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COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No.: FTN190Dec15/OTH135Sep16

In the matter between:

Caxton and CTP Publishers and Printers Limited	**First Applicant**
Capital Newspapers (Pty) Ltd	**Second Applicant**
And	
The Natal Witness Printing and Publishing Company (Pty) Ltd	**First Respondent**
Media24 (Pty) Ltd	**Second Respondent**
Novus Holdings Limited	**Third Respondent**
Paarl Coldset (Pty) Ltd	**Fourth Respondent**
Mandla-Matla Publishing (Pty) Ltd	**Fifth Respondent**
The Competition Commission	**Sixth Respondent**
Naspers Limited	**Seventh Respondent**
Naspers Beleggings Ltd	**Eighth Respondent**
Keeromstraat 30 Beleggings Ltd	**Ninth Respondent**
Wheatfields 221 (Pty) Ltd	**Tenth Respondent**

In re the settlement agreement between

The Competition Commission	**Applicant**
And	
The Natal Witness Printing and Publishing Company (Pty) Ltd	**First Respondent**
Mandla-Matla Publishing (Pty) Ltd	**Second Respondent**

Panel	:	N Manoim (Presiding Member)
		E Daniels (Tribunal Member)
		A Roskam (Tribunal Member)
Heard on	:	1 June 2017
Decided on	:	21 July 2017

REASONS

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[1] These reasons concern two related applications before us. Both applications concern the consequences of a merger that had been implemented contrary to the provisions of the Competition Act ('the Act').

The Settlement Agreement

[2] The first application, involves a settlement agreement entered into between the Competition Commission and the two errant merging parties, which they seek to have confirmed as an order of the Tribunal.

[3] The parties to this application are the Competition Commission ('Commission'), and the merging parties; viz. the Natal Witness Printing and Publishing Company (Pty) Ltd ('Natal Witness') and Mandla-Matla Publishing (Pty) Ltd ('Mandla-Matla'). This consent agreement contains an agreement for the merging parties to pay an administrative penalty of R1 million.

The Caxton Application

[4] The second application has been brought by Caxton and CTP Publishers Limited ('Caxton') and Capital Newspapers (Pty) (Ltd) ('Capital'), two rivals of Mandla-Matla and Natal Witness. In the Caxton application, the applicants seek an order from the Tribunal that it refuse to confirm the consent agreement and that instead it impose what they deem an appropriate penalty.[1] In argument, these parties suggested the penalty be significantly higher than that posited in the consent agreement.

[5] The Caxton application cites not only the parties to the settlement agreement viz. the Commission, Mandla-Matla and Natal Witness, but also seven other firms, listed as respondents above.

[6] Of these two, Novus Holdings Limited and Paarl Coldset (Pty) Ltd (the third and fourth respondents) have been joined because they have an interest in a printing contract which was a material part of the merger agreement. Paarl Coldset (Pty) Ltd owns the printing works from which income was derived and the Novus Holdings Limited is its controller.

[7] The remaining five firms are joined because, according to Caxton, they were parties to the merger from the date of its implementation. As we go on to discuss, the date on which

[1] Caxton prays for the imposition of a R40 million penalty, of which R20million would be payable at date of order and R20million would be a suspended sentence payable, if any firm in the Naspers group contravenes the Act again by failing to notify a merger within the next 5 years. Caxton's heads of argument page 43.

the merger was implemented is an issue in dispute. On Caxton's version, Media24, the second respondent, was an acquiring party as it jointly controlled Natal Witness, and the seventh to tenth respondents, Naspers Limited, Naspers Beleggings Ltd, Keeromstraat 30 Beleggings Ltd, Wheatfields 221 (Pty) Ltd, were respectively, controllers of Media24 and hence, in Caxton's view, deemed to be part of the ascending ladder of acquiring firms.

[8] Prior to the hearing, the eighth to tenth respondents had raised a special plea alleging that they had been misjoined. Shortly before the hearing, this opposition was withdrawn and we therefore need not consider the misjoinder.

[9] Given the plurality of applicants and respondents we have elected to keep matters simple by referring to the applicants in the singular as Caxton and all the respondents, save the Commission and the eighth to tenth respondents, as Media24 unless on the facts it is necessary to distinguish them.

[10] The parties to both applications are agreed that the two applications raised the same issues and it was agreed that they should be heard together, which they were on 1 June 2017. Hence in this decision, we explain our reasons for deciding both the Caxton application and the settlement agreement.

[11] The terms of the settlement agreement are relevant to both the settlement agreement and the Caxton application which objects to its confirmation. For ease of reference we set out the material terms of the settlement agreement:

- It is made in terms of section 49(D) of the Act read with sections 58(1)(b) and section 59(1)(d)(iv);
- The respondents to this agreement are limited to Natal Witness and Mandla-Matla;
- Natal Witness and Mandla-Matla admit that the Ilanga agreement gave rise to a notifiable intermediate merger and was implemented by them without the prior approval of the Commission in contravention of section 13A(3) of the Act;
- The agreement provides for behavioural relief in which Natal Witness and Mandla-Matla agree to implement a compliance program; and
- Natal Witness and Mandla-Matla agree to pay an administrative penalty of R1 million, but which has been allocated between them as follows: Mandla-Matla R200 000.00 and Natal Witness R800 000.00.[2]

[2] The parties were also given a period of time to pay the penalty in instalments, the first half payable within 20 days of approval of this order and the balance payable on the last day of the next calendar month. See clause 5.4 of the order, record page 86.

BACKGROUND

[12] On 19 November 2000, Natal Witness and Mandla-Matla concluded an agreement which provided for Natal Witness to provide "*non-editorial services*" to Mandla-Matla in respect of a newspaper Mandla-Matla owned called Ilanga.[3] Natal Witness was at the time a mid-sized, family owned firm, publishing and printing newspapers in the KwaZulu Natal, Midlands region. Mandla-Matla is the owner and publisher of Ilanga which is the oldest isiZulu newspaper in the country. We will refer to this, as the parties have, as the 'Ilanga agreement'. It is this agreement that constitutes the merger to which the two applications relate.

[13] It is common cause that the Ilanga agreement was not notified as a merger prior to its implementation. Determining the date of implementation, as we discuss more fully later, is a subject of dispute. Although the Ilanga agreement was signed on 19 November 2000, in terms of the agreement the date of commencement was to be only on 1 April 2002.[4] Certain provisions however came into operation on the date of signing. Media24 argues that the date of implementation coincides with the date of signature because certain restrictions and obligations of the parties arose immediately. Caxton contends for 1 April 2002 as the date of implementation because that is the date on which all the obligations in terms of the agreement arose. Put differently, in Caxton's submissions the obligations that arose on signature did not amount to control; those obligations, they argued, that did amount to control only arose on 1 April 2002.

[14] One might wonder why the merging parties would not want to rely on a later date for the implementation and conversely, Caxton an earlier one, given their respective positions on the adequacy of the fine.

[15] The answer is that there is a degree of opportunism in both positions for which the duration is less important than the existence of two important facts that took place between 19 November 2000 and 1 April 2002; one legal and one factual, which both sides to this debate consider material to the gravity of the contravention, and hence, the adequacy of the penalty.

[16] The legal issue relates to the consequences of an amendment to the Competition Act that came into effect on 1 February 2002. This amendment effected both substantive and procedural changes to the merger regime in the Act. We will refer to the Act as it was prior to the amendment as the "old Act". If the merger was implemented before this date,

[3] The settlement agreement reflects the date of the agreement as 14 November 2000. Nothing turns on this and it may be due to different dates for the signatures of the respective parties.
[4] See Ilanga agreement clause 2(a), record page 334.

then the definition of merger in the old Act applied. This is arguably more beneficial to the merging parties than the current definition.

[17] The factual issue is that Media24 became a joint controller of Natal Witness by acquiring 50% of the company in December 2000 shortly after the conclusion of the Ilanga agreement, but certainly long prior to 1 April 2002.[5] If implementation occurred on date of signature, i.e. November 2000, then Media24 was not yet an acquiring party. If the merger was implemented only in April 2002 then Media24 was by then deemed to be an acquiring party in respect of the Ilanga agreement.

[18] This transaction, in which Media24 acquired joint control of Natal Witness, referred to as Natal Witness I, was also not notified as a merger. In 2012, Media24 entered into a further agreement to acquire full control over Natal Witness. This transaction, (Natal Witness II), unlike the prior two, was notified.[6]

[19] During the course of the Natal Witness II merger hearing in 2012, Caxton, which had participated in the hearing as an intervenor, ascertained under cross examination of Pieter Le Roux, then Natal Witness's managing director, that the Ilanga agreement had never been notified. Le Roux explained that in their view (here he refers to Natal Witness and Mandla-Matla) the Ilanga agreement did not constitute a merger.

[20] This explanation clearly did not convince Caxton. On 29 May 2012 Caxton wrote to the Commission alleging that the Ilanga agreement was a merger that had been implemented without the requisite approval.[7]

[21] Although it claims it was investigating the matter, no enforcement action had been brought by the Commission at the beginning of 2015. Clearly Caxton was less patient. In February 2015, Caxton brought an application to compel the relevant parties to notify the Ilanga agreement as a merger.[8]

[22] Initially Media24 and Natal Witness opposed the application on the basis that the Commission was still investigating the issue and thus whilst it was doing so the Tribunal lacked jurisdiction to hear the Caxton application; and secondly, that the transaction was

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[5] The exact date of acquisition is not certain, but the earliest possible date was the 19 December 2000.This is according to the affidavit of the former managing director of Natal Witness whom we can assume is the most familiar with this. See record page 247.

[6] The Tribunal approved this transaction on 14 May 2012.

[7]See answering affidavit of Romeo Heathrow Kariga the Commission's deponent, paragraphs 8-9, record page 213.

[8] For Commission's version, see affidavit of Kariga, record page 250. For Caxton's version see affidavit of Paul Michael Jenkins record page 35.

in any event not a merger. The matter came before the Tribunal at a pre-hearing on 24 July 2015.

[23] The Tribunal postponed the matter *sine die* and ordered the Commission to conclude its investigation. It was given until the end of November 2015 to do so.

[24] Before the investigation period was concluded, and on 27 November 2015, the Commission, Mandla-Matla and Natal Witness entered into the present settlement agreement.

[25] However, the merger had not yet been notified. The settlement agreement merely provided that it would be *"...as soon as reasonably possible."* [9]

[26] The matter came before the Tribunal at a pre-hearing again on 21 April 2016. The Tribunal directed that the merger be filed and the investigation be concluded before the application to approve the settlement agreement could be approved.

[27] The merger was eventually notified on 27 June 2016. On 13 September 2016 the Commission approved the merger without conditions. Since it was an intermediate merger it did not require Tribunal approval.

[28] On 27 September 2016, Caxton and Capital brought the present application we have referred to as the Caxton application.

[29] The application is opposed by all the respondents.

[30] The essence of Caxton's critique of the settlement agreement is contained in the following paragraph of Jenkins' affidavit:

"It is noteworthy that none of the other acquiring firms are parties to this agreement and no consideration has been taken of the turnover of these entities in determining an appropriate proposed penalty."[10]

[31] Jenkins then spends several pages analysing what he terms are the Commission's errors in approving the merger. Jenkins concludes that the Ilanga agreement has led to a substantial prevention and lessening of competition and should have been prohibited or approved subject to conditions.[11]

[32] This analysis amounts to a review of the Commission's decision to approve the merger.

[33] *A fortiori* if it was anticompetitive then prior implementation should be looked at far more seriously. However, Caxton never reviewed this decision prior to bringing the present

[9] See settlement agreement paragraph 4.1, record page 85. See Jenkins affidavit record page 46.
[10] Paragraph 120 of Jenkin's affidavit, record page 46.
[11] Jenkins affidavit paragraph 163, record page 64.

application. It brought a review only after this matter was set down for hearing. Even as late as the last pre-hearing in this matter held on 27 February 2017 there was no mention of a review application. This review was subsequently filed on 10 March 2017. At the hearing of the present matter on 1 June 2017 Caxton's counsel advised us that the review would be withdrawn.

[34] This way of dealing with the dispute has implications. Part of the criticism is to suggest that the Commission has got its facts wrong on issues such as market definition and its estimation of the printing capacity of Natal Witness and Novus.[12] This assertion has been denied by the Commission and the merging parties. Their denials aside, however, at the time we considered these applications the Commission's approval stands. To the extent that Caxton now suggests on these papers that unconditional approval was based on errors of fact it must accept that the normal rules in opposed applications, as set down in the well-known case of *Plascon Evans* relating to disputes of fact, apply.[13] This means that where there are disputes of fact we accept the respondent's version unless "allegations or denials of the respondent are so far-fetched or clearly untenable that the Court is justified in rejecting them." [14]

LEGAL THRESHOLD

[35] Central to the debate in this case has been what threshold legal test the Tribunal should apply when considering whether to approve a settlement agreement purporting to settle cases involving a contravention of the merger requirements set out in Chapter 3 of the Act.

[36] The first point in contention can be decided briefly. The Commission and the merging parties sought to settle the case in terms of the provisions of section 49D of the Act. That provision, as Caxton correctly contended, applies only to settlement agreements in respect of prohibited practice cases. This was what the Tribunal held in *Netcare* and although that decision was overturned on appeal, the court did not overturn or comment on this finding.[15] Further, when it came to argument we did not understand either the merging parties or the Commission to contend otherwise.

[37] All parties also agreed that it is permissible for the Commission and merging parties to settle merger contraventions by way of settlement agreements.

[12] See affidavit of Jenkins record pages 53-64.
[13] See *Plascon-Evans Paints Ltd v Van Riebeeck Paints (Pty) Ltd* 1984 2 All SA 366 (A)
[14] *Ibid* para 9.
[15] *Competition Commission and Netcare Hospital Group (Pty) Ltd and Community Hospital Group (Pty) Ltd* CO111Mar07.

[38] The disagreement arises in what legal test the Tribunal must apply in considering whether to approve such settlement agreements if the legal regime laid down in section 49D does not apply.

[39] The Commission and merging parties argue that even if section 49D is not applicable, there is no reason why the legal test that has been formulated by the Competition Appeal Court in respect of the Tribunal's discretion to approve section 49D settlement agreements should not equally apply to settlements of merger or Chapter 3 infringements. In the *Netcare* case the CAC set out the test as follow:

"What then are the circumstances under which the Tribunal can interfere? As indicated above it is not a mere rubberstamp. It is not a court of appeal in the sense that it can embark on a re-hearing of the matter and substitute its own views for that of the Commission. The Tribunal of course plays a most important role in the Competition hierarchy. In exercising its discretion whether to approve a consent order it must obviously be satisfied that the objectives of the Competition Act, together with the public interest, are served by the agreement. An agreement which imposes an inordinately low penalty for a serious contravention will obviously bring the 14 objects of the Competition Act into disrepute and will be against public policy. <u>It seems to me that the true inquiry before the Tribunal in this context is whether the agreement is a rational one, whether it meets the objectives set out above and is not so shockingly inappropriate that it will bring the Competition authorities into disrepute</u>. As indicated the Tribunal cannot hear any evidence but it can surely make such inquiries at the hearing as it deems fit in order to satisfy itself that the abovementioned objectives are properly met" (our emphasis).[16]

[40] If that threshold is also applied to a Chapter 3 contravention, it would mean that the Tribunal could not refuse to confirm a settlement agreement simply because it would have reached a different conclusion; rather, it could only refuse to confirm the agreement if the *Netcare* test is not met.

[41] Caxton argued however that if section 49D does not apply, then the Tribunal is exercising its powers in terms of section 59(3) of the Act. That section states:

"when determining an appropriate penalty, the Tribunal <u>must consider:</u> the following factors

(a) the nature, duration, gravity and extent of the contravention;

(b) any loss or damage suffered as a result of the contravention;

(c) the behaviour of the respondent;

(d) the market circumstances in which the contravention took place;

(e) the level of profit derived from the contravention;

[16] *Netcare Hospital Group (Pty) Ltd and Community Hospital Group (Pty) Ltd and Norman Manoim NO and others* 75/CAC/Apr08

(f) the degree to which the respondent has cooperated with the Competition Commission and the Competition Tribunal; and

(g) whether the respondent has previously been found in contravention of this Act" (our emphasis)

[42] Caxton argues this language suggests that the Tribunal has to satisfy itself that the penalty is appropriate. This means, contrary to the approach now taken in respect of settlements made in terms of section 49D, that the Tribunal must reach its own conclusion as to whether a penalty is appropriate; not defer to the Commission's assessment.

[43] The merging parties and the Commission disagreed, arguing that there was no policy reason why settlement agreements in respect of merger contraventions should face a higher level of scrutiny from the Tribunal than would those for prohibited practice cases. It was pointed out that the *Netcare* case in any event related to a hybrid contravention. The offending parties were alleged to have contravened both the merger control provisions and section 4 of the Act.[17] Yet, the court applied the same standard to both. Moreover, the court would have been alive to the limited operation of section 49D of the Act because this was discussed in the Tribunal decision on appeal before it. The fact that the court made nothing of this suggests it did not see much merit in the distinction as far as the threshold test was concerned.

[44] Contraventions of the merger provisions do not necessarily entail anticompetitive consequences. Prohibited practice contraventions by definition always do. This means that the latter will invariably be more serious than the former. It is true that in many cases the two contraventions may raise the same issues. A merger between two competitors that is implemented without approval may lead to collusion between the two firms. Nevertheless, in such cases the Commission should be free to choose whether to prosecute the firms involved for both a section 4(1)(b) and 13A contravention (as it did in *Netcare*) or choose to settle only on a section 13A contravention, but view the conduct more seriously for the purpose of a remedy.[18] If the legal test for approving a settlement differed as between whether it was in respect of a prohibited practice or a Chapter 3 contravention, this would bedevil such settlements with uncertainty.

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[17] *Ibid* paragraph 16: *"The proposed order [settlement agreement] recorded that both Netcare and CHG conceded contraventions of sections 13A(3) and 4(1)(b)(i) of the Act."*

[18] This appears to be the approach taken to the *Life Health Care* settlement where the settlement related only to a contravention of section 13A but a penalty of R10 million was agreed. *Competition Commission and Life Healthcare Group (Pty) Ltd and Another* FTN229Feb16.

[45] Caxton was not able to offer any policy argument for why merger contravention settlements should be subjected to a higher degree of scrutiny than their more harmful prohibited practice counterparts. Its argument hinged around what reading needed to be given to section 59(3). But this reading is not as clear cut as suggested unless one takes an overly formalistic approach. But that is not the only reading the section can be given.

[46] There is nothing to suggest that by adopting the *Netcare* test, one is not considering the penalty in a manner that is *appropriate*.

[47] After all, one of the factors considered in section 59(3) is the extent a party has co-operated with the Commission. A settlement agreement represents a most significant degree of co-operation. Adopting a test of deference by recognising this factor is consistent with adopting an approach to penalties that is appropriate.

[48] As the Commission argued, and we have a great deal of sympathy with this approach, the Tribunal should encourage settlements between it and erring merging parties. If the Tribunal too readily second guesses the Commission, parties will be more reluctant to settle, thus imposing increasing public and private burdens which a settlement regime alleviates.

[49] We find that both policy arguments raised justify applying the *Netcare* threshold of review to settlement agreements in respect of merger cases as well, and that such an approach is not inconsistent with the language of section 59(3).

[50] We will thus review the present settlement agreement on this basis i.e. examining "*...whether the agreement is a rational one, whether it meets the objectives set out above and is not so shockingly inappropriate that it will bring the Competition authorities into disrepute.*" (our emphasis).[19]

THE FACTORS[20]

[51] As all the parties have done we will review the appropriateness of the settlement by considering the factors set out in section 59(3).

(a) *The nature duration, gravity and extent of the contravention*:

[52] The biggest difference in the approach of parties comes here. As explained earlier, central to this dispute is determining the date on which the merger was implemented.

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[19] See *Netcare* ibid.

[20] We deal with these factors in our reasons in a thematic fashion instead of in the order listed in the Competition Act.

This impacts on whether the parties to the merger extend beyond Mandla-Matla and Natal Witness to Media24 and in turn its controlling shareholders.

[53] When the Ilanga agreement was concluded in November 2000, the old Act had a different definition for what constitutes a merger from that contained in section 12(1) currently.[21] Second, at the time of the conclusion of the agreement merging parties were obliged to notify a merger within 7 days of conclusion of the merger agreement. That obligation no longer applies.[22] Although merging parties must still notify prior to implementation there is no longer a time period for them to notify after *the* conclusion of an agreement. These amendments to the Act viz. to change the definition of what a merger is and to remove the obligation to notify within 7 days of conclusion of the agreement came about on 1 February 2002 – i.e. after the conclusion of the Ilanga agreement in November 2000, but before its commencement date in April 2002. Media24 was not a controller of Natal Witness at the date of conclusion of the Ilanga agreement but it was some three weeks later.

[54] But as we noted earlier, the commencement date is simply a contractual stipulation between the parties. It does not answer the legal question of when the merger should be deemed to have been implemented for the purposes of the Act.

[55] Caxton and Media24 differ on what the implementation date is.

[56] Media24 argues that the merger took place when the old Act was in force. Under the old Act a merger had to be notified within 7 days of the conclusion of the merger agreement. Thus the date of notification would have been just prior to the conclusion of Natal Witness I, meaning that Media24 was not a party to the agreement at the date the obligation to notify became due.

[57] At that stage only Mandla-Matla and Natal Witness were parties to the agreement. Allegedly both firms were unaccustomed to the legal regime governing mergers and they reasonably believed, having regard to the definition of what a merger was at the time,

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[21] The old Act defined a merger as the acquisition of control over "*all significant interests in the whole or part of the business of* [another]". The current Act defines a merger occurring when "*one or more firms directly or indirectly acquire or establish direct or indirect control over the whole or part of the business of another firm*".

[22] Section 12(1) of the Old Act defined a 'merger' as:
"*the direct or indirect acquisition or direct or indirect establishment of control, by one of more persons over all significant interests in the whole or part of the business of a competitor, supplier, customer or other person, whether that control is achieved as a result of-*
(a) purchase or lease of the shares, interests , or assets of that competitor, supplier, customer or other person;
(b) amalgamation or combination with that competitor, supplier, customer or other person;
(c) any other means."

that the Ilanga agreement was a service agreement. Media24 argues that this reliance was reasonable, given that the definition of a merger at the time under the old Act referred to the acquisition of control over "*all significant interests*" of the target firm. Given that in the agreement Mandla-Matla retained editorial autonomy i.e. that this aspect of the business was not subject to joint control with Natal Witness, and that the business of Mandla-Matla was publishing a newspaper, a <u>significant interest</u> of the business was therefore not going to be the subject matter of the change in control. Therefore, Media24 argued, assuming that the Ilanga agreement did not constitute a merger was not unreasonable.

[58] At the same time as advancing this mitigation argument, which reads down the language of the merger definition in the old Act, Media24 also argues that the merger was implemented prior to its assumption of joint control over Natal Witness, notwithstanding the commencement date was only April 2002.

[59] Media24 are correct that certain aspects of the Ilanga agreement came into operation immediately. There was a resolutive condition that Natal Witness had to acquire the requisite printing plant by a requisite date. If not the agreement would terminate.[23] Secondly, both parties imposed restraints on each other's businesses effective immediately. These were that Mandla-Matla could not dispose or encumber any intellectual property rights attaching to the trademark "Ilanga" and that Natal Witness could not dispose of any intellectual property rights attaching to the trademark "Natal Witness".[24]

[60] Media24 argues that, examined holistically, these aspects of the agreement were of sufficient commercial significance to constitute acts of implementation. The reason why it does so is that it wants to argue that the merger – it has to concede now it was a merger – had been implemented before it got its own foot through the Natal Witness door, and thus at the material time, it was never an acquiring firm, and hence should not be deemed a party to the merger and have its turnover taken into account for the purpose of the penalty.

[61] Caxton argues that the later date i.e. the commencement date, is the correct date to deem implementation, because only on that date did all the obligations of the respective parties and thus the acquisition of control of Natal Witness (now of course jointly controlled by Media24) over Mandla-Matla, arise.

[23] The Ilanga agreement record page 334.
[24] The Ilanga agreement record page 344.

[62] Both parties adopt opportunistic arguments about the date of implementation. Media24 to keep itself out of the room on the date of implementation, Caxton to achieve the opposite.

[63] It is not necessary in the present matter for us to determine the date of implementation in order to determine whether a merger occurred. That a merger occurred is common cause. The debate over the date of implementation is relevant to the question of whether Media24 should be held culpable and if it is, whether the level of penalty is still appropriate.

[64] But because the date of implementation is only relevant to culpability, not a question of jurisdiction we do not have to decide what the correct date was. This as the debate shows, is an abstruse point of law, which moreover engages us in interpreting provisions of the statute no longer in force and which will serve no useful precedent in later cases.

[65] The real question is whether even if technically full implementation only occurred after Natal Witness I, this should matter greatly for the purpose of a penalty. In our view, it should not. Given how technical these arguments have proved to be they favour treating this contravention leniently. There is no evidence in the record to suggest that Media24 at any time was responsible for the merger not being notified timeously in 2000, as it should have been, or that subsequently, at least until the events of 2012 it was responsible for the ongoing unlawful implementation. Thus the view the Commission has taken of the facts, albeit lenient, is in our view, in this technically complex scenario, reasonable.

[66] We accept that there can be situations that two primary firms implement a merger without prior notification and that this situation endures. If another firm then acquires control over the errant primary acquiring firm, it might incur liability if it can be shown it knew or ought to have known, about the contravention and did not act to rectify the situation timeously.

[67] As far as Media24's culpability is concerned on this aspect the only evidence we have on whether it may have become aware of this situation was during the hearing of Natal Witness II in 2012, where the issue was raised by Caxton's counsel during the cross examination of Mr Le Roux. The fact that Media24 acquired its first interest in the Natal Witness (Natal Witness I), within weeks of the conclusion of the Ilanga agreement, might give rise to an inference that it was aware of the latter agreement and was even responsible for encouraging it. But apart from this coincidence in timing, there is no evidence in the record of any earlier role played by Media24. Nor is there evidence that the agreement was the initiative of the Natal Witness. According to Le Roux, whose evidence on this aspect is not contradicted, the initiative for the Ilanga agreement came

from Mandla-Matla *"...in circumstances in which it sought greater commercial autonomy"*.[25] Recall that at that time Ilanga had an agreement still with Independent Newspapers (Pty) Ltd ('the Independent'). Furthermore, the Commission spent a lengthy period of time investigating the merger and its efforts did not yield any prior involvement by Media24 either.[26] There is a suggestion from Le Roux that records from this time have been difficult to obtain given that the investigation was being conducted some fifteen years after the Ilanga agreement had been concluded.[27]

[68] It is true the Ilanga agreement was then only notified on 27 June 2016. Caxton suggests this only came about because of the pressure it brought to bear on the Commission and Media24. It is probably correct.

[69] This might be the strongest area of criticism of the process. Why did Media24 take so long to notify the merger after it had become pertinently aware of the issue in 2012? Media24 says the reason was that it was by no means clear that this was a notifiable merger. If we had to judge this argument on the basis of the present merger definition in the Act and more recent case law on section 12(2)(g) we would not find this argument convincing. The Ilanga agreement involved Mandla-Matla ceding its autonomy over pricing for its advertising and its cover price to one of joint control with Natal Witness. Those constitute the key revenue streams for the Mandla-Matla business.

[70] However, the Commission considered the merger from the perspective of the previous definition in the Act and the relatively undeveloped case law at the time. In fairness this definition is open to a more restrictive interpretation of what a merger is than the current one and in any event its language is far from clear; hence presumably the reason for its early replacement with the current definition in February 2001. The Commission, in its discretion, was sympathetic to the legal complexity raised by the old Act and so did not judge the merging parties harshly for either failing to notify in 2000 or once in the home of Media24 and brought to its attention in 2012, notifying the merger more expeditiously.

[71] Whilst Caxton may consider this approach lenient, it does not amount to a failure of law. The Commission has not decided that the Ilanga agreement was not a merger. We would not have the present application if that had been its approach. Rather it has decided to take a benign view of the dilatoriness of the merging parties. In reviewing that exercise

[25] See affidavit by Le Roux affidavit paragraph 18 record page 243.
[26] See Le Roux affidavit paragraph 216 record page 292. Le Roux stated the Commission conducted a detailed investigation close to the maximum period statutorily allowed.
[27] See Le Roux affidavit paragraph 71 record page 256. See also a letter from Media24's attorneys where they record that the Commission had sought all documents and correspondence relating to Ilanga and "covering a period of approximately fifteen years".

of discretion we should show some deference to the Commission's judgment. The Commission is the institution that has most experience of what parties understand about notification and how this understanding has developed since the advent of the Act in 1999. In this respect some deference should be given to its greater experience.

[72] Secondly, it has provided a rational explanation for why it has exercised its discretion in this way.

(b) Any loss or damage suffered as a result of the contravention; and (e) The level of profit derived from the contravention:

[73] These two factors are considered together as they relate to the same underlying facts. The central enquiry in a case of unlawful prior implementation is whether the merger led to the acquisition of market power and thus harm to third parties and a level of profit derived from the acquisition of market power or loss or damage to other parties in the market.

[74] Caxton's case on this point has not been consistent.

[75] In its first application, it sought to allege that the relevant market was one for isiZulu newspapers. The merger, it claimed, led to the merging parties having under one roof, Ilanga and UmAfrika, the latter a joint venture in which Natal Witness was also a partner. Further, it was alleged the Natal Witness had sole control over Echo which Caxton alleged had substantial isiZulu content. This was denied at the time by the merging parties. When it brought the current application Caxton now alleged a wider market, not confined to a language market. Into this it added Media24's Daily Sun. The Daily Sun is not an isiZulu language paper although it is a mass market tabloid. If the market was now a mass market one not defined by language but by other reader demographics it was not clear from Caxton's assertions how this should have affected the Commission's analysis. Furthermore, Caxton's factual case suffered from errors of fact easily refuted. The Echo contained very little isiZulu content. UmAfrika had not proved to be a formidable competitor. The Daily Sun had only entered the market in 2003 after the merger, even on the latest date, had been implemented. Further even on Caxton's figures the Daily Sun's market share was low. Most importantly, Caxton does not take into account the entry of the Independent's title Isolezwe which was a direct consequence of the merger and which our panel at the time described in a prohibited practice case brought by Mandla-Matla against the Independent[28] as *"a veritable windstorm of competition… in the KZN newspaper market"*, resulting in *"a significantly improved competitive structure*

[28] *Mandla-Matla Publishing (Pty) Ltd and Independent Newspapers (Pty) Ltd* CRP029Jun04.

of three important markets, namely the markets for newspaper printing distribution and publishing".[29]

[76] What is surprising is that given the amount of time that had elapsed and given that the merger had already been implemented, Caxton as a competitor in the market has not been able to come up with any better evidence. It stated that given the length of time the evidence was no longer available. This may be so, but it was for Caxton who brought in this application to make out such a case; however, it has not. By contrast, the Commission, which has in fact investigated the market, has not found that the merging parties acquired market power.

[77] The Commission's factual conclusions on these facts cannot be second guessed by us on what we have on these papers.

[78] Under loss or damage suffered as a result of the contravention Caxton alleges that the joint venture was profitable as Natal Witness earned income from it. This is not a fact in dispute. It appears from this argument that Caxton interprets any income that flows post-merger, as proof of loss or damage as a result of the contravention. It does not state so in so many words, but this is the implication of its argument. This may be a literal interpretation of the section – i.e. the contravention is the implementation of a merger, and *a fortiori,* any income derived from it is evidence of a level of profit derived from it. We think this interpretation is too simplistic for assessing merger contraventions.

[79] Some of the factors which have to be considered in section 59(3), are better suited to prohibited practice cases than merger contraventions. This means that in a merger case these factors have to be interpreted within an appropriate context. Just as with a prohibited practice the loss or damage suffered is one occasioned by anticompetitive conduct, so with prior merger implementation we must look for loss or gain resulting from anticompetitive conduct that was brought about by the merger. Thus if the merger lead to the acquisition of market power or an ability to engage in co-ordinated conduct that did not exist pre-merger, this loss or gain might be taken into account if merger specific. The mere fact that parties had benefitted from an increased turnover post-merger is insufficient to regard this as an aggravating factor.

[80] This is not to say that the conduct of the acquiring firm (and the target if it colluded with it) may not still be considered an aggravating factor even if the merger raised no competition concerns. However this could be addressed by assessing the behaviour of

[29] Ibid at paras 44 and 98.

the respondent (sub-paragraph (c)) and not the anticompetitive gain or loss contemplated under sub-paragraphs (b) and (e).[30]

(d) The market circumstances in which the transgression took place:

[81] At the time of the conclusion of the Ilanga agreement both Mandla-Matla and Natal Witness kept it confidential. As the Tribunal explained in Mandla-Matla section 8 complaint each had its own reason for doing so:

> *"At the time of concluding the new service agreement with* [Natal Witness], [Mandla-Matla] *did not inform* [the Independent] *that it would not be renewing their agreement. In fact it only communicated its decision not to renew their service agreement in* [the Independent] *in a letter dated 8 October 2001, that is, some eleven months after concluding the new agreement with* [Natal Witness] *and six months before the expiry of the service agreement with* [the Independent] *which was due to terminate on 31 March 2002. Both* [Mandla-Matla] *and* [Natal Witness] *were intent on ensuring – and understandably so – that* [the Independent] *should not get wind, at too early a stage, of the new agreement,* [Mandla-Matla] *was anxious to ensure that* [the Independent's] *service levels did not deteriorate in the remaining period of the agreement.* [Natal Witness] *did not want knowledge of its massive investment in new printing capacity brought to the attention of its competitors before it was ready to deploy these assets."* [31]

[82] Both reasons for keeping the agreement below the radar screen are pro-competitive. The one to keep service levels up, the other to ensure increased capacity. Even if the real reason not to notify was to keep the Independent in the dark (as opposed to legal uncertainty) this would still not constitute an aggravating factor. It was not the surreptitious acquisition of market power as ought to concern the Commission.

(c) The behaviour of the respondent:

[83] There is no evidence that the merging parties sought to gain from not notifying the merger either timeously or at all.

(f) The degree to which the respondent has co-operated with the Commission:

[84] While Caxton contested that Media24 co-operated with the Commission, the Commission has deposed that the respondents have given it their co-operation. There is no reason for us to go behind this assertion.

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[30] For instance, a firm may choose not to notify because it is engaged in a contested bid to control the target firm. If the transgressing party implemented the merger to gain a match on its rival which did notify, then incentives to obey the law would be undermined if the acquiring firm was insufficiently censured.

[31] *Mandla-Matla* supra note 29 para 17.

(g) Whether the respondents has previously been found in contravention of this Act:

[85] There is no suggestion that Mandla-Matla had previously been found in contravention of the Act. Caxton accepts this. This limits the issues in dispute to Natal Witness's conduct, and on Caxton's version, Media24 as well.

[86] Let us first consider Natal Witness. Media24 and the Natal Witness have admitted that they implemented the Natal Witness I merger in contravention of the Act. This has been the subject of a separate settlement agreement.[32] Caxton accuses the Commission of failing to take this contravention in account. The Commission denies this and states the level of the penalty reflected that it took into account this prior contravention as an aggravating factor. Again, we have no evidence to suggest that this is not the case.

[87] It remains for us to consider whether the remaining contraventions should have been taken into account. These contraventions relate to three instances.

[88] In the first Media24 and a company now known as Novus implemented a merger without notifying it in 2015. Whether this transaction, a restructuring of the arrangements between Media24 and the shareholder Lambert Retief was a merger was controversial. Caxton brought a case to the Tribunal in 2015 requesting an order that it be notified as a merger.[33] The Tribunal found it was not a merger, but Caxton appealed the decision and the CAC reversed the Tribunal holding the restructuring constituted a merger.[34]

[89] The Commission was entitled not to take the Novus merger into account as a prior contravention of the Act by the merging parties. This is because for it Mandla-Matla and Natal Witness are the merging parties in the present matter, not Media 24 or any of its controllers.

[90] The remaining two transactions alleged to have constituted mergers that were not notified, have as Media24 points out, not been proven to be mergers.

[91] The first concerns a contract entered into between Nasper's subsidiary Multichoice Proprietary Limited and the South African Broadcasting Corporation (SOC) Limited in July 2013.[35] In this case, Caxton together with a coalition of non-governmental organisations brought an application to the Tribunal to order that the transaction be

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[32] *Competition Commission and Media24 Limited, Lexshell 496 Investments Limited, & the Natal Witness Printing and Publishing Company* FTN090Nov07.
[33] *Caxton and CTP Publishers and Printers Limited and Media24 (Pty) Ltd and others* OTH225Mar15.
[34] *Caxton and CTP Publishers and Printers Limited and Media24 (Pty) Ltd and others* 136/CAC/Marh2015.
[35] *Caxton and CTP Publishers and Printers Limited and others and MultiChoice (Pty) Ltd and others* OTH201Feb15.

notified as a merger. The Tribunal found that on the papers there was not enough evidence to hold that it was a merger. The decision was appealed to the CAC.[36] The CAC also concluded that there was insufficient evidence on the papers to show the transaction was a merger but it ordered the parties to the contract to produce certain documents to the Commission for it to evaluate whether the transaction might be a merger. This process has not yet been completed at the time of this hearing.

[92] The remaining transaction concerns an acquisition of shares involving Sanlam and a company called Wheatfields which Caxton alleges is a controlling shareholder of Naspers, a fact the latter denies. But there is no evidence that this transaction constituted a merger.

[93] Since none of these transactions has yet been proven, at the time the settlement agreement was concluded to be a merger implemented in contravention of the Act,[37] the Commission correctly did not take them into account in assessing the penalty in the present matter. But even if they were, Caxton would still have to show that Media24 and its controllers should be liable in respect of the Ilanga agreement simply because on one interpretation of the facts, Media24 may have been a party to the merger as an acquiring firm having joint control over Natal Witness, the latter being one of the joint controllers of Mandla-Matla on the date of commencement of the agreement. The murky facts provided by Caxton weaken the chain of causation suggesting that holding the respondents more culpable because of this factor would be harsh in the extreme. The Commission in our view appropriately did not take them into account.

GENERAL

[94] Having considered the various factors set out in section 59(3) we must now assess whether the penalty that the Commission and the respondents have settled on induces a sense of shock.

[95] The total penalty of R1 million has been divided between the two respondents. Mandla-Matla is liable for R200 000.00, Natal Witness the balance of R800 000.00.

[96] Caxton does not quibble with the settlement with Mandla-Matla. It was the junior partner in the arrangements and is a small publishing business. In our view as well there is nothing about this settlement that raises one's eyebrows.

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[36] *Caxton and CTP Publishers and Printers Ltd and others and MultiChoice (Pty) Ltd and others* 140/CAC/Mar16.

[37] At the time of decision this was not yet established either.

[97] The settlement with Natal Witness is the one subject to attack. Here, as noted, Caxton suggests a penalty of R40 million be imposed, but subject to a suspended sentence of R20 million, payable immediately with the remaining R20 million payable, if any firm in the Naspers group contravenes the Act again by failing to notify a merger within the next 5 years.[38]

[98] The Commission and Media24 consider the penalty is appropriate and on their version on the higher side of recent accepted settlements. Using the approach adopted by the Commission more recently, the filing fee serves as a surrogate for base or affected turnover.[39] Using this benchmark the filing fee for an intermediate merger in 2000 was R100 000.00. This means the penalty at R1 million is ten times the filing fee.

[99] Neither proposal is based on an arithmetical formulation. The Commission's approach at least has the base of a filing fee as a starting point for the penalty calculation. Nevertheless there is no science in setting an appropriate penalty. It must be high enough not to become a cost of doing business, but not so high that it is disproportionate to the crime.

[100] In this case, our approach has been to enquire if the Commission's approach to the facts has been based on a rational assessment and whether there has been any error of law. We find that neither has been shown. That leaves us whether its decision to set the penalty at R 800 000 for Natal Witness was such as to induce a sense of shock. We find that there is insufficient evidence for us to reach such a conclusion.

[101] For this reason we dismiss the Caxton application and approve the consent agreement.

COSTS

[102] Ordinarily we may have awarded costs against Caxton. However, without its persistence however self-serving, this merger would not have been notified nor would enforcement of the failure to notify have been enforced. Private enforcement should not be chilled despite the fact it may be brought about for motives other than a concern about anticompetitive effects. That notwithstanding, the system benefits from the actions of a private policeman whatever its motives. To impose a costs award in these circumstances against Caxton would be inimical to encouraging such a regime. We make no order as to costs.

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[38] Caxton's heads of argument page 43.

[39] *Competition Commission v Deican Investments (Pty) Ltd and Another, Competition Commission v Dickerson Investments* LM027May16 and *Competition Commission of South Africa v Standard Bank of South Africa* FTN228Feb16.

ORDER

The Tribunal orders:

1. In respect of the Caxton application under case number FTN190Dec15/OTH135Sep16 the application is dismissed.
2. In respect of the settlement agreement under case number FTN190Dec15 the agreement is confirmed as agreed to and proposed by the Commission and Mandla-Matla and Natal Witness in the addendum annexed hereto marked approved "A".

Mr Norman Manoim — 21 July 2017 **DATE**

Mr Anton Roskam and Mr Enver Daniels concurring

Tribunal Researchers:	Aneesa Ravat and Hayley Lyle
For the applicant:	Adv. W. Trengove SC, and Adv. S. Pudifin-Jones, instructed by Nortons Inc.
For the respondent:	Adv. D. Unterhalter SC, and Adv. M. Norton SC, instructed by Werksmans Attorneys