



COMPETITION TRIBUNAL OF SOUTH AFRICA

CT Case No: 013938 / CR154Oct11

In the matter between:

THE COMPETITION COMMISSION

OF SOUTH AFRICA

APPLICANT

and

MEDIA 24 LIMITED

RESPONDENT

Panel: Mr Norman Manoim (Presiding Member)

Ms Yasmin Carrim (Tribunal Member)

Prof Merle Holden (Tribunal Member)

Heard on: 13 November 2014

Final submission on: 27 March 2015

Order issued on: 08 September 2015

Reasons issued on: 08 September 2015

ORDER AND REASONS FOR THE DECISION

SECTION A: INTRODUCTION

- [1] For nine years from the beginning of this century advertisers and readers in Welkom enjoyed the choice of four weekly community newspapers on four consecutive days.¹ By 2010 they were left with one. This case concerns whether the demise of the two others was causally linked to a prohibited practice, more specifically predation.
- [2] The firm accused of engaging in predatory conduct is the respondent in this matter, Media 24 Limited ('Media 24'). It owns Vista the only title to survive. It also used to own Forum, one of the two papers that exited. The other to exit, Gold Net News ('GNN'), was independently owned by a small company of owner managers called Berkina Twintig (Pty)(Ltd) ('Berkina').
- [3] Our task in this case is to determine the reasons for the exit of these two titles. In doing so, we have to decide between two contending narratives of the events that took place over a period of five years, between 2004 and 2009, which the Commission alleges is at least the length of the period of predation.
- [4] The one narrative, advanced by the Competition Commission ('the Commission'), which has referred this case, alleges that Media 24 intentionally used Forum as a predatory vehicle or 'fighting brand' during this period, to exclude Gold Net News from the market, and having achieved the eventual demise of the latter, closed down Forum after a short interval.
- [5] The other narrative, advanced by Media 24, denies any causal link between the fates of the two papers and moreover denies that Forum was used as a predatory vehicle to exclude Gold Net News. Forum, Media 24 contends, always earned revenues that exceeded any legally acceptable measure of cost. External factors, such as the 2008 recession and internal factors related to its pricing and its distribution efficiency contributed to GNN's demise, claims Media 24.

¹ One of the papers, Vista, ran a Tuesday and Thursday edition. Thus although there were three titles, there were four editions. Media 24 regarded Tuesday Vista as a stand-alone edition. See evidence of Jan Malherbe transcript page 1505.

- [6] Forum's revenues and indeed the Welkom newspaper market, would best be described as having economically modest significance, yet this did not detract from the manner in which both sides litigated the case, leaving no issue unchallenged. The result of this has been a case whose duration has been prolonged first by interlocutory skirmishes prior to commencement of hearings, then a lengthy and regrettably disrupted set of hearings which ended only in November 2014, nearly five-and-a-half-years after the complainant, the erstwhile owner of Gold Net News, had first complained to the Commission in January 2009.²
- [7] The Commission relies on two provisions of this Act in its case against Media 24, both of which can be categorised as abuse of dominance provisions that proscribe exclusionary conduct; in the first place section 8(d)(iv), the so-called 'express predation' contravention and then in the alternative, section 8(c) the so-called 'general exclusionary' contravention. This case involves not only an analysis of the factual basis of the Commission's case, but also an evaluation of the appropriate legal test in a case that is in many respects novel to this jurisdiction, if not to others as well.

SECTION B: BACKGROUND

- [8] In this section we set out some of the common cause facts as well as identifying the issues over which the parties are in dispute and which we have to decide. In 1971 a Mr Hans Steyl established a community newspaper to circulate in the greater Welkom area known as Vista.
- [9] In 1980, Perskor, a large media group existing at that time, acquired Vista. Steyl explained that the large groups had begun to be interested in community papers as television was eating into the advertising revenues

² The first skirmish occurred even before the complaint was referred. The Commission had during its investigation subpoenaed documents from Media 24 who had contested the validity of the subpoena, a matter we had to decide. See our decision issued under case number 18/x/APR10 dated 08 July 2010.

of their larger titles but the revenues of community newspapers were less affected.³

- [10] This paper was soon faced with a competitor in the market when a rival media group Naspers, now trading through its subsidiary, known as Media 24, the respondent in this case, established a paper called Forum to compete with it in Welkom in 1983. Whilst these two papers remained the only papers in the market under their separate owners we are told they were vigorous competitors. Steyl who had by this stage taken up a more senior position in the Perskor Group resigned in 1994.
- [11] In 1996 the Perskor Group was acquired by another large media group, Caxton. Then in 1999 the Caxton group sold a number of its Free State titles, including Vista to Media 24.⁴ As a consequence of this merger Media 24 now owned both titles in Welkom i.e. Forum and Vista and faced no competition.
- [12] This monopoly position did not last long.
- [13] According to Steyl, Media 24 already had publications in competition with the previous Perskor titles in some areas and the merger meant integrating their respective staffs. As a result, some chose to leave and took severance packages. One of them was Leda Joubert previously an employee of Naspers in Kroonstad that Media 24 had acquired as part of the same merger with Caxton.⁵
- [14] Joubert apparently backed by the resources of her husband entered the Free State market with some ambition. She established five titles under the brand NET NEWS in various Free State towns including Welkom.
- [15] In February 1999 she approached Steyl to manage her Welkom title but he declined. Approached again in October that same year he accepted. He managed to get other staff who had previously worked for Perskor or

³ Complaint from Berkina found at Pleadings file, page 5.

⁴ According to Steyl the other titles sold to Media 24 were Northern Times, Bloem News and Vrystaat.

⁵ Record, page 14.5 - Joubert described herself as manager of the office; Naas Du Preez describes her as a circulation manager.

Media 24 to join him at NetNews.⁶ One of them was a Ms. J.C. Erasmus, who had formerly been with Vista as its news editor in Steyl's time.

- [16] Steyl says the Welkom title soon established itself, but the same could not be said of the other NetNews publications which soon exited and the group was liquidated. Steyl and his colleagues then took over the Welkom publication and called it Gold Net News. The employees, or some of them, became its shareholders (the company was Berkina) and Steyl and Erasmus became directors.
- [17] Joubert exits our history at this stage but she was responsible for one last important intervention. Prior to closing down she had, in around 2000, brought a complaint of predatory pricing against Media 24.⁷
- [18] The Commission approached Media 24 to respond to the complaint. In its response Media 24 filed affidavits from several of its staff, all of whom denied the allegations. The Commission however never referred the complaint to the Tribunal.
- [19] Nevertheless the existence of the prior complaint is an important fact in the history of the case as we point out later.
- [20] Under Steyl's leadership GNN entered the market aggressively, offering advertising rates that from what we can discern from contemporaneous documents were considered very low by the local Media 24 staff.⁸
- [21] Despite this Steyl seems reluctant to have wanted to enter into a price war with Media 24. He says prior to GNN being established he met with Media 24's Free State operations manager and told him that GNN had no

⁶ Augnuscha Van Eck, Media 24's principal factual witness, who was around at the time supports Hans Steyl's version about the dissatisfaction after the merger leading some staff to leave and join Netnews.

⁷ From an email dated 12 October 2000, from Naas Du Preez, the then Regional Manager of the Group in Bloemfontein, we know the complaint must have come before October 2000. He refers to the fact that Netnews latest allegation is that "...we held a meeting in September or October 1999 all your names are mentioned." Du Preez asks them all to put their names to an affidavit in which the allegation is denied. See record page 10. For affidavits that follow see pages 11—14. Amongst the deponents were two later witnesses in the present case, Wian Bonthuyzen and Augnischa Van Eck.

⁸ Email from Augnischa Van Eck dated 6 March 2001 complaining that "the people are once again up to their old tricks "and asking "... what is our plan B if they now start cutting tariffs again..."Record, page 39.

intention of entering into a tariff war with Media 24 and nor was GNN in a position to do so.⁹

[22] Although there is some evidence that Media 24's local managers were willing to talk to Steyl, nothing it appears came from this. As we shall discuss later competition ensued and whether this was aggressive or predatory is in issue.

[23] Gold Net News fortunes changed over the years. Starting off strongly with loyal advertising support and a paper of medium size winning almost 25% of the advertising market, it ended struggling to attract advertising and with a thin newspaper.

[24] Eventually it was closed down in April 2009.¹⁰ Nine months later Media 24 closed down Forum in January 2010.

[25] Since then no new community paper has permanently entered the Welkom market and Vista remains the only offering to advertisers for this type of publication.¹¹

The original complaint from Berkina

[26] On 30 January 2009, just prior to closing GNN, Steyl filed a complaint on behalf of the complainant with the Commission. Aspects of the complaint are dealt with in greater detail later in these reasons. For now it suffices to state that the complaint was made against Media 24 "... *trading as Vista*

⁹ See complaint, pleadings file, pages 4-5. The manager who he spoke to was presumably Naas Du Preez who has since passed away. We thus only have Steyl's version of this meeting. However, there is some confirmation of this in an email from Wian Bonthuyzen, Volksblad's manager of community newspapers to Du Preez, where after forwarding him an email from Agnushka Van Eck, the sales manager of Vista at the time, he asks what to do about GNN's price cutting "*Hans Steyl must perhaps again be invited to you for tea.*" Record, page 39.

¹⁰ Complaint Referral, paragraph 53, Pleadings file.

¹¹ The pleadings suggest various hit and run entry occurred post Forum's closure. See answering affidavit paragraph 97 and the refutation in the Commission's replying affidavit paragraphs 16 -17. (Both in the pleadings file).

*and Forum” for “... abuse of a dominant position in the Free State Goldfields.”*¹²

[27] The complaint was that Media 24 was:

“..printing Vista and Forum at cost or below) and/or somehow subsidise these publications in the broader corporate sense, to enable them to sell at considerably lower local advertising rates than Gold-NET-NEWS who(sic) is printed at market related printing rates by a commercial printer and therefore has to sell at market related rates to survive.”

[28] The essence of his complaint was that Media 24 through Vista and Forum had cut its rates for advertising by 2004. These rates he contended were not market related but below what he would expect to be a market price.¹³

[29] He gave his reasons why. First, by comparison to historic tariffs before this period in the Goldfields region, and second, by comparison with rates for what he considered equivalent or inferior publications elsewhere in Free State which he claimed charged considerably more. He accused the two publications of *“... severe local advertising rate cutting by reduced rates on a selective basis.”*¹⁴ His conclusion was that on either of these comparative metrics, Media 24’s publications were charging below a market price.

[30] He concluded the complaint (which note is made whilst GNN was still in the market) by indicating that GNN was being forced to close.¹⁵ As it happened it closed three months later.

The case as pleaded

[31] The Commission referred the complaint to the Tribunal on 31 October 2011.¹⁶ The referral alleged that Media 24 had engaged in pricing conduct that contravened section 8(d)(iv) alternatively 8(c) of the Act.¹⁷

¹² See complaint, Pleadings file, page 1.

¹³ The complaint follows from pages 2-4 of the pleadings file and has an additional summary to be found on pages 7-8 with annexures to it of advertising quotes from Vista and Forum inter alia.

¹⁴ *Ibid* page 2.

¹⁵ *Ibid* page 4.

- [32] We will not consider the complaint referral as originally conceived in any detail since the Commission's theory of harm was changed by a major amendment that followed.
- [33] However, it is relevant to understanding the evolution of this case and the economic complexities it raises.
- [34] The Commission's main cause of action was that Media 24 had through Forum engaged in pricing conduct (advertising pricing is contemplated here) that was below the paper's relevant average variable costs (AVC) or below its relevant average total costs (ATC).¹⁸
- [35] Two theories were advanced. The first was a fighting brand theory. In terms of this theory Forum had been operated over the complaint period (defined as between January 2004 and February 2009) deliberately as a fighting brand, to serve as a barrier to entry for new entrants and to prevent GNN from growing in the market. The Commission contended that as a result of this theory of harm; (i) all Forum's costs over the complaint period should be regarded as variable and (ii) that in fact they were all variable over the period.¹⁹
- [36] The Commission contended that if the price charged for its advertising over the period was compared with its variable costs it priced below AVC or alternatively below its ATC.
- [37] In its second formulation the Commission contended that if one took costs that could be considered variable over a twelve month period (the Commission then itemised what it considered these were) then over the complaint period Forum was pricing below AVC for 55% of the time and below ATC for all the time.²⁰

¹⁶ The normal investigation period of one year afforded to the Commission was extended from 31 January 2009 to 31 October 2009. (See complaint referral, Pleadings file paragraph 10.)

¹⁷ Pleadings file page 28.

¹⁸ Paragraph 31 of the Referral, Pleadings file, page 45. These terms which are technical terms in economics are explained later in this decision.

¹⁹ *Ibid* Paragraphs 38-39.

²⁰ *Ibid* Paragraph 46.

[38] The Commission's conclusion was that the conduct was both exclusionary and anticompetitive.

- It was exclusionary because GNN had been excluded from the market and that Forum, which had never been profitable throughout the relevant period, was then closed down after GNN had been forced out.²¹
- It also had exclusionary effects in other markets where Media 24 operated community newspapers, as rivals would, due to the reputational effects, be dissuaded from competing with it.²²
- The anticompetitive effect was that the conduct harmed consumer welfare, affecting two constituencies.²³ Advertisers were forced to pay higher prices, and deprived of their choice of newspapers and the benefits of greater competition in terms of quality and service; similarly, readers were deprived of choice and the benefits of increased competition in terms of quality.

[39] The Commission denied that the conduct had any pro-competitive gain.²⁴ As far as remedies were concerned the Commission sought an administrative penalty of 10% of Media 24's turnover and a declaratory order.

[40] Media 24's answer was lengthy and need not be considered in detail either at this stage. Instead we highlight the essential themes raised as they figure later in the in this decision. First, Media 24 denied that GNN competed with Forum. Its real competitor was Vista.²⁵

[41] Next it denied that there was any policy decision to "...undercut GNN or to position Forum as a cheap advertising opportunity".²⁶ When GNN closed,

²¹ *Ibid* Paragraphs 49 and 53.

²² *Ibid* Paragraph 55.

²³ *Ibid* Paragraph 56.2.

²⁴ Showing a pro-competitive gain is a defence to a dominant firm in terms of both 8(c) and 8(d)(iv.)

²⁵ Answering affidavit Paragraphs 39 and 60.

²⁶ *Ibid* paragraph 53.

Forum did not benefit from its closure and there was no significant move of advertisers to it from GNN.²⁷

[42] Media 24 de-links Forum's closure from that of GNN; instead it is attributed to the 2008 recession, on-going downsizing in Media 24 as a whole, the poor outlook for marginal products, and the problem of publishing two newspapers in the Welkom area.²⁸ Media 24 then criticised the methodology the Commission used to calculate its variable costs. It stated that the Commission had included as variable costs, what Media 24 terms allocated costs. Allocated costs are those portions of Head Office costs in Cape Town and the costs of the Volksblad offices in Bloemfontein and Welkom, whose shared costs are apportioned to all the group's titles in some proportion. Media 24 contended that these costs were not variable, as they did not fluctuate with either changes in volume or the closure of the newspaper.²⁹ If Forum's variable costs were correctly calculated it covered its variable costs in each year.³⁰

[43] Media 24 also insisted that the use of total costs for assessing predation was not consistent with the Act.³¹

[44] As far as the 8(c) count was concerned, Media 24 maintained that the Commission's case as to what cost measures it was relying on was unclear, but to the extent it relied on the same cost measures for 8(d) (iv), they were for the same reasons not available to the Commission under 8(c).³²

[45] The Commission filed a replying affidavit dated May 2012. This served largely to join issue with Media 24 and did not take the facts of the case much further.

[46] However, the case changed significantly when it filed a supplementary affidavit on 12 July 2013.

²⁷ *Ibid* Paragraph 64.

²⁸ *Ibid* paragraph 66-7.

²⁹ *Ibid* paragraph 69.2.

³⁰ *Ibid* paragraph 70.

³¹ *Ibid* paragraph 79.

³² *Ibid* paragraph 82.

[47] This supplementary affidavit purported to alter the Commission's case in two key respects:

1) The Commission alleged that subsequent investigation had led it to conclude that Media 24 was engaged in a targeting strategy against GNN and that whilst Forum was the primary vehicle used in this strategy it now alleged that "...it also used Vista to buttress this strategy..." Vista was used where necessary to target local customers to induce them not to purchase from GNN and hence to force the latter out of the market. It termed these allegations the '*Further Conduct*' allegations.

The Commission then went on to state that as a matter of clarity, its 8(d)(iv) case was unaffected by the Further Conduct allegations. What was affected was the 8(c) case, where reliance would be placed on the Further Conduct. However, it stated that the original case was still extant i.e. these Further Conduct allegations were an additional arrow to its bow under 8(c).³³

2) The second change was described as a clarification of cost measures. Here the Commission signalled that it would rely on an incremental cost standard. In that regard it stated that the decision to continue to operate Forum as a fighting brand was to be considered as variable or marginal to the decision to operate Forum and that those costs had to be compared to the incremental revenues obtained by Media24 from operating Forum. This cost clarification was to apply to both the counts under 8(d)(iv) and 8(c).³⁴

[48] Media 24 objected to the amendments. The Tribunal heard argument on this and decided to allow the amendments, but required further particulars to be furnished on the grounds that they were too vaguely formulated.

[49] We gave reasons for this decision on 28 March 2013 and for this reason they need not be repeated here.

³³ Supplementary affidavit paragraphs 23.1 and 23.2.

³⁴ *Ibid* paragraph 25.

- [50] The Commission then filed its further particulars which were met with further objections. The Tribunal ruled that the cost clarification particulars could, with further clarification, be allowed. This further information was then supplied by way of a further affidavit.³⁵
- [51] However, the further particulars in relation to the Further Conduct allegations did not, in the Tribunal's view, meet the particularity standard required and so these particulars were struck out.³⁶
- [52] The Second supplementary affidavit on cost clarification was dated 12 July 2013. The major new issue raised here was how Forum's so-called incremental revenues were to be calculated. Here the Commission advanced the thesis that would become a central issue of contestation during the hearing. Forum's incremental revenues, said the Commission, were to be calculated as the total revenues from its management accounts, reduced by the proportion of its revenues that would have been diverted to Vista if Forum had exited the market. The diversion was premised on a ratio of 27%. The source for the 27% was based on a remark made in a Media 24 document.³⁷ The remainder of the affidavit gives further details as to the calculation but, as we discuss this in depth later, it need not be discussed now.
- [53] Media 24 filed their supplementary answering affidavit, responsive to this new approach, on 14 November 2014. In essence Media 24 contended that the Commission's incremental cost measure was neither relevant nor permissible under section 8(d)(iv)³⁸. It also disputed the use of what it termed the profit sacrifice test for purposes of the count under section 8(c).³⁹ In conclusion, Media 24 contended that on a proper application of an incremental cost measure, Forum was not consistently loss making on an incremental cost basis.

³⁵ See pleadings file page 217.

³⁶ They are paragraphs 12- 23 of the February Supplementary affidavit.

³⁷ *Ibid* Paragraph 5.

³⁸ Supplementary Answering Affidavit paragraph 12.

³⁹ *Ibid* paragraph 13.

Other Interlocutory Hearings

[54] During the course of this litigation we heard several interlocutory matters. Most, apart from the objections referred to above, related to documents. Prior to the referral being filed, the Commission in May 2010 subpoenaed documents from Media 24. Media 24 challenged the subpoena but we upheld it and ordered production of the documents sought by the Commission on 8 July 2010.⁴⁰ Subsequent to the referral there were several contests over discovery which need not be documented here.

Hearing

[55] The hearing of the matter commenced on 12 November 2013 ran for nine days and then resumed on the following dates:

- 25 – 28 January 2014;
- 10 – 14 March 2014
- 12 May 23 May 2014; and
- 14 – 18 July 2014.

[56] Final argument was heard on 13 November 2014 and at the request of the Tribunal, further information on some of the calculations was requested. This resulted in a further flurry of correspondence with the last submission coming from Media 24 on 6 March 2015. The Commission indicated it wished to respond to that as well but we indicated in correspondence that further submissions would not be accepted.

[57] At the hearing we heard oral testimony from the following witnesses:

⁴⁰ Our decision on the subpoena is reported under case number 18/x/APR10.

Commission:

- Wian Bonthuyzen;
- Sharika Betts;
- Hans Steyl;
- Neil Dryden; and
- Dr Simon Roberts.

Media 24:

- Jan Malherbe;
- Anel Coetzee;
- Francois Groepe;
- Augnischa van Eck;
- Johannes Botha;
- Mike Leahy; and
- Stephan Malherbe.

[58] Further witness statements were filed on behalf of others who were not called. In respect of the Commission only one witness signalled was not called and that was Phillip Swart from Buildmat Welkom, one of the customers of GNN.

[59] Media 24 trimmed their witness list more substantially deciding not to call the following factual witnesses Rassie Van Zyl and Jonathon Crowther and one of their expert witnesses, Dr Cristina Caffarra.

MAIN CASE

Advertising

[60] All three papers competed in the market for advertising. It is common cause that adverts came in three classes for which different rates applied:

- (i) National advertising by which was meant advertising from customers who placed the same advert in several community papers around the country, for instance the supermarket chains. In the case of the two Media 24 publications this advertising was sold by a division of Media 24 called AD 24 and not by the Welkom consultants.⁴¹

GNN also did not sell its own national advertising, but outsourced this to a firm called Capro, which also performed this function on behalf of a

⁴¹ Media 24 refers to staff who sell advertising as consultants.

number of publications, which, like GNN were independent of the major publishing groups;

(ii) Local advertising from businesses in the Goldfields area and which was limited to the publications in that area. This advertising was sold by the local consultants;⁴² and

(iii) Classified advertising, which was local in nature but where the customer contacted the paper when they wished to advertise something.

[61] Rates differed for the three types with a premium charged for national advertising.

[62] Vista dominated in terms of the volumes of advertising it carried in all three categories. However, its market share was proportionately lower, and GNN's and Forum's respectively higher, in respect of local advertising as the Table below, prepared by Genesis Media 24's economists, illustrates:

Share of classified, national and local advertising for Vista, Forum and GNN

	Title	2005	2006	2007	2008	Average for 2005-2008
Share of classified advertising	Vista	73%	71%	73%	80%	74%
	Forum	5%	5%	6%	5%	5%
	GNN	23%	24%	21%	16%	21%
Share of national advertising	Vista	90%	89%	84%	88%	88%
	Forum	2%	2%	7%	1%	3%
	GNN	7%	9%	9%	11%	9%
Share of local advertising	Vista	59%	61%	63%	65%	62%
	Forum	17%	18%	17%	16%	17%
	GNN	24%	21%	20%	19%	21%

Source: Genesis calculations based on measured volumes from RD604-RD630 and RD963

Note 1: All time periods are calendar years.

Note 2: Shares of advertising are based on corresponding time periods. These time periods are determined by the availability of measurements for GNN and therefore do not always correspond to full years.

Note 3: Local advertising is taken as the residual of total advertising after subtracting classified and national advertising.

Note 4: No measurements of individual advertising categories for GNN are available in the discovery prior to 2005.

[63] The Commission's case is that the contestation was over the share of local advertising. As we will note later, for GNN, a critical threshold was keeping its share of local advertising above 20%, and in its final full year of operating in Vista in 2008, the table shows GNN's market share fell below this for the first time, in the years for which we have figures.

⁴² Van Eck testimony transcript pages 1970-2.

- [64] Media 24, as we discuss later, rely on this table to suggest that GNN lost market share to Vista, not Forum. It argues that this disproves the thesis that Forum was the predator, as, if it was, the market share should have accrued to it. We discuss the cogency of this argument and the Commission's response to it, later in this decision.
- [65] During the complaint period it appears that GNN's rates were higher than those of both Forum and Vista and that Forum charged the lowest rates.
- [66] Rates were a function of many factors the most important of which was circulation. During the complaint period, on average, circulation figures were:
- Vista - 38 000 (48 -56 pages);
 - Forum - 30 000 till 2006 and 23 000 thereafter and possibly 15 000 in the final months. (8 – 16 pages); and
 - GNN - 35 000 (33 000 till 2005) (16 – 24 pages).⁴³
- [67] The size of the newspapers was never constant and might vary from week to week. The size was determined by the number of adverts to be carried what is referred to as loading or the ratio of adverts to editorial. In theory the newspapers tried to reach an optimal loading which varied according to the publication. If the loading was too low the newspaper would not cover its costs; if it was too high the proliferation of adverts would put off readers.
- [68] Although the papers had a rate card which set out rates for the types of advert, size and whether it was colour or black and white, in practice all three quoted prices lower than those reflected on the rate cards. This has made getting clean data on the rates difficult in this case. Complicating matters further was the fact that the papers offered discounts, free adverts and in the case of Forum and Vista, Media 24 for some time, adopted a practice where it offered bundles for advertising in both.

⁴³ See Genesis report expert witness file Record page 157 Table 1.

- [69] Because of this judging performance of the papers by revenue was opaque to outsiders. In practice those in the market when wanting to compare their performance against rivals' instead relied on comparing volumes of adverts in each edition. They did this by measuring column centimetres of advertising in each edition for a particular week, then aggregating this and then calculating each paper's proportion of the whole, to determine market share.
- [70] However, from time to time a customer would approach a paper with a quote from a rival and ask for it to better that rate or equal it. This explains how the 'meet and beat' strategy that one witness testified Media 24 engaged in, was possible to effect.
- [71] Initially after the merger different consultants sold advertising in Vista and Forum. However, Forum seems to have been plagued with problems in this area and eventually local advertising for both papers was sold by the same team. Van Eck testified that this lead to consultants selling Vista more heavily than Forum.⁴⁴
- [72] When asked how consultants sold two papers with different strengths and weaknesses, Van Eck replied that when selling Vista they would emphasise its brand strengths and print order, whereas when selling Forum they would emphasise that adverts could be highly visible and its pricing lower.⁴⁵

Predatory pricing the economic and conceptual problems

- [73] The proscription of predatory pricing creates a policy paradox for competition authorities, as numerous writers have noted. It seems to prohibit the very outcome the process of competition seeks to promote - low prices to consumers. Why then should the desired outcome now become undesirable?
- [74] The answer by competition regulators is that predatory pricing is only a transient pleasure to consumers; in the longer term it poses an existential

⁴⁴ Van Eck testimony, transcript pages 1999-200.

⁴⁵ Van Eck testimony, transcript page 1998.

threat to competition in that particular market, because once the targeted competitor has been eliminated or hobbled, the low price honeymoon is over and the period thereafter is one of sharp price increases, enabling the predator to recoup the losses sustained in the period of predation.

[75] As one writer David Howarth put it:

*“Although below cost prices will be good news for consumers in the informal sense and the increase in consumer surplus may outweigh the monopolist’s welfare loss, pricing below cost will result in inefficient allocation of resources in the economy as a whole. Rather than offsetting the benefits of below-cost prices against the harm of high prices, predatory pricing creates a double distortion: first in a period of inefficiently low prices and secondly when they are inefficiently high.”*⁴⁶

[76] Whilst most authorities accept the theory that predatory pricing can constitute exclusionary conduct and hence harm competition, there is less consensus on how to apply the forensic tools to determine whether a low price is simply pro-competitive aggressive pricing by an efficient firm or predatory pricing.

[77] Historically, many cases were decided on evidence of intent.⁴⁷ Did the firm intend to eliminate its competitors as opposed to grabbing market shares from them? However, many writers argued that evidence of intent was an unreliable signifier of the existence of predation because it is inherently ambiguous. Most firms seek to eliminate their competitors; competition is not an altruistic process. Therefore they argue relying on intent does not serve to distinguish lawful but aggressive competition from that which is predatory.

[78] In 1975, in a highly influential article, the United States academics Phillip Areeda and Donald Turner, suggested that an economic benchmark could be devised to test for predation, which meant that relying on the vicissitudes of intent would not be necessary. They argued that if a firm

⁴⁶ David Howarth, in a chapter entitled “Pricing abuses”, published in “*E.C. Competition Law; A critical assessment*”. Edited by Guiliano Amato and Claus Dieter Ehlerman, page 293.

⁴⁷ See Phillip Areeda and Donald Turner, “Predatory Pricing and Related Practices under section 2 of the Sherman Act” 88 *Harvard Law Review* 697 (1975), at page 699 footnote 10.

charged a price for a good, that was below the cost of producing the last unit of it, (in technical terms this is referred to as its marginal cost) , such a price could never be justified – it make no business sense to be in business to sell at a loss. Thus pricing below this measure of cost would be highly probative of predatory intent. As they put it: “... a monopolist charging below marginal cost should be presumed to have engaged in a predatory or exclusionary practice”⁴⁸

[79] The authors however recognised that marginal costs were difficult to ascertain from a firm’s books of accounts - firms typically do not account for costs in this manner. Rather, they suggested a more accessible proxy for marginal cost – average variable cost.⁴⁹ A variable cost is a cost that varies with changes in output. The average variable cost (‘AVC’) is defined as the sum of all variable costs divided by output.⁵⁰

[80] A firm has a better handle on what its variable costs are and whilst these are not the same as its marginal cost, (a graph in the famous article, shows marginal cost moving from below to above AVC) a price below this more readily obtainable measurement, was likely, in the opinion of the authors, to indicate a predatory price.⁵¹

[81] The original approach received several tweaks in later writings by Areeda and his new co-author Hovenkamp, but this did not diminish the extraordinary influence of the original article;⁵² it is likely that it was the provenance of the test proposed in section 8(d)(iv) of the South African Act, which uses both marginal and AVC to justify a test of presumptive predatory pricing. Now is the time to examine what this section states:

8. *It is prohibited for a dominant firm to –*

(a)...

⁴⁸ See Areeda and Turner *ibid* page 712.

⁴⁹ See Areeda and Turner *ibid* page 716.

⁵⁰ See Areeda and Turner *ibid* page 700.

⁵¹ See Areeda and Turner *ibid* page 701.

⁵² *Antitrust Law: An Analysis of Antitrust Principles and Their Application* by Phillip E. Areeda and Herbert J. Hovenkamp, Wolters Kluwer.

(d) engage in any of the following exclusionary acts, unless the firm concerned can show technological, efficiency or other pro-competitive, gains which outweigh the anti-competitive effect of its act:

(i).....

(iv) selling goods or services below their marginal or average variable cost; (our emphasis)

- [82] Whilst AVC was considered a more manageable standard than marginal cost, it too, was not without its challenges. Firms with a high ratio of fixed to variable costs might price above AVC, but still pose a predatory threat. Other commentators suggested that the distinction between variable and fixed costs was by no means clear and often the line was blurred depending on the time period selected.⁵³
- [83] During the 1980's another candidate for an appropriate measure of cost surfaced in the academic literature known as average avoidable cost ('AAC'). This is the standard adopted by the Commission after it amended its case and referred to what is essentially the same concept of Forum being priced below its average incremental costs.
- [84] An AAC cost is a 'but for' concept, it is the cost the firm could have avoided by not engaging in the predatory strategy. The important difference with AVC, is that AAC includes an element of fixed costs, known as product specific fixed costs, thus making the fixed /variable quandary more manageable. The idea however does not seem to have caught on until another seminal article appeared in the journals this time by economist William Baumol in 1996.⁵⁴ (AAC does not receive express mention in the South African Act. It is possible that its rise to prominence through Baumol was too close to the drafting period of the Act (1998) for the ideas to have permeated to the legislature as worthy of inclusion.)

⁵³ See Report by Department of Justice on Section 2 of the Sherman Act page 63 which describes the process of classifying a cost as fixed or variable as "... often difficult and at least seemingly somewhat arbitrary. "The report examines decisions regarding advertising costs and depreciation as examples of areas of difficulty. Bishop and Walker in "Economics of European Competition Law" state that the implicit assumption that average variable costs are easy to measure is dubious. Page 30.

⁵⁴ Baumol too has revised some of his ideas about AAC as a test since then.

[85] The definition of AAC does not however include sunk costs. Sunk costs are costs that have already been incurred and thus cannot be recovered.⁵⁵ The Commission's economists sometimes use the term incremental costs and sometimes refer to avoidable costs. The difference between the two as Compass Lexecon explains in their report is that incremental costs include sunk costs. Absent sunk costs they explain incremental costs and avoidable costs would be equal.' They go on to qualify this by saying:

*"However, incremental costs would be higher than avoidable costs if some costs incurred in increasing the level of output cannot be avoided by decreasing the level of output to the original level. Such costs are referred to as sunk costs."*⁵⁶

[86] Since in this case the issue of sunk costs does not arise as part of the dispute between the parties we will continue to make use of the term AAC.

[87] The first widely reported consideration of the AAC test in the case law appears in the European Union in the *Deutsche Post* case⁵⁷ and in Canada in the *Air Canada* case⁵⁸ where Baumol appeared as one of the experts. In the United States the test was advocated but unsuccessfully on the facts in *United States v AMR*.⁵⁹

[88] Nevertheless despite its novelty in the case law, AAC has become a widely accepted cost standard for the assessment of predatory pricing. This acceptance into orthodoxy is evident both from its inclusion in the EU's Guidelines,⁶⁰ the recent International Competition Network

⁵⁵ See <http://www.investopedia.com/terms/s/sunkcost.asp>.

⁵⁶ See expert witness file record page 64.

⁵⁷ *Deutsche Post AG* (Case Comp)/35.141) Commission Decision 2001/354/EC, [2001] OJ L125/27.

⁵⁸ *Competition Commission v Air Canada* (2003), 26 CPR (4th) 476 (Comp Trib.).

⁵⁹ *United States v AMR Corp.*, No01-3202 (10th Cir. July 3, 2003).

⁶⁰ EU Guidance on the Commission's Enforcement Priorities in Applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings.

guidelines,⁶¹ a Department of Justice report⁶² and the approbation of academic writers.⁶³

- [89] Indeed both economists in this matter were agreed that the standard was an appropriate one to use in predatory pricing cases. However, there were two points of difference in approach. The first was whether AAC could be slotted into 8(d)(iv) because as we have seen that section refers expressly to marginal cost and AVC, but not AAC. The second related to its use under section 8(c). Although Media 24 conceded the AAC standard was an appropriate measure of cost to use under 8(c), it argued that the Commission had not applied it properly to the facts, because if it had, Forum would be shown to have priced above AAC for the relevant period.
- [90] The latter difference of opinion raises questions about the apparent advantages of AAC over AVC. Whilst averting controversy over whether a particular cost is fixed or variable over the chosen period of time, the AAC test merely shifts that controversy – from fixed versus variable - into avoidable versus non-avoidable.
- [91] The final candidate relevant to this case for an appropriate measure of cost is average total cost ('ATC'). ATC includes fixed, variable and sunk costs. Nor is the test premised on whether costs are classified as avoidable or not during the period – they are assumed to be included.
- [92] Naturally as a result the ATC includes more costs than do any of the other measures and thus makes a finding of predation more likely. For this reason the standard has its critics amongst those who fear it will lead too easily to over enforcement, a concept economists refer to as a Type 1 error or a false positive. (The term false positive signifies assuming conduct to be harmful when it is in fact not. Economists also use another term to deal with an error at the other end of the spectrum when there may be under enforcement. This happens when one assumes conduct is

⁶¹ International Competition Network Guidelines accessed at <http://www.internationalcompetitionnetwork.org/library.aspx?>

⁶² Department of Justice op. cit. page 67, "*When the Department can determine the predatory increment, it generally will rely on average avoidable cost in determining where prices are predatory.*"

⁶³ *Areeda & Hovenkamp*, Antitrust Law, Lexis Nexis, p. 83; and p.85; *Predation and the Logic of the Average Variable Cost Test*, The Journal of Law and Economics, William J. Baumol p.49 – 71.

not harmful when it in fact is. This is called a false negative or Type 2 error. Here because the law is under inclusive it leads to harm to consumers.)⁶⁴

[93] However, courts have seemed less pre-occupied by this concern than are academics and in European law ATC remains a standard accepted by its highest court, the European Court of Justice ('ECJ'), subject to a caveat which is that there must also be evidence of intent.

[94] The leading case on this is *AKZO*. In *AKZO* the ECJ, in an oft cited passage, held that prices above AVC but below ATC were abusive *if "... they formed part of an exclusionary plan, since such prices could eliminate a competitor perhaps as efficient as the undertaking."*⁶⁵

[95] Later in these reasons we examine the debate around the appropriateness of ATC as a test.

[96] In summary the forensic tools proposed all have their virtues and their flaws. There is no consensus on the holy grail of tests. Adjudicators have to be pragmatic and decide which test may better be used to decide a particular case. Nor can adjudicators avoid the fundamental problem posed by any choice of test – they can either be over inclusive and risk penalising what may be pro-competitive non-predatory pricing or be under inclusive and risk allowing conduct that presents itself as merely aggressive competition but is in reality predatory.

[97] In this case in assessing the appropriate choice of test we have attempted to grapple with the practical application of these problems.

SA Law to-date

[98] South African competition law has not had much opportunity to engage with predatory pricing. Whether this is because such cases are rare or because the burden on those trying to bring these types of cases is considered too great, is not something we can answer. This case is

⁶⁴ See on this distinction in the context of competition law, Richard Whish, *Competition Law*, Seventh Edition page 193.

⁶⁵ See *Akzo Chemie BV v Commission* (Case C-62/86)[1991] ECR I – 3359.

therefore the first opportunity we, as the Tribunal, have had to consider such a case on its merits after a full-blown trial.

[99] In an earlier decision in *Nationwide*, the Tribunal was called upon to consider some of the interpretive issues in an interim relief case. That case, by its nature, did not go to trial and had to be decided on the papers.⁶⁶

[100] In *Nationwide*, the Tribunal set out its interpretation of the Act's application to predatory pricing cases. The first point made was that section 8(d)(iv) was not exhaustive of the provisions of the Act that may apply to predatory pricing. The case decided that even if pricing conduct could not be found to have fallen below the marginal cost or AVC thresholds that are set out in 8(d)(iv), it may still be found predatory, but then the applicable provision would be 8(c) not 8(d)(iv).⁶⁷

[101] As the Tribunal put it this conclusion would have several implications:

"Unless the record shows unequivocally that a respondent is pricing below the prescribed cost levels the Tribunal should not make a finding under section 8(d)(iv) but consider the complaint in terms of section 8(c).

What then is the difference in proof between these sections? Section 8(c) is the residual category or "catch all" of abuse practices. Unlike section 8(d) where a closed list of abuses is catalogued this section is non-specific and flexible. The crucial difference is that under 8(c) the onus is on the complainant to establish that the anti-competitive nature of the act "outweighs the technological, efficiency or other pro-competitive gain."

The burden on the complainant in a complaint of predatory behaviour is higher under this section therefore than under section 8(d)(iv). On the other hand the complainant is not bound to follow the prescribed cost formula suggested in 8(d)(iv). In other words if a complainant, relying on section 8(c), can show that a respondents costs are below some other appropriate measure of costs not mentioned in the section it may prevail provided it

⁶⁶ *Nationwide Airlines (Pty) Ltd v SAA (Pty) Ltd and others* [1999-2000] CPLR 230 (CT).

⁶⁷ See *Nationwide* page 10.

adduces additional evidence of predation beyond mere evidence of costs.⁶⁸

(Our emphasis)

- [102] Media 24 argued that *Nationwide* should continue to be good authority. The reason it did so is because the Tribunal's approach was that section 8(d)(iv) should be interpreted restrictively. This, it argued, means that an AAC test cannot be read into the language of 8(d)(iv), leaving it only open to application under 8(c). The Commission however argued that the *Nationwide* approach was too narrow, and the decision should be re-considered so as to accommodate an argument that 8(d)(iv) can still contemplate, on the appropriate facts, a test for predation based on AAC.
- [103] We do not need to reconsider the *Nationwide* decision here. In *Nationwide* we did not have to grapple with the central issue that is articulated here. The Commission's case is that on these facts, AAC is equivalent to AVC. Hence, if a price is below AAC, it is *a fortiori*, below AVC and properly within the remit of section 8(d)(iv). But the question of whether they are equivalent is an economic, not a legal argument, and since *Nationwide* was not engaged in deciding an economic question, but rather a legal question on the costs standards mentioned in that decision, we do not think it decides the present point.
- [104] It seems as a legal proposition that if a party used another measure of cost which was not AVC or marginal cost, and could show, by way of evidence that on the facts of the case that the particular cost standard would be below AVC or marginal cost, then the party should succeed under 8(d)(iv). The section does not compel one to use only those categories; rather it requires that the measure of costs chosen would yield a result that would still be below at least one of them.
- [105] Of course it could be argued that if the chosen cost measure yielded a result that was below marginal cost or AVC, why would one choose the former cost measure in preference to the latter – wouldn't its usage prove a futile and unnecessary exercise?

⁶⁸ *Nationwide*, page 10.

[106] The answer would be that the choice of cost measures is driven by methodology. In certain cases AAC is a better tool to use than AVC or marginal cost because it better suits the theory of predation being considered. Here the theory of harm posited is that of a fighting brand. If that theory is correct, then the incremental costs associated with maintaining that brand in the market are considered avoidable which means that one will have to consider whether the incremental revenues, generated by the brand, exceeded those costs which otherwise could have been avoided. Thus, in the circumstances, AAC is the logical tool to utilise as the measure of cost.

[107] The Commission expressed it this way in its heads of argument:

“The incremental profitability test measures the incremental loss associated with operating Forum. These incremental losses constitute the variable or marginal costs associated with Media 24’s decision to operate Forum during the complaint period.”⁶⁹

[108] What we understand the Commission’s economist to be saying is this – we have used the technique of AAC as it is more appropriate to this set of facts, but once we have concluded that it was a fighting brand, notions of variable versus fixed are unnecessary to consider – everything is variable if you operated a fighting brand. Using AAC however is the more appropriate way of conceptualising the problem posed.

[109] There is support for this type of approach. In its *Guidance* document the European Commission makes exactly the same point.

“In most cases the AVC and AAC will be the same, as often only variable costs can be avoided. However, in circumstances where AVC and AAC differ, the latter better reflects possible sacrifice; for example, if the dominant undertaking had to expand capacity in order to be able to predate, then the sunk costs of that extra capacity should be taken into account in looking at the dominant undertaking’s losses. Those costs would be reflected in the AAC, but not in the AVC.”⁷⁰ (Our emphasis)

⁶⁹ Commission’s main heads of argument paragraph 25.

⁷⁰ Guidance paragraph 64 footnote 3.

- [110] O' Donoghue and Padilla in their work⁷¹ also contemplate that in some cases the two costs might be considered equivalent.⁷²
- [111] If this technical approach is correct then it resolves the apparent paradox. There may be cases where one might be able to rely on another cost standard, say AAC, and demonstrate that it yields a result where the firm concerned is pricing below its AAC, but that the costs relied on for this exercise are not only avoidable but also variable.
- [112] In this case we have not had to decide the legal question of whether pricing below AAC can lead to liability under section 8(d)(iv) (assuming an appropriate set of facts where AAC is shown to be equivalent to AVC). The reason for this is that on the facts the Commission has not discharged the onus of establishing that Media 24 priced Forum below its AAC. Since the legal question only arises if the factual case has been established, answering it in this case becomes moot.
- [113] We explain further below why we have reached this conclusion on the facts about AAC. We then go on to examine the case on the ATC test, which both sides have agreed can only be decided under 8(c).

The Commission's theory of harm

- [114] The Commission's theory of harm in this case has been most succinctly expressed by its economic expert Neil Dryden, from the firm Compass Lexicon,⁷³ in his slide presentation during his oral testimony:

"The theory of harm is that Media 24 operated Forum as a fighting brand i.e. that it sacrificially maintained Forum in the relevant market with a view to marginalising / excluding GNN."⁷⁴

⁷¹ O' Donoghue, R and Padilla, A.J. *The Law and Economics of Article 82 EC*. 2 ed. North America: Hart Publishing (2013).

⁷² "It will be immediately obvious that AAC and AVC are the same when all fixed costs are sunk." O' Donoghue and Padilla page 163.

⁷³ The Compass Lexecon reports were prepared jointly by Dryden and his colleague Dr Jorge Padilla, but Dryden testified.

- [115] Dryden explained that he used the term ‘sacrifice’ in a relative sense to the alternative course of closing Forum. He explained that price cutting by Forum was not a necessary part of the theory of harm however “... *the level of Forum’s prices is a lever that affects the intensity of the conduct.*”⁷⁵
- [116] On this approach the relevant costs were “...*from an economic perspective those costs Media 24 would have avoided by not operating Forum during the complaint period.*”
- [117] So how do these costs slot into section 8(d)(iv) which refers, as we have seen, to marginal and average variable costs?
- [118] Dryden answers in this way: “... *these are costs that are variable or marginal with respect to the decision to operate Forum rather than to close it.*” He goes on to say that “... *the test for sacrifice amounts to a test of the incremental profitability of Forum.*”
- [119] We examine what he means by this more fully in the following sections.

SECTION C: ELEMENTS OF THE CASE

PROOF OF DOMINANCE

- [120] Proof of dominance is an essential requirement for a section 8 contravention. In this case the Commission alleges that Media 24 is dominant in the market for community newspapers, in what is termed the Goldfields region. This is a geographic region wider than the town of Welkom, but, in line with the parties and the witnesses, we have in this case referred to Welkom as a short hand for that region. Although Media24 did not go so far as to agree that the Commission was correct

⁷⁴ Exhibit Number 17, Dryden slide’s, number 7.

⁷⁵ Ibid slides nos. 7-8.

about the market definition, it adopted the position that it would assume it was.⁷⁶

[121] At the relevant time during the complaint period Media 24 would have had a market share of approximately 75%. In terms of section 7(a) of the Act this gives rise to an irrebuttable presumption that the firm is dominant.⁷⁷

[122] Since Media 24 does not dispute the market definition or its share of the market it is unnecessary for us to consider this aspect any further.

[123] We find that Media 24 is a firm that is dominant in the market for community newspapers, in what is described as, the Goldfields area for the purposes of this case.

ABUSE

a. Exclusionary Act

[124] An essential element of a section 8(d) or 8(c) case is proof of the existence of an ‘*exclusionary act*’ perpetrated by the dominant firm. The Act defines an exclusionary act as:

“...an act that impedes or prevents a firm from entering into or expanding in a market.”⁷⁸

[125] Under section 8(d)(iv), as we observed earlier, the exclusionary act is established if the dominant firm prices below AVC or marginal cost for its goods or services. Here the nature of the exclusionary act is specified. Under 8(c), which we have previously described as the general ‘catch-all’ exclusion provision, the nature of the act needs to be alleged and to be shown to meet the definition for exclusion set out in the statute.

[126] In this case, the architecture of the Commission’s case, as finally argued, can be set out as follows:

⁷⁶ Bundle C2 Expert witness report of Malherbe page 155, paragraph 25.

⁷⁷ There is no dispute that Media 24 well exceeds the turnover requirement set out in terms of section 6 of the Act, read with the relevant threshold determination of 9 March 2001, which sets this figure at R5 million rand per annum.(GG2128 Gen Notice number 562).

⁷⁸ Section 1(1)(x).

- (i) Main count: under section 8(d)(iv); that Media 24 during the complaint period, priced Forum below its AAC; or
- (ii) First alternative count: under section 8(c); that Media 24 during the complaint period priced, Forum below its AAC; or ⁷⁹
- (iii) Second alternative count: under section 8(c); that Media 24 during the complaint period, priced Forum below its ATC with predatory intent.

[127] Since an element of both the main and first alternative count involves the issue of whether the Commission has established that Forum priced below its AAC, we turn to that issue first and in turn first consider it as a component of the 8(d)(iv) case.

[128] The Commission's expert, Mr Neil Dryden from the consultancy Compass Lexecon, advanced four scenarios which depended on separate assumptions being made, some more conservative than the others.⁸⁰ On each scenario he calculated, Forum's costs were greater than its revenues during the complaint period.

[129] Two of his scenarios included the exit and opportunity cost calculation that we explain later. They differed as to the period under which the period cost could be considered avoidable. The one test considered that cost could be avoided over the full period, which he called total and the other over a shorter period of one year, which he termed partial avoidability.

[130] The remaining two tests excluded the exit and opportunity cost calculation but one was based on the total period and the other the partial period as explained above.

[131] Of the four tests, Dryden advocated the test that took into account both exit and opportunity costs and which was calculated for the partial period.⁸¹

⁷⁹ In the heads of argument this is what appears to be contended. See paragraph 223. See also Dryden slide presentation slide 18. It is not clear to us whether this approach relies on intent as well. In his slides Dryden does seem to rely on what he calls his test 2 plus intent. See Dryden slide 22.

⁸⁰ See Dryden slides number 13 and 14.

⁸¹ This is referred in his slides as 'Test 1 econ partial'. See Dryden slides no 14.

b. AAC the Case under 8(d)(iv)

[132] As we noted earlier, the Commission had originally alleged that Media24 had priced Forum below its AVC, using it as a fighting brand – this at least was the case made out in the complaint referral, a case that Media 24 denied. Following the amendments to its case, the Commission still pursued a case relying on the fact that Forum was used as a fighting brand by Media24 who then closed it down. Since on this theory of harm Forum was being used, at least during the complaint period, as a fighting brand, the theory was that a large part of its costs during this period were avoidable with the closure of Forum.

[133] Hence on this standard, once these costs were computed, Forum was pricing below its AAC. However, as observed earlier, the subsection does not refer to AAC – only AVC and marginal cost. The Commission, as noted, seeks to get around this difficulty by alleging, on these facts, AAC and AVC are equivalent. On this argument, all Forum’s costs (other than non-product specific fixed costs), since it was used as a fighting brand, could be regarded as avoidable over the period and hence variable.

[134] As we noted earlier, whether pricing below AAC can lead to liability under section 8(d)(iv), is a legal question which we do not have to decide in this matter, as it depends initially on a factual showing that Media 24 indeed priced Forum below its AAC. It is this latter factual question that we now go on to consider.

Elements of the dispute

[135] The two economists in this case neither agree on a figure for Forum’s AAC over the period nor have either presented their own definitive figure of what the AAC was. Rather, both have presented us with a range of options for what the AAC might be depending on the rejection or acceptance of some underlying assumption. Unsurprisingly, on any of its scenarios, the Commission finds that Forum priced below AAC, whilst

Media 24 finds that on most of its, Forum exceeded its AAC during the period.

[136] The dispute then turns on which assumptions about avoidability to accept or reject rather than a debate over the correctness of particular accounting entries or arithmetic.

[137] We discuss these assumptions *seriatim*.

Opportunity costs

[138] The most controversial suggestion, and the one with the largest implication for the costs of Forum, is the contention by the Commission that one includes in the calculation of avoidable costs, the opportunity costs of diverted revenues.

[139] First some concepts need to be understood.

[140] Opportunity cost is a term of art in economics that can be defined in different ways. A definition that suits the notion as used presently is:

“the value of the action that you do not choose, when choosing between two possible options.”⁸²

[141] What the Commission argues is that there is evidence that Media 24 sacrificed profits which it would have made in Vista, by keeping Forum open. Business economists refer to this effect as ‘*cannibalisation*’, because the cheaper brand takes away some sales at its lower prices that might otherwise have gone to the more expensive brand.⁸³

⁸² Cambridge Business English Dictionary.

⁸³ See Dryden slides slide 8. The term cannibalisation is more formally defined in business dictionaries as: “*The negative impact of a company's new product on the sales performance of its existing related products. Market cannibalization refers to a situation where a new product "eats" up the sales and demand of an existing product. This can negatively affect both the sales volume and market share of the existing product. Market cannibalization occurs when a new product intrudes on the existing market for the older product, rather than expanding the company's market base. Rather than appealing to a new segment of the market and increasing market share, the new product appeals to the company's current market, resulting in reduced sales and market share for the existing product.* www.investopedia.com/terms/m/marketcannibilization.asp

[142] The proposition was controversial in the case for several reasons. Firstly, this type of approach has not been the basis for deciding any case on predation to date. What the Commission has relied on, as its authority for its approach, is a discussion in one case⁸⁴ and an approach taken by the European Commission in its *Guidance* document.⁸⁵

[143] In the *Cardiff Bus* case, the Office of Fair Trading was evaluating the use by a dominant firm of a newly introduced bus service in addition to its main service and whether this was used as a fighting brand against a new entrant. The OFT in one passage states:

“ As the incumbent, Cardiff Bus was likely to incur an opportunity cost as a result of some customers switching from its normal services to the white services (in terms of reduced core revenues), whereas 2 Travel faced no such opportunity costs

...

*There is clear evidence that the revenues generated by Cardiff Bus’ white services failed to cover its costs of running those services. The revenues generated by the white services did not even cover the costs of paying the wages of the drivers who drove the white buses. The introduction of the white services resulted in Cardiff Bus incurring losses that it could have avoided had it not started its white services”.*⁸⁶

[144] The European Guidance states in a footnote dealing with its section on cost benchmarks:

“In order to apply these cost benchmarks it may also be necessary to look at revenues and costs of the dominant company and its competitors in a wider context. It may not be sufficient to only assess whether the price or revenue covers the costs for the product in question, but it may be necessary to look at incremental revenues in case the dominant company’s conduct in question negatively affects its revenues in other markets or of other products. Similarly,

⁸⁴ UK Office of Fair Trading Abuse of a dominant position by Cardiff Bus CA98/01/2008, decision dated 18 November 2008.

⁸⁵ EC Guidance, para 26, footnote 3.

⁸⁶ *Cardiff Bus*, para 7.19 and 7.20.

*in the case of two sided markets it may be necessary to look at revenues and costs of both sides at the same time.*⁸⁷ (Our emphasis)

[145] Thus the idea of recognising that opportunity cost could be included as part of the cost benchmark, has received some recognition. But while the approach may not be entirely novel it has to date not been applied as a basis for coming to a decision in a reported case to which we have been made aware. There are also some cases, on which Media 24 has relied, which reject this approach.⁸⁸

[146] Media 24 raised three major objections to the inclusion of opportunity costs. The first was a policy objection and the other two objections were to the methodology.

Policy objection

(i) Relying on academic writers, Media 24 argued that taking into account opportunity cost was subject to two policy objections –the calculation of opportunity costs was too imprecise and far reaching. Indeed, it argued that, on the facts of this case, the Commission’s own calculations varied radically; ranging from 27% to 38,5% of Forums’ revenues that would have gone to Vista during the complaint period, depending on which factual assumptions one accepted. At the same time because of a factual dispute about the diversion ratio, which we discuss later, Media 24 contended that if there was a diversion to be taken into account for this purpose (something it didn’t concede) then the correct figure would have been only a 16% diversion. The difference mattered, as on the latest set of figures where the Commission’s economists had revised some costs downwards (other costs, not opportunity costs), if the diversion ratio was only 16%, then even if one provided for this as an opportunity cost, Forum’s pricing would still not be below its AAC. One would need to accept as a matter of

⁸⁷ *EC Guidance, para 26, footnote 3.*

⁸⁸ *United States of America vs. AMR Corporation, American Airlines, Inc., and AMR Eagle Holding Corporation* (No. 99-1180-JTM); *United States District Court for the District of Kansas HS; United States District Court for the Northern District of California and Transamerica Computer Company, Inc. vs. International Business Machine Corporations*, (MBL No. 163-RM, No. C-73-1832 R).

fact that the correct figure to calculate the diversion ratio was at least the Commission's lower bound i.e. 27%.⁸⁹

(ii) This is of course supports the arguments of the critics of using opportunity cost in this way, namely by way of estimates of likely diverted revenues, to calculate AAC. If economists can only posit a range of values for this figure how would managers of a dominant firm ever be certain whether their conduct was predatory or not? This would have a chilling effect on their businesses apart from being an unwarranted interference in business autonomy. If a dominant firm wanted to innovate by introducing a new product line or brand it would have to factor *ex ante* into cannibalisation effects an unknowable quantity. *Baumol* who expresses his position most stridently on this issue writes:

*“Every rational and successful firm has at some point forgone near-term profits in the expectation that the temporary sacrifice constitute what amounts to an investment that will later pay off in spades... It is not only silly, but destructive of effective exercise of entrepreneurship to determine that such as an act is suspect.”*⁹⁰

Methodological objection

(i) Media 24's other economist, Professor Cristina Caffarra of the firm Charles River & Associates (“CRA”), argued that if one was to include the opportunity costs of lost sales in the calculation one must also calculate what the consequence of closing Forum was to Media 24 in terms of opportunity costs. She referred to this as the ‘real option’ value. Professor Caffara however did not calculate this figure herself nor despite having given a witness statement was she called upon to testify by Media 24. The Commission's response to this was that Media 24 was in the best position to calculate what the real option value of Forum was to it at the time (since Forum was its publication

⁸⁹ See Appendix I to this decision. This is based on a table submitted after the hearing by Media 24 in a letter dated - headed Annexure B: ‘The Supplementary Revised Table Assuming Consistent Cost Definitions for Forum and Vista’.

⁹⁰ *Baumol*, page 68.

after all) but not having done so and with the subsequent closure of Forum and not its sale to another, its real option value was negligible.

(ii) The second objection relates to the factual basis on which the diversion ratio is based on. As this involves a complicated dispute of fact which we deal with more fully below in the section on profit sacrifice, we will deal with it only briefly now. The Commission has relied on two internal documents from Media 24 to calculate the diversion ratio. What it means by diversion ratio is the percentage of revenue that would have been diverted to Vista had Forum been closed. Taking both these documentary references into account which were made about 3 years apart, Dryden, the Commission's economist, calculated that a diversion ratio of 30.7 % was likely.⁹¹ Media 24's economist Stefan Malherbe, of the firm Genesis, argued that even if one takes into account opportunity costs this diversion ratio is premised on an incorrect interpretation of the facts and he, taking a benign reading of the witness' explanation for one of these figures which seeks to diminish them substantially due to an alleged misunderstanding, arrives at a figure of 16 %.

Analysis of opportunity costs as part of AAC calculation:

[147] Dryden correctly argues that economic costs are not identical to accounting costs. An appropriate measure of predation, he argued should be premised on economic cost not merely accounting cost.⁹² Even critics of Dryden's approach would concede at the conceptual level that opportunity costs are costs that economists must properly have regard for.

[148] However, the policy reason for not doing so these critics argue is two-fold: if this argument on opportunity cost is taken to its logical conclusion then a dominant firm that could be shown to have made any business decision that was not profit maximising, could find itself guilty of predation, because this lost opportunity cost is factored into the calculation of its avoidable

⁹¹ See Dryden slides *op cit* slide 36.

⁹² See ICN Unilateral Conduct Workbook: Chapter 4 Predatory Pricing Analysis, paragraph 76-79; accessed at <http://www.internationalcompetitionnetwork.org/uploads/library/doc828.pdf>.

costs. This, argue the critics, may result in an unwarranted chilling of business decisions and even more seriously, false positives.

[149] The second objection is less based on principle and more pragmatic. This argument is that the calculation of opportunity costs is inherently uncertain. Unlike historical costs, which have been incurred and can be ascertained from accounting records, opportunity costs rely on assumptions of what might have been. This means, as has happened in this case, that these costs emerge, not as a round figure, such as the costs incurred on paper for printing, but in a range of values based on best estimates of possible diversions; and ultimately figures on which reasonable people could differ. Condemning a firm for below cost pricing based on such flimsy foundations, the critics argue, is unfair and unwise.

[150] Dryden, for the Commission, responded robustly to his critics. The first criticism he said was a false characterisation of his argument. He was not contending that the opportunity costs incurred here were about a failure to maximise profit to some hypothetical price. That approach he agreed was problematic. What he was contending for was a failure to pursue a “ ... *clear and obvious alternative that the dominant company would have pursued had it not pursued the allegedly abusive strategy.*”⁹³

[151] Secondly, he argued that he was not basing his diversion ratio calculation on some calculation of his own but on statements made by Media 24 itself at the relevant time. This he argued made his approach a more conservative and reliable one.

[152] These facts about the reliability of the diversion ratio figure were in dispute and require us to digress into some more detail about how the dispute arose.

[153] Dryden based his calculation on two internal documents of Media 24 that were revealed during discovery. He used these documents to calculate how much revenue earned by Forum would have been diverted to Vista, had Forum been closed down.

⁹³ Transcript, page 1253.

[154] In the first Media 24 document which is dated July 2006, thus at a midway point of the predation period, Agnushka Van Eck, the sales manager in Welkom at the time, is recorded as having given her superiors, at their request, an estimate of how much advertising revenue of Forum would go to Vista, if Forum was closed down. The figure she is recorded in the document to have given is 27%. In her testimony during the hearing, Van Eck admitted having provided this figure to her immediate superior Wian Bonthuzen, who was the author of the document. However, she claimed that he had misunderstood the context of her answer which required a further calculation. Had this latter calculation been performed, her evidence as bolstered by the arithmetic of Media 24's economists would have resulted in a much lower figure of -16%. (Later we explain how this dispute arose but we need not burden the reasons with them now except to say this dispute exists).

[155] Dryden identified another Media 24 document, dated November 2009, which could fairly be read to suggest that if Forum was closed, 40% of its advertising would go to Vista. At that stage in 2009, GNN had already closed down (recall its last edition was in January of the same year) and for this reason Dryden stated it did not directly provide an estimate of the diversion ratio. He therefore did an adjustment to provide for this, and based on this calculation, came up with a figure of 30.7% for the diversion ratio.⁹⁴ He considered the figures of 30.7% and 27% over this period as highly consistent, but nevertheless in calculating the diversion ratios, used the lower figure of 27%.

[156] He then did a further correction; netting off the avoidable cost figure against the costs that Vista would have incurred in re-capturing these sales. This estimate he said was based on Media 24's own costing.⁹⁵ In layman's terms this netting off benefits Media 24 by lowering its net avoidable cost.

⁹⁴ His calculation found on slide 36, is 30.7%. This is calculated by taking the (40%) multiplied by Vista's market share excluding Forum (=64.5% / (100% -15.9%))

⁹⁵ See Dryden slide 37.

[157] However the netting off calculation gave rise to another debate. Whilst both economists agreed that if one was going to take into account opportunity costs of profits foregone one also had to net off the cost of making those profits, they could not agree on whose costs. Dryden contended that the appropriate net off costs were those of Vista not Forum . Media 24 contended that his approach was inconsistent. Taking Vista's costs made, it argued, 21 items that he had treated as avoidable with Forum as unavoidable for Vista. What this meant is that in Forum these costs are pushed up but when it comes to Vista's opportunity cost (a cost the Commission needs to be higher and Media 24 lower) by making them unavoidable Vista's profit foregone figure appears higher and hence the Forum AAC figure becomes higher.⁹⁶

[158] This is just a taste of how arcane the economic debates in this case became. However one can see why the abstraction mattered when it came to the question of whether Forum was above or below its AAC. If for example one accepted the validity of opportunity costs but favoured Ms Van Eck's figure that she claims she meant – 16% - then on this scenario on all Media 24's figures Forum would still be above its AAC. However on the one Commission scenario – what it termed its CL Test 1 lest cost concessions – that is the test most favourable to Media 24 as it omits what we later discuss as the redeployment cost – then Forum is still below AAC if we accept the Commission's versions in how the net off costs are to be calculated. Although below its AAC, the figure is R 240 000 for the period, thus not far below.⁹⁷ However, if we take the same scenario – i.e. the Commission CL Test 1 and a diversion ratio of 16% for the opportunity costs but use what Media 24 contends is the correct net off cost methodology then Forum's revenues are above its AAC albeit even more narrowly by R 9000.

[159] What does all this amount to in this case? Quite a lot it turns out. The diversion ratio which assumes cannibalisation, which in turn assumes the

⁹⁶ See post hearing written submission from Media 24 entitled "Media 24's comments on Commission response ..."undated, pages 11 -12.

⁹⁷ See Appendix 2, column 3 row 10.

legitimacy of the opportunity cost approach, makes, as a table set out in Appendix I to this decision illustrates, a crucial difference to whether Media 24 is pricing Forum below AAC. For the Commission to succeed in showing that Forum priced below AAC it needs to include an opportunity cost figure to dent Forum's revenues, as without it, as we go on to consider below, it needs to win the debate on what other allegedly common cost should be considered avoidable on all the issues that it and Media 24 could not agree on.

[160] Expressed differently, without the inclusion of the opportunity cost at a diversion ratio of greater than 16% - if it is to avoid controversy around the correct net off figure - for the Commission to come home on AAC, it needs to take an ambitious view of the remaining avoidable costs or rely on total costs or ATC.

[161] We have decided to exclude opportunity costs from the AAC calculation. The reason for this is based on the second critique referred to above, the so called 'pragmatic approach'. The calculation of AAC, on the Commission's version, is based on too imprecise an assumption to be used as a basis to arrive at a reliable benchmark. Even if we accept that the estimate of 27% was the figure Van Eck intended to convey, this version was an estimate made out at a single moment during the complaint period. Whilst Ms Van Eck, the then sales manager for the two publications in Welkom, and with a long history of selling adverts in the local market, was probably better placed than anyone else to make this estimate, it was still more an informed hunch than precise science. She had to guess what advertisers might do without knowing for certain what they would definitely do. We know both from her evidence and a later document that is in the record, that advertisers on the closure of Forum could, if GNN was still in the market, have done any of the following: moved advertising to Vista, moved advertising to GNN, advertised only once a week if they already advertised in both publications, or found some other medium for advertising, such as pamphlets.

[162] However, even if opportunity costs may be included as part of an AAC calculation, an issue we don't need to decide, the second critique of using opportunity cost is on the facts of this case valid. It is too imprecise to form the basis for costs under 8(d)(iv). Had for instance an exercise been done on Vista's advertising, post the closure of Forum, to see which advertisers of Forum had migrated to Vista, a more precise estimate may have been done. However, we have no evidence on this.

[163] Even though the Commission relies on Media 24's own estimates they are still, in the context in which they were made, highly speculative. All the other costs relied on to calculate AAC are based on actual costs capable for the most part of precise determination because these costs were actually incurred and there are accounting entries to verify them. The opportunity costs contended for in this case are not verifiable in the same way from accounting entries .Instead they rely on estimates of 'what might have been', made at a time when the 'might have been' was subject to too many imponderables nor is the task made easier by the controversy over the correct net off cost alluded to above an issue that we also for reasons of our broader approach need not determine. Nor is the approach cured by adopting a more conservative approach to the numbers - a 16% diversion and the Media 24 approach to the net off calculation.⁹⁸ Once the basis to the approach is accepted to be built on unreliable foundations it does not help to construct something less ambitious but still suspect as a means of calculation on top of it.

[164] A further difficulty with calculating opportunity cost, on the facts of this case, is that Forum was not a fighting brand that entered the market in response to new entry, but as noted earlier, had existed for many years prior to the new entry by GNN. This has made considering data on calculating opportunity cost more complex than where the alleged fighting brand was introduced after the alleged target had entered. In the latter case, the before and after periods would have served as better sources

⁹⁸ As noted above even this still would not bring Forum below AAC on the CL 1 test unless the Commission was able to persuade us that further costs of Forum, classified by Media 24 as unavoidable were in fact avoidable. An exercise the Commission attempted with the so called redeployment costs debate we deal with later.

for making more precise calculations about opportunity costs, than the facts of the present case admit.

- [165] For this reason we conclude that measuring AAC in this case must exclude the opportunity costs of revenue forgone from Vista by virtue of the cannibalisation of the Forum brand. However, as we go on to discuss later, this profit sacrifice is not without relevance in this case – it is just not a sufficiently reliable metric for calculating AAC. It follows if we do not include opportunity costs in the calculation of AAC that we do not need to deal with the real option value objection. That calculation would have been subject to similarly difficult imponderables, as was calculating with more precision, the opportunity cost.

Classifying which costs are avoidable

- [166] Forums' total costs during the period exceeded its revenue in each year. But total costs are a wider category than avoidable costs, which by definition, are confined to those costs which could have been avoided if the impugned activity had not been undertaken.
- [167] Conceptually AAC is relatively simple, however applying it to a real life business that is the offshoot of a much larger entity, is far more complex. This subject was hotly debated between the two teams of economists and although both sides changed their views on specific items over the course of litigation, final agreement could not be reached; indeed, at the end they appeared to be further apart than they were at the beginning.
- [168] First let us consider what is not in dispute. Forum's revenues during the relevant period are common cause; so are a number of the costs that both economists would accept as having been correctly classified as being either avoidable or non-avoidable. However, there is disagreement over two categories of costs whose magnitude is such that it determines whether Forum's revenues cover its AAC during the complaint period.
- [169] Into the first category is a dispute which is primarily factual and relates to whether certain printing and distribution costs should be treated as avoidable. For want of a better description we will refer to this as the

‘miscellaneous costs category’. The second category the Commission has termed the ‘redeployment costs’. Here the dispute is more one of policy. The Commission argues that with the closure of Forum certain resources could have been redeployed within the Media 24 Group and so should be regarded as avoidable once Forum had closed down.

[170] To appreciate this debate requires some background into how Media24 classified its costs.

Common costs

[171] Media 24 is what is termed a multi-product organisation. At any given time it is publishing hundreds of publications which rely on a common infrastructure to support them. These costs get shared between the titles and hence are referred to as common costs. These costs range from the costs of the Head office in the Cape, its regional office in Bloemfontein and finally local costs in Welkom.

[172] It is difficult to discern any science behind this allocation which seemed to depend on managerial discretion. As O’Donoghue and Padilla have noted when discussing the problem of common costs in multiproduct companies:

[173] “Identifying which products benefit most, and in what proportions, is more a matter of policy than precision ... Common cost allocation to individual products on a pro rata basis will therefore inevitably involve some policy judgements rather than precise calculations.”⁹⁹

[174] The one Media 24 witness who dealt with the common cost issue in most detail was Anel Coetzee, an erstwhile accountant with Volksblad in Bloemfontein. She stated that “... as a *general rule*” these costs were allocated on different bases which included advertising volume, headcount and floor space. Cape Town head office costs were at one time allocated directly to community newspapers but since 2006 they

⁹⁹ O’ Donoghue and Padilla, *op cit.* page 261, footnote 84.

were allocated via Volksblad's allocation of common costs. Cape Town head office costs too she stated were allocated on different bases.¹⁰⁰

[175] Jan Malherbe the erstwhile chief executive officer of Media 24 was clearest on the arbitrariness of the allocation. Whilst commenting under cross-examination on an increase in common costs at one time he remarked:

[176] "...it was a bit of a spike, and it illustrates the point that allocation of fixed costs, overhead costs, is sometimes a little bit of an arbitrary thing; it's based on people's decisions and those decisions change."¹⁰¹

[177] Thus these costs cannot be regarded as true economic costs of the titles, but rather what management at the various levels of the corporation decide to allocate to the titles. Common costs are not the same as any of the other species of costs and hence are not the equivalent of either variable costs or avoidable costs, but seem to constitute a mixture of both. They are not meant to be a measure of economic cost, but a management tool for assessing how to cost the infrastructure of the organisation across its income earning titles.

[178] It became however the mainstay of Media 24's defence to assert that as long as Forum was making a contribution to its common costs it was not, in its view, a candidate for closure.

[179] The fact that a firm may be covering what management has defined as its common costs is not a defence in a case of predation as common costs are not a recognised measure of costs like AVC, marginal cost or AAC. Of course covering common cost may be an issue with regard to whether Media 24 had the intention to predate, but that is an issue we discuss later when we deal with ATC; it does not answer the problem of defining avoidable costs.

[180] For now therefor the debate then turns on what costs are properly defined as avoidable costs.

¹⁰⁰ See Coetzee witness statement, record pages 141 -3, in particular paragraphs 14-15.

¹⁰¹ Transcript, page 1516.

Miscellaneous cost

- [181] The miscellaneous category of costs is relatively minor, despite the lengthy and frankly often confusing minutiae of detail it required us to digest to appreciate the arguments, with constant changes to the calculations being made. Even if we accepted the Commission's figures on this aspect as correct, they would not be sufficient to bring Forum's revenues below its AAC¹⁰² (once we had excluded opportunity costs) unless we accepted wholly or partially the Commission's argument on the additional redeployment costs, which were much larger than its previous avoidable cost calculation figure (R7 366 000) and in the Commission's final submission amounted to an increase of R2 530 000.¹⁰³ That figure represents approximately 33% of Forum's total revenue figure for the period so one can appreciate why the number mattered so much to both sides.
- [182] For this reason, since the outcome depends on the resolution of the redeployment costs debate, we deal with it first.

Evolution of Redeployment costs

- [183] The Commission raised the issue of the redeployment costs only at the end of the case during argument. The reason for its late arrival requires some explanation about the history of evidence in this case.
- [184] When the Commission amended its case to rely on AAC, not conventional AVC, as it had in the referral, its economists sent a list of queries to Media 24's representatives, the object of which was to assess which of its costs were avoidable over a one year period. The one year period was adopted

¹⁰² See Appendix 2 column 3 row 9.

¹⁰³ See Appendix I. This is arrived at by subtracting what is termed the CI Test 1**** less the concessions figure of R7 366 from what is termed the Commission's submission which is R9 896 (These numbers are in 000). The percentage is the difference between these two divided by the total revenue figure of R7 554.

as it had formed the standard in a decision by the UK Competition Appeal Tribunal in *Aberdeen Journals*.¹⁰⁴

- [185] What the Commission meant by the one year period was that even if a cost was not avoidable over a short period of time - say a week or a month, over a period of a year, such a cost should have been avoidable, because the firm would have had the opportunity to avoid that cost measured over this length of time.¹⁰⁵ For instance, if a piece of capital equipment was the subject of an annual lease, then on any period shorter than one year the cost would not have been avoidable, but on a period over a year it would.
- [186] The task of providing the information to the Commission was entrusted to a Mr. Thys Botha, who at the relevant time was the financial manager in Media 24's Volksblad division. On the basis of this information provided by Thys Botha, the Commission's economists prepared a calculation of the Media 24's avoidable costs. This then figured as the basis of their calculation in their first witness report. Their reliance on these figures is thus perfectly reasonable.
- [187] Media 24's economists however did not believe that Botha had made the correct categorisation – it appears on their version that Botha either did not fully appreciate what avoidable cost meant or that he was misled by the ambiguous nature of some of the questions – and so they re-calculated the amounts, an exercise that led to a substantial reduction in the amount of avoidable costs.
- [188] When Mr Dryden, the Commission's economist, gave evidence he pointed out this history and although pressed on why he regarded some costs as

¹⁰⁴ *Aberdeen Journals Limited v The Office of Fair Trading*, CAT Judgment dated 23 June 2003 at paragraph 7.18.

¹⁰⁵ Whether a period is considered short or long run may be relative to the nature of the costs associated with the industry involved. In a Notice, the European Commission says generally about applying the AKZO test, that neither the very short nor the very long run, are appropriate. In relation to the telecommunications industry it is suggested that a period of longer than one year may be appropriate for examining average incremental costs. See European Commission(1998) 'Notice on the application of competition rules to access agreements in the telecommunications sector – Framework, Relevant Markets and Principles [1998] OJ C 625 [114- 115]. In this case the one year assumption seems reasonable.

avoidable when Media 24's economists did not, he was understandably in a predicament and could only point out that he had relied on what Media 24, *via* Thys Botha, their own employee, had provided. Importantly, although he had to make some concessions on this aspect given the information then before him, Dryden stated that his concessions were subject to a caveat that unless the factual evidence, which could only come from Media 24 witnesses, proved otherwise. It must be pointed out that the Commission was obliged to lead its evidence first, and when Dryden testified he had not yet had the benefit of hearing Media 24's factual witnesses who were led on the issue of avoidability.

[189] When it came to the presentation of its case, Media 24 led three factual witnesses whose evidence was specifically focussed on the avoidability issue. They were Anel Coetzee, Johannes Botha and Andre Nortje. Although testifying to their specific area of knowledge of the business, all witnesses adopted the same theme. The issue was did the closing of Forum not mean that its common costs could be avoided? No, testified the three – essentially because Forum's common costs were too trivial in relation to the total costs of the particular common cost to warrant cessation of that activity pursuant to its closure.

[190] Perhaps the best summation of this comes in a supplementary affidavit from Coetzee. She says that in the context of a very small product within a large company, common costs that are not product specific are likely to remain fixed, whether the output of the product in question is increased or decreased, and hence, must be regarded as unavoidable if that product is terminated. Examples of costs that fell into this category were the costs of graphic artists, office rental and general management cost for the services of the accountants and HR personal, etc. On her evidence a pool of people existed to do the work of more than one title and when a title exited those people's services were still required for the others.

[191] However, in its cross-examination of these witnesses, particularly Ms Coetzee, the Commission challenged the basis of this evidence. Two themes emerged from this cross-examination. The Commission

questioned why re-deployment was not possible. Secondly, it challenged whether the witnesses, in particular Ms Coetzee, who had since left the employ of Media 24, had personal knowledge of whether re-deployment had taken place within the one year period the Commission asserted could have made these costs avoidable. Coetzee stuck to her position. The loss of Forum did not make the changes suggested by the Commission worthwhile.

- [192] Coetzee had difficulty dealing with this line of cross-examination, largely, because she was an accountant at Volksblad and no longer employed there either. She could attest to numbers not management decisions about whether to deploy.
- [193] Media 24 countered with the evidence of its expert Stefan Malherbe of Genesis. However, the counter only came about in his re-examination when two tables were produced by Media 24, which purported to show that Vista's advertising and editorial volumes fluctuated between a maximum and minimum monthly range that exceeded Forums' average monthly volumes.¹⁰⁶
- [194] Expressed differently Media 24 was claiming that the capacity swings associated with producing Vista from time to time exceeded the capacity required to produce Forum at any given time. Since this capacity had to be retained, as the requirements for Vista were never constant, they could not reasonably be avoided.
- [195] This exhibit was, due to the lateness of this evidence, only produced during re-examination of Stefan Malherbe, and Dryden, who had testified before him, was never given the opportunity to confront it. However, internal documents of Media 24 at the relevant time would tend to support this conclusion – namely that the size of Vista was subject to large fluctuations depending both on the week and the month when the publication appeared.¹⁰⁷

¹⁰⁶ Exhibits 31A and 31B.

¹⁰⁷ See for example Record, pages 424-426; 427-429; 430-433; 499-501.

[196] The Commission argued that if Media 24 was going to claim the scale efficiencies it did, which rivals who were not vertically integrated could not match, it could not at the same time assert that it required surplus capacity across its titles to meet variable demand.

[197] The Commission thus disregarded the 'variability' justification for not redeploying, what it contended, was surplus capacity and when it presented final argument it calculated a new AAC, revised by what it claimed were these re-deployment costs, which it added to the total of avoidable costs it had previously asserted. The figure was significant as we observed earlier as it added to the amount of avoidable costs an amount of R2 530 000. This amount is sufficient to bring Forum below its AAC for the period even if one does not include any opportunity costs, or what we have termed the residual costs.

Analysis

[198] There is nothing in principle wrong with the economic rationale of the Commission's argument - the efficient firm will over a one year period takes steps to mitigate its costs when it closes down a business unit. Matters become more complicated when one is dealing with a multiproduct firm with vertically integrated business units like Media 24 and its parent Naspers. Making assumptions about re-deployment involves a judgment made on the business requirements of the firm. Take the costs of the various employees at Bloemfontein who spent some small portion of their week on Forum business. The evidence was that these employees were not dedicated to Forum but spent some time per week on the title and then worked on the other titles as they came to them during the course of the week. True, as the Commission suggested in cross-examination, if several sub-editors each spend X hours per week on the title, totalling those hours would occupy one person on an almost full-time basis. Retrenchment of the persons concerned, or less drastically conversion of these positions to part-time employees would save Media 24 costs over a one year period, thus making such costs avoidable for the purpose of the AAC exercise. However, this required Media 24, for whom

Forum was a minor expense of little significance, to engage in minor re-organisation, when its changing existing needs and possibilities for new business, made such tinkering unnecessary and irrational.

[199] From what evidence we have from Mr Francois Groepe, the erstwhile CEO of Media24, when the firm did retrench, it did so in a more comprehensive manner across the whole organisation. Put differently, major cost shocks make such a firm responsive to engaging in cost cuts – minor ones, such as those occasioned by the closure of Forum, do not.

[200] Of course this means that on an AAC standard, the large scale multiproduct firm has a greater ability to claim that costs are unavoidable because the alleged predator's costs become trivial fractions of the larger pie meaning that they make no sense to avoid when the unit is closed. This points to the utility of ATC as an appropriate cost standard in such instances, as we go on to discuss more fully below.

[201] We conclude that whilst in principle re-deployment costs where demonstrable should be regarded as avoidable, on the current evidence we are not able to state on a balance of probabilities that the costs concerned could reasonably have been re-deployed or indeed should have been re-deployed, given the relative size of the costs as compared to the scale of the enterprise in which they are incurred. Further, the evidence about the fluctuations in Vista's size during the complaint period, which is corroborated by internal documents from Media 24, suggests that some capacity needed to be retained to meet the needs of the publication. To suggest that one part of some employees functions be they sub-editor, graphic artist or advertising consultant, could have been scaled down after the closure of Forum would be to impose our own business judgment on the firm. Such an approach is not advisable and encroaches on an area of business autonomy a regulator should not second guess.

[202] We therefore conclude that the Commission has not succeeded in demonstrating that, what is classified as re-deployment costs should be treated as avoidable.

Remaining miscellaneous costs

- [203] The final dispute over calculating AAC concerned a miscellaneous set of costs relating to printing and distribution. Both sides changed their estimates during the course of the hearing, with Media 24's economist adopting a final position at the end of proceedings where he conceded that amounts he had regarded up until then as unavoidable, were in fact avoidable. At the same time however he claimed back certain costs as unavoidable, which he previously thought avoidable. The net result of this was to lower the amount of avoidable costs from his previously stated position, an exercise that was in his client's favour. (See Appendix 1, column 1, row 2 as compared to its original position signified by column 2, row 2.)¹⁰⁸
- [204] The Commission raised what we consider an interesting policy argument on avoidable costs. It argued that costs for services that could be outsourced, such as printing and distribution should be cost at market rates not at their transfer price.
- [205] The issue arose because of the interesting transition of the Volksblad printing works during the complaint period. For the four years of the complaint period the printing works were part of Volksblad group and were thus wholly owned by Media 24. During the final year the printing operations were sold to Paarl Post Web, a separate company, but one in which Naspers Media 24's parent has a significant interest. When the printing was transferred, after a brief transition period, Paarl Post Web charged Forum a 15% mark up on the printing cost.
- [206] The Commission's economists surmised that if this was the market rate for printing, then the past expenses for printing should be loaded up by the amount of 15% and that this amount should be added to the avoidable costs of printing. Media 24 disputed the principle of imposing what was

¹⁰⁸ In this regard see Appendix 1.

termed an 'uplift', but also whether the Commission was correct on the facts.

[207] After the testimony of Mr Johannes Botha of the printing works (not to be confused with the erstwhile financial manager Thys Botha referred to earlier), the position in respect of printing costs and how they were assigned became murkier, as it was not clear exactly what had been charged to Forum in the past. The detail was tortuous and need not be considered further here, but the fact that it suffered so many iterations, not least by Media 24 itself, suggests that there is no final clarity on these numbers.

[208] An even more opaque dispute of facts surrounded the costs of distribution. Forum's papers were printed in Bloemfontein. The papers were then transported to Welkom where small business contractors performed the local distribution. Naspers has its own distribution company called NLD which is responsible for distribution. The costs of transport from Bloemfontein to Welkom are conceded to be avoidable, but not the non-subcontractor distribution costs (NLD overheads and profit margin) included in the NLD charges to Forum.

Analysis

[209] Even if we were to accept that all the Commission's calculations in respect of these miscellaneous costs are correctly classified as avoidable, the additional numbers still do not raise Forum's avoidable costs to a level where they exceed its revenues. The reason for this, as we explained earlier, that we have not included in the calculation, opportunity costs or the re-deployment costs.

[210] For this reason we do not need to decide this dispute of fact nor the principle behind the Commission's interesting and important loading argument.

Conclusion on AAC

[211] Because we have concluded that opportunity costs and redeployment costs cannot be factored into the calculation of Forum's AAC, we find that the Commission has not established that during the period Forum's revenues were below its AAC, although it marginally scrapes through. This means by extension that the Commission cannot establish a case to argue that Media 24 operated Forum below its AVC. Recall, its argument was that in this case AAC was equivalent to AVC, and if Forum was below its AAC, it was below its AVC. We therefore do not need to consider if this argument holds up. Once the Commission cannot prove that Forum priced below AAC, and without any other basis in the evidence regarding whether it priced below AVC or marginal cost, no case for predatory pricing can be made out under 8(d)(iv). It is important to note that we have not found that Forum's revenues exceeded its AAC. We have found only that the Commission, which bears the onus on this issue, has not established on a balance of probabilities that Forum's revenues were below its AAC during the complaint period.

[212] The case under 8(d)(iv) therefore must be dismissed.

Case under 8(c)

[213] The Commission's case under 8(c) was premised on a finding that Forum priced below its AAC or alternatively that it priced below its ATC, plus intent. Given our finding that Forum did not price below its AAC, it is only the latter issue we must now consider.

The existing case law on 8(c)

[214] In *Nationwide* we held, insofar as 8(c) was concerned, that proof of pricing below an appropriate measure of cost plus additional evidence would suffice to prove exclusion.¹⁰⁹

¹⁰⁹ *Nationwide*, page 10.

[215] *Nationwide* did not decide what the appropriate cost standard was, nor was it dispositive of what the ‘other’ was although from its discussion at least evidence of recoupment was envisaged.

[216] In this case the remaining measure of cost that the Commission seeks to rely on once we have dismissed the case on AAC is ATC.

Is Forum below its ATC

[217] As Appendix 1 demonstrates there is no dispute that Forum priced below its ATC during the period.¹¹⁰ The dispute rather turns on (i) whether ATC was an appropriate standard to follow, and even if it was, (ii) whether the Commission has established the additional evidence of exclusion and if so, what it was. We deal with these two issues next.

(i) Is ATC an appropriate standard to follow.

[218] The main criticism of the ATC standard i.e. a situation where a firm may be pricing above AVC or AAC, but below ATC, is that it may lead to a false positive or over enforcement because pricing at this level may have some legitimate pro-competitive purpose.

[219] However, some writers take the opposite view and favour the use of the ATC standard because they see AVC or what is referred to as the Areeda-Turner test, as possibly under deterrent, if it was the only accepted standard.

[220] As the authors of one text book argue, “A key reason for preferring the ATC rule to the Areeda-Turner rule is that the latter rule is too permissive, allowing predators to escape too easily.”¹¹¹ They go on to quote another writer, Greer, who in even stronger terms criticises the AVC rule because, it:

¹¹⁰ There was still a dispute as to what the correct ATC was. Media 24 has a lower figure (R 11 141 000) than the Commission’s (R 11 375 000) for Forum’s ATC, but both totals, as Appendix 1 shows, have an ATC figure that exceeds Forum’s revenue (R 7 554 000).

¹¹¹ See “*Economics of Regulation and Antitrust*”, Second Edition, W. Kip Viscusi , John M. Vernon and Joseph E. Harrington Jnr, MIT Press, page 285.

*“... produces a defendant’s paradise, a monopolist’s heaven.... a monopolist with abundant financial reserves could under the [Areeda-Turner] rule, drive less financially secure but equally efficient rivals from the market without fear of prosecution merely by pricing below ATC and above AVC”.*¹¹²

[221] In our view the use of the ATC standard, even where prices are above AVC, is appropriate, particularly in our economy, characterised as it is by high barriers to entry in many markets and the unwillingness of capital markets to sponsor the entry of competitors against dominant incumbent firms. They are the “*less financially*” secure than Greer contemplates. Moreover, the ATC test is a more reliable standard when dealing with the problems associated with the vertically integrated or multi-product firm, because here the more orthodox measures of cost evaluation, whether marginal cost, AVC or AAC, can so easily be obfuscated or frustrated. In such a context the informational asymmetries between the outsider seeking to indict the firm as a predator and the insiders defending the firm, are such that in most instances the firm is better placed to win the cost classification debate. Not because it is necessarily doctrinally correct, but because it has command over the accounting choices.

[222] Objections to the use of the ATC standard on the basis of its susceptibility to false positives can be overcome, if the adjudicator relies on evidence from different sources to make its findings more robust. This is what we go on to consider under the heading of the additional evidence.

(ii) The additional evidence

[223] Before we consider whether the evidence presented constitutes ‘additional evidence’ of an exclusionary nature, it is necessary to examine what evidence of exclusion means for the purpose of section 8(c).

[224] In SAA we indicated that the difference between sections 8(d) and 8(c) is that under the former, conduct is deemed exclusionary if it falls within any

¹¹² See Viscusi et al. *op. cit.* page 285. The quote from Greer referred to is from Greer “*Business, Government and Society*”, page 166.

of the designated categories, whereas under 8(c), the conduct has to be established as being of an exclusionary nature.¹¹³

- [225] The short answer as to whether conduct is exclusionary is whether it meets the definition set out in the Act, viz that the conduct “...*impedes or prevents a firm from entering into, or expanding within, a market.*”¹¹⁴
- [226] However, that definition sets out the nature of an exclusionary act by reference to its outcomes; it does not set out the test for determining its nature.
- [227] Comparative case law on the subject from the EU and US is instructive. But those looking for consensus in these jurisdictions will find their expectations frustrated. Case law does not suggest a standard test has been adopted, nor is there agreement on what it should be, and indeed, there is not even consensus that there should be a standard test for exclusion.
- [228] To complicate matters the term exclusionary does not always mean the same thing to all courts or commentators. Some subsume it into the same enquiry as for anticompetitive effects, others separate them. The take home message from this is when we look to other jurisdictions for guidance on their approaches we must appreciate that our legal tests and use of terms are not always the same.
- [229] Our statute technically requires the separation of these enquires, as observed in SAA. However, the existence of discrete tests as a legal requirement does not necessarily mean that the same evidence cannot be relied upon to establish both. In other situations one might require evidence of both.
- [230] For instance, there may be evidence that a firm has priced a good or service below AVC. That would suffice to establish an exclusionary act for the purpose of 8(d)(iv). However, the period of below AVC pricing might

¹¹³ See SAA paragraph 105 citing an earlier Tribunal decision in *The Competition Commission and Patensie Sitrus Beherend Beperk* – 37/CR/Jun01, at paragraph 95.

¹¹⁴ Section 1(1)(x).

have been very brief and hence proof of an anticompetitive effect would be needed to supplement this evidence. But if the duration of the exclusionary conduct was particularly long, the inference of an anticompetitive effect foreclosing rivals would be very strong, and absent any rebuttal evidence, this would suffice as well to establish the requirement of an anticompetitive effect at the same time as the evidence of exclusion.

[231] What also needs to be placed in context is the difference between rebuttal evidence on the one hand and evidence of a technological, efficiency or pro-competitive effect. (For the sake of a useful shorthand we will refer to the latter three as evidence of an 'objective justification' which is the language used in other jurisdictions).

[232] A respondent under 8(d)(iv) cannot lead rebuttal evidence in respect of exclusion, but can in respect of an anticompetitive effect. Under 8(c) a respondent can lead rebuttal evidence in respect of both. Again here rebuttal evidence of one may elide with the rebuttal evidence on the other although formally again we would look at them as separate issues legally.

[233] Evidence of objective justification is technically different legally to this rebuttal evidence. It is evidence that even though there may be an exclusionary act with anticompetitive effects there is an objective justification for it, which outweighs the anticompetitive effect. For instance in a predation case, a firm may justify below cost pricing that foreclosed competitors by saying it was necessary to invest in a new product line that had to be introduced into the market for a certain period or had to sell obsolete goods to introduce a new line.¹¹⁵

[234] However, evidence of objective justification might also rely on the same facts as rebuttal evidence. Legally this may make life complicated as the onuses are different. In the case of rebuttal evidence the respondent rebuts evidence of the complainant but the overall onus is on the

¹¹⁵ See *Whish* for example page 742 and Motta 'The European Commission's Guidance Communication on Article 82' a paper which built on presentations made at the meeting of the European Association of Competition Law Judges (Malta, June 2006) and the Conference on "Economic Developments in European Competition Policy (Brussels, December, 2008), page 4.

complainant. In the case of the objective justification the onus shifts depending on whether the respondent is facing a case under 8(c) (where it does not bear the onus) or 8(d)(iv) where it does.

[235] In this case we will be discussing just such a situation. Media 24 has led evidence to justify its below ATC pricing viz the contribution to common costs. The same issue has also been relied on as rebuttal evidence to the Commission's case on intention. However, as the evidence of contribution to common costs has been to justify reasons for retaining Forum in the market rather than justifying its level of pricing, it is more properly analysed as rebuttal evidence to the Commission's case on exclusion and this is how we have treated it.

[236] We now turn to the types of tests for exclusion that emerge through the case law and the literature. In the *US DOJ Section 2 Report* and other literature, the following tests are frequently mentioned:

- No business sense;
- Profit sacrifice; and
- Equally efficient competitor test.¹¹⁶

[237] In predation cases in particular evidence of exclusion has also included evidence of intention (direct and indirect) and recoupment.

[238] In the present case we will examine the Commission's additional evidence of exclusion under the following tests: direct intention, indirect intention and recoupment and the equally efficient competitor test. In respect of each we examine the rebuttal evidence adduced at the same time.

[239] We have not chosen these tests because we find that they are superior to any other. Rather we have followed the approach recommended by some authorities who have eschewed championing any one test and favoured recognising that they all have their strength and weaknesses. For instance, sometimes the choice of test is determined by the type of

¹¹⁶ More tests are mentioned in the DOJ Section 2 Report but these ones are examined in other literature as well. For instance see "Role of the Equally Efficient Competitor in the Assessment of Abuse of *Dominance*", Martin Mandorff and Johan Sahl Konkurrensverket Working Paper Series in Economics 2013.1.

conduct being considered; at other times it may depend on the nature of evidence available.

[240] That has informed our approach here. Since the conduct being considered is predation some tests are better suited to examining that. On the other hand, evidence available in the record has also informed that choice. For instance in this case, because of the time since the exit of the alleged target and the hearing, evidence of whether there has been recoupment serves as a useful test.

[241] This approach of considering a number of tests does not mean that in each case under 8(c) the complainant has to ensure its theory of harm passes several of these tests. The approach is that given the imperfect nature of all these tests, it is useful to look at others, to serve as a filter to the conclusions reached by one or more other tests. Where however, a chosen test serves to robustly evidence a conclusion, such an approach would be unnecessary and burdensome. In this case, given the contestation around the analysis of exclusion, we have considered it appropriate to use more than one tool of analysis before coming to a conclusion to avoid error.

[242] This does not mean that we have changed our approach adopted in the *Nationwide* decision. In that case as noted we held that the test for exclusion under 8(c) is pricing below an appropriate measure of cost accompanied by “.... *additional evidence of predation.*” We indicated that we did not wish to be “prescriptive” as to what would constitute examples of this form of additional evidence, but we mentioned evidence of recoupment as one. What we have been discussing above is the approach in a predatory pricing case under 8(c) as to what that other evidence should be, and how to test for it. The approaches are therefore consistent.

[243] In this case because predation is the conduct at issue, we find the test for intention serves as a useful starting filter. As this test has its potential for false positives or over deterrence, we examine further what the EU Guidance describes as evidence of indirect intention. The difference

between these two tests of intention is that the direct test relies on subjective evidence of intention – what the respondent firm thought as evidenced by statements, correspondence and strategy plans, whilst indirect evidence is objective - we look at facts and draw inferences about how to interpret that behaviour.

[244] The two further tests looked at here; recoupment and the equally efficient competitor test, are also objective, but are examined separately. Nothing much turns on whether they should fall under one label or another but for convenience they form self-standing sections.¹¹⁷ Finally we look at an argument raised by Media 24 which does not fall under any of the other categories but which argues that there is no causal link between its actions and the exit from the market of GNN.

[245] All these tests serve the purpose, individually, of testing for exclusion and, collectively, as filters of one another.

[246] In each section we have first considered the theoretical issues associated with that test and then examined the evidence relevant to that.

[247] We first consider the evidence concerning intention.

Direct intention

Legal issues

[248] The Commission, as noted, rely on the legal test in *AKZO* for their approach. The Court in *AKZO* held in an oft cited passage:

“Moreover prices below average total cost, that is to say, fixed costs plus variable costs, but above average variable costs, must be regarded as abusive if they are determined as part of a plan for eliminating a competitor perhaps as efficient as the dominant undertaking.”¹¹⁸ (Our emphasis)

¹¹⁷ As we explain later in the EU Discussion paper recoupment is discussed as a form of indirect intent.

¹¹⁸ *AKZO* *ibid* paragraph 72.

- [249] What a '*plan*' means in this context was the subject of debate between the parties. Relying on a common law approach to the interpretation in civil proceedings, the Commission argued that it sufficed to prove that the intention was the '*...dominant, operative or effectual intention...*' it did not have to be the 'sole' intention.¹¹⁹ Media 24 argued that for a plan to constitute the elimination of a competitor it must be established that this was the dominant firm's sole intention.
- [250] The essence of the Commission's case was that Media 24 had embarked on a predatory strategy and this can be gleaned not only from witness testimony it lead, but also statements made by Media 24 employees during the complaint period, and which appear in the record.
- [251] Media 24 for its part stated that the intention was to retain Forum in the market for as long as it was considered to be contributing positively to its share of the common costs, and that, equally, witness testimony and the contemporaneous evidence from the record supported the correctness of its interpretation of events.
- [252] Thus, on the Commission's approach, one does not have to reject the possibility of the Media 24 factual version – only to find that it was not the dominant purpose for retaining Forum.¹²⁰ On the Media 24 argument, the Tribunal would have to come to the conclusion that it's evidence, i.e. that it retained Forum because it contributed to common costs, was false, and if we could not be so categorical, the Commission must fail on intention because the test of 'sole' intention had not been met.
- [253] The Media 24 argument relies in part on a subsequent European decision in *France Telecom(Wanadoo)*. That case involved the weighing up of evidence of predatory intent – there were internal documents to this effect which the firm concerned had described as binding only their authors and

¹¹⁹ The case relied on was *Cooper NNO v Merchant Trade Finance Ltd* 2000(3) SA 1009(SCA). The court held:

"It is essential and indeed fundamental to any decision as to whether there has been an intention ... to examine and weigh up all of the relevant facts which prevailed at the time ... in order to determine what, on a balance of probabilities, was the 'dominant, operative or effectual intention in substance and in truth' of [the relevant party]. The passage cited comes from the headnote.

¹²⁰ See Commission's heads of argument paragraph 228.

not the company and evidencing no more than “... *the dialectics of the decision making process*”.

[254] Wanadoo’s defence for its below cost pricing, was that it was a start-up and its pricing was part of a strategy to enter the market.¹²¹ The Commission did not accept this explanation and considered that the pricing strategy was in reality an attempt to pre-empt the market from rivals who might enter. The General Court upheld the Commission and the case was then heard by the European Court of Justice. The ECJ did not overturn the General Court for technical reasons that do not concern us here, but what is relied on by Media 24 is a statement made by the court on the question of evidence of mixed intention. The Court stated:

“ ..an undertaking abuses its dominant position where, in a market the competition structure of which is already weakened by reason precisely of the presence of that undertaking, it operates a pricing policy the sole economic objective of which is to eliminate its competitors with a view, subsequently, to profiting from the reduction of the degree of competition still existing in the market.”¹²² (Our emphasis)

[255] In their text book O’Donoghue and Padilla, in a comment on this passage, argue that it means that there is a need to show “*a singular objective and not mixed objective consistent with competition.*”¹²³

[256] The problems with the intention as a factor not only relates to analysing the problems of evidence of mixed intent but also the paradoxical nature of intention itself. Even strong evidence of predatory intention can lead to erroneous conclusions. Perhaps this is best articulated in a well-known US decision *A.A. Poultry Farms Inc. v Rose Acre Farms Inc.*:

“*You cannot be a sensible business executive without understanding the link among prices, your firm’s success, and other firms’ distress. If courts use the*

¹²¹ The case had started off as the Wanadoo case number CMLR 120 but by the time of appeals France Telekom had succeeded to Wanadoo’s rights hence it became France Telecom on appeal. See Whish *op cit* page 744.

¹²² *France Telecom SA v Commission* ECR I-2369 [2009] 4 CMLR1149, at paragraph 107.

¹²³ See O’ Donoghue and Padilla, *The Law of Economics of Article 102 TFEU* page 309, footnote 66.

*vigorous, nasty pursuit of sales as evidence of a forbidden 'intent', they run the risk of penalising the motive forces of competition.*¹²⁴

[257] O' Donoghue and Padilla also point out that if the language of intent serves as evidence, then the well-counselled firm that carefully manicures the tone of its internal communications is better off in a prosecution than its less circumspect rival which lacks the astuteness to take the sting out of the tone of some injudicious language. Then, as the authors point out, one firm may be condemned but not the other, all things otherwise being equal, simply because of an approach to the adoption or not of 'commercially-correct' language.¹²⁵

[258] These critiques of the intention based approach might seem to suggest it should be dispensed with. However, such a conclusion is over hasty. Like all tests for predation, including the cost based tests discussed earlier; intention has its weaknesses making it susceptible to deciding cases based on evidence of false positives. On the other hand, dispensing with it altogether would again increase the possibility of false negatives or under enforcement. A more modern solution to the use of intention is to recognise it as a source of circumstantial evidence, but that needs to be assessed against other sources of evidence. As U.S scholar Christopher Leslie has noted:

"Still some courts belittle the notion of "predatory intent" as an element, protesting "the futility in attempting to discern predatory conduct solely through evidence of the predator's intent". This reasoning is a red herring created by treating a single element as if it were the test for liability unto itself. This view would be persuasive if predatory intent were the "sole" element necessary to prove predatory conduct. But of course, predatory intent alone does not give rise to liability. A claim for predatory pricing has many elements... Predatory intent works well in tandem with these other elements

¹²⁴ 881 F.2d 1396 at 1402 (7th Cir 1989).

¹²⁵ See O' Donoghue and Padilla, *op cit* page 310.

*to distinguish good price cutting from anticompetitive price cutting and to reduce the risk of false positives.*¹²⁶

- [259] An interesting more recent approach has been to distinguish between evidence of direct and indirect intent. As O' Donoghue and Padilla point out that this is an approach now favoured by institutions in the European Community.¹²⁷
- [260] Direct intent is the type of intent that we have discussed up until now – that which emanates from the documents of the accused firm and statements by its employees. Indirect intent has a greater economic basis. Examples cited would be reputational reasons for predation, targeting of specific customers and competitors reliant on external funding.¹²⁸
- [261] As the name suggests, indirect intention is not reliant on direct intention as expressed by the impugned firm but circumstantial economic evidence that may give rise to an inference that conduct is predatory. Indirect intention received more attention in a document that preceded the Guidance, which is referred to as the Discussion Paper, yet the approach to analysing indirect intention still forms part of the present Guidance.¹²⁹
- [262] In the Discussion Paper evidence of recoupment is also considered evidence of indirect intent, although in EU law evidence of recoupment is not considered a requirement, unlike the present position in US law.¹³⁰
- [263] Our approach in this case is to consider evidence of both direct and indirect intent. We examine whether the two types of sources of evidence lead to a consistent or inconsistent conclusion. More specifically, whether the indirect evidence can be used to answer the question resolving the evidential dispute over direct evidence? Does the indirect evidence make one interpretation more probable than the other? If it does then that approach is to be the more probable one and the one to be preferred.

¹²⁶ Christopher Leslie, "*Predatory pricing and recoupment*", 113 Columbia Law Review 1695, at 1755-6 (2013).

¹²⁷ See O' Donoghue and Padilla *op cit* page 249.

¹²⁸ Advisory paragraph 115.

¹²⁹ DG Competition Discussion paper on the application of Article 82 of the Treaty to exclusionary abuses December 2005 (hereinafter referred to as the "Discussion Paper").

¹³⁰ Discussion Paper page 35, paragraph 122.

Secondly our approach to direct evidence is to look beyond what may only facially be the use of “incorrect commercial language” and ask if the direct intent conveys something deeper in the form of a plan or clear cut steps to be taken or does it constitute mere bravado.¹³¹

[264] Thus our approach to evidence of intention is to favour neither approach of the parties, which is to examine if the intention is the dominant intent (the Commission) or the sole intent (Media 24). Neither method of examining intent in this way deals with the fact that tests for sole or dominance may be good legal tests in other contexts, but are not useful in analysing the subjective aspect of economic behaviour. Rather we would follow the approach urged by Leslie and make use of evidence of intention but caution against relying on it as the ‘sole’ evidence of predation and use it ‘in tandem’ with other evidence. For this reason we have also analysed other evidence of exclusion not based on intent namely recoupment. We have also in this case considered, as a final screen, the question of whether GNN was an equally efficient competitor. We consider at each enquiry the rebuttal evidence led. Finally we consider evidence led in rebuttal of the case for exclusion which does not fall into any neat category, but which, if a theme to describe it is useful, would be termed causation.

Intention: Factual issues

[265] The classic text book predation case is usually triggered by some action by the alleged predator after new entry by a rival. This manifests itself in the predator either dropping prices substantially, increasing supply or introducing a fighting brand to specifically attack the rival’s product. In this case the Commission relies on a fighting brand theory, but the theory has a twist. The alleged fighting brand, Forum, was in the market long before the entry of the target. Further there is no evidence that Media 24 dropped Forum’s prices at the outset of the predatory period. Indeed, the only

¹³¹ See the Discussion Paper, paragraph 113. The Discussion Paper points out that in AKZO there was a detailed plan with figures describing measures that the dominant firm would put into effect if the target would not withdraw from the market.

evidence of pricing we have for this first year of the period shows that Forum's prices remained stable.¹³²

[266] The Commission's case on intention therefore does not turn on a traditional set of facts. This, as we consider later in these reasons, was a key aspect of Media 24's defence to suggest the conduct in question could not be regarded as predatory.

[267] The first fact relied upon is the acquisition of dominance by Media 24. This occurred in 2000 when Media 24 acquired Vista. At that stage Media 24 would have acquired a dominant position in the relevant market. Indeed they acquired a monopoly position.¹³³ Because Media 24 purchased Vista along with other titles in the Free State region from Caxton, it cannot be suggested that the purpose in purchasing the additional title was a predatory one aimed at Welkom. The likelihood was that it was a 'take-all-or-leave-it' deal and so Media 24 without necessarily having, pre-merger, a clear strategy for the roles of Vista and Forum, acquired its monopoly position in Welkom.

[268] No witness who was familiar with Media 24's intentions back then was called by Media 24. Although Ms Van Eck was working for Vista at the time, she was too junior an employee to have been party to such discussions, if indeed they ever took place. Mr Jan Malherbe, the then chief executive of the newspaper division, testified but was not led on this issue.¹³⁴

[269] However, the merger was a game-changer in terms of Media 24's legal obligations. It had moved from having a non-dominant position in the

¹³² See Exhibit 10.

¹³³ It appears that the merger, which involved the purchase of several publications including Vista, from rival group Caxton's Penrose subsidiary, was cleared on a technicality, because the Commission, which had intended to prohibit it, had got their order out a day late. See Tribunal decision under case No 27/AM/March00 in the Reconsideration of two Intermediate Mergers between CT Media Publications (Pty) Ltd and Caxton Publishers and Printers Limited and Nasionale Media Limited and Penrose Holdings. Although the Tribunal reasons don't mention the publications involved, given the similarities in the date of the transaction and the parties names, it is likely to be the same transaction. The technicality arises by virtue of section 14(2) of the Act which provides for deemed approval of an intermediate merger if the Commission does not issue its decision within the requisite time period.

¹³⁴ Malherbe was CEO of the newspaper division from January 1998 to March 2007.

market to acquiring a monopoly position. Whilst this position was legally acquired because of the deemed approval, once a firm is dominant in a market it assumes the responsibility of avoiding conduct that may constitute an abuse of dominance – a responsibility unique to dominant firms in the Act.¹³⁵

[270] The question then from the outset is whether Media 24, so obligated, took this care. Very little time passed between the implementation date for the merger and the entry into the market of a new competitor in the form of Netnews. None of the witnesses can specifically recall how long this was, but from what evidence we have, it could only have been a matter of months.

[271] The earliest evidence we have of Media 24's post-merger intentions comes from Wian Bonthuyzen who was the Commission's first factual witness. Bonthuyzen was an erstwhile employee of Media 24. For the period 1999 to April 2008 he was employed by Media 24 in its Volksblad division as the senior manager for its community publications in the Free State and Northern Cape. Amongst his responsibilities pertinent to this case were for the sales, marketing, budgeting and implementing strategy.¹³⁶ As such he was directly responsible for the business of Vista and Forum, as well as reporting to Naas Du Preez, who at the beginning of the complaint period was the general manager at Volksblad, a position he held till sometime in 2006.

[272] Bonthuyzen was a controversial witness. As an employee of Media 24 at the time no-one was better placed to testify to its intentions than he was, yet he ended up as a witness called by the Commission. We discuss this fact later when we evaluate the reliability of his evidence. For the meantime we first consider his testimony.

¹³⁵ This is because of the deeming provisions of section 8 which makes certain conduct unlawful only if perpetrated by a dominant firm. EU law speaks of the special responsibilities of dominant firms. See *Michelin v Commission* where the Court of Justice stated that a firm in a dominant position has a special responsibility not to allow its conduct to impair undistorted competition' on the internal market (Case 322/81 [1983] ECR 3461, [1985] 1 CMLR 282.). Which says this statement is routinely repeated in the judgements of the European courts and decisions of the Commission. See *Which op cit* page 192.

¹³⁶ Transcript, page 6.

[273] Bonthuyzen testified that the first strategy considered after the merger was to convert Forum, the paper with the smaller circulation, into a 'shopper'.¹³⁷ A shopper is an industry term for a publication containing only adverts, but with limited or no editorial. Its advertising rates are lower and so for that reason it attracts more smaller businesses to advertise with it, but its lack of editorial makes it a less compelling product for the reader. According to Bonthuyzen, a shopper gets distributed at shopping centres and contains adverts from businesses who would otherwise not advertise in a conventional community newspaper. On his definition of what a shopper is, one can conclude that it is a publication complementary to, but not necessarily competitive with a community newspaper, because it reaches advertisers who don't choose to advertise in the latter.

[274] Bonthuyzen testified that once it had been converted into a shopper, Forum would operate not only in Welkom, but also Bloemfontein, Kimberley and Bethlehem. He registered several Forum names as part of this plan. However, the plans were abandoned when Steyl (and noticeably not Alida Joubert) entered the market. Steyl was respected as a competitor (something Alida Joubert it seems was not)¹³⁸ as he was seen as a true "newspaperman" and it was necessary to "...focus on Hans [Steyl] and [go] head-on-head with a proper community newspaper. That is the reason why we couldn't budget for a profit for Forum it was never feasible, in fact from what I can remember the profit loss (sic) grew year on year, it grew tremendously."¹³⁹

[275] Bonthuysen testified that:

At first we tried to fight the rates of Gold Net News with the Tuesday Vista and that didn't work, it didn't succeed because Tuesday Vista was already a very

¹³⁷ He says this at various parts of his evidence but see for instance Transcript page 35.

¹³⁸ See comment of Bonthuyzen, transcript page 17 where she is described as a bit of a 'loose cannon'. He later repeats this unflattering description, but the important point he makes is that they did not consider her a threat so they only met some of her prices and did not consider going below her rates. Steyl was considered a different prospect. (See transcript, page 22) MR BHANA: *When it changed was there a point where you went beyond simply meeting the rates?*

MR BONTHUYZEN: *Ja definitely when Hans was there we do that.*

¹³⁹ Bonthuyzen, Transcript page 10.

small newspaper. Then we moved on to Forum and that's the reason why before that I registered several names, Forum Group names and we thought we must make (indistinct) of the name Forum bring out a Forum Shopper(?) in Welkom, in Bloemfontein, Kimberley and also in Bethlehem.

[276] On his evidence then Steyl's entry into the market as a "ware [authentic] newspaperman" required Media 24 to change its original strategy of changing Forum into a shopper and thus a title not competitive with that of GNN, to one that was a proper community newspaper that could.¹⁴⁰ Vista Tuesday, the weaker sister paper to Vista's Thursday version, was not considered strong enough to do the job. Hence Forum served as the vehicle to prevent GNN's ability to expand in the market.

[277] Bonthuyzen's evidence on this aspect is corroborated by an early set of emails during mid-2001. What emerges from these is a picture of an anxious Van Eck, who at the time was the sales manager at Vista, pre-occupied with the effects an advertising price war with GNN was having on the fortunes of Vista. Her language in these emails is bellicose and aggressive. But what is clear is that she was calling for her seniors in the Bloemfontein office of Volksblad to embark on a strategy to counter GNN. In March 2001 she emails Bonthuyzen, accusing GNN of getting away with murder and asks what is our (meaning Media 24) 'plan B' if they start cutting our tariffs again.¹⁴¹

[278] Over the coming months Van Eck emails Bonthuyzen on several occasions with more alarmist news about the effect GNN is having on targeting their customers and its low rates. The emails get progressively more alarmist, and one in June 2001 refers to the '*reign of terror being waged*'. Van Eck then suggested that " ... *we must level them immediately and not give them the chance to make money.*" She goes on to say that " ... *we can survive it, they not. We can rather put the money into our*

¹⁴⁰ A business plan for the central region of Media 24 refers to a plan for the express editions which is what the shoppers were going to be called having to be scrapped in Welkom and Bethlehem due to Netnews low pricing. This may support the testimony of Bonthuyzen although it places the decision about shoppers being made at an earlier time. Record page 42 Central News Group report for March and April 2001.

¹⁴¹ Record page 39 RD 67.

pockets even if it is cheaper by half.” She notes that Vista Tuesday was getting nothing that week and “... even Forum is struggling. They shook the market.” And then “... we are ready to give them a bit of our own medicine.”¹⁴²

[279] How her approach was received from those higher up emerges from an email from Naas Du Preez to Jan Malherbe on 22 June 2001. He describes the concerns and then suggests they ‘sweat it’ out but that if they must hit back this must be done using either Tuesday Vista or Forum.¹⁴³

[280] In August 2001, Du Preez was away and so Bonthuyzen emailed Malherbe suggesting using Vista Tuesday to “*measure’ their tariffs*” (he puts the word measure into inverted commas). Malherbe replied that he agreed and suggested that the entire strategy get urgently reassessed once Du Preez was back.¹⁴⁴ But he added “... *maybe we should again look at less titles*”. The idea of having less titles in Welkom, (they had three at that stage as they considered Vista Tuesday and Thursday as separate publications) later got consideration at a strategic session held in November that year, attended by what appears to be the Volksblad management team at the time. Of the suggestions minuted is one saying, “*Reconsider Forum and one other publication in the market – Forum and Vista Tuesdays.*”¹⁴⁵

[281] However, the fact that Malherbe writing in 2001 suggests that the idea of having less titles needed to be considered again suggests that even prior to this, closing of one of the titles had been contemplated.

[282] Curiously at the time also being considered is a strategy for Du Preez to meet with Steyl to discuss an end to the price war. This, as noted earlier, was mentioned by Steyl in his complaint to the Commission. So clearly what was being contemplated at the time was a form of collusion over prices. However, nothing seems to come of that and Du Preez at least is

¹⁴² Record page 47 RD 69.

¹⁴³ Record page 48.

¹⁴⁴ Record page 58 RD 72.

¹⁴⁵ Record page 71. Bonthuyzen is at this meeting but not Van Eck.

mindful of the Competition Act problems and he says as much in one of his emails.¹⁴⁶

[283] But problems of possible collusion were not the only Competition Act problems contemplated by the Volksblad management team, as they strategized how to deal with the price war being waged by GNN.

[284] According to Bonthuyzen's testimony they were also mindful of dropping tariffs without Forum showing a loss because, as he put it, "*of the Commission*".

[285] This strange answer requires some background explanation.

[286] Bonthuyzen's evidence was that following the complaint from Alida Joubert (described earlier) the Commission had begun an investigation into whether Media 24 was engaged in predatory pricing against her titles.¹⁴⁷ The complaint was however brought to Media 24's attention at a senior level, who took it very seriously, obtaining legal advice and as we have seen, putting up statements to the Commission denying such conduct.

[287] The significance of the complaint, according to Bonthuyzen, was that Media 24 was thereafter sensitive to the fact that it must not be seen to be running Forum at a loss.¹⁴⁸

[288] The existence of the complaint and the seriousness with which it was taken is a significant fact in this case, as it informed the subsequent approach that Media 24's local managers in Bloemfontein adopted.

[289] Mindful of the possibility of another complaint from the Commission, but also fearful of the potential threat posed by GNN under Steyl's stewardship, Bonthuyzen and Naas Du Preez, who was his immediate superior in Bloemfontein, and as general manager the most senior

¹⁴⁶ Record, page 1357.

¹⁴⁷ We don't have much detail in the record about this complaint, beyond those described earlier, but what we do know is that the Commission never brought a referral in respect of the complaint.

¹⁴⁸ Transcript, page 9.

manager in the Volksblad division, discussed an appropriate course of action.

- [290] According to him, he and Naas Du Preez had many discussions at a '*lapa*' in their offices at Volksblad in Bloemfontein about using Forum as a vehicle to prevent GNN expanding in the market. These discussions were never documented to avoid them falling into the hands of the Commission.¹⁴⁹
- [291] Du Preez has since passed away prior to the commencement of these proceedings, and was thus not available to either side as a witness, to confirm or rebut the evidence of intent provided by Bonthuyzen.
- [292] Since his discussions with Du Preez constitute the most probative evidence of direct intent, both sides had probed Bonthuyzen to ascertain if the strategy had been communicated to anyone else.
- [293] When asked if anyone else knew of the strategy Bonthuyzen was uncertain. He thought Du Preez might have told Jan Malherbe, if not all the detail, at least the gist. (Jan Malherbe was at that time the chief executive of the newspaper division later to become known as Media 24.)
- [294] He testified that when Du Preez was on leave he (Bonthuyzen) told Malherbe in an email that they would be using Vista Tuesday against GNN and Malherbe had agreed, but had said Bonthuyzen should discuss it further with Du Preez on his return (the email to Malherbe is in the record and corroborates this), however, Malherbe was not able to take this aspect further in his testimony as he could no longer recall what questions he might have asked in 2001.¹⁵⁰
- [295] Bonthuyzen was clear that the strategy was not communicated downwards. Van Eck and he had discussions about GNN, but not on the same terms as he and Du Preez had. The discussions with Van Eck were that Forum should meet and if necessary beat quotes from GNN and make sure it did not grow.

¹⁴⁹ Transcript, pages 12, 24 and page 27.

¹⁵⁰ Transcript, page 1529.

[296] Thus on Bonthuyzen's evidence the fact of the Commission investigation into Alida Joubert's complaint had two outcomes – he and Du Preez avoided putting down their strategy towards GNN on paper, and secondly, they were careful to ensure Forum did not drop its prices in a manner that might be suggestive of a predatory strategy. Meet, and sometimes beat, was communicated downwards as acceptable.¹⁵¹

[297] Bonthuyzen emphasised that since he knew his own titles costs, and that Forum was not profitable, he confidently assumed that GNN, lacking Media 24's economies of scale and scope could not be making money. Indeed he was surprised the paper lasted as long as it did.¹⁵² The literature on predation often raises the issue of whether the predator has good knowledge of the targets costs. Bonthuyzen asserts that his experience of community newspapers in the area meant that he did.¹⁵³

[298] Forum was kept alive, he testified, to keep GNN out of the market, if it hadn't been there, he testified, Media 24 would have closed it.

[299] In his witness statement he states:

"By 2003 Forum was operating at a significant loss and would, absent the presence of GNN in the market, almost certainly have been closed by Media 24."¹⁵⁴

[300] He repeated this contention more emphatically in his oral testimony: Asked if there was any doubt in his mind about that paragraph in his witness statement he answered:

If Gold Net News wasn't there then we would have changed our strategy and closed down Forum we kept it open because of Gold Net News.¹⁵⁵

[301] This then is the essence of the Commission's case on direct intention. But because this evidence is heavily, albeit not solely, reliant on the oral evidence of Bonthuyzen, whose evidence, as we discuss later, has to be

¹⁵¹ See Transcript page 21.

¹⁵² Transcript, pages 31-32.

¹⁵³ Transcript, pages 27-28, 30-31 and 11.

¹⁵⁴ Paragraph 18.

¹⁵⁵ Transcript, page 34.

approached with caution, we have to examine whether his explanation is consistent with or contradicted by the other evidence we have in this case.

[302] The early email exchanges in 2001, which we have referred to earlier, suggest the following. Van Eck was pre-occupied by the on-going threat constituted by GNN. Her seniors, although not responding very quickly, soon took these concerns seriously. Various options appear to have been considered; first the ‘*sweat it out*’ approach initially advised by Du Preez. This approach was based on the assumption that GNN could not last long charging the tariffs it was and that sooner or later it would have to raise them. When this did not happen, it appears that the decision was to use one of either Forum and/or Vista Tuesday, but not Vista Thursday, the strongest and most expensive, to take on GNN.

[303] At the same time it was clear that in 2001 consideration was being given to closing down one of the Welkom titles or both. This emerges from both the November 2001 strategy document and the remarks of Jan Malherbe.

[304] Bonthuyzen’s evidence and the Commission’s case on intention is to put these two facts together. The reason that these titles were not closed down when they were was that Forum, at least, was seen as a useful instrument in the strategy against GNN. Vista Tuesday was not suitable enough at least on Bonthuyzen’s evidence to do the job. Given that in a memo prepared by Van Eck she remarks that Vista Tuesday “... *in some weeks did not even have a single booking ...*” , this is not surprising.¹⁵⁶ Jan Malherbe testified that Tuesday was not a good day to bring out a community newspaper. He said anyone who looked at the situation at the time would think that the Tuesday publication was the one most unlikely to survive.¹⁵⁷

[305] The question then was this strategy already being contemplated in 2001, albeit embryonic, a predatory one?

¹⁵⁶ Record page 33, RD283. See also Transcript page 2012-2014.

¹⁵⁷ Transcript, page 1528.

- [306] To bolster its case on this aspect the Commission moved forward in time to 2003, it relied on a Volksblad strategy workshop that took place in March of that year, at a place called Moolmanshoek and for which a document exists that purports to record some of those discussions and decisions made.¹⁵⁸
- [307] The document takes the form of a presentation, in point form, of various options for the Volksblad Group to pursue. This choice of format and the lack of a coherent narrative meant that the document lent itself to alternative readings. This is precisely what happened in the hearing; both sides in this case sought to emphasise those points favourable to their respective versions.
- [308] One page of the document records in point form a discussion about what is termed the “Forum Group”. Here it is recorded *inter alia* that the “*Forum brand can be considered for cheap shoppers.*” Another suggestion is “*Consider the name for special folios and letter columns in Volksblad and its community newspapers.*”¹⁵⁹
- [309] There follows in respect of the Goldfields area, a consideration of two options and a weighing up it seems, of the pros and cons.
- [310] The first option considered is to raise Vista’s rates and to keep Forum’s rates the same. The conclusion is that the risk is not worth it. In a column marked “*Comment*” it is noted that the Forum/Vista market share is 70%. It is proposed that Vista’s rates be raised to a figure suggested and that Forum rates remain the same. Then follow two interesting comments each respectively supportive of the contending narratives before us.
- [311] The first notes: “Increased Vista rates have advertisements migrating to Forum and not Netnews.” But the next bullet point below this contains the remark: “Risk factor (assuming Vista rates are raised as proposed) of 50% of Vista advertisements ...going to Netnews.” There follows another bullet point that “Hans Steyl and Netnews must not be underestimated.”

¹⁵⁸ Present were Bonthuyzen, Du Preez, Jonathan Crowther, the editor in chief of the group, Mike Van Rooyen and Neil de Klerk. (See email invitation, record page 155).

¹⁵⁹ Volksblad is the daily newspaper owned by Media 24 circulating in the wider Free State market.

- [312] Still under this option is a heading containing action steps and here several comments about Forum are made:
- [313] Forum must be kept as a 'doorstop' because of its low rates; Forum's rates must grow, but always lower than those of Netnews (GNN); Forum must break even – submit budget for 2004/5.
- [314] The second option considered is to raise Vista's and Forum's rates. Here one of the comments made is "*Netnews will cash in*".¹⁶⁰
- [315] Finally, the document contains a 'decisions' section. This suggests that the earlier pages contained a set of ideas that were aired with their pros and cons with the final page containing the conclusions. Thus although earlier the sections containing the discussion offer support to each contending reading, the decision section is the one that must be given due weight, given that it reflects the outcome of the workshop discussions and hence what was intended to be implemented.
- [316] Adopting this approach, of relevance to us is the bullet point which says strategic considerations apply in certain areas: "*Forum in Goldfields must prevent Netnews from growing as a result of the decisions on Vista*".¹⁶¹
- [317] This extract tends to support what Bonthuyzen had testified to earlier about the strategy he and Du Preez had discussed.
- [318] Although Bonthuyzen was examined and cross-examined at length on this document, his recollection of it was minimal and it is likely that his answers were influenced by reading it again, rather than on an independent recollection that we can rely on.
- [319] Whilst he said the first option was rejected, he does not explain why and it seems that this conclusion is reached because the document itself says so.¹⁶²

¹⁶⁰ Record, page 160.

¹⁶¹ Record, 165.

¹⁶² Transcript, page 45. The remark is made in the minute, under the sub heading "*Conclusion*" that "*risk is not worth it*". Record page 159.

[320] However, what he did state more confidently was that decisions relating to Forum's continued operation, as it was operating at a loss, depended on what GNN was doing – his view was that to break-even, Forum had to raise its rates by 100%.¹⁶³

[321] Of course of relevance is what message came from this strategy workshop that informed later strategy. To put it differently, did the workshop inform a strategy more consistent with an intention to utilise Forum as a vehicle to predate or for some other legitimate business rationale?

[322] Bonthuyzen testified that he, and presumably he would include the others, did not disclose the strategy discussed, as the concerns arising from Alida Joubert's earlier complaint to the Commission were still being kept in mind.

[323] What was conveyed to staff at a more junior level to him is thus not clear:

MR BURGER: There was a suggestion that in this time period there was devised what we've referred to as the 'lapa' strategy and you heard that term being used while you listened to the evidence given by Mr Bonthuyzen.

MS VAN ECK: Never before, never.

MR BURGER: Well assume that you heard it during that. Did you know about any strategy which flowed from these discussions in March 2003?

MS VAN ECK: I have no – I didn't know anything about that, nothing about a strategy like that was ever conveyed to me.

...

MR BURGER: No but do you remember that there was such a 'beraad' to which you were not invited?

MS VAN ECK: Yes.

...

¹⁶³ Transcript, page 48.

MR BURGER: Is it strange that you were not invited or is it above your level of authority?

MS VAN ECK: Above my level.

MR BURGER: And do you have an independent recollection of Mr Bonthuyzen coming back from that 'beraad' and reporting to you?

MS VAN ECK: Not reporting to me privately. I know after the 'beraad' all the sales managers went to Bloemfontein to a meeting where he had given us feedback on the 'beraad'.¹⁶⁴

[324] There is some documentary evidence of what may have been conveyed upwards to more senior people in Media 24. A document written by Bonthuyzen, and dated 10 July 2006, entitled "*Volksblad Groep Gemeenskapkoerante*" is sub-headed "*Decisions about Forum*". It states the following:

"At a strategic session in 2003 in Parys, it was decided to let Forum continue existing in its current form for the following reasons:

- serve as a stopper in the market for new entrants;*
- prevent Gold Net News growing in volume;*
- if a price war were to begin in Goldfields, Forum's rate allows us to offer the lower rates with Forum."¹⁶⁵*

[325] Bonthuyzen could not recall for whom the document had been prepared.¹⁶⁶ However, the fact that the introductory paragraph contains an explanation as to what Forum is, and when it started, suggests that the likely readers were persons senior to Bonthuyzen in the group, as those junior to him would be the staff in Welkom, who wouldn't require this information; secondly he was using the document to motivate the justification for keeping Forum going and for permission to employ an additional consultant – such a request by its nature would be directed to

¹⁶⁴ Transcript, page 2035-2036.

¹⁶⁵ Transcript, page 92 read with Record page 409.

¹⁶⁶ Transcript, page 90.

one or more senior to him in the group.¹⁶⁷ The formal tone is also an indication that it was directed to someone at head office level.

[326] Bonthuyzen then makes a point that became the heart of the debate over opportunity costs in this case which was alluded to earlier. He states that if Forum was to be closed, 27% of its monthly advertising income, and he then gives what this represents in a rand amount (R126 662) would be diverted to Vista, but the remaining 73% would either go to GNN or to some other advertising medium. He indicates that the customers are highly price sensitive and would not pay Vista's higher rates.

[327] Despite Forum's poor performance (its figures are set out in the document and in 2005, the immediate prior financial year, it evidenced its worst ever performance, recording a loss of over one million rand) the recommendation is that it be retained.¹⁶⁸ Bonthuyzen offers two justifications for this recommendation: "*For the same business reasons which presented themselves in 2003 as well as the contribution to common costs which would not go away.*"

[328] Since the business reasons which presented themselves in 2003 were set out earlier there is no mystery as to what he meant here – it is the so called 'stopper' strategy. In one sentence then, Bonthuyzen appears to seek the retention of Forum for what in this case have been argued are two contradictory reasons; a predatory purpose to prevent Forum growing in the market and to serve as a barrier to entry to others, but yet at the same time supporting the opposing objective – that it was retained because it contributed to common costs.

[329] But Bonthuyzen was not advocating a schizophrenic strategy. What this document suggests is that instead of thinking of the two objectives as mutually incompatible, it is perfectly conceivable that the one may exist without constituting the negation of the other. It seems perfectly rational, that managers such as Bonthuyzen wanted to engage in a predatory

¹⁶⁷ Record, page 411.

¹⁶⁸ Record, page 410 sets out table for losses and for 2005 this is recorded as R1 072 457.

strategy, but at the same time needed to ensure that it was not too costly either.

[330] Bonthuyzen was engaged in what he appreciated was a longer term strategy; but as he considered he knew what GNN's costs were, he assumed that it could not last that long. He was surprised he testified that it had.¹⁶⁹

[331] What is also of interest in this document is that it advances the same strategy that appeared in the Moolmanshoek document, three years prior to this one. This supports the view that the strategy to use Forum as a 'stopper' in early 2003, was still being considered well into the heart of the complaint period, (mid 2006).

[332] We don't know what happened pursuant to this document as no documentary response to it was discovered, but we do know that Forum was retained in the market, leading one to conclude that Bonthuyzen's suggestion was followed.

[333] An earlier, post Moolmanshoek document, dated 23 June 2003 and which appears to have been written by Bonthuyzen, casts more light on how the strategy was to be practically implemented. He notes that Forum has been going through various crises and so he is not convinced it will serve to win the business being lost at Vista. Netnews has become a spoke in the wheel as it is cutting tariffs at month end to cut Vista's wings. He notes that our plan to use the second last edition of Forum as "teenvoeter" is not paying off quite yet. For some reason or other, he comments, clients are not comfortable advertising in Forum.¹⁷⁰ He notes that they have taken tough action on certain discount customers and that some of them had been snapped up by GNN.

[334] We discuss later when we deal with the evidence of Van Eck the significance of the month end strategies of the respective papers.

¹⁶⁹ Transcript, page 22-23.

¹⁷⁰ Record, page 190.

- [335] The Commission's second factual witness to testify on the subject of intent was Hans Steyl. This is hardly surprising given that he is the complainant in the case. More surprising however was that Steyl's evidence, at first glance, appeared to support the probabilities of the Media 24 case rather than the Commission's.
- [336] The thrust of Steyl's evidence was that Vista was the predator. Steyl mentions this not only in his complaint to the Commission¹⁷¹ but later in his conversation with the Media 24 executives in – 2009¹⁷² and then again in his testimony in this case.¹⁷³ He mentions Forum, but describes it as constituting only a “*nuisance*”. Recall that it is the Commission's case that the predator is Forum. Media 24 rely on this apparent inconsistency, to suggest that this is entirely destructive of the Commission's case on intention. After all it argues, that if in the complainant's view Vista is the predator, but on the Commission's case Vista is not alleged to be pricing below some measure of cost, then the case on predation in terms of 8(c) must, on this ground alone, fail.
- [337] On the face of it this argument seems sound. However, just as it is important to read evidence of intention from the mouths of the predator with caution as the literature suggests, so we must not read a complainant's subjective statements uncritically either.
- [338] We must examine more carefully what Steyl has stated. Although his complaint seems centred on Vista, and not Forum, as the predatory vehicle, this is not surprising. As an entrant, his business strategy was to win market share from the larger of the two incumbents – Vista. When Vista did not increase its prices in the manner he expected – he had assumed it would charge a premium on its tariffs over GNN given its larger circulation and more established brand – GNN struggled to take away market share. From his point of view, it was this action by the larger publication that was more damaging to his greater ambitions than were

¹⁷¹ Complainant's Complaint Pleadings File page 3.

¹⁷² Record, page 1032 RD258 which is an internal email sent by Mr John Davids to Mr Howard Plaatjies in March 2009 which summarises the meeting between Mr Davids and Mr Steyl.

¹⁷³ Transcript, pages 506-509.

the actions of Forum, which had a smaller circulation than his own and was considered an inferior product.

[339] Thus from his subjective point of view, the pricing policy Media 24 adopted, for Vista was seen as more threatening to his business than Forum. Nevertheless his testimony does not discount the presence of Forum as a factor albeit that he had described it earlier in apparently dismissive language as constituting a ‘nuisance’. However, the entire sentence should be set out as it appears in his complaint:

“Up until 2004, when Vista and Forum started to cut rates, all three publications sold at market related advertising rates (Gold –NET-NEWS then sold at R17.50 per single column/centimetre. Forum has always been cheaper perhaps because of its smaller print order but probably also to constitute a “nuisance” factor in the Goldfields market.

Vista and Gold Net News were direct competitors, with Vista clearly in a dominant situation averaging 48 pages and more per week and Gold –NET-NEWS averaging 24 to 28 pages per week.¹⁷⁴

[340] Whilst granted, if we dwell on his choice of the term ‘*nuisance*’, that would suggest that in his mind Forum’s impact was trivial. But that would be a superficial reading of what he has said. His meaning is much more subtle. Forum on this version and consistent with Bonthuyzen’s testimony, is being used to serve a purpose. Why else the choice of words “to constitute a nuisance” and why else place the word *nuisance* in inverted commas. The words “to constitute a nuisance factor” suggest that Forum was being used as part of strategy and not that it was some trifling irritation. If that reading is correct his assessment accords with Bonthuyzen’s testimony.

[341] True, in the next sentence he describes GNN and Vista (not Forum) as direct competitors, but that must be read with what he has said in the previous sentence. Thus to characterise the complaint statement as inconsistent with the Commission’s case, is unfair and does not give the complaint a proper reading.

¹⁷⁴ Extract from complaint by complainant, Pleadings file page 3.

[342] There is further mention in the complaint which is inclusive of the pricing conduct of Forum.

[343] For instance, in an annexure to his complaint, which received little attention during the hearing, he stated:

“Four years later by 2004, Gold Net-News local rate was R17.50 excl. and Media 24 started cutting their rates for Vista and Forum in the Goldfields to 13.00 exclusive per sc/cm down to, in some cases as low as R 4.38 exclusive.”¹⁷⁵

He goes on to state in the same document:

“In all of the following instances, regular Gold-NET-NEWS advertisers have indicated since 2004 that Vista (and Forum’s) local per single column/centimetre (sc/cm) is now much lower than that of the complainant.”¹⁷⁶

He goes on to note:

“An interesting attachment to this document is a Forum quote of 1997, with a local rate of R 13.95 (12.24 excl) per sc/cm compared to their rates 11 years later.”¹⁷⁷

[344] Read as a whole, these remarks in an annexure, which forms part of his original complaint, do not discount Forum as a factor in his paper’s demise, albeit that his point of emphasis is Vista.

[345] Moreover, this is a debate about economics, not whether he has made the wisest choice of semantics. When asked to explain during his testimony what the effect of Forum was then, his answers again suggest an effect that is consistent with, and not destructive of, the Commission’s case on intention.

[346] For instance he explained that the presence of Forum made it difficult for GNN to raise its prices – if GNN had raised rates it would have lost business to the others; a move he described as constituting “sudden

¹⁷⁵ Extract from complaint by complainant Pleadings file page 7.

¹⁷⁶ *Ibid.*

¹⁷⁷ *Ibid.*

death". Forum's tariff price he claimed was below GNN's printing costs. He says he could have won about 40% of Forum's business. He then testified that "... *without Forum we might still have been in business*".¹⁷⁸ This last claim then is entirely consistent with the evidence of Bonthuyzen and the Commission's theory of intention.

[347] Under cross-examination he conceded that he regarded Vista as his principal competitor.¹⁷⁹ But this as we have noted, is for a good reason and not destructive of the notion of Forum's predatory role. For instance when asked about the mopping up theory, he rejected this strongly and said that the general plan was to stop GNN from operating.¹⁸⁰ Whilst it was put to him that he had described Forum as a nuisance, and he confirmed this, he was not taken further on this point and thus his version in chief was not challenged.

[348] The main point on the cross-examination was to put the figures to him that had been prepared by Genesis, Media 24's firm of economists, on aggregate tariffs over the period, and to suggest that Forum was priced so low relative to that of GNN that predation made no sense.¹⁸¹ It was put to him that Forum charged 50% less than GNN.

[349] Steyl's response to the table was that it did not accord with his experience in the market as he had to quote against quotes of the others.¹⁸²

[350] Later we deal with the these tariffs and whether they constitute evidence of the targeting strategy at local level in Welkom

[351] Media 24 put up Agnushka Van Eck as its main witness to rebut the Commission's case on intention. For all but one year of the complaint period, Van Eck was the advertising sales manager in Welkom, initially having come from Vista, but eventually responsible for the sales of both

¹⁷⁸ See transcript pages 471-2.

¹⁷⁹ Transcript, page 501.

¹⁸⁰ The mopping up theory relied on by Media 24 to some extent was based on a reading of the Moolmanshoek document discussed earlier. Here one of the proposals was that if Vista raised its price, some of its advertisers would leave, and hence Forum offering a lower price could "mop them up."

¹⁸¹ See Exhibit 10 for these figures.

¹⁸² Transcript, page 539.

Forum and Vista. The local advertising sales staff based in Welkom, referred to as consultants, reported to her. Since these representatives were the main source of sales of local advertising, and that was the main area of contestation between GNN and the other two titles, she was well placed to comment on whether there was a predatory strategy.

[352] Van Eck was first asked to comment on who the competitors were in the market. Recall that it is Media 24's case that GNN competed with Vista and not Forum. Her answer was both GNN and Forum competed with Vista. Granted she did not say that GNN competed with Forum.¹⁸³ But what is odd about this answer, is why, if Forum competed with Vista, and so did GNN, did she not consider drawing the obvious inference *viz* that therefore Forum and GNN must compete with one another to. It seems Van Eck was being careful to avoid this logical conclusion in her evidence.

[353] Van Eck denied any knowledge of a predatory strategy being used against GNN. If this was what Bonthuyzen had intended, she was never told about it. Yet internal documents suggest that regardless of whether she had been expressly told as such, she was certainly aware of;

- The danger GNN constituted to Media 24 in Welkom;
- That in the initial years GNN's low prices were hurting the two Media 24 titles;
- The necessity of preventing GNN from making money in the market;
- That Forum was to be used as the vehicle for attacking GNN;¹⁸⁴ and
- The conclusions of the Moolmanshoek workshop even though she did not attend.

¹⁸³ Transcript, page 1985.

¹⁸⁴ Record page 190; It appears from this document entitled "Versonderings Verslag Moolmanshoek" apparently prepared by Bonthuyzen on 23 June 2003, which Van Eck refers to in her Witness Statement at pages 57-58 para 131-132 that she (Van Eck) was at the very least aware of the strategy to use Forum's second last publication to attack GNN. To quote from the document "*Netnuus once again was [SIC] a spoke in the wheel as they are cutting tariffs at month-ends to clip Vista's wings. Our plan to use the second last newspaper in Forum as antipode [SIC] 'teenvoeter' is not paying off quite yet.*" In her Witness Statement Van Eck said the plan to use Forum's second last paper each month was "*also not altogether bearing fruit.*"

- [354] Van Eck testified that when Netnews entered it was not taken that seriously in the market place but that changed when Hans Steyl joined. As she put it "... *you could see that they were getting into the market.*"¹⁸⁵ In this respect her assessment of the different competitive threat posed by Steyl, as opposed to Alida Joubert, is consistent with the position of Bonthuyzen.
- [355] In the early years after GNN's entry she was, as evidenced from the record, the one Media 24 employee most concerned about what was happening in Welkom and the low prices that GNN was offering. A series of emails to Bonthuyzen evidences this concern and her seeming exasperation that those further afield (i.e. those based in Bloemfontein) were not taking the threat sufficiently seriously.¹⁸⁶
- [356] Perhaps her most robust formulation comes in an email dated 26 June 2001 when she refers to the necessity of "*hulle dadelik 'level' en nie 'n kans gee om geld te maak nie.*" When asked about the use of the English term *level*, which in the email is in inverted commas, she does not give an adequate explanation for her pugnacious turn of phrase, other than to say the word was italicised because she could not find a suitable Afrikaans word. Her best attempt is to explain the choice of the word *level* was to suggest *level* meant in that context an endeavour to equal GNN's prices.¹⁸⁷
- [357] However, this explanation seems unlikely. In the context of the sentence, *level*, whilst not an unambiguous term, suggests at least an aggressive disposition to eliminate a competitor especially when accompanied by the comment that we must not give them a chance to make money.
- [358] Comments of this nature are not isolated instances and continue into the complaint period. In the record at page 270 she is motivating to have more consultants, the purpose of which is to use Forum as a "*teenvoeter*"

¹⁸⁵ Transcript, page 2011.

¹⁸⁶ Transcript, page 2018.

¹⁸⁷ Transcript, page 2022-3.

against Netnews. Later she is recorded as saying that with two consultants at Forum, Netnews' market share is going to decline further.

[359] In a document in the record she has writes that "Forum regards Netnuus as opposition and targets its market for their advertising opportunities."¹⁸⁸

[360] When asked about this passage during testimony she explained that it made no sense for Forum to target Vista clients, so hence it targeted those of GNN. Forum, she said, looked at what GNN had by way of unique advertisers and targeted them.¹⁸⁹

[361] Whilst this document could be read as no more than a competitor's aggressive stance against a rival, it exposes contradictions in the version of Media 24. Firstly, it runs contrary to the version that Vista was the primary rival of GNN. This version is entirely consistent with that of Bonthuyzen. Secondly, it suggests that the use of Forum to target GNN and to thus protect Vista made sense as a strategy. Thirdly, it exposes the risk that Media 24 had by having two papers in the same market and the risk of cannibalisation that we discuss later.

[362] Van Eck's use of Forum as the vehicle against GNN is referred to again in the record in a document she authors when she motivates for more consultants in order to use Forum as a *teenvoeter* against Netnuus.¹⁹⁰ In the same document she indicates that Forum has taken away certain customers from GNN. Admittedly the document also refers to one customer of GNN's going to Vista. But this indicates the nature of the rivalry of all three papers. It is not the Commission's case that there was no rivalry between Vista and GNN. Clearly for some customers, such as the one instanced here, this was the choice; the question is what the effect was of Forum on this rivalry.

[363] A further instance of what appears to be the implementation of the Bonthuyzen Moolmanshoek strategy, i.e. to prevent GNN from expanding in the market appears from another document in the record written by Van

¹⁸⁸ Record, page 268.

¹⁸⁹ Transcript, page 2056.

¹⁹⁰ Record, page 270.

Eck.¹⁹¹ In a document entitled 'Project Gold Net News' Van Eck proposes a strategy for Forum and Vista to increase their market share. Suggestions are made as to what each paper should do in relation to GNN, in respect of focuses and promotions. In a slide entitled consequences she says that Vista must increase to an average of 60% market share and Forum to 16%. Then the remark is made that this will drive GNN to an only 19% market share.¹⁹² From the document it appears that GNN's market share was then for the calendar year 2004, on average above 20%, ranging between 20,4% and a high of 24.7%.¹⁹³ When asked the comment about driving GNN to 19%, Van Eck said this meant expanding the market so that GNN was left with 19%.

[364] Again this interpretation sounds like special pleading. The more obvious reading seems to take away market share from GNN so it was left at below 20%. This accords with Bonthuyzen's testimony again. In the same document the manner in which this is to happen is described. Forum must handle so-called special pages to keep them out of GNN's hands. This suggests again that the vehicle to compete with GNN was seen as Forum not Vista.

[365] Van Eck is the author of another document drafted in late 2007, where the use of Forum against GNN is again emphasised. In a note on comparative market shares of the three publications for Week 1 of November, Forum's market share exceeds that of GNN and the remark is "comparisons look good"¹⁹⁴ Although the comment doesn't evidence who GNN is being compared to, it is evident that it must be Forum whose market share has now leapfrogged GNN's, with Vistas' remaining fairly constant. However, any doubt on this score is dispelled by a comment made later that same month where she comments " *...although Forum has a tariff advantage it*

¹⁹¹ Record, page 289.

¹⁹² Record, page 294.

¹⁹³ Record, page 291.

¹⁹⁴ Email from Van Eck to Stella Diesel and Marietjie Benade dated 13 November 2007 - Record, page, 630.

*doesn't have a chance to work off losses the current growth of market share against Netnuus has had the positive aspect of motivating staff.*¹⁹⁵

[366] Bonthuyzen's evidence receives further corroboration from another documentary source, a Media 24 Business plan for the Free State area drafted in 2008/9 and thus significantly, at a time when Bonthuyzen was no longer with the company. We quote a lengthy extract from this document because of its telling nature.¹⁹⁶

"Shoppers

Business plans have already been written and are in place to begin the first Shoppers in the Free State and Northern Cape. The roll-out will be from April in Bloemfontein and there is the possibility of distributing it within the subsequent nine to twelve months in four nodes (Bloemfontein, Kimberley, Welkom and Bethlehem). The business plan has been written precisely for possible newcomers to the market.

*In short the plan is for it to be an eight page tablet that is inserted partially in some of our current publications. The business plan is compiled in such a way that the advertisements are being sold at a very low rate and only certain sizes are sold. The substantiation for this is that should a big entrant come into the market with low rates we can use the product/s to match rates with publications that are already established (very low rates) so that we cannot be reported to the competition commission by them for cutting rates and not giving them a fair chance to establish their business. The plan has also been written so that new advertisers, who cannot afford our current rates, are targeted for now. This is done on the one hand because we can reach new markets in low cost areas without entrance and on the other hand not to give newcomers a way in, should it become necessary.*¹⁹⁷

[367] The reference to shoppers as predatory vehicles, carrying low priced advertising is clearly evident here as well as the concern about being reported to the Competition Commission.

¹⁹⁵ Record, page 632 dated 21 November 2007.

¹⁹⁶ Record, page 678.

¹⁹⁷ Record, page 678.

- [368] The document was apparently written by Alda Roux who did not testify. It was put to Van Eck for comment who was not in a position to take the strategic issue any further.
- [369] Of course it can be said this was a plan to use shoppers as inserts in existing publications, and whatever its motives, the plan did not reach fruition during the complaint period, and that Forum was never converted into the shopper.
- [370] However, the plan contains the details of strategic thinking startlingly congruent with that espoused by Bonthuyzen *viz* using another low priced vehicle to create a barrier to entry or expansion to a competitor; an appreciation that such a strategy might circumvent successful complaints to the Competition Commission; and the identification of Welkom (where in 2008 GNN was still operating) as one of the areas for the strategy to be carried out.
- [371] This suggests that Bonthuyzen's strategy was not that of a lone-wolf or maverick employee, but consistent with thinking held more widely in the Media 24 Group at the time, it makes the likelihood that what he describes as the strategy more probable, rather than constituting the recent invention of a disgruntled former employee.
- [372] In conclusion, the evidence of direct intention to use Forum as a predatory vehicle against GNN is supported, not only by the oral testimony of an erstwhile employee, but also documentary evidence in the record throughout the period. The documents authored by Bonthuyzen show that his testimony in the hearing was consistent with his own writings at the time. Further the record contains documents evidencing the same intention authored by others and at dates throughout the period.
- [373] The attempt to rebut Bonthuyzen's testimony by Media 24 has not been convincing. Whilst we appreciate that they could not rely on the person at the time who had the greatest personal knowledge of the existence or not of such a strategy, namely Naas Du Preez due to his passing away, Media 24 did not call witnesses whom the record suggests may have

been in a position to rebut Bonthuyzen, instead, Media 24 called witnesses whose structural relationship to Bonthuyzen meant that they knew very little, they were either too senior or too junior.

[374] The two senior executives who were called, Jan Malherbe and Francois Groepe, exhibited little local knowledge of the Welkom situation. This is not meant as a criticism of them. Welkom, and more especially Forum, figured so low in the Group's earnings hierarchy that there was no reason that its fortunes, or lack thereof, should have come to their attention as executives in charge of the whole group. Malherbe, as we have seen from the earlier emails in 2001, was aware, at least, that strategies were being taken to deal with the threat posed by GNN and seems content to have left this to his local managers to deal with. Hence, in his email to Bonthuyzen, in reference to the problems being posed by GNN, he suggested letting Du Preez deal with the matter on his return.¹⁹⁸

[375] Van Eck, who was junior to Bonthuyzen, as noted earlier, also denied knowledge of the strategy. However, Bonthuyzen does not suggest that those more junior knew of the strategy and Van Eck appears to have been kept in the dark about strategic issues as we will note when we discuss later how Media 24 planned to close Forum down.

[376] Indeed, surprisingly Van Eck admitted during testimony that she did not know whether Forum was operating at a loss or not as she was not privy to its financial position. As far as she was concerned the papers were profitable if they were meeting their advertising targets.¹⁹⁹ If Van Eck was not apprised of whether Forum was operating below cost, there would be no need to explain a strategy to her that required keeping Forum open despite it incurring regular losses. There would be no need to justify this to her – she did not know. Further given the past history of the complaint from Alida Joubert, keeping such a strategy discrete made perfect sense.

[377] Nor was there any need to communicate the rationale for the meet and beat strategy to Van Eck as without such prompting she had a keen

¹⁹⁸ Record, page 58.

¹⁹⁹ Transcript, page 2008.

appreciation of the role she had to play. The documents we have cited from the record drafted by her from 2001 onwards show her appreciation of the fact that Forum was to be used as the chosen vehicle to compete with Vista and the reasons why this was.

[378] As noted above, Media 24 failed to call witnesses, who, at least from the documentary record, may have been in a position to rebut the allegations of the existence of the strategy. Alda Roux is the author of the key business plan and was a key executive in Bloemfontein at the time of the demise of both GNN and Forum. Rassie van Zyl was Naas Du Preez's successor from November 2006,²⁰⁰ and gave the order to Alda Roux to prepare the memorandum to motivate for the closure of Forum.²⁰¹ Media 24 had prepared a witness statement for Van Zyl but he was not called.

[379] Media 24 had intended to call Jonathan Crowther, whose witness statement had been put to Bonthuyen in cross-examination, to test the latter's version of events at Moolmanshoek. However, it chose at the last minute, not to call him despite him being present at the Tribunal and ready to give testimony.²⁰²

[380] The one witness who Media 24 did call who had been based in Bloemfontein at the time was Anel Coetzee. Although she only joined Media 24 late in the complaint period she still overlapped with time of Bonthuyzen. When asked by the Commission's Counsel if she was aware of Bonthuyzen referring to the stopper strategy, she recalled that he had referred to Forum as a stopper. Asked what he might have meant by this she said its purpose was to keep market share. Pressed if by that he meant keeping it even if it was loss making to keep market share, she replied that was how she understood it.²⁰³

[381] In conclusion, the evidence of direct intention to use Forum as a predatory vehicle against GNN is supported, not only by the oral testimony of an

²⁰⁰ See Van Eck statement record page 24. Van Zyl statement record page 152.

²⁰¹ Record 1334 email from Van Zyl to Alda Roux dated 6 November 2009.

²⁰² For this reason the Commission brought an application for the Tribunal to call Crowther which Media 24 opposed. Our reasons for this decision need not burden this decision but were published on 20 May 2014.

²⁰³ See CC heads page 114, and Transcript page 2811.

erstwhile employee, but also documentary evidence in the 1record throughout the period. The documents authored by Bonthuyzen show that his testimony in the hearing is consistent with his own writings at the time. Further, the record contains documents, authored by others, evidencing the same intention at various dates throughout the period. Media 24 failed to call direct rebuttal evidence, despite having access to witnesses from the Bloemfontein office, who would have been able to testify to the strategy for Forum at the time.²⁰⁴

[382] The Commission suggested we draw an adverse inference from this. We have not gone that far. However, to the extent that witnesses who were available to rebut Bonthuyzen's evidence were not called, we have accepted his evidence, subject to the caveats we discuss later. Secondly, where a document could have been given an interpretation by a witness, who could have been called to give it an alternative explanation for its content, we have relied on its ordinary meaning or its meaning in the context of earlier documents, on the assumption that if this ordinary interpretation was not correct, the appropriate witness would have been called to testify to a different reading.

[383] The evidence of direct intention, whilst comprising some bellicose language, constitutes more than just war talk by a competitor about its rival. The strategy devised at Moolmanshoek and which is evidenced later in the documents, constitutes a plan to eliminate a competitor in the market by using one of its titles, which they had earlier on considered closing, as a barrier to expansion in the market to protect the market position of the larger title. This would be done by targeting local advertisers and responding to GNN's strong penultimate month-end edition by a penultimate month-end edition from Forum, as we gather from the document authored by Van Eck and her own testimony.²⁰⁵ The plan had to be implemented carefully as the Volksblad management had already faced accusations of engaging in predatory pricing by Alida

²⁰⁴ The Commission's counsel asked Van Eck in cross examination if she knew why Roux had not been called and she was unable to say. (Transcript page 2134).

²⁰⁵ Record page 168 and 270.

Joubert and they were astute to avoid a repetition of those problems, hence steep price cuts did not characterise this period, but rather the strategy was to confine GNN to a share of the market insufficient for it to be profitable over the longer term.

[384] We noted earlier in this section that Bonthuyzen was considered a controversial witness. This comment needs to be explained as it relates to the credibility of his testimony. Bonthuyzen was dismissed from his employment with Media 24 in April 2008 for allegedly making false travel claims. Criminal charges were levelled against him and he was convicted on some counts but not others. At the time of his testimony he had appealed the convictions but the matter had not been finalised.

[385] At some time, before the commencement of the hearing of this matter, he was approached by the Commission to give evidence. He then contacted Media 24's attorney and offered, if he was paid, to ensure that certain documents which he claimed to have, were not given to the Commission. Media 24's attorneys quite properly rejected this offer and had nothing further to do with him. When the Commission required him to testify Bonthuyzen refused to be of further assistance to it (although he had consulted with the Commission's team earlier to give them a witness statement) and he had to be subpoenaed. This he confirmed in the hearing where he explained that he no longer wished to be drawn into the dispute between the Commission and Media 24.²⁰⁶

[386] When asked about his request to be paid by Media 24's counsel during the hearing he admitted the request but he said he only wished to be compensated for his legal costs in the criminal matter which he considered had been unjustly brought against him. All this means that Bonthuyzen's reliability as a witness needs to be approached with caution.

[387] It needs to be said that his offer to be of assistance to the Media 24 legal team was to destroy documents not to make up testimony against

²⁰⁶ See transcript, page 5.

them.²⁰⁷ It was not a threat to fabricate a version against Media 24 if he was not compensated.

[388] Indeed Bonthuyzen does not seem to have been hostile to Media 24 during his testimony as he made numerous concessions during testimony under cross- examination and he often seemed more like a man eager to leave the witness box, than a former employee with a vendetta.

[389] Nevertheless, we have only accepted his testimony in respect of direct intent to the extent that it was consistent with documents from the record at the time, or where it has been corroborated by other witnesses. We have rejected as too speculative other testimony for which there was not this type of corroboration. We have thus not relied on his testimony in his witness statement and which he repeated in oral testimony, to the effect that Media 24 had deliberately manipulated Forum's costs so that the variable costs appeared to be lower than they in fact were. An example of this was manipulation of printing time. Since these facts could find no support in either the record or the testimony of others, we have not accepted this evidence.

[390] This does not mean we should reject those other aspects of his testimony for which there is corroboration. Our courts frequently take the approach that it is permissible to rely on some parts of a witness's testimony even if one rejects others and this is what we have done.²⁰⁸

[391] Van Eck's testimony too needs to be approached with caution. Here the caution emerges not from events external to the hearing – as with Bonthuyzen - but certain unsatisfactory aspects of her testimony where she demonstrated a propensity to testify to facts she considered helpful to her employer's version of the case, despite its inconsistency with her own

²⁰⁷ See Record, page 1556 for his email to Werksmans dated 20 June 2012. Werksmans were Media 24's attorneys in this matter.

²⁰⁸ See *S v Trainor* 2003 (1) SACR 35 (SCA) at [9] Navsa JA said:

"A conspectus of all the evidence is required. Evidence that is reliable should be weighed alongside such evidence as may be found to be false. Independently verifiable evidence, if any, should be weighed to see if it supports any of the evidence tendered. In considering whether evidence is reliable, the quality of that evidence must of necessity be evaluated, as must corroborative evidence, if any. "

writings in documents at the time some, of which we have considered earlier.

[392] We will deal in detail later with the credibility of her evidence on how the 27% diversion figure was arrived at, but our conclusion is that her explanation, for why the wrong figure was conveyed to Bonthuyzen, is implausible and unsatisfactory. Further her attempts to explain away certain language she herself had used in documents such as ‘stopper’ and ‘levelling’ the competition, were implausible and manifestly *post facto* constructions to remove the sting from the language she had at the time phrased in bellicose terms.²⁰⁹ On the other hand, when not defending her own language choices or actions, Van Eck was a highly knowledgeable and informative witness, whose recollection of events was better than most who testified and whose feel for the local context has aided us in our understanding of events.

Evidence of indirect intent

[393] The Commission’s case also relies on indirect evidence of intent. We consider three forms are pertinent to this enquiry.

- Evidence that Forum was consistently loss making over the complaint period;
- The circumstances surrounding the closure of Forum and their link to the purchase of Vista in 1999;
- The cannibalising effect of continuing to operate Forum had on Vista’s revenues.

(i) *Forum’s losses*: When Forum’s closure was considered by Media 24’s then Chief Executive Francois Groepe, he was given the table set out below. This table provides figures over a nine year period from 2000 to

²⁰⁹ In her witness statement she says she used the term “*level them*” directed at GNN, to mean equal their tariffs. (See Witness Statement paragraph 96, Record page 48.) She says she never used the word “*deurstop*” herself but understood it to be a product that will hold its position in the market. (See Witness Statement paragraph 126, Record page 56.) Both explanations stretch language beyond what is plausible from the context.

2009. This is a period that precedes, coincides and follows, the complaint period (2004 – 2009) and hence is useful to consider.

9 jaar verliese Forum									
Forum Analysis	2001	2002	2003	2004	2005	2006	2007	2008	2009
Contribution/(Liability) to Shared costs	-154,923	-104,838	34,726	136,273	7,366	17,680	89,775	202,268	-3,532
Shared Costs (Gesamentlike dienste + Vaste koste)	-574,200 Werklik	-541,396 Werklik	-623,272 Werklik	-620,499 Werklik	-665,733 Werklik	-1,090,137 Werklik	-957,517 Werklik	-633,701 Werklik	-481,730 Werklik
Net Loss	729,123	646,234	588,546	484,226	658,367	1,072,457	867,742	431,433	485,262

[394] This table shows us the following – Forum’s losses and Forum’s contribution to common costs during the nine years.

[395] The first point to observe and on this point there is no dispute – Forum was loss making during all nine years. There are suggestions that even before this it was loss making. According to Bonthuyzen, Forum was not profitable even in 1999 when the merger with Vista occurred.²¹⁰ In Media 24 documents, at the time its closure was being contemplated, one of its executive’s comments, “*Forum never made a profit even in good times.*”

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[396] This consistent accounting evidence of losses powerfully supports the Commission’s case that Forum was kept in the market for a predatory purpose, as it would make no business sense to keep a loss making publication open for such an extended period.

[397] Media 24’s rebuttal case on this is that Forum was throughout, with one exception, making a positive contribution to common costs.

[398] The idea being that since these costs would remain if a publication closed down, as long as it was contributing towards them, even an unprofitable publication was worth keeping on a life support system. (As can be observed, in two of the years set out above, Forum did not even make a positive contribution to its common costs. This, according to Media, should be considered aberrant; as the losses were incurred due to a fraud

²¹⁰ See Transcript, page 10. He testified “*I started at Volksblad Group in 1999 and then Forum was already at a loss....*”

²¹¹ Rassie Van Zyl in an email to Alda Roux, Thys Botha and Christo Van Staden dated 15 December 2009, Record, page 1357.

perpetrated by members of Forum's then advertising staff. Thus from 2003 at least, it was making a positive contribution to these positive costs.)

[399] Even if one accepts for the time being that this version was a legitimate one, there are two problems that detract from its credibility. Firstly, the decision to close the publication made in late 2009 and implemented in 2010, after years of losses, might be credible if fortunes differed in the last years from prior years. Recall, that Forum was not new in the market. It had been part of the Media 24 stable since 1983. Given that it was now being closed after nearly 27 years in the market which explanation is more probable for its closure in 2009? Media 24's version is that it was no longer contributing to common costs, and the view of the market following the 2008 recession, was further cause for pessimism.

[400] However, as the Commission's expert Dryden points out, based on the contribution to common cost figures, Media 24 should have closed Forum much earlier and instead chose a time when that contribution appeared to be improving. Thus, according to the Commission, the contribution to common costs (although a theory it does not accept at any time) was stronger in December 2009 than at any other time.

[401] Dryden also examined Forum's budget forecasts during this period. Before the commencement of each financial year the Media 24 staff would prepare a budget for the particular publication for the following year. Forum, he testified, never met its budget expectations in any financial year during the complaint period. Those of its witnesses, who sought to explain this, contended that there was always a sense that the paper would be turned around.

[402] It is also difficult to believe that a group with Media 24's experience and sophistication of the publications market, despite year after year of disappointing results, would still harbour some 'Pollyannaish' belief in the turnaround of Forum's fortunes, without investing in it or changing its business strategy. Media 24 did neither. Indeed, as Bonthuyzen testified, they elected not to convert Forum into a shopper. We know also from the

internal documents referred to earlier, that they had contemplated closing Forum and Vista Tuesday as far back as 2001, yet they did not do so in the case of Forum. Despite a brief experiment in 2009 to convert Forum into a more rural based publication, this again was not pursued with any enthusiasm or self-belief, despite some adherents such as Van Eck, as we discuss later.

[403] Dryden argued, correctly in our view, that one can legitimately draw an adverse inference from Forum's persistent failure to meet budget forecasts over a period of time. As he put it, "*Forecasts that are persistently wrong in the same direction are unreasonable.*"²¹²

[404] A further difficulty with the contribution to common costs defence was the contradictory approach taken to it by Media 24's own witness. Jan Malherbe also testified on this issue. While his evidence-in-chief supported the contribution to common costs thesis, his inconsistency on this point was exposed under cross-examination. Asked how much of a contribution to common costs would justify keeping a publication open, he engaged in some lengthy fencing with counsel. Whilst conceding that the common costs should be substantial or not insignificant.²¹³ He went on to qualify this concession saying substantiality would be area specific (i.e. something significant in Welkom might not be in Gauteng) and the paper's prospects would be another;²¹⁴ however later, when pressed on actual figures, he recalled that Naas Du Preez felt that Volksblad was carrying too much of the common costs and the community papers too little. This he explained was rectified, and explained the apparent spike in Forum's common costs to R965 000 in 2005, when in prior years they had been in region of R500 000 to R600 000.²¹⁵

[405] Malherbe's comments about the degree of managerial discretion over the allocation of common costs between group titles, and the acknowledged spike in costs in 2005, from those allocated in prior years, casts serious

²¹² See Exhibit 17, Dryden Slides, number 27.

²¹³ Transcript, page 1511.

²¹⁴ Transcript, page 1511.

²¹⁵ Transcript, page 1516.

doubt as to whether this metric constituted a reliable basis for determining the continuation of a publication. If managers themselves saw these figures as “... *an arbitrary thing*”²¹⁶ then one has to fall back to what Malherbe termed as the paper’s “*prospects*” as the more solid reason for deciding to continue it, when it was routinely unprofitable from one year to the next. Yet even this basis of justification was flawed if we consider the budget as a metric for future prospects, because as we have seen, it routinely failed to meet these projections. Nor is there any evidence that Media 24 came with any big idea or new investment in Forum to turn its prospects around. What changes were made amounted to small scale tinkering in staffing levels among consultants.

[406] Thus on the probabilities, the Commission’s theory that Forum was retained for predatory purposes, seems the more likely explanation than the business rationale offered by Media 24.

[407] Media 24 also advanced a second rationale for why Forum was kept open all these years despite being consistently loss making. This was the so-called mopping-up rationale, according to which, Forum was there to take up the demand from advertisers who could not afford Vista’s rates, given Media 24’s wish to increase Vista’s rates, now that the price war period with Forum (which pre-dated the merger) was over.

[408] Although there is some basis in the record that this had been considered at some time before the complaint period, it also seems that the likelihood of this being successful on an on-going basis was soon discounted. In a document referred to earlier, Bonthuyzen comments that Forum had not been successful in mopping-up advertisers who had left Vista and indeed some had gone to GNN.²¹⁷

[409] If the mopping-up rationale was seriously considered rather than being an earlier idea that was discounted later, the closure of GNN in 2009 would have been the ideal opportunity to retain Forum.

²¹⁶ Transcript, page 1515. See page 47 of these reasons for the full quotation.

²¹⁷ Record, page 190.

- [410] We know from the record that Vista's rates increased substantially after GNN was closed. This would have been the ideal opportunity to retain Forum in the market; to 'mop-up' those advertisers who left Vista and absent GNN had nowhere else to turn to. Instead Forum was closed and prior to that, surprisingly, Media 24 briefly raised its tariffs to R11.32 sc/cm from R9.83 sc/cm in FY2007/08.²¹⁸
- [411] The mopping-up rationale, based as it seems, on the thin evidence of the suggestion contained in the Moolmanshoek minutes quoted earlier, is not credible.
- [412] It suggests that Media 24 considered there was room for it to have two community newspapers in Welkom. Yet in 2009, one of the influential figures in the decision to close Forum, Rassie Van Zyl observed: "... *there isn't room for two community papers in Welkom.*"²¹⁹
- [413] If the mopping-up theory was correct such a remark would not have been made by a key executive in Volksblad at the relevant time.
- [414] Rather, Van Zyl's remark is more consistent with the Commission's cannibalisation theory, discussed earlier in the section on avoidable costs. As we stated earlier, we accept the figure of 27% suggested by Ms Van Eck at the time is probably a conservative figure, but taking it as the best evidence we have on the effect, the 27% still had a substantial negative effect on Vista, making the retention of Forum irrational unless it served a different purpose. That Van Zyl saw this so clearly in 2009, begs the question as to why others did not earlier.
- [415] The answer given by Bonthuyzen is the more plausible explanation. Forum was being retained to counter GNN for as long as the latter was in the market. Once GNN had exited, the rationale for having two papers in Welkom owned by the same company, no longer existed.

²¹⁸ Exhibit 10.

²¹⁹ Email from Rassie Van Zyl to Thys Botha and Christo, Record page 1357.

Closure of Forum

- [416] Forum published its last edition in January 2010. It closed approximately 10 months after publication of the final edition of GNN. Why did a newspaper, which had been in the market since 1983, close so soon after the demise of Media 24's only rival in the community newspaper market in the Goldfields area.
- [417] The Commission relies heavily on the relative contemporaneity of the closures to suggest that this is consistent with its theory of the use of Forum as a predatory fighting brand. Once it had served its purpose there was no business justification for its continuity – it just required a decent interval before its closure. Evidence of the decision to close, emerges shortly after the demise of GNN, as early it seems as mid-2009.
- [418] Media 24 sought to de-link the two closures. On its narrative the only common facts linking the closures were an economic downturn starting at the time of the world-wide recession in 2008. Advertising spend reduced in this period and unsurprisingly although all three papers suffered, the two smaller ones bore the brunt the hardest, as when advertising spend declines, customers stick to the strongest titles. Media 24 contend that Forum's closure was being contemplated as early as 2008 i.e. a date preceding the exit of GNN, but various strategies to re-position the paper were attempted first, and when these failed, the decision was to close the paper against a backdrop of belt tightening more generally in the Media 24 Group. Moreover, not all agreed that closure was necessary, with those in Welkom, such as Van Eck, keen to give more time to the re-positioning experiment.
- [419] The record is not complete for this period. Indeed internal documents of Media 24, post the 2009 closure of GNN, are missing despite the fact they could be most informative on the subject.
- [420] Thus what we have of the record – a mixture of Welkom reports on the state of the business viewed in the moment, as comments on performance on month by month basis against set advertising targets, are

mostly, in Forum's case, about gloom with the occasional moment of optimism.

[421] A closer examination of Media 24's record and testimony reveals the following. Although GNN closed in April 2009, having come out sporadically rather than regularly in the course of that year, it had already very publically signalled its demise in December 2008, when it told readers in an apparent final edition that it would be closing and blamed Vista for its troubles. Van Eck testified to this as she recalls being upset by the accusation.²²⁰

[422] However, contrary to what it had stated, GNN survived into the following year, producing a few editions until the last in April 2009. At the same time in January 2009, Steyl had lodged his complaint of predatory pricing with the Commission. Thus Steyl had brought his complaint at a time when he was still in the market, albeit reeling.

[423] Then in February 2009, Steyl made his strange overture to Media 24, inviting them to buy his publication. His meeting was with two senior executives in Cape Town who presumably, at the time, were not familiar with the local situation. For that reason they gave him no response at the meeting and approached Alda Roux for information. Roux got information back from her local contacts who estimated that GNN's distribution was down to 6000 copies and that its tariffs were half those of Media 24's and that its distribution was confined to businesses. Her source told her "*... in a month they will be out of the market*".²²¹

[424] Roux's informant was almost right. It closed in April.

[425] Why did Media 24 not close Forum shortly thereafter, if it was only in the market to serve as a predatory vehicle and its task had with the exit of GNN, now been accomplished?

[426] From the record of Media 24's documents during that period, two concerns emerge. First, it is evident that late in 2009 Media 24 executives

²²⁰ Transcript, page 2106.

²²¹ Record, page 1030.

were still concerned about the appearance of an opposition newspaper in the Goldfields. We see this in a Media 24 consultation document dated 21/10/2009 (according to the index), which deals with reasons why certain publications that were “*onomkeerbare*” were not closed. The answer given is that for strategic reasons, Media 24 cannot just close publications and withdraw from the market as it gives competitors the opportunity to “...*make themselves at home in the Free State market.*”²²²

[427] This comment suggests that Media 24 was wary of new entry into markets where it operated and presumably unsure if GNN would resurrect itself again, after having survived a further quarter, after its death was announced in the December of the previous year; caution was thus understandable in it thinking the market might still be open for contestation.

[428] Media 24 executives also knew, from Steyl’s overture to them in February 2009, that he was intending to sell his paper if he could not just close it. Although they had turned him down he might find another buyer willing to enter.

[429] Secondly, Media 24, the record shows, was clearly concerned about the consequences of the closure of Forum would have on the pending investigation by the Commission. There are continual references to the investigation in minutes during this period. In 2010 the Commission subpoenaed a wide range of documents from them and despite challenging the subpoena it was upheld.²²³

[430] However, by September 2009 it appears that Media 24 felt more confident about its situation. In a Media 24 monthly report, dated September 2009, mention is made of the fact that that they had submitted a “*lywige document*” to the Commission and that the Commission was satisfied with it “... *en ons hoef nie meer voor die Commissie to verskyn nie.*”²²⁴

²²² Record, page 1301.

²²³ Case number 18/x/APR10.

²²⁴ Record, page 1278.

- [431] Later in the year, in December, the month when the decision to close was finally taken, Van Zyl, in an email to Alda Roux, Thys Botha and Christo Van Staden says that Ashoek (the internal legal counsel of the group) has advised that Forum's closure would have "...no impact on the Competition Commission and that it could easily be incorporated into Vista".²²⁵
- [432] These facts suggest that the delay in closing Forum was driven by two strategic considerations – the possible re-emergence of another competitor and legal concerns given the Commission's investigation.
- [433] However, Media 24 also rely on the fact that the closure of Forum had been contemplated prior to the closure of GNN, and that although this proposal had not been implemented, the fact that it was considered then, in its view, serves to break the nexus between the exit of GNN and the subsequent closure of Forum that the Commission seeks to draw. Expressed differently, Media 24 contend that the closure of Forum was a decision made independently of any consideration of what was happening or did happen to GNN.
- [434] It seems clear from the record that at various times prior to April 2009, Media 24's personnel had at least contemplated the closure of Forum. The request from Bonthuyzen to Van Eck in 2006 that lead to the controversial 27% figure, was in Van Eck's view, a request made because management were contemplating the papers closure.²²⁶
- [435] In November 2006, Rassie Van Zyl had requested Alda Roux to give input on the possible closure of Forum.²²⁷
- [436] It is hardly surprising, given its poor performance that consideration had from time to time been given to closing Forum. Indeed, we know from Jan Malherbe's email in 2001, that closing publications was being considered as early as then – one year after Media 24 had acquired Vista from the

²²⁵ Record, page 1357.

²²⁶ Transcript, page 2095. She also said that Molly Green had told her that she (Green) had heard rumours that Media 24 was going to shut Forum down.

²²⁷ Record, page 1334.

Caxton group. But the point is that despite this, it was never closed prior to the exit of GNN.

[437] Media 24 also relied on the fact that the decision to close Forum was finally made by the then CEO of Media 24, Francois Groepe. Groepe was called as a witness and he testified to the fact that it was his decision. His decision was based on a memorandum he had received from Volksblad management and answers to various queries he had raised arising from it.

[438] But although Groepe formally made the decision, which appears in the Media 24 system of authority, to require the CEO's sign off, the document trail suggests that the *de facto* decision to close was made much earlier by local management in Bloemfontein.

[439] The first signs of their dissatisfaction came in a proposal, made during a teleconference call on 2 September 2008, to make Forum, and five other publications in the local group, part of a pack of 5 which would be jointly marketed as a publication called the Bulletin.²²⁸

[440] Nothing seems to have come of this idea, because later in the same month a meeting of Volksblad management decided that Maluti and Forum had a year to improve, otherwise they would be closed down.²²⁹

[441] Despite this, in January 2009, the minutes record that Forum's tariffs are to be increased by 17%. This is a remarkable figure given that, according to Van Eck's testimony of earlier years, tariffs increased in the 6.5% -10% range.²³⁰ Of course this was an ill-considered move perhaps precipitated by GNN's anticipated demise after its December closure announcement. Unsurprisingly the same documents record that Forum lost advertising as a result.

[442] During 2009, it seems around mid-year, there was an attempt to reposition Forum as a "*plattelandse*" newspaper. What this meant is not entirely clear from the record, but it appears to be an attempt to enlarge

²²⁸ Record, page 830. The other regions were papers from N. Cape, Kuruman and Maluti. Note that Van Eck is not present at this meeting, but Alda Roux is.

²²⁹ Record, page 840.

²³⁰ Transcript, page 2031.

the geographic readership of Forum, to make it wider than the Welkom area, but retain its target reader demographic of largely conservative white readers.

[443] That too seems to have failed. Van Eck appears to have thought the experiment was not given enough time, her Bloemfontein managers felt it was enough.

[444] It is not clear from the record precisely when the Bloemfontein management decided to finally recommend closure, as the record of discovered documents of that stage is incomplete. We know a strategic meeting took place in July of that year, but have no minute for it.²³¹

[445] What correspondence we do have is an exchange of emails sent later in 2009.

[446] A Media 24 monthly report, dated July 2009, recorded that Forum had been budgeted for a R2 254 loss, but had achieved one of R47 560. It recorded that the publication's distribution area had been changed, with effect from 1 June of that year, to gain an additional income stream. Presumably this was a reference to the rural experiment of Van Eck.²³² At the same time the on-going Commission investigation was being reported on.²³³ An exchange of emails in August of that year, between Van Eck and others, indicated a difference of opinion over the new strategy, with Van Eck seemingly wanting to give it a try and the others apparently averse to increasing Forum's circulation beyond a total of 18 000.²³⁴ Given Forum's previous total circulation figure of 30 000, this amounts to a 40% drop in circulation.

[447] At the same time, as expressed in an email of the same day, the sales manager was receiving complaints about Forum from clients and seemed

²³¹ Under cross-examination about the strategic meeting of Volksblad in July 2009, Van Eck was certain that a strategic meeting had been held, and that minutes would have been taken. The cross-examiner probed her on whether a decision was taken to close Forum at this meeting, and her answers alternated between apparent certainty that it hadn't and uncertainty as to what was discussed about Forum. Transcript 2154 - 2156

²³² Record, page 1203.

²³³ See Record, page 1210 and in likewise in September, Record, page 1218.

²³⁴ Record, page 1226.

alarmed. She copied the assistant director, Christo Van Staden, who in an email to Van Eck that same day said he was very worried about Forum “... *we have to do something*.”²³⁵ He asked to speak to them. In an email to Alda Roux on 19 August 2009, he remarked that after having met with the others (it seems *inter alia* Van Eck) they were going to come up with a plan to improve Forum’s loading and circulation.²³⁶

- [448] Following this email, on the same day, he sent an email to Van Eck and Karen Herbert wherein he asked for proposals about how to improve Forums’ loading and where to distribute. In the email he also worked on a draft motivation but it is not clear to whom this was addressed. What is significant is the reason he gave for continuing to keep Forum. He noted that Forum had struggled in the past few years against Vista, the market leader. One of the reasons was that both papers were serving the same market and where this happens, the older, more established title has a great advantage as the leader in the area. But then he goes on to explain why Forum could not be closed. “*Die rede ... is dat dit as strategies belangrike stopperprodukt dien om opposisie uit die gebied te hou.*”²³⁷
- [449] Here is yet another Volksblad executive giving the same reason that Bonthuyzen has for Forum’s continuation in the market, despite the fact that it was struggling and they had another product in the same market. Notable as well is his choice of language; Forum is a “*stopperprodukt*”. Similar terminology to that employed in the Moolmanshoek document of 2003.
- [450] He also noted that the publication was getting thinner and that the perception was that it was an advertising pamphlet.
- [451] Van Staden drew the conclusion however, was that Forum needed more support given how it had only recently changed to its new format.²³⁸

²³⁵ Record, page 1228.

²³⁶ Record, page 1237.

²³⁷ Record, page 1238.

²³⁸ *Ibid.*

- [452] On 4 September 2009 a management meeting of managers in the Free State, led by John Davids, who at the time was Volksblad's general manager, took place. Davids notes the problems of the recession and how it had affected community newspapers.²³⁹ Forum was described as one of the problem publications about whom there has always been a question mark. Davids says that Forum's future would be decided at the end of September.²⁴⁰
- [453] In a Media 24 consultation document dated October 2009, which was prepared for a retrenchment that took the form of a question and answer, the question was asked why certain publications had been kept going even if they were loss making. The response was that certain publications could not just be closed as it gives competitors the opportunity to "... *make themselves at home in the Free State market.*"²⁴¹
- [454] The final decision to close Forum appears to have been taken at a budget meeting of the Bloemfontein leadership on 29 October 2009. The minutes are written cryptically and the denouement is recorded in one phrase - "*Haal Forum uit*". It is then recorded that "... *40% totale inkomste van Forum skuif na Vista*".²⁴² Later in the same minute it is noted that Forum's legal costs would be moved over to Vista.
- [455] On 6 November Rassie Van Zyl requested Alda Roux to draft a memorandum to motivate the closure of Forum. The motivation was sent to him 27 minutes later with the remark that '*Christo and Thys had given insights*'.²⁴³ Given the detail contained in the memorandum and the acknowledged consultation, it is probable that this had been prepared well in advance of the request.
- [456] A teleconference call was then set up with Abraham Van Zyl, the chief executive officer of newspapers, which takes some time to set up;

²³⁹ Record, page 1262.

²⁴⁰ Record, page 1265.

²⁴¹ Record, page 1307.

²⁴² Record, page 1323.

²⁴³ Record, page 1334.

seemingly till mid-December.²⁴⁴ Rassie Van Zyl prepared his motivation for Abraham Van Zyl in an email of the same date as the proposed call (15 December 2009).²⁴⁵ (We have referred to this document earlier. It is the one that records no place for two or more community newspapers in Welkom.)

[457] Abraham Van Zyl then sent an email to Groepe on 17 December 2009. In it he says that 'Dailies and Communities' has recommended Forum's closure and that he supports this. Groepe emailed him back asking for Forum's figures for the past 3 years.²⁴⁶ The memo was then sent to Groepe on 21 December.²⁴⁷

[458] On 10 January 2010 Groepe finally told Abraham Van Zyl and Plaatjies to proceed with the closure of Forum. The following day Rassie Van Zyl reported to Abraham Van Zyl that they were commencing the process of closure.

[459] Forum's last edition was published on 27 January 2010²⁴⁸ and confirmed in the monthly report for January 2010.²⁴⁹ That the closure had positive effects on Vista becomes apparent in a report for March 2010, where it was reported that Vista had exceeded its goal by 17.3%.²⁵⁰

[460] But evidence of what the Commission considers the real motive still appeared in this correspondence. In this email signalling the end of Forum, the author, Rassie Van Zyl, tells his superior Howard Plaatjies that "*... ons is verder besig om 'n strategie saam te stel om geen gaping in die mark te verseker en om die omsette (turnovers) van Forum te behou by Vista.*"²⁵¹

²⁴⁴ Record, page 1341.

²⁴⁵ Record, page 1357.

²⁴⁶ Record, page 1367.

²⁴⁷ Record, page 1374.

²⁴⁸ Record, page 1457.

²⁴⁹ Record, page 1487. The month was utilised to brief the staff and prepare announcements for the market. Molly Green, the erstwhile editor, seems to have been in the dark about the announcement as she had sent an email in December asking whether rumours about the closure were true - Record, page 1356. The email records that she was informed of the decision only in January 2010 -Record, page 1456.

²⁵⁰ Record, page 1538.

²⁵¹ Record, page 1456.

- [461] This remark in one sentence confirms two aspects of the Commission's thesis; that Forum served as a barrier to entry to competitors in the market and that without Forum in the market that advertising revenue would have gone to Vista.
- [462] The fear of possible entry also emerged from an email Van Eck sent to her sales managers about the closure. They were told to watch all gaps in the market and to report on competitors who might enter the market.²⁵²
- [463] Elrina De Beer, the sales manager who reported to Van Eck, told her on 22 January 2010 that most of the Forum advertisers had already moved to Vista in July and August of 2009. She also says that they would lose the income of some clients (which included the casino and some car dealers) who had advertised in both.²⁵³

Analysis

- [464] Although it has been necessary to consider the closure events in some detail by examining the contemporaneous record, what seems clear is that the demise of Forum followed the closure of GNN even more quickly than the period of nine months between the two events might suggest. Already by mid-year in 2009, Forum had been reconfigured so that it was a shadow of its even modest former self, with a substantial drop in its circulation and a loss of credibility amongst its advertisers who migrated to the only publication left – Vista. Had this occurred just three months earlier, GNN might have had a chance for survival as some of those advertisers might have migrated to it.
- [465] Thus the re-orientation of Forum occurs so soon after the exit of GNN that the inference that the two events were linked is highly probable, and for which no other credible explanation has been given. Further, it appears that the final decision to close Forum was made as early as October 2009, and was contemplated even earlier at the beginning of September that year by the local management in Bloemfontein, whose decision was the

²⁵² Record, page 1482.

²⁵³ Record, page 1483.

one that counted, notwithstanding that Groepe was the one to sign off on it. Indeed, only the slow internal bureaucracy of Media 24 led to the decision being formally taken only in January 2010.

[466] We conclude that the Commission's explanation that Forum was closed when it was because GNN had exited the market is, on balance, the more probable explanation.

[467] This is not to gainsay the theory that in 2009 Forum was experiencing the ill-effects of the recession. The record is replete with the difficulties being experienced at the time.²⁵⁴ Thus, taken in isolation, the reason given for closing Forum when it was, may, without context appear plausible. But when one analyses this decision in the light of previous decisions when an equally ailing and redundant Forum was retained over the years, post the 2000 acquisition of Vista, then what seems less convincing is the not the closure, but why it only happened when it did.

[468] The proper question to ask is not whether Media 24 had a proper business rationale for closing Forum – they certainly did. The question is: why then and not much earlier? Media 24 make the recession the 'why then' factor. Certainly in 2008/9 that was a factor different from some earlier years. But the paper had been retained during earlier periods of local downturns in the mining industry, through a fraud which caused it great loss, greater periods of loss in repeated years, but had still been kept going.²⁵⁵ The documents we have considered mention that publications are sometimes kept open for strategic reasons despite being loss making. We know that Malherbe had recommended closing publications down as far back as 2001. We know that in 2009, managers in Bloemfontein were questioning why the group needed to have two publications competing in the same market. That question could equally be asked nine years earlier. The answer given is in 2009 in some of the emails discussed, was that for strategic reasons certain publications had

²⁵⁴ See Genesis Report- Record, page 239; Van Eck Witness Statement pages 102-11, paragraphs 286; 289; 293; 304; 305; 306; 308; 314; 318.

²⁵⁵ In 2006 Forum showed its greatest loss – R1,07 million and although it still made a positive contribution to common costs, this was miniscule in comparison – only R17 680.

to be retained in the market. Elsewhere this strategy receives more elaboration – so that competitors cannot make themselves at home in the Free State market.

[469] Why then, if the Commission's theory that the closure of Forum was directly linked to closure of GNN, were the two events not closer in time? The more probable reason then for the timing of Forum's closure was that by then GNN's exit from the market was now considered irreversible. Recall that in December 2008 GNN had proclaimed its demise only to survive again briefly in early 2009.

[470] Media 24 also knew that Steyl was looking for a new backer in early 2009 and the possibility existed that he might find one, despite being rebuffed by it, existed. It was also known that the Commission was investigating allegations of predation and this was a constant item for report-backs in the monthly reports during the course of 2009. It is clear that this was also a factor taken into account over the closure of Forum. Media 24's in-house advisor was consulted over whether the closure would affect the Commission's investigation.²⁵⁶

[471] Media 24 argued that we must rely on the reasons stated in the closure memorandum that was presented to Francois Groepe as constituting the reasons explaining the closure. However, this document must be approached with caution. Media 24 would have known that the closure memorandum would have to be disclosed to the Commission. The Commission's investigation was still on going and it had already had internal documents subpoenaed. The closure of Forum was likely to trigger further document requests from the Commission. It is highly probable that the document was written with this risk in mind.

[472] Why else is there so little mention of the end of GNN, except a brief mention of its existence in the history of the area. Since closure of a rival title would be a strategic event of some moment, why would there be no mention that the rival in the market had exited a few months before and

²⁵⁶ This appears from the record (Record, page 1357) and was confirmed in testimony by Groepe – Transcript pages 2484-2485.

that there was now no competition in the market. We know from internal documents of Volksblad, which presumably were not written with the Commission as its audience in mind that leaving the market open to competitors was a factor for consideration. Its absence as a factor for consideration in this document suggests that it was sanitised, because of likely scrutiny by the Commission.

[473] Groepe was called by Media 24 to testify to the reasons for the closure. He largely repeated the reasons given in the memorandum, but he added his own – the threat of the internet. Whilst large papers in the group particularly the dailies, may have faced this threat, there is no evidence that the emergence of online papers was a threat to community newspapers in Welkom at that time. Not even the memorandum mentions this, nor does it appear in any of the internal documents which have been discovered. Nor is this factor mentioned by Van Eck, the person closest to the Welkom market of those who testified. In fact Mr Jan Malherbe, the then CEO of the newspaper division, directly contradicts this in his evidence where he was motivating the strategic importance of community newspapers versus daily or Sunday newspapers. In his evidence he describes how community newspapers have continued to do well locally and internationally despite the challenges the internet has brought to bear on daily or Sunday newspapers.²⁵⁷

[474] Whilst Groepe asserted that he was the final decision maker in the closure of the paper – and *de iure* he was – as the document trail shows the real decision was made by local management in Bloemfontein, none of whom were called to testify. Nor is it surprising that they were the decision makers; in the context of the Media 24 group, Forum's revenues were trivial, hardly a publication whose fortunes or lack thereof would overtly concern the Head Office of the group.

[475] But more problematic for the Media 24 version is that those closest to the Welkom market such as Van Eck, did not advocate the closure of the paper and urged its continuation. Nor was Van Eck consistent with the

²⁵⁷ Transcript, page 1417-1418.

rest of the Media 24 version that the recession was the reason for Forum's difficulties in 2008. When asked about the economic factors at the time that gave rise to difficulties, her first answer was to mention of the introduction of the National Credit Act.²⁵⁸ Only later, when she was led on this, did she mention the effects of the recession.²⁵⁹ Note, it is not denied that the economic downturn affected Welkom adversely in terms of advertising revenues, but it does not appear to be the dominant reason the publication, which had weathered recessions before in its nearly 27 years of existence, had to be closed down then. It simply made the decision to close the publication more compelling, but it was not decisive. The removal of the competitive threat from GNN, on the balance of the evidence, seems the most probable cause for the decision to close Forum at that time. This decision was made in Bloemfontein and endorsed by Head Office subsequently.

Cannibalisation

[476] We discussed the evidence of cannibalisation earlier in the section on AAC. Although we did not find the evidence of cannibalisation sufficiently precise for the purpose of calculating the AAC – this does not render the evidence irrelevant for purposes of indirect intention. Here we look at evidence of cannibalisation in a qualitative rather than quantitative sense.

[477] The evidence the Commission relied on came from Media 24 documents.²⁶⁰ The information was contained in a document in which Bonthuyzen was motivating for filling a vacant position at Forum but at the same time was giving an assessment of Forum at the time. He had asked Van Eck to tell him what percentage of Forum's advertising revenue would go to Vista if the paper was closed.

[478] In the document he states that the figure was 27%. The rest or 73% he states would go to GNN or other advertising mediums.

²⁵⁸ Transcript, pages 2098-2099.

²⁵⁹ Transcript, page 2101.

²⁶⁰ Record, page 411.

[479] Van Eck testified that he had asked her to give this figure to him at the time. In haste she prepared an estimate. However, she had been misunderstood. When she performed the calculation she had first deducted the number of people unlikely to advertise in Vista. That was the 27%. Of the remainder she then calculated how many would go to Vista, and of this revised figure, the amount that would go over was 16%.

[480] It appears then on her version Bonthuyzen had misunderstood her when he wrote his document. However, despite this figure being a crucial part of the Commission's case, since the amendment to its pleadings, and also appearing in its expert reports this misunderstanding was never put to Bonthuyzen in cross-examination. Nor is the explanation of it credible. She does not deny mentioning a figure of 27% only it was not the end of the calculation. Why then would she not give this final figure to Bonthuyzen, who presumably only wanted the final figure. This she wasn't able to explain under cross-examination. Van Eck's version on this point must be rejected and we accept that the figure of 27% was the one she meant to give to Bonthuyzen.

[481] The Commission's economist Dryden, as we indicated earlier, relied on the closure documents which refer to Vista's budget needing to be increased by 40% as a second check on this figure, and so he gets to an estimate of 30.7% for the period. However, there was also an explanation from Media 24 which sought to suggest that the 40% figure did not signify what it appeared to mean. Since we didn't have any of the witnesses who could testify to that, we will accept that this figure might not mean what it appears to say about 40% of the remaining Forum advertising going to Vista.

[482] The cannibalisation effect, even if we rely only on the 27% figure, is still substantial. Even if Van Eck is to be believed on what she intended to convey (which we don't accept) the fact is that any reasonable reader from Bonthuyzen upwards in the group would have understood the information that Forum's closure would have led to that level of diversion back to Vista. Whatever Van Eck might have thought she wanted to

convey, that was not what was conveyed to the decision makers. In all likelihood they would have understood the information in the same way the Commission has. If we accept this, then the fact that Media 24, knowing that figure in 2006, nevertheless decided to continue with Forum is an indication that the strategic importance of having Forum, to them, outweighed the cannibalisation effect on the stronger Vista. This is again strong corroborative evidence of the predatory intent of maintaining Forum in the market.

Conclusion

[483] All three factors of indirect intent point to the maintenance of Forum for predatory intent. That coupled with evidence of direct intent is sufficiently strong evidence based on several different aspects of corroborating evidence that we conclude establishes predatory intent.

Recoupment

[484] In *Nationwide* we gave recoupment as an example of the type of additional evidence that might be led in an 8(c) case. This was influenced by the approach taken in the leading US case of *Brooke Group Ltd v Brown Williamson* where the U.S. Supreme Court held that predation was established by proof of pricing below a relevant measure of cost (which the court did not stipulate), plus evidence of recoupment.²⁶¹

[485] In our law evidence of recoupment, unlike in US law, is not a prerequisite to prove an 8(c) contravention.²⁶² As we held in *Nationwide*, there is no

²⁶¹ 509 US 209 1993.

²⁶² Recoupment is not a requirement in other jurisdictions. In the United Kingdom, the Competition Appeal Tribunal held in *NAPP Pharmaceutical Holdings Ltd v Director General of Fair Trading* (1001/1/1/01)[2002] CAT 1. - evidence of recoupment receives the emphasis it does in US law because dominance is not a requirement and hence recoupment is there to screen out those cases where predation effects may be trivial. In South Africa, as in Europe, dominance is a prerequisite to a finding of predation. In Europe, the Court of First Instance, as it was then known, held in *Tetra Pak (Tetra Pak International SA v Commission* [1994] Case T-83/91 ECR II-755), that proof of recoupment is not a requirement. The EU Guidance document goes further to state predation may prove more difficult than anticipated at the start of the conduct, and hence there may not be actual proof of recoupment as the total costs of the predatory strategy at the time of consideration may outweigh its

need to be categorical about what form the additional evidence should take. That type of approach leads to rigidity and error. In this case we have already considered additional evidence in the form of direct and indirect intention.

[486] However, because the matter was heard several years after the alleged target had exited the market, a legitimate question is to ask whether there is evidence of recoupment.

[487] Evidence of whether there has been recoupment is not always present in every case, because it depends on the timing. If a target is still in the market at the time of the hearing, evidence of recoupment might not yet be available, as the act of predation may be incomplete. If however, the alleged target/s have been eliminated and some time has passed since their demise, we might expect to see evidence of recoupment or if not, an explanation for why it was not present.

[488] Evidence of recoupment thus serves as useful circumstantial evidence of the existence of predation, and is a useful controlling factor to avoid the type II errors that may be associated with the 'pricing above AVC or AAC, but below ATC test', for the reasons discussed earlier.

[489] As Padilla and O' Donoghue write:

"Second", requiring proof of a reasonable prospect of recoupment may be a useful way to minimise the cost of error in predation cases."²⁶³

[490] They go on to state:

*"Further practical experience with cost based rules is that they are often complex to apply in practice, in particular for multiproduct firms... A recoupment analysis helps provide a cross-check, based on market structure or conduct, on whether the inference of predation is credible."*²⁶⁴

later profits, but the firm concerned may still consider it rational to continue with the conduct it had started. EU Guidance C45/17 footnote 6.

²⁶³ See Padilla and O' Donoghue, page 254.

²⁶⁴ *Ibid*, page 254.

- [491] Thus evidence of recoupment in an 8(c) case can either serve to bolster a conclusion reached around intent or to serve to throw some doubt on its reliability.
- [492] This is the reason we have decided to examine the evidence of recoupment in this matter, despite having already concluded based on the intention evidence, that predation was the probable explanation.
- [493] As Leslie has noted of the utility of recoupment in US law "... the recoupment requirement is justified as an effective filter that lets judges avoid the more complicated issues of intent and price-cost relationships."²⁶⁵
- [494] Having established the relevance of recoupment in the exclusion enquiry we now need to consider what type of evidence constitutes proof of recoupment.
- [495] O' Donoghue and Padilla suggest that recoupment can be tested using two methods; examining the conduct and the structure of the market. The conduct enquiry involves examining whether the predation has paid off i.e. has it enabled the firm post-predation to raise prices sufficiently above a competitive level, to enable it to recoup what it lost during the predation period. Among the structural factors they recommend considering are market shares. If the market share of a predator has grown, post predation, then it has gained market power over a greater share of productive output than it had before the predation period; in that sense there has been recoupment.²⁶⁶
- [496] In this case the Commission has presented both structural and conduct evidence to support its case on recoupment.
- [497] Its economic experts Compass Lexecon examined the accounts for Vista for the post complaint period. They compared the average monthly

²⁶⁵ Leslie *op cit* page 1706.

²⁶⁶ See O 'Donoghue and Padilla, page 253-4. Others, but not relevant to this case, are capacity constraints and barriers to entry.

profitability of Vista during the complaint period with the average during three selected post complaint periods.²⁶⁷

[498] During the first post period March 2009 – February 2010 the average monthly profit had declined relative to the complaint period by R23 434. However, during a second period March 2010 to December 2010 the average monthly profit had increased by R73 612 relative to what it was in the complaint period.²⁶⁸ They then presented several scenarios for a likely recoupment period and, depending on which level of cost was adopted for Forum, it would be recouped in, at the very least, a period of two years, but otherwise, depending on the level or profitability that could be recovered, in perpetuity. The figures for Forum’s costs were revised in a second report they provided, but their conclusion that there was a high likelihood of recoupment, was not altered.²⁶⁹

[499] Media 24 did not challenge these findings. So we can assume that this evidence is unchallenged given that Media 24 with access to Vista’s accounts for the periods beyond those given to Compass Lexecon (up to 2010), would easily have been able to demonstrate whether the latter’s projections of Vista’s future profits were refuted by their actual figures. They did not do so.

[500] The Commission also led the evidence of one factual witness Sharika Betts, the marketing manager of Goldfields Casino in Welkom. Betts, whose firm was a regular advertiser in GNN, testified how, when GNN exited, her firm was worse off. She had no option but to advertise in Vista whom she said could “... *charge me what they want*” and that she had no choice where her adverts were placed. She spoke disparagingly about Vista’s quality and described how, because it carried so many adverts, it was difficult to find her company’s adverts easily, despite the fact that she

²⁶⁷ See Compass Lexecon first report Section 13 pages 97 – 101 of the Record.

²⁶⁸ *Ibid* Record, page 100.

²⁶⁹ Second Compass Lexecon report record pages 371-2. See also Dryden slides number 89.

was looking for them.²⁷⁰ She said if this was her difficulty it would be even less likely to be noticed by a customer.

[501] She said the rates with Vista had increased significantly since the exit of GNN. According to her, in 2008 Vista had charged her R2 400 for a half page but in 2013 this amount had increased to R4 734.²⁷¹

[502] The effect was that her casino placed fewer adverts than it wished to and used smaller adverts.

[503] Further evidence of increased pricing post-exit comes from an email Steyl provided to the Commission on 28 October 2010. It contained a quote from an unnamed former customer of his, who told him that rates at Vista had gone up to R22.00 in 2010.²⁷² According to Steyl this was an increase of R6.00 on the existing rate of R16.00 when GNN was still in the market. If Steyl is correct – he wasn't challenged on this point, then Vista had increased rates by 37.5 %. Given the contention that demand for advertising was softening in the post 2008 period, this type of increase is strongly indicative of Vista's market power in 2010.

[504] A further source of evidence of unusually high rate increases, post the exit of GNN, came from Media 24's own documents. At the beginning of 2009, Media 24 raised the rates of both Forum and Vista by 17%. Whilst this is lower than the figure of 37.5% derived from the information supplied by Steyl, we do not know if they are based on the same period. Steyl's figure compares the rate in early 2009 when he was still in the market with 2010. The Media 24 figure of 17% is the increase at the beginning of 2009. If there was yet another increase in later 2009, this may account for the discrepancy with Steyl's figure.

[505] However, even if we accept that the figure of 17% is more reliable, the increase is substantial compared to increases during the complaint period. Recall that according to Van Eck, Media 24 had raised rates during the

²⁷⁰ See Transcript, page 379 where Betts described how she had to page through the paper three times to see her advert.

²⁷¹ Betts witness statement record page 18 paragraphs 21-22.

²⁷² Record, page 1554.

complaint period of between 6.5 – 10%.²⁷³ Whilst GNN was still in the market at this time, it was by now a much weakened competitor and its announcement of its imminent demise the previous month, must have fortified the confidence of Media 24 that rates in Welkom could be raised by these unusually high amounts, without fearing losing customers to GNN. This rate of increase is again made more unusual by the fact that these were, on Media 24's version, difficult times for newspapers in Welkom given the recession.

[506] Furthermore, internal documents discovered by Media 24 for early 2010 show that Vista revenues were exceeding budget forecasts.

[507] But there is also strong evidence of structural recoupment. Since April 2009 barring some brief and unsuccessful entry, Media 24 has been the only firm in this market.²⁷⁴

[508] Since January 2010 Vista has been the sole newspaper in that market. At the time of completing this hearing, which would have been five years after the closure of GNN; nor was there any evidence of any likely new entry. Whilst Media 24 had always enjoyed the market share of Forum as well as Vista, it now had the remainder of the market once held by GNN ranging at times between 19 – 25%.

[509] But there is another aspect to testing for recoupment apart from the conduct and structural factors we have considered up till now. Academic writing and case law has also recognised what is termed “reputational recoupment” or leveraged recoupment. Where the dominant firm operates in multi-geographic markets, as is the case with Media 24, then it benefits in its other markets from a reputational effect – i.e. being seen as a robust competitor. The reputational recoupment effect is thus a multi-market benefit from predation and not a benefit recouped in a single market. On the facts of this case Media 24, which has numerous community

²⁷³ Transcript, page 2031.

²⁷⁴ See Steyl Witness Statement paragraph 25. Steyl says there he had not re-entered and there had not to his knowledge been any other “material entry.” Nor did Betts know of any other entry.

newspaper titles throughout the country, would have benefited in this way as well.²⁷⁵

[510] We conclude that evidence of recoupment is significant, robust and not controverted.

Equally efficient competitor test (“EEC”)

[511] The Commission has not advanced the EEC as part of its affirmative case on exclusion; rather the issue comes before us as a relevant test because Media 24 has asserted that GNN was excluded from the market because it was not an EEC, an issue the Commission contested.

[512] For this reason we will consider the dispute from the manner in which the issues were raised by Media 24 and then consider the Commission’s response to them. The dispute over EEC is not only factual but also conceptual. Does the EEC mean that one must inquire whether the competitor could have survived, if it had the dominant firm’s costs, or does it have a more extended meaning? Many caution against uncritically adopting this test. For instance the OECD in a 2006 briefing paper stated on the test:

“This test may be too lenient, though, if it is interpreted as allowing the elimination of new firms that are currently less efficient but that would have eventually become equally or more efficient than the incumbent if they had been able to survive long enough.”²⁷⁶

[513] It is questionable whether such a test would have any meaningful application in markets such as these, i.e. markets with high barriers and where a stand-alone new entrant has to face the experience and resources of a dominant media group. We do not think it is an appropriate test, but do consider it for the purposes of completeness and to demonstrate, on the facts of this case, why GNN represented a strong competitive threat to Media 24.

²⁷⁵ See also report of Compass Lexecon, Record page 101, who rely as well on reputational recoupment. It is also an opinion shared by Steyl. Steyl Witness Statement, paragraph 25.

²⁷⁶ OECD Policy brief entitled “What is Competition on the Merits “June 2006. By “lenient” the OECD means on the stringency applied to the dominant firm’s justification that an excluded competitor was not an equally efficient one.

[514] Media 24 advanced numerous arguments as to why GNN could not have survived in the market irrespective of its conduct in maintaining Forum in the market.²⁷⁷

We consider each one *seriatim*.

(i) *It was not easy to compete with a successful and entrenched newspaper*

[515] The argument was stated in its most general terms by Jan Malherbe, who said it was impossible to take on incumbents in a market, unless one had a differentiated product. It would be unfortunate if competition law questions were resolved by making such assumptions as would-be entrepreneurs would never enter markets. Entrepreneurs enter markets where opportunities are seen – in particular, as in Welkom, where incumbents were seen as complacent or inefficient, an entrepreneur will see an opportunity to profitably enter.

[516] Was Steyl the entrepreneurial entrant or someone with some ill-conceived and romantic pre-conception that he could survive in a market competing with the largest media company in the country?

[517] Early in Steyl's cross-examination by Media 24's counsel, it was suggested to him that if you want to compete with the big boys (by which was meant Media 24) you had to know what you were doing. Steyl agreed with this proposition.²⁷⁸ The question and its answer, provide a useful basis to deal with the first issue. Did GNN fail because Steyl, and by extension the staff of his newspaper, did not know what they were doing?

[518] Steyl was neither a new entrant to the community newspaper market nor to the Goldfields area. He was after all the father of community newspapers in Welkom, having founded Vista. Later, when the paper was bought out by Perskor, he worked there as a manager for thirteen years, eventually becoming the person responsible for all its Free State

²⁷⁷ In the heads they are put into the mouth of Steyl as his reasons the paper could not survive. But these are propositions put forward by Media 24 which he was cross-examined on. (See Media 24 main heads paragraph 843.)

²⁷⁸ Transcript, page 488-489.

operations, including a printing factory in Kroonstad.²⁷⁹ Nor was he unfamiliar to the world of newspaper competition. Forum had entered into the market while he was still at Vista; this heralded a newspaper war between the two titles. Forum entered as a free publication whilst Vista was still paid for by the reader. Vista had to counter this threat first by experimenting with its own Vista Wednesday free publication, and then eventually succumbing to the threat and becoming free as well.²⁸⁰

[519] He thus entered in 2000 having had experience working as a 'small boy', then as an executive of one of the 'big boys', and the demands of a competitive and evolving market place.

[520] He came back into the market when Netnews, GNN's predecessor, had already entered under Alida Joubert. He worked as her employee for some months before he bought out the title. So he had sufficient time in the market again to make his own assessment of whether the publication might succeed. He also knew before he took the decision to take over her Welkom title that she had failed against Media 24 in the other markets. His entry therefore was based on sufficient information on the challenges he faced. That Welkom was a more promising market than Joubert's other choices, finds support from the testimony of Van Eck. She testified that Welkom was a more eager advertising market than any of the others served by the Volksblad group. As she put it, advertisers advertised all the time.²⁸¹

[521] The next advantage he had was that he took over some erstwhile Perskor staff as part of his advertising team; this meant that he entered with staff that had experience in the industry, and, as importantly for a community newspaper in a small town, knew and had contacts with the local advertising community.²⁸²

[522] The third advantage was the perceived weakness of his two competitors at the time. Van Eck testified that following the merger with Media 24

²⁷⁹ Transcript, page 463.

²⁸⁰ Transcript, page 464.

²⁸¹ Transcript, page 1974.

²⁸² For instance his editor was Chrystelle Erasmus, the former new editor of Vista.

there was a great deal of dissatisfaction amongst the Vista staff.²⁸³ In Steyl's opinion the two papers editorial quality had declined.²⁸⁴ The market was thus ripe for entry and Steyl's early successes, and Media 24's consequent alarm about it, are the best evidence of this.

[523] Within a short period GNN had won at least a quarter of the market from the two incumbents. It is probable that editorially, GNN was the superior product of the three. This also comes across in Media 24's own assessments at the time. Van Eck in a report dated June 2004 highlights what she regards as the strengths of GNN and includes mention of its news and editorial autonomy.²⁸⁵ This editorial strength was made clear by the testimony of one of the customers Sharika Betts, who was responsible for the advertising of the local casino. Her example was that if they had an event GNN would send a reporter whereas the other two would ask them to write the copy for them.²⁸⁶

[524] There is also evidence that GNN was the more innovative of the three papers. Van Eck, in several documents, urges Forum and Vista to emulate the manner in which GNN used focuses and promotions, to increase its advertising opportunities.²⁸⁷

(ii) GNN suffered from an increase in expenses and an inability to increase tariffs sufficiently to compensate; and

(iii) GNN suffered from a lack of capital

[525] As these issues are interrelated we deal with them together. It is correct that GNN's advertising revenues were eventually insufficient to compensate for its increased expenses over the years. However, as this case is about predatory pricing that would be the expected outcome when the predator has priced below cost. GNN had to drop its advertising tariffs

²⁸³ Transcript, page 1963.

²⁸⁴ Transcript, page 466. Steyl testified that the successive takeovers of Vista, first by Caxton and then by Media 24, had led to a decline in staff morale. He also perceived a decline in the editorial content of Vista.

²⁸⁵ Record page 270.

²⁸⁶ Transcript, page 365.

²⁸⁷ See Record page 270. Van Eck refers to GNN's use of tricks. See also Steyl's Supplementary Witness Statement for details of promotional initiatives Record 183 – 186

to stay in the market for as long as it did. That it was unable to survive at these tariffs was a function of the unlawful pricing by Forum, not the inefficiency of the firm.

[526] While there is no case that Vista priced below cost, its pricing during this period, was, as we have seen in the previous section on recoupment, well below what it would charge later. As Steyl noted in an email to the Commission a year later, having received details from a former client of the current pricing from Vista (at a time when Forum had also exited): “... *with these rates we could have lived.*”²⁸⁸

[527] By making Forum a predatory vehicle, Vista too was affected. Ever since emerging from its days of price wars with Forum pre-merger, Vista had not been able to move its rates to a level that Volksblad managers wanted it to be at. We see this most clearly from the Moolmanshoek minutes, but the problem persists throughout the complaint period. For instance, in one document Van Eck notes that Vista has not been able to increase as fast as it wanted to.²⁸⁹ Since Forum was cannibalising Vista’s advertising, if Vista priced too high it would have lost customers to Forum. Van Eck remarked that efforts to get Forum to differentiate itself from Vista were a struggle.²⁹⁰ Forum’s below ATC pricing thus affected the rest of the market, since despite some differentiation, advertisers considered the three papers as substitutes. Its effects were greater on GNN than on Vista – that is true – but even Vista, an incumbent, market leader and benefitting from all the economies of scale afforded by being part of a large publishing group, performed sub-optimally compared to what it would in later years.

[528] Simon Roberts, who also testified as an economic expert for the Commission, undertook an analysis of its costs. His view was that GNN’s problems were not associated with its inability to contain costs. He motivated this by showing that during the complaint period its costs increased by just 2.1% on a compound basis. Although Media 24 accused

²⁸⁸ Record page 1554 (email to the Commission from Steyl dated 28 October 2010).

²⁸⁹ Record, page 270.

²⁹⁰ Transcript, pages 2066-7.

Steyl of drawing excessive directors fees towards the end, Roberts argued that

“this does not look like a cost related problem that he’s facing it’s a revenue problem.”

...

Furthermore, *“... I’ve looked back at that part of the record and I also looked at the review done in 2007 and it says directors taking salaries by way emoluments, the amounts are neither large nor significant given the level of responsibility and involvement of the directors in the business.”*²⁹¹

[529] Compass Lexecon, for the Commission, also undertook what they called a cloning exercise and asked whether a clone of GNN would also have been excluded. The purpose of this exercise in creating a clone was to create an objective competitor test and avoid the subjective issues that might surround GNN. On this objective clone test Compass Lexecon concluded an efficient competitor would have been excluded.

[530] The clone model was not uncontested. Genesis, for Media 24 quibbled about cost figures, so we regard the clone evidence as not necessarily conclusive, but at least indicative about possible exclusion within a certain range of values.²⁹²

[531] The same can be said for the criticism of lack of capital. Whilst GNN was not endowed with deep pockets, it did not need to be. When it entered the market, the period when a new entrant might be most vulnerable as it attempted to build market share and a brand, it performed extremely well. This would have been the period it might have needed sufficient capital to fund entry, but it survived for nine years. Media 24’s economists produced a chart of the respective papers’ fortunes, before and during the complaint period. According to this GNN only became unprofitable in 2006/7

[532] Its problem was, as the predation period progressed, it wasn’t able to retain capital. Whilst its costs increased the costs of the other two papers

²⁹¹ Transcript, pages 916 – 918.

²⁹² See Dryden slide 92, see Transcript, page 3273 for Genesis Refutation.

could be subsidised. Steyl testified that his costs of printing and wages increased each year while his rivals did not increase tariffs by the same rate necessary to absorb these.²⁹³ But there is no evidence that his expenses were not market related or the result of any inefficiencies in his operation. There is evidence that for four of the five years of the complaint period, Forum and Vista printed at costs lower than they did later, when their printing became the subject of an arms-length contract. Prior to that, their printing was the subject of an in-house arrangement that they had with Volksblad, which, at that time, owned its own printing unit, which had excess capacity. Although the extent of this amount was still the subject of dispute, even after hearing final argument in this matter, there is certainly evidence that there was at least some advantage for Forum from its parent. That this advantage was more a product of under usage of spare capacity, than the superior advantage of economies of scale of the multiproduct firm, is evidenced by the decision to transfer the printing division to an arms-length dedicated printing company, whose relationship with Forum and Vista in the latter years of the life of GNN, became a market related third party one.

[533] But nevertheless this is not a case where the Commission is relying on exclusion based on an 'above cost' standard. The equally efficient competitor would, on these facts have been excluded as well, given that Forum on the evidence, priced below its average total cost in every year of the complaint period and prior to it as well, despite having the advantages of scale and vertical integration that it did as a publication in the Media 24 Group.

[534] Nor should one over emphasise in our market context, the nature of rigidly and uncritically adopting this test. Even in Europe where there is far greater access to capital markets than in ours, the Guidance offers the following cautionary words:

²⁹³ In the complaint he sets this out in more detail. Printing costs escalated by 8% each year and 12% in 2009. He said printing costs equalled more than 50% of GNN's annual turnover. See complaint, pleadings file page 2.

“However the Commission recognises that in certain circumstances a less efficient competitor may also exert a constraint which should be taken into account when considering whether particular price based conduct leads to anti-competitive foreclosure.”²⁹⁴

[535] The fate of GNN which lasted nine years in a market against a well-resourced dominant rival gives weight to this critique. Indeed five years later no other rival has entered.

(iv) Distribution problems

[536] GNN’s distribution was the subject of Media 24’s criticism for two reasons; its choice of distribution company and its failure to get ABC accreditation.

[537] In its initial years GNN made use of a small distribution company. It was satisfied with this service but at some stage towards the end of 2007 service levels deteriorated, according to Steyls’ testimony.²⁹⁵ Steyl was eventually forced to terminate his contract with the firm and contract with Media 24’s distribution arm known as NLD, but not before having written them a scathing letter blaming them for destroying his business.

[538] He was cross-examined at length on the content of the letter which had itemised a number of instances of the distributor’s poor performance. Steyl accuses the firm of destroying his business.²⁹⁶

[539] Steyl maintained that he had deliberately written the letter in hyperbolic terms as he wanted to justify eventually cancelling the agreement. What Steyl maintained was that although there were distribution problems they were not as serious as made out in the letter. It is unlikely that distribution was a problem in earlier times for GNN because Van Eck, writing in a report dated 4 June 2006²⁹⁷— analysing the papers strengths and weaknesses does not identify distribution as a problem.²⁹⁸

²⁹⁴ See Guidance Document, *op cit* paragraph 24.

²⁹⁵ Transcript, page 474 -475

²⁹⁶ Transcript, page 493-502.

²⁹⁷ Record, page 270.

²⁹⁸ Van Eck does say GNN had distribution problems in her witness statement (paras 58 and 64) but we don’t find this weakness identified in her contemporary communications in the record.

- [540] Another distribution problem raised about GNN was that it did not have an ABC certificate, while Forum and Vista did. An ABC certificate is a certification from the Audit Bureau of Circulation that the newspaper distributes the papers it claims to. This is done by having an independent audit conducted.
- [541] At some stage GNN opted to get what is known as a Verified Free Distribution (VFD) certificate, a lesser form of certification from the ABC, which verifies a newspaper's print order, and method of circulation but does not verify actual delivery to the reader. For this reason, according to Michael Leahy, the advertising industry consultant who testified for Media 24, the VFD certificate is regarded by the advertising industry as an inferior to the ABC one.
- [542] The ABC itself takes a more elevated view of the VFD certificate. In explaining the certificate as useful to *inter alia* smaller publications that cannot afford full ABC membership it states: "*This new certificate gives smaller publishers the tools to compete for that advertising on a more even footing*" and "... *The certificate will elevate the status of the publication in the eyes of the advertiser.*"²⁹⁹
- [543] Steyl denied that not having ABC verification constituted a problem. He recalled only one customer ever complaining about this.³⁰⁰ He gave a perfectly plausible reason for why the ABC certificate is not a major factor to local advertisers in a small community. The advertisers and their customers all reside in the same small community. If a newspaper was not getting to its target audience advertisers would soon find out by word of mouth. The same sentiment was supported by Sharika Betts.³⁰¹
- [544] We accept Steyl's evidence on this point that the ABC issue was not decisive in undermining advertiser confidence. Leahy, whilst experienced in the advertising industry, had no personal knowledge of the Welkom

²⁹⁹ See Record File 5, page 79 (RD 357).

³⁰⁰ Transcript, page 479.

³⁰¹ Transcript, pages 371-375.

area, nor had he been briefed on it, and thus he was of little assistance to us.³⁰²

[545] Clearly GNN was having serious problems with its distribution at the time Steyl wrote his angry letter, and the fact that GNN replaced its distributor with NLD is evidence of this. It is another matter to suggest this was a reason for its failure or a strong contributing factor to its decline.

[546] Distribution was not a problem throughout GNN's history, but only at one stage when the existing distributor's service levels plunged. Steyl claims to have resolved the issue when he moved over to NLD. The question then was whether this was a temporary blip or a fatal wound to GNN's credibility. We have no reason not to accept Steyl's evidence that it was temporary. Media 24 did not produce any independent evidence of a more on going distribution problem and instead placed most emphasis on the letter. If the distribution was as dysfunctional as suggested and on a more on-going basis, there would have been more independent evidence of this either from contemporaneous Media 24 reports or testimony from its own witnesses of specific advertisers they had won away from GNN because of its distribution problems at this time. We were not provided with either.

[547] Furthermore, it seems that distribution problems are endemic to community newspapers. For instance in 2009, Media 24 reports on its own distribution problems.³⁰³ Leahy conceded this point as well.³⁰⁴

(v) Staff too large and printing problems.

[548] Media 24 also raised a number of what it considered operational problems with GNN. It claimed that GNN was over staffed having 12 employees as compared with the sparer staffs of Vista and particularly Forum. But Forum was a poor exemplar, as the record shows that it was continually under-staffed and Van Eck was always asking for more consultants. Nor were these papers editorially strong, as the evidence of Betts suggests,

³⁰² Counsel for Media 24 took the unusual step in re-examination in disclosing the limitation of Leahy's brief after criticism on his research from the Commission's counsel in cross examination. See Exhibit 25 and Transcript, pages 2644-2645.

³⁰³ Record, page 598.

³⁰⁴ Transcript, page 2606.

they were not able to get reporters to cover events but GNN was. Forum had only one editorial employee at the end, its editor Molly Green.

[549] This argument again seems unconvincing and, if anything, Forum and Vista appear to have been understaffed during this period. In one document Van Eck accounts for Forum's problems because they only had one consultant, whereas in her opinion they needed at least 3 to survive.³⁰⁵

[550] Nor must it be forgotten that staffing levels at these papers were supplemented by work done by others at Bloemfontein level which included sub-editing, accounting and additional advertising functions. Comparisons of staffing levels are thus misleading.

[551] Complaints about printing quality were put to Steyl which he denied. Again this seems more of an endemic problem that a paper suffers from time to time, as Steyl explained.³⁰⁶ In a document from 2001, Van Eck complains about the problems with Vista's quality and notes, that GNN has superior printing quality. Thus printing quality was not an on-going problem it seems, but like for any publication, something that happens from time to time.

(vi) Internet advertising

[552] Media 24 also raise the onset of digital media as a problem. The source for this evidence is Francois Groepe who, as we noted earlier, justified this as one of the reasons for closing Forum.³⁰⁷ Whilst this problem may have already been threatening larger titles of Media 24 at the time, which is no doubt why Groepe was thinking about this issue, there is no

³⁰⁵ Record 230 and Transcript page 2050.

³⁰⁶ Transcript, page 481.

³⁰⁷ Transcript 2457-2458.

evidence in the record or from the local witnesses that this was a threat at the time. Nor was this stated as a reason for closing Forum when this document was being put to Groepe. This was further as noted earlier, contradicted by evidence lead by Jan Malherbe where he stated that community newspapers tend to be more sheltered from the threat of the internet as opposed to daily or Sunday newspapers.³⁰⁸ If the internet was a threat in the Welkom community newspaper market it would surely have been mentioned there, this appears to have been an afterthought.

(vii) *Difficult economic conditions*

[553] Media 24 has relied heavily on the declining economic climate, as a result of the 2008 recession post the collapse of Lehman Brothers, in September 2008. Although the Commission does not deny that the recession did affect the Goldfields area, leading to a reduction in advertising spend, it does not accept that this factor was as central to GNN's demise as Media 24 suggests. The evidence of Dr Simon Roberts was that the effects were felt later and were less significant than Media 24 had suggested.³⁰⁹

[554] From internal documents of Media 24, we find a report for the Free State for the February 2009 period, which says community newspapers are under great pressure.³¹⁰ Whilst this provides contemporary support to the Media 24 argument of external shocks, it also supports the Commissions' position that GNN had already been forced out of the market before this. Although GNN had published some editions in 2009, recall that it announced its closure already in December 2008, its first year of loss making during the complaint period occurred in the 2006/7 financial year, according to Exhibit 10. Thus well before the effects of the recessionary period would have been felt.

³⁰⁸ Transcript, page 1417-1418.

³⁰⁹ Transcript, pages 662-664 and pages 928-948.

³¹⁰ Record, page 1006. In same report at 1006 it is reported that Netnews had closed but that there are '*gerugte*' that they are going ahead with very low tariffs and gaan dan ook net by '*besighede versprei*'.

(viii) **Conclusion**

- [555] Media 24 has raised several difficulties that GNN had with its business. But all businesses have their difficulties from time to time and they don't necessarily lead to their closure. The record shows Media 24 staff frankly evaluating their own titles when compared to GNN and finding their own wanting. The fact is that with all these difficulties we are uncertain as to their extent. Did any one of them cause GNN's demise or was it cumulative? On this point Media 24's case is far from clear and seems to grasp at issues such as the letter by Steyl to his erstwhile distributor and the lack of an ABC certificate, rather than present a coherent case for failure, independent of the actions of Media 24 *via* Forum.
- [556] Against this we know of other facts less uncertain. The paper survived its earliest start up years winning a larger market share than Forum by at least the start of the complaint period, and despite being a new entrant up against two incumbents owned by a large vertically integrated media group. The paper survived for nine years. If some of the factors listed by Media 24 were as instrumental as suggested, why did the paper not exit earlier, especially during the start-up phase, when most newspapers are most vulnerable?
- [557] We have in this case a perfect example of what economists term a natural experiment. Steyl took over the management of Alida Joubert's Welkom edition before he took ownership of it. This edition survived whilst her other four failed and exited. This suggests that under Steyl, GNN was an efficient competitor, as an inefficient one would have exited as rapidly, or almost as rapidly, as the other Joubert's titles had; instead GNN survived for another eight years.
- [558] What then of the recession of 2008? Of all the factors listed, it is the one most closely tied in time to the demise of GNN. However, as much as this would have impacted on all titles and those without deep pockets hardest, the market had seen mining downturns before and papers had survived. To the extent that the recession would have impacted on the local advertising market in Welkom, the lifeblood of GNN, there needed to be

stronger evidence that linked its decline to the advent of the recession. As the Commission has argued, the recession's bite appears to have taken place when GNN already had one foot in the grave.

[559] Even if we are wrong on this assessment the question here is whether the exclusionary strategy made the paper more vulnerable to closure than would otherwise have been the case, as the Commission argued.

[560] To rebut evidence that there may have been other causes, the Commission is not required to negate each one piecemeal to make its case. Nor does the existence of some of these factors, such as the recession of 2008, a factor affecting all papers – negate the fact that the predation made GNN more vulnerable to external economic shocks, than might otherwise have been the case. The definition of an exclusionary act is an extensive one. It is not confined to forcing a rivals exit – indeed the definition does not even refer to this – it refers to acts 'preventing' and the less demanding notion of 'impeding' a rival from entering or expanding in the market.

Causation

[561] Finally in this section on exclusion, we consider various arguments made in rebuttal by Media 24 that have in common the argument that Forum's conduct could not have been causal in GNN's demise.

[562] The first argument was that Forum's market share was insufficient to cause GNN's exclusion. According to Stefan Malherbe of Genesis, Forum's market share in the period was 16% measured by volume and 11% measured by revenue.

[563] The Commission argued in response that these figures understate the foreclosing effect of Forum. They point out that the effective realm of contestation was the local market in Welkom, and that if figures for national advertising, which GNN was unable to successfully contest are excluded this meant that the true foreclosing effect of Forum was closer to 26%.

- [564] Steyl had testified that if he had managed to obtain only 40% of Forum's advertising volumes, he would have survived.³¹¹
- [565] Dr Roberts performed a diversion ratio calculation and his testimony was that with a 43% diversion from Forum, GNN would have increased its income by R500 000 in every year of the complaint period.³¹² Even at 40% diversion, the figure given by Steyl, the figure would still be above R500 000 for the period. Note that in its two last full financial years, GNN suffered losses for the first time in the complaint period, and that for three consecutive years prior to this it was profitable. Further these losses were small, in the amounts of R54 000 and R70 000 respectively.³¹³
- [566] There was also anecdotal evidence that if GNN could be confined to below a certain threshold of market share it would gradually decline. This is the thrust of Bonthuyzen's 'stopper strategy' evidence. Bonthuyzen had testified that he had a rough idea of what GNN's costs would be and so could infer what they would need by way of market share to survive.
- [567] This approach emerges clearly in the report by Van Eck regarding the (2005) calendar year. After looking at what appeared to be GNN's declining and Forum's and Vista's growing market share, she remarked that GNN has been driven to below 20% of the market.³¹⁴
- [568] While Van Eck sought to give the remark a benign interpretation, it evidences a pre-occupation with getting GNN below a threshold market share, and 20% seems to be the number she had in mind.
- [569] Since Forum was the cheapest offering in the market, it was the most obvious vehicle to drive down GNN's market share.
- [570] What must also be borne in mind is that unlike in many other markets, Media 24 had the ability to increase capacity in the market if needed.

³¹¹ Transcript, pages 471-2; 576 – 581.

³¹² Transcript, page 652.

³¹³ These losses were also minor compared to Forum's profit loss. At that time R850 000 and R508 000, respectively. See Exhibit 10.

³¹⁴ Record, page 270.

- [571] Advertisers had a limited budget per month and the papers competed to get that money out of the advertiser's pocket first, but they also had to be sensitive to the fact that month-end was when consumers spend and advertisers needed to be visible. Vista would bring out a large edition in week four to attract this advertising. GNN knowing this had used week three to target Vista's lucrative week four edition. Van Eck explained that Forum was then used to counter this and hence target GNN's week three strategy. This strategy would not be evidenced in aggregate national figures. This is the reason that Van Eck, when she drew up her figures as in her monthly reports which illustrates the effects week by week.³¹⁵
- [572] In a similar argument to that raised above, Media 24's economists argued that there was no evidence of the finger prints of predation, in that we would expect the market share of GNN, if it was being excluded by Forum, to go to Forum. They argue that the evidence does not show this a shift away from GNN to Forum, but rather a shift from GNN to Vista, the non-predatory vehicle.
- [573] The Commission's first point in response to this has already been made earlier. The market contestation took place at local, not national level, so aggregate national figures do not tell us much about what was essentially a local targeting strategy.
- [574] The second point of the Commission's case is that the predation case was a holding strategy, not a sudden seizure of market share strategy. It was in the words of Media 24's staffers a 'stopper strategy'. Further, Genesis figures only cover the complaint period and don't show us what happened from when GNN entered the market share with a zero market share, and from whom it took market share. The figures cover the period, for which as Bonthuyzen described it, the 'stopper strategy' was in operation. A 'stopper strategy' would not leave the same forensic market share footprints as a seizure strategy

³¹⁵ See for example Record, pages 424-426; 427-429; 430-433; 499-501.

[575] The evidence shows that whilst Vista benefited from its greater circulation and brand familiarity as the oldest title in the market, some advertisers like Betts considered that their adverts would get lost in its crowded pages or thought that it was inferior editorially to GNN.

[576] Media 24 used Forum to prevent those advertisers going to GNN. It was able to use it to do so because Forum, like GNN, was less crowded with adverts, had the benefit of being first in the week to come out, and was the cheapest. But as we saw in the Moolmanshoek documents, and in later ones, Media 24 wanted to grow Vista, not Forum. This was perfectly rational given that Vista was the stronger title and could charge higher rates. The problem was, as Van Eck explained, that Media 24 was unhappy at having inherited uneven rates for Vista's customers, some who had enjoyed historic discounts during the price wars with Forum, and were resisting being moved up. Vista's sales staff was trying to make the rates more uniform and to move advertisers from Forum to Vista.³¹⁶ We see in some of the letters to advertisers that annual rate increases were not uniform. This was the manifestation of the attempt to get them to a standard rate. However, as long as GNN was around this strategy was difficult as advertisers had an alternative. By hurting GNN from below through Forum or using bundling strategies as they did later in the complaint period, they prevented GNN expanding. Forum was also used to target GNN customers who were not potential customers for Vista. Thus Forum served two roles in relation to GNN.

[577] Thus we find that the aggregate figures of changing market share are insufficiently probative to rebut the case on predation, given the specific form that it has taken in this case.

[578] Media 24 also raised other arguments, apart from the market share argument, that fit into the theme that this was an atypical form of predation, and hence on its argument, the lack of these typical symptoms rebutted the notion that was predation.

³¹⁶ In 2009 Molly Green the editor of Forum complained about advertiser's loyalty going to Vista in a letter addressed to Christo Van Staden. Record, page 1356.

- [579] Its next argument was that there was no price reduction by the predator firm in response to the new entry. It further argued the predation period was atypically long. The longer the period of alleged predation it argued the less likely that predation exists.
- [580] In essence even the Commission would concede that this is not a typical predation case. But it is important not to confuse features that may typically be associated with predation cases, with the essential legal or economic requirements for predation. For instance, in our law proof that the respondent is a dominant firm is an essential requirement. Proof of pricing below some appropriate measure of cost would be an essential requirement and differs depending on whether the case is being considered under 8(c) or 8(d)(iv). However, proof of price cuts during the predation period or a short period of predation, are not essential requirements in the same sense as the others mentioned are; they merely constitute facts that join the matrix of other facts to be considered.
- [581] Granted, they might tend to suggest a lower probability that conduct is predatory, but they would still need to be weighed up in the context of the overall factual matrix; and may indeed be rebutted by way of a suitable explanation; however, unlike the absence of the legal and economic pre-requisites mentioned, their absence would not spell the end of the case. We go on to consider them further now.

No price reductions

- [582] Whilst it is correct that the complaint period does not commence with price reductions it is not correct to state that there were no price reductions during the complaint period. Exhibit 10, which we have referred to earlier, and which was prepared by Genesis, Media 24's economists, shows that from 2004/5 Forum which had up until then increased its rates annually, decreased them in real terms, on a year by year basis, for the next three years. In the fourth year rates were increased again, but minimally; they were still below what they were in 2004/5. Vista's real rates also declined, although they started their decline a year later and declined again on a year-on-year basis for three years.

- [583] GNN which was the most expensive of the three papers showed a decline in its aggregate advertising rates, again in real terms, from 2004/5 onwards for the next three years. Genesis did not have any rates for GNN for the period 2008/9 although it was still in operation for 10 months of this period. However, we note that during this period the Vista rates had moved up to R16.90. Since these are aggregated figures it is not clear whether rates increased on GNN's exit or were uniform during this period. However, recall that Steyl had told the Commission that he could have survived with the rate of R16.00. He also suggested to Media 24 executives that a rate of R17.00 would have been a market rate.
- [584] Given that GNN's expenses, as Steyl had testified, would have been going up all these years and it was less favourably placed without a large group behind it to absorb these expenses, the decline in real rates over this period is consistent with the strategy advanced by Bonthuyzen. It supports, rather than refutes the Commission's case, which is about slow poisoning of the target firm, not a sudden assassination. Significantly after two years of cutting its rates Forum suffered its greatest loss (R981 847), yet the following year it cut its rates, in real terms, more significantly than in any prior year (R8.02 to R7.13).
- [585] The Commission also does not argue that the predation period started in 2004. It does not know when it started. As explained by Dr Roberts its case is that predation was at least in operation by the beginning of 2004. This is something different. It is Steyl who in his statement said that the market was competitive until 2004 from which the commencement of the period is supposedly to have come.
- [586] However, Steyl's evidence on this point is not decisive. As an outsider he was giving his impression. The predation period may well not have had a commencement date which one could mark in one's calendar. We can see that from 2001 onwards a strategy to counter Steyl was already being considered. We don't know what happened thereafter but we have evidence that these ideas gained greater clarity at Moolmanshoek in

March 2003, and then may have taken longer to reach the battlefield i.e. the desks of the consultants who went out selling advertising.

[587] We must also bear in mind that Exhibit 10 suffers from the same problems as the market share figures discussed earlier. The figures aggregate national, local and smalls although we know that tariffs for these varied greatly. Central to the Commission's case however, is a targeting strategy affected at local level which this type of data would not show.

[588] Therefore we consider that nothing decisive turns on the fact that the beginning of 2004 or some earlier period shows no discernible moment of predation commencing.

[589] But it is also important to appreciate that the predation strategy, allegedly affected here, was not only a pricing strategy. Rather it was about having additional capacity in the market to act as a barrier to entry by incumbents or would be entrants. This is what is meant by having a 'stopper' in the market. The literature on predation shows that capacity increases also constitute predation. The EU Guidance in its section on predation refers to the fact that sacrifice can be shown by charging lower price or "*...by expanding its output over the relevant period*".

[590] Granted, in this case Media 24 did not increase capacity in the traditional sense following entry. However, the merger with Vista presented Media 24 with the opportunity, not only to gain a dominant position in the Welkom market for the first time, but also more capacity in the market than either it (as the erstwhile owner of just Forum) or Caxton/ Perskor (as the erstwhile owners of just Vista) ever had. We know from Bonthuyzen's evidence that at one time the solution to this problem was the conversion of Forum into a shopper. This would have provided a complementary, rather than competitive product to Vista for Media 24, and led to an increase in demand because the shopper would have brought in advertising from businesses who could not afford the regular papers.

[591] The decision that he testified, to not to take this option but to keep Forum in the market to operate as the so called '*stopper*', results in the same

supply increasing outcome from Media 24's perspective as if, without the merger, a hypothetical owner of Vista had increased supply into the market by the volumes of available weekly advertising space from a paper the size of Forum.

Period

[592] Media 24 argues that in the classic predation case the period of predation is brief, as it would be irrational for a firm to fund below cost pricing for any longer period of time, as it could not recoup what it had lost during the period of predation. The period of five years is too long to rationally engage in predation. This, Media 24 argues, suggests that the conduct was unlikely to be consistent with the short sharp pain predation is supposed to inflict.

[593] Whilst in many typical cases of predation this observation may be correct, each case must be viewed in its context. In some cases courts have come to the opposite conclusion and found that the length of time made the inference of predation more, not less, likely. As Einer Elhauge has noted:

*“Alleged predatory prices that last only one month cannot cause an equally efficient rival to lose any money by not exiting unless those prices are lower than the short-run costs the rival incurred by operating that month. In contrast, pricing that lasts for ten years will cause an equally efficient rival to lose money (relative to exit) if the price does not suffice to cover the fixed costs of producing anything next year (like overhead) or the future capital costs in the short run but are variable over a time horizon of ten years. Thus, we need not pick one time period or cost measure in the abstract; the choice is dictated by the time period of the alleged predation.”*³¹⁷

[594] Further, as the EU Guidance points out, sometimes predation may prove more difficult than expected at the start of the conduct and actual

³¹⁷ E Elhauge “Why above cost prices cut to drive out entrants are not predatory and the implication for defining costs and market power” (2003) *Yale Law Journal* 681- 795, at 708. Cited in O’Donoghue and Padilla *op cit* page 239.

recoupment may be impossible (not the case here) but it still may be rational for the firm to continue with the predatory strategy it started.³¹⁸

[595] Secondly one cannot view the predation period in isolation from the period of recoupment that is open to the alleged predatory firm. A long period would be irrational if the period of recoupment was not commensurate. However, the converse also holds. On the facts of this case the predation period has been followed by a period of recoupment that is still extant.

[596] Further, recoupment for Media 24 also comes in the form of reputational recoupment in all its other community newspaper markets, where it solidifies its reputation as an aggressive competitor.

[597] Finally, an important fact to bear in mind in this case, as Bonthuyzen testified, is that Media 24 at all times since 2001, following the complaint for Alida Joubert, knew that the Commission would be looking over its shoulder. This discouraged any attempt at a quick price decreasing strategy of predation which would have left finger prints in the market place that the Commission could easily find.

Conclusion on exclusionary act

[598] We have come to the conclusion that for the purpose of section 8(c), Media 24's conduct in operating Forum for at least the complaint period constituted an exclusionary act. We have based this conclusion on the fact that Media 24 operated Forum, for at least this period, below its average total costs and that there is additional evidence, that on a balance of probabilities, is consistent with predatory intent. That evidence consists of direct intent, in the form not merely of statements, but also the formation and implementation of a plan that was predatory in nature, indirect evidence in particular of cannibalisation, operating Forum for a lengthy period despite repeated loss making and failure to perform to budget forecasts, the timing of the closure of Forum shortly after the exit

³¹⁸ EU Guidance *op cit* paragraph 71 footnote 6.

of GNN, and finally strong evidence of recoupment which was not contested.

[599] We have also considered the rebuttal evidence of Media 24 and consider this has not negated the probabilities of the other evidence. Various business rationales offered by Media 24, such as the mopping-up theory and the contribution to common costs, have on closer examination not proved convincing. The argument that GNN was not an equally efficient competitor was only correct on the assumption of a particular model of static costs, which we did not find appropriately recognised the unique qualitative evidence about GNN, and the fact it was able to have lasted in the market as long as it did. Our final conclusion is that on the balance of probabilities the conduct was exclusionary.

Anti-competitive effects

[600] In order to establish a contravention of 8(c) the Commission has to go further than establish the existence of an exclusionary act. The Commission under this provision also has to establish that the anticompetitive effects of the act outweigh any pro-competitive gain.

[601] This is the approach we adopted in SAA where we held that:

“If the conduct meets the requirements of the definition, we then enquire whether the exclusionary act has an anti-competitive effect. This question will be answered in the affirmative if there is (i) evidence of actual harm to consumer welfare or (ii) if the exclusionary act is substantial or significant in terms of its effect in foreclosing the market to rivals. This latter conclusion is partly factual and partly based on reasonable inferences drawn from proven facts. If the answer to that question is yes, we conclude that the conduct will have an anti-competitive effect. Whichever species of anti-competitive effect we have, consumer welfare or likely foreclosure, we have evidence of a quantitative nature and hence we can return to the scales with a concept capable of being measured against the alleged efficiency gain.”

[602] In this case the Commission relies on evidence of both types of anti-competitive effects. The elimination of GNN as evidence of foreclosure and the level of recoupment after its exit from the market is relied on as evidence of the effect on consumers. In this case the consumers are those businesses which rely on advertising in community newspapers to reach readers in the Goldfields region.

[603] As we have seen, Media 24's defence has been to deny the existence of any causation between its conduct and the demise of GNN. Thus it does not dispute the existence of the outcomes the Commission relies on as evidence of anti-competitive effects – a single firm market and higher prices than would have existed under competition. But what Media 24 alleges is that these outcomes cannot be causally linked to an exclusionary act on its part; rather they were the product of GNN's own frailties, exacerbated by the recessionary conditions in the market at the end of the complaint period.

[604] However, we have already found against Media 24 on these issues. More specifically, we have found that the exclusionary act of maintaining Forum in the market when its prices were below ATC, caused the exclusion of GNN and lead to the recoupment effects described earlier.

[605] This does not eliminate the need to examine in greater detail those effects to exclude the possibility that they may be of a trivial or transient nature.

[606] We proceed to consider this under the two heads referred to in the SAA case.

(i) Foreclosure

[607] The exclusionary act of Media 24 removed a rival GNN from the market. GNN was an effective rival for a number of reasons. It provided competition in respect of advertising tariffs, which as we have seen increased above the competitive level, once it had exited the market.

[608] Consumer choice was reduced in two ways; advertisers lost an alternative outlet to advertise their goods and services and paid higher prices;

readers lost the choice of an alternative newspaper. We elaborate on this more fully below.

[609] No new paper has entered the market in any sustained manner since the exit of GNN. Effectively Vista has enjoyed a monopoly for the past five years. Expressed differently, the exclusionary act has led to the removal of the only effective competitor to Media 24, and given that there has been no subsequent new entry, foreclosure has been both total and enduring.

(ii) Consumer welfare

[610] Newspapers, as has been noted frequently in the literature, operate in a double- sided market. On the one side of the market, which has largely been the focus of this decision, they compete in the provision of advertising services to businesses, and private advertisers for classified adverts.

[611] On the other, they compete to provide a product to readers. In the present case price competition affects the former, not the latter, as the newspapers in question are distributed for free to readers. Non-price competition however impacts both sides of these markets.

(iii) Advertisers

[612] Post the complaint period Vista has been able to achieve higher rates than it could previously during the complaint period and over a much greater share of the market – indeed the entire market. Advertising rates have increased at rates higher than they were during the period of competition. Compared with the rates at which tariffs had increased in previous years, on the evidence of Ms Van Eck, these increases reflect supra-competitive pricing. Given the fact that Media 24 acquired a monopoly in the market post April 2009, this effect is hardly surprising and is predictable. Since the monopoly still subsists at the time of the conclusion of this matter the anti-competitive effects are substantial and enduring.

[613] In respect of non-price competition customers for advertising have also been adversely affected. Advertisers have been limited to fewer choices of newspapers (from three to one) and fewer opportunities to place adverts (a choice of three days a week to only one day).

(iv) Readers

[614] Readers of community newspapers in the Goldfields area have also been adversely affected in the form of the benefits of non-price competition: the loss of a competitive news source that provided a different choice by way of communication of information to them, and the provision of communication from advertisers to them of marketing messages. We also know from the record that the papers competed to provide community events in Welkom, as this was seen as an indirect source of advertising, and an area where, to the chagrin of Van Eck as least, GNN was very successful. Without this competition between rival papers to provide this type of opportunity the Welkom community as a whole is worse off.

[615] In small communities like Welkom the loss of consumer choice by the elimination of a competing community newspaper has a more marked impact on limiting consumer choice. This is because these communities tend to be underserved by the larger media whether electronic or print who are less likely to carry their local news and are too expensive for local businesses to advertise in. Whilst consumer choice limitation in this context may be considered a public interest issue, that does not detract from it also being an orthodox competition concern about the impact on consumer choice. It is the latter, not the former that serves as a concern for our jurisdiction.

[616] We thus find that the exclusionary act in this matter has had an anticompetitive effect both in respect of foreclosing rivals and reducing the consumer welfare of both advertising customers of the newspapers concerned, and readers in the Goldfields region. More specifically this consumer welfare effect, was manifested by a reduction in terms of both price competition, as it affected advertisers and non-price competition, and also affecting both advertisers and readers.

Pro-competitive gain

[617] In terms of section 8(c), as we have seen, even if the firm has engaged in an exclusionary act with an anticompetitive effect, it can still lead rebuttal evidence to show that the anticompetitive effect is outweighed by evidence of a pro-competitive gain.

[618] In *Senwes* we held that:

*“Under section 8(c) the Act makes it clear that the onus is on the party bringing the complaint to demonstrate that the anti-competitive effect outweighs the gain from the objective justification. Under 8(d) it is the reverse. However, even under section 8(c) it would be necessary for the dominant firm to establish the existence of an objective justification for the balancing exercise to be invoked. If it does not do so, the complainant is not required to imagine all the justifications that might be invoked and then repudiate them. This is perfectly fair, as the existence of any objective justification is one best known to the firm concerned. The complainant is not expected to mind read the respondents’ defence of justification and then debunk it. Thus where a firm does not raise a defence of objective justification it will be assumed that it does not have one, and the complainant will be deemed to have established that the anti-competitive effect has outweighed any pro-competitive gain.”*³¹⁹

[619] In this case Media 24 has not sought to lead such evidence. The presumption therefore of an anti-competitive effect has not been rebutted.

CONCLUSION

[620] In this matter the Commission has charged Media 24 with having contravened section 8(d)(iv) alternatively section 8(c) of the Act. In relation to the main count under section 8(d)(iv) we find that the Commission has not proved on a balance of probabilities that Media 24

³¹⁹ *Competition Commission v Senwes Limited* Case number 110/CR/Dec06 paragraph 171. In this decision we also referred to the European Union’s General Court’s decision in *Microsoft* where it held that: it is for the dominant position concerned, and not for the Commission, before the end of the administrative procedure, to raise any plea of objective justification and to support it with argument and evidence. It then falls to the Commission, where it proposes to make a finding of an abuse of a dominant position, to show that the arguments and evidence relied upon by the undertaking cannot prevail and, accordingly, that the justification cannot be accepted.” Case T-201/04 [*Microsoft Corp v Commission 2007*] ECR II –000, 5 CMLR 846, paragraph 688.

priced below the relevant cost measures and the case in respect of this subsection is dismissed.

[621] In respect of section 8(c), the Commission has established that Media 24 priced its publication Forum below its average total cost, and that together with other evidence of direct and indirect intent to predate its competitor GNN, and its subsequent ability to recoup what it lost during the predation period, has established this as constituting an exclusionary act. This act furthermore had an anti-competitive effect and there is no evidence of any pro-competitive gain that outweighed this effect. Accordingly, we find that Media 24 has contravened section 8(c) of the Act and that this contravention lasted, for, at minimum, the duration of the complaint period, namely January 2004 to April 2009.

REMEDIES

[622] Both sides requested us to make a finding on the merits first, and then depending on that outcome, to reconvene the hearing of the matter to determine a remedy.³²⁰ For this reason the decision does not deal with the issue of a remedy and the matter will proceed at a later stage to deal with remedies. A pre-hearing will be convened shortly to deal with this.

ORDER

We hereby make the following order:

After hearing evidence the Tribunal finds:

- (1) In respect of the main count, under section 8(d)(iv) of the Act, the case against Media 24 is dismissed; and

³²⁰ In the complaint referral the Commission had sought an administrative penalty of 10% of Media 24's turnover. However no remedy was sought in respect of the alternative count of 8(c) for which a penalty is not competent for a first time contravention. (See section 59(1)(b) of the Act.) It is common cause in this matter that Media 24 has not previously been found to have contravened the Act.

- (2) in respect of the alternative count, under section 8(c) of the Act, Media 24 is found to have contravened section 8(c) of the Act, during the period January 2004 to April 2009; and further
- (3) A hearing on remedies is postponed to a date to be arranged by the registrar.

NORMAN MANOIM

8 September 2015

DATE

Yasmin Carrim and Merle Holden concurring

Tribunal Researcher:

Derrick Bowles

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