COMPETITION TRIBUNAL OF SOUTH AFRICA

Case No: CR191Mar12

In the matter between:

THE COMPETITION COMMISSION **Applicant**

and

PRIMEDIA LIMITED **First Respondent**

AVUSA LIMITED **Second Respondent**

Panel:	Anton Roskam (Presiding Member) Imraan Valodia (Tribunal Member) Enver Daniels (Tribunal Member)
Heard on:	8, 9 and 26 May 2017
Order issued on:	5 February 2018
Reasons issued on:	5 February 2018

DECISION AND ORDER

Introduction

[1] In this matter, the Competition Commission ("the Commission") alleges that Ster-Kinekor[1] and Nu Metro[2] contravened section 4(1)(b)(ii) of the Competition Act, because they agreed to divide markets by limiting the genre of film that each theatre could exhibit at the Victoria & Alfred Waterfront shopping complex

[1] At present, Ster-Kinekor Theatres is a division of Primedia (Pty) Ltd.
[2] The Nu Metro Cinemas business was previously owned by Nu Metro Entertainment (Pty) Ltd. At present, it is a division of Avusa Ltd.

("V&A") in Cape Town. The complaint was referred after the Commission's investigation, which was prompted by an application for leniency by Avusa Ltd.

Background

[2] The history of the corporate owners of the Ster-Kinekor business is complex. Originally, Ster-Kinekor Films (Pty) Ltd, which later changed its name to Ster-Kinekor (Pty) Ltd, owned the Ster-Kinekor business ("the old Ster-Kinekor"). Primedia Ltd ("the old Primedia"), a public company listed on the Johannesburg Stock Exchange, then bought Ster-Kinekor (Pty) Ltd and it became a subsidiary of Primedia Ltd. But then, the Primedia group of businesses was restructured in 2007. In this restructuring, New Primedia (Pty) Ltd, which later changed its name to Primedia (Pty) Ltd ("the new Primedia"), purchased the businesses of all the companies owned by the old Primedia. This included the Ster-Kinekor business. Ster-Kinekor ("the new Ster-Kinekor") then became a division of the new Primedia. Where these distinctions are not relevant, we simply refer to Nu Metro and Ster-Kinekor.

[3] Nu Metro and Ster-Kinekor are the two leading competitors in the film exhibition market in South Africa. Nu Metro showcases all the existing new cinematic products on the big screen and operates about 24 cinema multiplexes across the country with 196 screens. Ster-Kinekor is the largest exhibitor in South Africa with about 48 cinemas nationwide, with over 400 screens.

[4] From April 1992, Nu Metro operated 11 cinemas at the V&A under a 15-year lease agreement with two five-year renewal options.[3] The cinemas showed what is referred to as "commercial films".

[5] In 1997, Nu Metro discovered that the Landlord was in the process of negotiating a lease agreement with the old Ster-Kinekor wherein Ster-Kinekor would occupy premises at the V&A to operate an "art cinema complex". Nu Metro objected. It

[3] At the time, Transnet Ltd owned the V&A. In 1994, it was sold to the Transnet Pension Fund. The rights, title and interest under Nu Metro's lease agreement were transferred to the Transnet Pension Fund. As nothing turns on the identity of the owner of the V&A, for convenience, we refer to the successive owners of the V&A as "the Landlord".

alleged that it had an oral agreement with the Landlord in terms of which it had the right of first refusal if additional theatres were developed at the V&A. When the objection was not heeded, Nu Metro instituted legal proceedings against the Landlord in the High Court. The action was launched in October 1997. The old Ster-Kinekor was cited as an interested party, but no relief was sought against it.

[6] On 11 May 1998, the matter was settled. The terms of the settlement agreement were that Nu Metro agreed to withdraw its objection to Ster-Kinekor's entry to the V&A on the following basis: Ster-Kinekor undertook to exhibit only "art films" and Nu Metro agreed to exhibit only "commercial films" at the V&A. Before the settlement agreement was concluded, representatives of the old Ster-Kinekor and Nu Metro met to determine how art and commercial firms would be determined. The relevant terms of the settlement agreement are as follows:

> "2 A1. Ster-Kinekor shall not show any films identified in the industry as commercial films. Without limiting the definition of what constitutes a non-commercial film, the parties agree that for purposes of this agreement inter-alia the following categories of film shall be agreed not to be commercial films:
>
> A1.1 sub-titled foreign language films (other than English and Afrikaans);
>
> A1.2 English or Afrikaans language films scheduled for 'limited release' (as generally accepted in the film industry from time to time-currently 7 prints) on the South African exhibition circuit;
>
> A1.3 Any film that is classified by Movieline Magazine as an "art film".
>
> A2. Should a particular film be shown at either (or both) the Rosebank Mall and/or Cavendish Square Cinema Nouveau complexes, then, provided that it is not a commercial film, Ster-Kinekor shall be entitled to show this film at the V & A Cinema Nouveau;
>
> A3. In the event that a commercial film is shown at either (or both) the Rosebank Mall and/or Cavendish Square Cinema Nouveau complexes, then notwithstanding this fact, Ster-Kinekor shall not be entitled to show this film at the V & A Cinema Nouveau complex and this commercial film will be shown by Nu Metro in one or more of its theatres at the V & A Waterfront.
>
> A4. Nu Metro undertakes not to show, in its V&A Waterfront cinemas, any films of the genre reserved to Ster Kinekor as described under 2 above, unless Ster Kinekor has elected not to show it at its Cinema Nouveau complex in the V&A Waterfront."

[7] In terms of the settlement, the Landlord, Ster-Kinekor and Nu Metro agreed to give effect to this arrangement in their respective lease agreements. On 29 September 1998, the settlement agreement was made an order of the High Court. This was before the commencement of section 4 of the Competition Act.[4]

[8] Primedia purchased the assets and liabilities of Ster-Kinekor's business in September 2007. (One of the issues in dispute in this matter was whether the old Ster-Kinekor's rights and obligations under its lease with the Landlord was transferred to Primedia.)

[9] In December 2008, a Nu Metro employee alerted employees of the new Ster-Kinekor to a breach of the settlement agreement regarding the intended exhibition of certain films by Ster-Kinekor at the V&A. Nu Metro alleged that new Ster-Kinekor was to show films that were defined as commercial films in terms of the settlement agreement. The new Ster-Kinekor employees stated that they had no knowledge of any settlement agreement entered into between the old Ster-Kinekor and Nu Metro.

[10] In late January 2009, and upon external legal advice, Nu Metro abandoned the settlement agreement and applied for leniency in terms of the Commission's Corporate Leniency Policy. Nu Metro was also advised to cease any communication with Ster-Kinekor pertaining to the settlement agreement.

[11] The Commission then initiated its complaint in May 2009. It granted Nu Metro conditional immunity. In October 2009, the Commission informed the new Primedia of its complaint against it and Nu Metro. Primedia responded on 7 December 2009 and advised that it did not believe that it acted unlawfully in terms of the settlement agreement, as it was simply abiding by an order of the High Court.

[12] On 31 August 2010 the new Primedia approached Avusa in an attempt to agree to the abandonment or rescission of the court order. Avusa responded on 5 October 2010 that it was too premature to take such steps as the Competition

[4] Section 4 of the Competition Act commenced on 1 September 1999.

Act stipulates that a provision of an agreement can only be nullified upon a declaration by the Competition Tribunal ("the Tribunal") or Competition Appeal Court.[5]

[13] On 21 January 2011, Primedia, Ster-Kinekor and the Landlord entered into an agreement wherein Primedia succeeded to the old Ster-Kinekor's rights and obligations under its lease with the Landlord.

[14] On 14 March 2012, the Commission referred the complaint to the Tribunal.

The Commission's Complaint

[15] In its referral, the Commission alleged that Ster-Kinekor and Nu Metro, being parties in a horizontal relationship in the market for the exhibition of films at the V&A, engaged in a market allocation agreement limiting the genre of film each was entitled to exhibit at the V&A. This conduct, which it alleged commenced in 1998, stipulated that Ster-Kinekor would not exhibit at the V&A any films identified in the industry as "commercial films" and Nu Metro would not exhibit at the V&A any films identified in the industry as "art films". The Commission sought no relief against Nu Metro, as it had granted it conditional immunity.

Ster-Kinekor's Defences

[16] Ster-Kinekor raised three defences. The first was that a proper characterisation of the settlement agreement was that it was a settlement of a dispute involving two vertical relationships, the one between Nu Metro and the Landlord and the other between Ster-Kinekor and the Landlord. This is because the settlement agreement culminated in an amendment to the lease agreements between the Landlord and Ster-Kinekor and the Landlord and Nu Metro regarding the nature of the films that each cinema house could show. It is the leases that imposed the

[5] Section 65(1) of the Act stipulates as follows; "Nothing in this Act renders void a provision of an agreement that, in terms of this Act, is prohibited or may be declared void, unless the Competition Tribunal or Competition Appeal Court declares that provision to be void."

restrictions. Therefore, the agreements that divided markets were the vertical lease agreements with the Landlord.

[17] The Commission submitted that the settlement agreement contained a restraint that prevented Nu Metro and Ster-Kinekor from competing with each other in the different film genres; namely, "commercial" and "art" films as determined in the settlement agreement.

[18] Although Ster-Kinekor's other defences assumed that section 4(1)(b)(ii) of the Competition Act applied, Ster-Kinekor nonetheless contested that it had contravened the Act.

[19] The second defence was that it was not competent for the Tribunal to grant relief against new Primedia because even if its predecessors had contravened section 4(1)(b)(ii), it had not done so. Ster-Kinekor argued that new Primedia only purchased the business of Ster-Kinekor in 2007 and it only succeeded Ster-Kinekor as tenant in 2012, which was long after both parties had abandoned the settlement agreement.

[20] The Commission argued that new Primedia was liable by virtue of it being the economic successor of the Ster-Kinekor business.[6]

[21] Ster-Kinekor's third defence was that Ster-Kinekor had never implemented the settlement agreement at any time after the Competition Act had come into force. This was the subject-matter of much of the evidence led at the hearing.

[22] The Commission submitted that since 1998, when the settlement agreement was concluded, until the date that the parties abandoned it, both parties had abided by the terms of the settlement agreement. Therefore, the Commission argued that Nu Metro and Ster-Kinekor, being parties in a horizontal relationship, contravened section 4(1)(b)(ii) of the Competition Act.

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[6] Amongst others, the Commission cited in support of this submission: *Hoechst v Commission* (T-161/05) [2009] E.C.R, *Enichem v Commission* (T-6/89) [1991] E.C.R. II-1694, *Competition Commission v Delatoy Investments (Pty) Ltd and others* (CR212Feb15).

[23] Ster-Kinekor also argued that the settlement agreement was not egregious; and therefore, could not be characterised as a section 4(1)(b) contravention. This contention was advanced on the following basis: (a) An agreement that constitutes a section 4(1)(b) contravention is *per se* prohibited – a firm that has contravened this section is not entitled to show that the agreement did not have anti-competitive effects. (b) Section 4(1)(b) is reserved for "only those economic activities in regard to which no defence should be tolerated" (See *Competition Commission v South African Breweries*[7]). (c) The facts show that the settlement agreement was not such a contravention.

[24] For reasons that will become apparent, we consider the third defence first; namely, whether Ster-Kinekor implemented the settlement agreement.

Evidence regarding the Implementation of the Settlement Agreement

[25] Glen Clack, who was employed by Nu Metro during the period 1993 to 2001, first as Operations Director and from 1996 as Managing Director, testified on behalf of the Commission. His evidence was that in early 1998, he and other representatives of Nu Metro attended the settlement negotiations between the old Ster-Kinekor and Nu Metro. He stated that Peter Hall, the Chief Executive Officer of the old Ster-Kinekor, and Rob Collins, the head of the old Ster-Kinekor Distribution, attended the negotiations and that representatives of the Landlord were not present. According to Mr Clack, the negotiations concerned the basis and wording upon which Nu Metro and Ster-Kinekor would distinguish between non-commercial or art films and commercial films, a distinction that is not easy to delineate. According to the Commission, the agreed distinction constituted the agreement that regulated the division of markets.

[26] Mr Clack stated in his evidence-in-chief that until his departure from Nu Metro in 2001, Ster-Kinekor fully complied with the settlement agreement. However, under cross-examination, he conceded that while at Nu Metro, he did not

[7] Case No. 129/CAC/Apr14 at para 44.

personally monitor Ster-Kinekor's compliance with the settlement agreement. Therefore, he had no personal knowledge that Ster-Kinekor complied.

[27] Mr Clack also conceded that one could not infer that Ster-Kinekor adhered to the settlement agreement merely because it screened art films at the V&A. He also accepted that the agreement about dividing the market between art and commercial films was easy to conclude, as both Nu Metro and Ster-Kinekor got what they wanted and intended – Ster-Kinekor got to show art films and Nu Metro commercial films. This was because from the outset and before the settlement agreement was concluded, Ster-Kinekor's business strategy, which was based on its art nouveau business model, was to screen only art films at the V&A. (According to Ster-Kinekor's witnesses, Ster-Kinekor's branding at the V&A was consistent with this business strategy and model.)

[28] Fiaz Mohammed, who was the CEO of Ster-Kinekor Theatres, a division of new Primedia, testified that he worked at Ster-Kinekor theatres as Chief Operating Officer from 2006. He stated that he only became aware of the settlement agreement in 2009 when the Commission initiated its complaint. Mr Mohammed also testified that the type of films Ster-Kinekor showcased at the V&A were in line with its art nouveau business model. In addition, he testified that upon knowledge of the settlement agreement, Ster-Kinekor approached Nu Metro to try and have the court order abandoned, to which Nu Metro refused.

[29] Mark Harris, who was Nu Metro's Product Manager from July 2002 and its Content and Marketing Executive since November 2008, also testified on behalf of the Commission.

[30] Mr Harris was not involved in the litigation between Nu Metro, Ster-Kinekor and the V&A's Landlord in the late 1990's. However, he stated during his evidence-in-chief that he was responsible for monitoring the implementation of the settlement agreement, which he performed from when he became Project Manager of Nu Metro until 2009. Mr Harris also testified that when he became Project Manager, his predecessor handed him a copy of the settlement agreement and took him through the terms of the settlement agreement and what

it entailed. He claimed that if he discovered that Ster-Kinekor was in breach, he would alert the relevant personnel at Ster-Kinekor distributions and that he successfully invoked and enforced the settlement agreement against Ster-Kinekor on multiple occasions. However, in cross-examination, he conceded that he only ever made one attempt at enforcing the settlement agreement. This was his attempt in December 2008.

[31] Mr Harris testified that in December 2008, he informed Ster-Kinekor Distribution that it should allocate four films (*Burn After Reading*, *The Dutchess*, *Doubt* and *Rachel Getting Married*) to the V&A Nu Metro and not the V&A Ster-Kinekor because the films fell within the commercial and not the art category as defined in the settlement agreement. He threatened to invoke the settlement agreement and complain to the Landlord.

[32] Isabel Rao, who has been with Ster-Kinekor Distribution since 1988 and has been its CEO since 2000, testified that Ster-Kinekor never implemented the settlement agreement. She stated that she did not even know about its existence until Mr Harris drew her attention to it in December 2008. This was corroborated by Nicolette Scheepers, presently a Sales Executive at Ster-Kinekor Distribution, but who has been with Ster-Kinekor from 1997. This evidence was consistent with her email correspondence with Mr Harris in December 2000. In that correspondence, Ms Scheepers asked Mr Harris for a copy of the agreement, as she knew nothing about it.

[33] Following their interactions, Ms Rao and Ms Scheepers agreed to allow Nu Metro to screen the films at the V&A. However, they also allowed Ster-Kinekor to screen them at the V&A. This was contrary to the settlement agreement.

[34] Ms Scheepers and Ms Rao also testified that when carrying out their duties at Ster-Kinekor, their decisions were always influenced by what would be financially viable for the company, based on historical data and comparative tittles.

[35] Ms Rao produced a list of the films distributed by Ster-Kinekor Distribution and screened by both Ster-Kinekor and Nu Metro at the V&A from 1998 to 2013.[8] These films were, by definition, screened in breach of the settlement agreement.

[36] In addition, Ms Rao testified that Ster-Kinekor also screened many other "cross-over" films[9] at the V&A that fell outside the permissible limits contained in the settlement agreement. Her testimony was for the period up to the end of 2001, but she stated that the number only increased in the remaining years.

Did Ster-Kinekor Implement the Settlement Agreement?

[37] The Commission submitted that the examples where Ster-Kinekor did not implement the settlement agreement were examples of cheating, which is common in cartel cases, and did not show that Ster-Kinekor did not implement the settlement agreement.

[38] Even if this were so, which is difficult to accept in light of the number of breaches that went unchallenged by Nu Metro despite Mr Harris' claim that he monitored the settlement agreement's implementation, the Commission faces two problems arising from its witness' own evidence.

[39] The first is the Ster-Kinekor's exhibition of art films at the V&A could plausibly have been as a result of the implementation of Ster-Kinekor's business strategy and model and not the settlement agreement. That Ster-Kinekor may have, in general, shown art films, does not necessarily mean that it implemented the settlement agreement. As counsel for Ster-Kinekor pointed out, the fallacy of such an argument is well illustrated by a story our courts have retold about the Parisian cripple suspected of being a German spy in disguise: "(T)hat he [i.e. the Parisian cripple] habitually speaks French and limps on two sticks matters not at

[8] The list did not itemise the only films Ster-Kinekor screened at the V&A in breach of the settlement agreement, but only those screened by both cinema houses.
[9] These are films that the industry considers art films, but that generate revenue similar to mainstream commercial films. i.e. the industry considers them art films, but they fall within the definition of commercial films contained in the settlement agreement.

all: that he was once heard speaking fluent German and was seen to run may well be conclusive."[10]

[40] Furthermore, according to Mr Harris' concession during cross-examination (which alarmingly contradicted his evidence-in-chief), Nu Metro tried to invoke the settlement agreement only once. In addition, there is the uncontested evidence of Ster-Kinekor's witnesses was to the effect that when Nu Metro attempted to invoke the settlement agreement, Ster-Kinekor employees involved in the interaction with Mr Harris did not know about the settlement agreement, did not implement it and had not implemented it before.

Conclusion

[41] The settlement agreement was concluded before the Competition Act came into operation. Therefore, there can only be a contravention of section 4(1)(b)(ii) if there were actions or discussions between the parties directed at implementing the agreement after the Competition Act came into force. (See *Netstar (Pty) v Competition Commission*[11] with regard to the meaning of "agreement" in section 4.)

[42] The Commission submitted that although the settlement agreement was concluded before the commencement of the Competition Act, there was continuing conduct regarding the implementation of the agreement after the Competition Act came into force. However, this was not borne out by the facts. Therefore, Ster-Kinekor did not contravene section 4(1)(b)(ii) of the Competition Act.

[43] In light of this finding, it would be an academic exercise to consider whether section 4(1)(b)(ii) is legally applicable in this matter because, even if it is, there is insufficient evidence that it was contravened. Similarly, it is not necessary to deal with Ster-Kinekor's other defence that no relief could be granted against

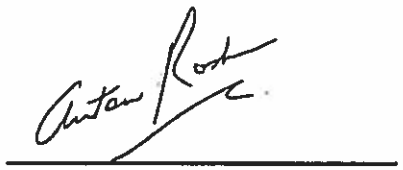
[10] *Afrisure CC and another v Watson NO and another* 2009 (2) SA 127 (SCA) at para 28 quoting *Lawson & Kirk v South African Discount and Acceptance Corporation (Pty) Ltd* 1938 CPD 273 CPD at 282.
[11] 97/CAC/May10 at para 25.

new Primedia because it had not contravened section 4(1)(b)(ii), even if its predecessors had.

ORDER

1. The Commission's complaint referral under case number CR191Mar12 is dismissed.

2. There is no order as to costs.



Mr Anton Roskam

5 February 2018
Date

Mr Enver Daniels and Prof. Imraan Valodia concurring

Tribunal Researcher:	Caroline Sserufusa
For the Commission:	B Majenge, M Swart and N Pakade
For Primedia:	W Trengove SC and C Steinberg instructed by Bowmans