"*.

[49] Since operational independence is not defined in the 2008 agreement, Caxton submits that it must be given its ordinary meaning, namely that Mr Retief can "arrange the conducting of the business of the Paarl Group Companies" independently of Media24 and the Novus board.

[50] Contrary to this provision, clause 4.4.5 of the 2015 agreement, provides that *"Mr Retief shall exercise his duties and responsibilities in terms of this agreement and arrange the conduct of the business of the Group on the basis of Operational Independence from Media24 (the controlling shareholder of Novus as at the restatement date), provided that it is exercised from time to time in consultation with the Board and further subject to Mr Retief's accountability to the Board"*.

[51] Operational independence is defined in the restated agreement as *"the conduct of the business of the Group in a manner which ensures the ability of the Group to secure and conduct business in the Group's commercial interests as determined from time to time and for the time being by the Board and, in particular without derogating from the generality of the aforegoing in a manner which (i) does not give or allow Media24 any uncompetitive advantage over any existing or potential clients of the Group in a manner whatsoever detrimental to the commercial interests of the Group, and (ii) permits the Group to refuse to give Media24 access to commercially sensitive information of any third party client of the Group"*.

[52] Mr Trengove argues that operational independence has been given a different meaning under the 2015 agreement. The key difference here is that operational independence now means independence from the controlling shareholder, Media24, not the Board as was previously the case. Mr Trengove argues that Mr Retief can no longer act independently of the Board, which he submits, is a significant shift in the power previously enjoyed by Mr Retief.

[53] According to Caxton, Mr Retief's powers of management and operational control of Novus, independently of the Novus board is re-enforced further by other provisions of the 2008 agreement, being his veto powers over important strategic matters as discussed above.

Media24's submissions regarding the control of Novus

[54] Media24 argues firstly that the issue of the control of Novus must be determined on a proper interpretation of the 2008 agreement coupled with a factual inquiry as to how the agreement has been implemented (to establish if Mr Retief has exercised autonomous managerial and operational control of Novus as alleged by Caxton). Secondly, assuming Mr Retief will lose control, Media24 submits it neither follows that such divestment of control constitutes a merger, nor that Media24 will acquire such control.

[55] The nub of Media24's argument is that the notion that Mr Retief has autonomous management and operational control of Novus pre-listing (which he will lose in favour of Media24, post-listing) is not borne out by the 2008 agreement. This is because contrary to Caxton's views, Mr Retief's powers of control over Novus have at least since the 2008 agreement, been subject to the Board as reflected in the provisions discussed above. There will therefore be no material changes to Mr Retief's powers post-listing (save as discussed below). To the contrary, says Media24, the proposed listing will result in a dilution of Media24's control over Novus as contemplated under section 12(2)(c) of the Act. In any event, says Media24, it does not follow that any loss of control by Mr Retief will be acquired by Media24.

No material change to Mr Retief's powers (be they veto or operational independence rights)

[56] Media24 argues that Mr Retief's powers of control under the 2008 agreement are nuanced rather than autonomous, as alleged by Caxton.

[57] Specifically regarding Mr Retief's alleged veto powers, including his authority over the strategic direction of the firm, the appointment of the CEO and CFO as well the operational independence of Mr Retief, Media24 says all these powers were always subject to the Board. The listing will therefore simply substitute one controller for

another. This controller will be the new independent Board of Novus over whom Media24 will have no control.

No merger

[58] Mr Unterhalter does not take issue with the case law that a move from joint to sole control constitutes a merger and should be notified to the competition authorities.

[59] His argument is that there can be a de-merger without an acquisition of control. This is because the Act defines a merger as "a *direct or indirect acquisition of control…*" In the case of the proposed listing, assuming Mr Retief will lose some control he enjoys pre-listing, the divestment of these powers does not create a merger event as Media24 does not acquire some attribute of control that it didn't previously enjoy.

[60] Our conclusions on these submissions are discussed below.

Prior submissions before the competition authorities

[61] Caxton relies on four prior submissions before the competition authorities where Mr Retief was represented as having *de facto* control of Novus as contemplated under section 12(2)(g).

[62] We have already mentioned the 2014 abandoned merger, whereby Media24 had notified its proposed acquisition of Mr Retief's minority shareholding as a merger involving a move from joint to sole control of Novus. Caxton argues that the proposed listing will have the same objective and outcome as what Media24 intended to achieve in 2014. It remains a merger, as Media24 will acquire sole control of Novus (from a joint control situation). Caxton says having notified the transaction as a merger in 2014 and abandoning it in the face of Caxton's intervention in the proposed hearing of the matter, the listing is an attempt by Media24 to circumvent the scrutiny of the competition authorities as would have occurred had the 2014 merger proceeded.

[63] The second prior submission is the Nasmedia/Paarl Post Web Printers ("PPW") merger[17] in 2000 when Media24 (then Nasmedia) and PPW established a new printing company, Newprint. At the time of the merger, Mr Retief was the chairman of

[17] Nasmedia Ltd/Paarl Post Web Printers (Pty) Ltd 65/LM/May00.

PPW. Post-merger, he would be appointed CEO and managing director of Newprint. In approving this transaction (in which Media24 would have a 65% shareholding), the Tribunal in its decision noted that "*the parties made much of the fact that despite Nasmedia's majority shareholding, it would not control Newprint as management control would vest in Mr Retief*". On this basis, the Tribunal was satisfied that any concerns over Nasmedia's dominance would be alleviated as Mr Retief would not allow the company (Newprint) to be run in a manner contrary to the best interests of Newprint where those interests conflicted with those of Media24.

[64] The third prior submission relied on by Caxton is the Paarl Media Group/Primedia merger[18] in 2011 in terms of which the merger parties notified the Commission of a small merger in terms of which the Paarl Media Group would acquire control over Primedia@Home, a direct competitor of Media24's subsidiary, "On-the-Dot". Primedia@Home and On-the-Dot collectively accounted for more than 80% of the market for knock and drop distribution.

[65] Through the merger, Primedia@Home would be controlled by Media24, making the merger effectively a merger to monopoly. In their merger filing, Media24 and the Paarl Group confirmed the *de facto* control position enjoyed by Mr Retief under the 2008 agreement. They also submitted that Media24's shareholding in the Paarl Group was for investment purposes only. The parties submitted that Mr Retief would conduct the operations and implement the strategic direction of the Paarl Group independently of Media24.

[66] The fourth prior submission pertains to a merger between Media24/Natal Witness and Publishing Company ("Natal Witness")[19] wherein a managing director within the Paarl Group, confirmed that the Paarl Group is controlled by Mr Retief.

[67] According to Caxton, the above submissions make it clear from the horse's mouth as it were, that Mr Retief enjoys operational autonomy over the Paarl Group, and thus has *de facto* control, a position which will change post-listing.

Media24's response to statements made in prior submissions

[68] Media24 denies Caxton's allegation that the proposed listing is an attempt to achieve what it failed to do through the abandoned merger in 2014. Media24 says Caxton

[18] Paarl Media (Pty) Ltd/Primedia (Pty) Ltd [2011] ZACT 54.
[19] Media24 Limited/Natal Witness Printing and Publishing Company (Pty) Ltd 15/LM/Jun11.

confuses these two transactions, which are fundamentally different in various respects.

[69] The first is that whilst the abandoned merger would have involved the transfer of the Retief interests in Novus to Media24, the listing will see Retief, through entities controlled by him, retaining his shares in Novus for at least a period of three years, during which Mr Retief my dispose of his shares incrementally as agreed between the parties. Secondly, under the abandoned merger, Mr Retief would have resigned, consistent with his intent to retire, whereas with the proposed listing, Mr Retief will remain a non-executive director of Novus until the age of 65. Thirdly, whereas the 2008 agreement would have been terminated under the abandoned merger, it will continue in the restated form post-listing.

[70] Whether Caxton's allegations are true or not regarding the 2014 merger, what remains is that the issue before us is whether or not the restated agreement constitutes a merger as contemplated in section 12(2) of the Act. Of course this does not mean that we should ignore historical factors where relevant, as demonstrated in our conclusions on Media24's prior submissions before the competition authorities, discussed below. Ultimately, we have to decide the current transaction on its merits.

[71] Regarding prior submissions on control, Media24 does not deny that it made the statements (that Mr Retief was a joint controller with Media24 as contemplated in section 12(2)(g) of the Act) as alleged by Caxton. The following extract best describes Media24's response on this issue: *"So we can't deny that there are references you can find which are the ones Caxton has seized on and sought to make a great deal of, but you will find other references that indicate a much more nuance [sic] and different view and take them for what they are worth. They're not dispositive of what the position is"*. Mr Unterhalter submits that whatever Media24 believed to be the control position as advised by different legal representatives at different times cannot be dispositive of the issue.

[72] Our conclusions on these prior submissions are discussed later.

Caxton's submissions on locus standi and relief sought

[73] Caxton submits that its *locus standi* stems from its position as a competitor of Media24. As a competitor of Media24 in the business of community newspaper publishing and to a limited extent, in paid-for newspapers it has a direct interest in

any change of control in the Paarl group. Caxton argues that, by granting Caxton leave to intervene in the abandoned merger proceedings in 2014, the Tribunal recognised this interest.

[74] Caxton further submits that to the extent that the transaction pursuant to which the listing will occur constitutes a move from joint to sole control, it has established a clear right to the relief sought. This entitles it to the protection afforded by the Act that requires the notification of mergers before they can be implemented, irrespective of the competition implications of the merger. In any event, argues Caxton, the listing will have adverse effects on concentration and diversity in the South African media industry as the biggest newspaper group will acquire sole control of the biggest printing group.

[75] Caxton alleges that, should the listing be implemented prior to it being notified and approved, it would be difficult to unscramble its implementation once it has occurred.

[76] Caxton also seeks an order for costs against the respondents.

Media24's submissions on *locus standi* and relief sought

[77] Media24 challenges Caxton's *locus standi* and the relief sought on numerous bases. The first is that the fact that Caxton is a competitor of Media24 and was granted leave to intervene in the abandoned 2014 merger does not establish a clear right in favour of Caxton that is protectable through a mandamus.

[78] Secondly, Media24 argues, the relief sought by Caxton is in effect final as its consequence, if granted would be to derail the listing. Media24 argues that the Tribunal can only grant a final interdict when a clear right (by Caxton) has been established, which Caxton has failed to do. This is because, according to Media24, a clear right can only be established in circumstances where there are undisputed facts. In this case, it is arguable whether Mr Retief enjoys managerial and operational autonomy over Novus, such that the listing results in a change from joint to sole control, as alleged by Caxton.

[79] Media24 also argues that Caxton has failed to show irreparable harm to itself personally which will arise if the listing were to proceed without notification to and approval by the competition authorities. To the contrary, Media24 alleges it will suffer severe financial and other related prejudice, if the listing is derailed.

[80] Media24 further submits that, even if there was a basis for the relief sought, the Tribunal has discretion whether or not to grant it, given the drastic consequences that will flow from it.

Requirements for a (final) interdict

[81] The urgency of the matter is not in dispute given the imminent listing. There appears to be no dispute between the parties that the relief sought by Caxton is a final interdict, given its effect. It is also not in dispute that the requirements for a final interdict are:

a. A clear right;
b. A reasonable apprehension of harm; and
c. No other remedy[20].

[82] For reasons below, we do not discuss each of the requirements *in seriatim*.

[83] At the heart of establishing a clear right is the *locus standi* of the person bringing the application. As mentioned, Caxton alleges that it has a right by virtue of being a competitor of Media24, a right it claims, was recognised by the Tribunal in granting Caxton leave to intervene in the abandoned merger proceedings.

[84] Caxton submits that to the extent that the transaction pursuant to which the listing will occur constitutes a move from joint to sole control, there is a merger. This entitles it to be protected from a prior implementation of the merger in contravention of section 13A(3) of the Act, irrespective of the competition implications of the merger.

[85] Media24 argues that the reasons advanced by Caxton do not establish a clear right. They argue that it is not sufficient that Caxton is a competitor of Media24. They say the Commission is the primary body entitled in the public interest to enforce the Act. Caxton, on the other hand, has not established (such) a right.

[86] For purposes of this application, we have assumed that Caxton has the *locus standi* to bring this application. We have previously taken a wide view, based on the provisions of the Act, that proceedings can be initiated before us by a party other than the Commission (in circumstances where two parties who were competitors of

[20] Setlogelo v Setlogelo 1914 AD 221.

the respondents applied for a declaratory order before the Tribunal regarding an alleged failure by the respondents to notify a merger before implementing it).[21] To hold otherwise would be to deny parties legal standing to pursue what may be in the public interest.

[87] The Supreme Court of Appeal ("SCA") has also confirmed a Competition Appeal Court ("CAC") decision in the matter between American Natural Soda Ash Corporation and Botswana Ash ("Botash")[22] where Botash, a competitor of Ansac, had brought an interim relief application before the Tribunal to interdict Ansac from continuing to implement an agreement alleged to be in contravention of section 4 of the Act. Botash's *locus standi* to bring the application was unsuccessfully challenged before us. On appeal to the CAC, the CAC held that an applicant for an interdict need not show that a specific (personal) right has been infringed, as Ansac sought to argue, or that they require protection to prevent serious or irreparable harm[23].

[88] On appeal to the SCA, the SCA confirmed the CAC decision on Botash's standing on the basis, *inter alia*, that Ansac did not have to show the ordinary common law prerequisites for obtaining relief. The SCA confirmed that the provisions of the Act cast the right to participate in Tribunal hearings widely. This is because "*the orders that the Tribunal can make … are 'of a limited kind to be made in the public interest."*" We therefore assume that Caxton has *locus standi* to interdict the prior implementation of the restated agreement, if it is a merger. We will return to the question whether Caxton has established a clear right in our conclusions on change of control below.

Our conclusions on change of control

[89] In our view, the control issue essentially boils down to two aspects of the Novus control situation pre- and post-listing: whether the 2008 agreement confers on Mr Retief veto rights which the listing will take away; and whether the 2008 agreement gives Mr Retief *carte blanche* as alleged, over the management and operations of

[21] See Bulmer SA (Pty) LTD and Seagram Africa (Pty) Ltd/Distillers Corporation (SA) Ltd and others 94/FN/Nov00/101FN/Dec00.
[22] American Natural Soda Ash Corporation/Botswana Ash (Pty) Ltd, case no. 554/03 (SCA). Although the matter concerned complaint, rather than merger proceedings, the principle of recognizing third party rights to initiate proceedings before the Tribunal applies equally.
[23] American Soda Ash Corporation and another v Competition Commission and others 12/CAC/DEC01.

Novus, which will disappear post-listing. There are also statements made in prior submissions by Media24, which are relevant in these proceedings.

[90] We first consider the key powers conferred on Mr Retief under the (current) 2008 agreement as alleged by Caxton; then we come to Media24's submissions in prior proceedings before the competition authorities which appear unequivocal in their stance i.e. that Mr Retief enjoys (joint) control over Novus under the 2008 agreement.

[91] It is common cause, as mentioned that pre-listing, Media24 has control over Novus by virtue of several provisions of the Act (sections 12(1)(a), 12(2)(b), 12(2)(c) and 12(2)(d)). Mr Retief enjoys joint control with Media24 by virtue of the 2008 agreement which gives him management powers. What we have to decide is whether Mr Retief has autonomous managerial and operational control over Novus, as alleged by Caxton.

[92] As mentioned earlier, Novus was originally established in 2000 through a merger between Nasmedia (now Media24) and Paarl Post Web Printing (now the Paarl Group). At the time of the merger, Mr Retief was the chairman of Paarl Post. Post-merger he was appointed CEO and managing director of Newprint (being the newly established company). The parties submitted to the Tribunal that in terms of agreements between them, Mr Retief would have a large measure of autonomy in the running of Newprint.

[93] In 2008, a restructuring of Newprint took place. There was confusion during the hearing whether this restructuring constituted a merger and whether it was notified to the Commission. According to Media24, the rationale for the restructuring was to combine the printing businesses of Media24 and the Novus group, and to use them to service the printing needs of Media24 and third parties, including customers of the Retief entities who were competitors of Media24. This gave rise to the need for the entrenchment of operational independence between the Novus group printing businesses and the publishing businesses of Media24[24].

[94] Consequently, the existing management agreement was concluded amongst Retief, the Retief Entities, Novus and Media24.[25] In terms of this agreement, Mr Retief was

[24] See page 358 of the record.
[25] See page 33-36 of the record. See also *Paarl Media (Pty) Ltd and Primedia (Pty) Ltd [2011] ZACT 54 (25 July 2011)*

appointed as a non-executive chairman of the Novus Group but would retain certain operational and management competencies. It appears that to the extent that the 2008 restructuring impacted on the control structure of Novus, Media24 and Paarl Coldset took steps to notify the relevant transaction to the Commission but subsequently withdrew it. At the hearing for the present application, the Tribunal was informed from the bar that the Commission, in 2008, advised the parties that notification was not necessary in these circumstances.[26]

[95] This poses a question whether Media24 acquired sole control then (in 2008) which would be problematic for Caxton's case as it would mean that Media24 already has sole control of Novus and therefore the listing does not result in a change of control. This is however not a case before us currently. For our purposes, the yardstick for control that we are required to assess is the position in 2008 when the management agreement was concluded, and not the 2000 position when Novus was originally established. Recall that the control position presented by Media24 in 2000 was that Mr Retief would enjoy a large measure of autonomy. However, the crucial question currently is whether Mr Retief has autonomy in conducting the business of Novus under the 2008 agreement.

Our views regarding the legal position in 2008

[96] It is common cause that Mr Retief was appointed as a non-executive chairman of Novus in 2008, from his prior position as CEO. According to Media24, Mr Retief has at least since 2007 not been involved in the day-to-day operations on Novus. His appointment as a non-executive chairman of Novus appears consistent with him relinquishing involvement in the day-to-day operations of the firm, a role he played as CEO.

[97] For reasons explained by Media24 above, namely to entrench "operational independence" between the Novus group printing business and Media24's publishing businesses, Mr Retief was given certain rights. As mentioned, Caxton alleges that these rights confer on Mr Retief management and operational control on an autonomous basis[27]. Media24 disputes this and says Mr Retief enjoys devolved rights of managerial and operational independence, subject to the Novus Board.

[26] See page 56-57 of the transcript.
[27] See page 49, paragraph 100 of the record.

[98] Unfortunately, the 2008 agreement does not shed any light on this dispute. It is more opaque than it is clear. For instance, whether Mr Retief has the veto rights alleged by Caxton remains ambiguous. Mr Retief certainly has a right to dispute certain important issues - the business plan and budget of Novus.

[99] However, this right is diluted by the need to obtain consensus from the Board. As mentioned, if the Board does not agree with Mr Retief, then the dispute is referred to an expert (whose decision is final and binding). This is not consistent with a normal veto. In a normal veto situation no decision can be made without the consent of the party who has a veto. This ability to create a deadlock gives the veto holder leverage to influence decisions. Retief's right to dispute decisions cannot create a deadlock because the expert mechanism serves to prevent deadlock. As a result his leverage when compared to someone with a veto right is considerably diminished.

[100] As mentioned, the meaning of Mr Retief's operational independence is also a key issue in dispute between the parties. Again, the 2008 agreement is no less opaque. For convenience we repeat clause 3.4.5, which states that: *"It is intended that Retief shall exercise his duties and responsibilities in terms of this agreement and arrange the conducting of the business of the Group on the basis of operational independence in principle from the Board, Media24 and the Shareholders, provided that it is exercised in consultation with the Board and further subject to his accountability to the Board"* own emphasis.

[101] Mr Unterhalter concedes that the agreement is "*a very peculiar agreement and what it appears to give with one hand it quite obviously takes back with the other"*. Clause 3.4.5 is purely farcical. While on the one hand it gives Mr Retief the right, in principle, to arrange and conduct the business on the basis of operational independence, it on the other hand, it takes this right and puts it in the hands of the Board by requiring a consultation with the board and accountability by Mr Retief to the board. Mr Unterhalter argued that the proviso (to consult with the Board and subject to Mr Retief's accountability to the board) "dominates over the in principle" right, pointing to the nuanced, rather than autonomous control powers enjoyed by Mr Retief.

[102] *De facto* control as contemplated in section 12(2)(g) necessarily involves a factual inquiry into the control situation of a firm. The ambivalence in the 2008 agreement does not appear to be elucidated by facts that tell us how in practice, the 2008 agreement was implemented. Has Mr Retief blocked any of the important matters

discussed above in a manner that has constrained Media24? We have not been told any of this.

[103] What we know from the facts before us is that Mr Retief was appointed as a non-executive chairman of Novus in 2008, consistent with him relinquishing his role in the day-to-day management and operations of the firm *circa* 2007. It cannot be said that in this role, he has information that an executive director may possess, which may arguably, somehow confirm his autonomy over Novus. He appears not to. The CEO (and CFO) occupies a key role in the day-to-day management of the business, bearing only a duty to consult with Retief over certain key decisions, which are ultimately subject to board approval.

[104] We have not been told of any instances where Mr Retief has in fact been a guardian or protector of third party customers of the Paarl Group, who are competitors of Media24 in the publishing business, by blocking any decision which may have given Media24 preference or a competitive advantage over these third party customers (the very basis of the 2008 management agreement as alleged). We only have Media 24's version on this where Mr Retief's actual role is described as minimal. Based on the Plascon-Evans decision,[28] Media24 argued that this version of the facts advanced by the respondent had to be accepted.

[105] However Mr Trengove argued that Media 24 had put up two versions of Mr Retief's powers. The diluted version in the present application but the joint controller version in past mergers. He argued that there is nothing in Plascon-Evans to say which version of the respondent's argument had to be accepted if there were contradictory versions. Even if we accept that as a matter of law Mr Trengove is correct, for the reasons set out above the version of Mr Retief's powers given in this application is the more probable one than in the prior notifications.

[106] Mr Retief's small economic interest in Novus, his status as a non-executive director, and his imminent retirement, all point it to being unlikely for him to be able to constrain Media24 in any meaningful way. In the absence of facts in support of any of the potential indicators of Mr Retief exercising control powers as discussed above, we are constrained to conclude that both Media24 and Mr Retief have merely been paying lip service to the management agreement.

[28] Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd 1984 (3) SA 623 (A).

[107] We find therefore that the 2015 agreement does not limit Mr Retief's powers any more than the 2008 agreement. Whilst the change in mechanisms in the respective agreements dilutes Mr Retief's influence to some degree, this dilution is so insignificant that it neither amounts to a relinquishing of any type of joint control power that he previously had or the acquisition of sole control by Media 24. Since we cannot conclude, on the facts before us that the restated agreement constitutes a merger, we find that Caxton has not established a clear right. This is because any right that Caxton may have to interdict the alleged prior implementation of the restated agreement would exist only if the restated agreement constituted a merger, which would be unlawfully implemented.

Our conclusions regarding Media24's prior submissions on control

[108] Media24's prior submissions before the competition authorities beg the question, has Media24 been transparent and honest about the locus of control of Novus. Unequivocally, no. Mr Unterhalter tried to argue that whatever position Media24 may have said in the past cannot be dispositive of the matter, as the relationship between Mr Retief and the Board is more nuanced than previously presented.

[109] Mr Trengove, quite correctly pointed out that Mr Vroom, a director of Media24 who previously said in the Primedia merger referred to above, that Novus was jointly controlled by Media24 and Mr Retief, now contradicts this on oath in these proceedings. He argues that Media24's version of control in these proceedings is "a mere function of opportunistic convenience" and should not be accepted.

[110] We agree with Mr Trengove that Media24 has exaggerated Mr Retief's role in prior proceedings when it suited it. We do not accept that this was a matter of interpretation as Media24 now suggests. Media24 would have known all along what the *de facto* control position it is now espousing was, at all relevant times.

[111] We also note that both the 2008 and 2015 agreements appear to be cynical attempts to avoid having to notify the Commission in the event of Mr Retief disposing of his shares. We have very little sympathy for the way in which Media24 has conducted itself. Assuming we have the power to grant costs, we would not do so in this case, even though Caxton is unsuccessful.

Order

[112] The application is dismissed.

[113] We make no order as to costs.

Ms Mondo Mazwai

17 April 2015
DATE

Mr Norman Manoim and Mr Andreas Wessels concurring

Tribunal Researcher: Derrick Bowles & Ammara Cachalia

For the Applicant: Wim Trengrove S.C. (appearing with Jerome Wilson, Gavin Marriott and Sarah Pudifin-Jones) on the instructions of Nortons Incorporated

For the Respondent: David Unterhalter S.C. (appearing with Michelle Norton, Robin Pearce, Richard Moultrie and Kirsty McLean) on the instructions of Werksmans Attorneys