

SOUTH AFRICA / JUDGMENT

Competition Commission v Kagiso Media Investments (Pty) Ltd (CO008Apr21) [2021] ZACT 92 (5 May 2021)

[2021] ZACT 92

COURT

Competition Tribunal

BEFORE

Y Carrim, AW Wessels, F Tregenna

CASE / FILE NUMBER

CO008Apr21

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COMPETITION TRIBUNAL REPUBLIC OF SOUTH AFRICA

Case No: CO008Apr21

In the matter between:

The Competition Commission Applicant

And

Kagiso Media Investments (Pty) Ltd First

Respondent

Mediamark (Pty) Ltd Second

Respondent

Panel : Y Carrim (Presiding Member)

: AW Wessels (Tribunal Member)

: F Tregenna (Tribunal Member)

Heard on : 05 May 2021

Decided on : 05 May 2021

CONSENT AGREEMENT

The Tribunal hereby confirms the consent agreement concluded between the Competition Commission, Kagiso Media Investments (Pty) Ltd and Mediamark (Pty) Ltd, annexed hereto.

Presiding Member Ms Yasmin Carrim

Concurring: Mr Andreas Wessels and Prof. Fiona Tregenna

Date: 05 May 2021

IN THE COMPETITION TRIBUNAL OF SOUTH AFRICA

(HELD IN PRETORIA)

CC Case No: 2019Aug0028

CT Case No: [...]

In the matter between

THE COMPETITION COMMISSION Applicant

and

KAGISO MEDIA INVESTMENTS (PTY) LTD First Respondent

MEDIAMARK (PTY) LTD Second Respondent

CONSENT AGREEMENT IN TERMS OF SECTION 49D OF THE COMPETITION ACT, 1998 (ACT NO. 89 OF 1998), AS AMENDED, BETWEEN THE COMPETITION COMMISSION, KAGISO MEDIA INVESTMENTS (PTY) LTD AND MEDIAMARK (PTY) LTD IN RESPECT OF AN ALLEGED CONTRAVENTION OF SECTION 13A(3) THE COMPETITION ACT, 1998.

1. PREAMBLE

The Competition Commission, Kagiso Media Investments (Pty) Ltd and Mediamark (Pty) Ltd hereby agree that an application be made to the Competition Tribunal for the confirmation of this Consent Agreement as an order of the Tribunal in terms of section 49D read with sections 58(1)(b) and 59(1)(d) of the Competition Act 89 of the Act

2. DEFINITIONS

For the purposes of this Consent Agreement the following definitions shall apply:

2.1. Act Competition Act, 1998 (Act No. 89 of 1998), as amended;

2.2. Commission body established in terms of section 19 of the Act, with its principal place of business at 1st Floor, Mulayo Building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng;

2.3. Consent Agreement means this agreement duly signed and concluded between the Commission, Kagiso Media and Mediamark;

2.4. means business days;

2.5. Kagiso Media Kagiso Media Investments (Pty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at 1 Floor, Kagiso Tiso House, 100 West Street, Wierda Valley, Sandton, Gauteng;

2.6. LARI means Lagardere Active Radio International Société par actions, a company incorporated in France, having its registered place of business at 3-9 avenue André Malraux, 92300 Levallois-Perret, France;

2.7. Mediamark ty) Ltd, a company duly incorporated in accordance with the applicable laws of the Republic of South Africa, with its principal place of business at Mediamark House, 36 Homestead Road, Rivonia, Sandton, Gauteng. Prior to 2012, this entity was called Radmark (Pty) Ltd; it changed its name to Mediamark in 2012;

2.8. Respondents Kagiso Media and Mediamark; and

2.9. Tribunal established in terms of section 26 of the Act, with its principal place of business at 3rd Floor, Mulayo building (Block C), the DTI Campus, 77 Meintjies Street, Sunnyside, Pretoria, Gauteng.

3. BACKGROUND TO THIS AGREEMENT

3.1 This Consent Agreement relates to a January 2011 transaction whereby Kagiso Media purchased 2 725 ordinary shares in Mediamark (then called Radmark), the 2011 Transaction. The Respondents did not notify or obtain the approval of the Commission prior to implementing the 2011 Transaction. It bears mention that Kagiso Media purchase of the Mediamark shares was an exercise of a call option that was granted to it by LARI in December 2006.

3.2 In August 1997, the Mediamark shareholders including the First Respondent and LARI concluded a Shareholders Agreement, which regulated the relationship between them. In December 2006, Kagiso Media and LARI concluded a Call Option Addendum to the 1997 Call Option Addendum, which granted Kagiso Media an irrevocable right and option to purchase 2 725 Mediamark shares from LARI. Kagiso Media exercised the call option with effect from 1 January 2011 and purchased the 2 725 ordinary shares from LARI. As a result of the 2011 Transaction, Kagiso Media acquired 50.01% (50% plus 1 share), more than half of [....].

3.3 The Commission was made aware of the 2011 Transaction when the Respondents filed a notification of a large merger in June 2019, whereby Kagiso Media sought to purchase the remaining 49.99% (50% less one share) held by LARI. The Commission requested the Respondents to first notify the 2011 Transaction.

3.4 The Respondents filed the 2011 Transaction on 14 August 2019 under protest. The Commission assessed both transactions and approved each without conditions. The Commission also conducted a separate investigation into the 2011 Transaction as a possible prior implementation in contravention of section 13A of the Act.

3.5 The Respondents are of the bona fide belief that Kagiso Media and LARI have been in joint control of Mediamark since Kagiso Media's investment in 1997 and that the 2011 Transaction did not affect the de facto quality of control.

3.6 However, the Respondents recognise that proving de facto material influence would present certain challenges due to, among other things, the effluxion of time and reliance on viva voce evidence about conduct and circumstances that took place in the distant past. Accordingly, the Respondents engaged the Commission with a view to settling the investigation in order to bring the matter to a speedy resolution and avoid the need for potentially costly litigation. The Respondents are grateful for the Commission's willingness to engage and reach terms in accordance with this Consent Agreement.

4. INVESTIGATION AND FINDINGS

4.1 Kagiso Media first acquired shareholding in Mediamark in 1997 in terms of the August 1997 Shareholders Agreement. At the time, Mediamark had 4 (four) shareholders namely, Kagiso Media (27.25%), LARI and NAIL who each held 27.28% and SAPEF Radio Co-Investors (Pty) Ltd (SRC) with 18.19% shareholding. The August 1997 Shareholders Agreement expressly conferred de facto control over Mediamark on LARI and NAIL. Apart from assertions by management and directors at the time, there is no evidence that Kagiso Media had or exercised the same rights as LARI and NAIL over Mediamark under the August 1997 Shareholders Agreement.

4.2 The [...] before the 2011 Transaction, the Respondents engaged in the following transactions, which were not assessed or approved by the Commission:

4.2.1 In November 2001, Kagiso Media, LARI and NAIL purchased shares held by SRC (18.19%) in Mediamark. [...] After the transaction, [...] increased to 31.68%, increased to 31.64% and [...] increased to 34.68%. The Radmark Trust acquired the remaining 5%;

4.2.2 In June 2004, Kagiso Media and LARI purchased all the shares held by NAIL in Mediamark. [...] After the transaction, LARI [...] 47.53% (4 752 724 shares) and Kagiso Media increased to 47.47% (4 747 276 shares). The Radmark Trust retained its 5% (500 000 shares);

4.2.3 In December 2006, Kagiso Media and LARI concluded the Call Option Agreement whereby LARI granted Kagiso Media a call option to purchase 2 725 Mediamark shares from LARI;

4.2.4 In February 2008, Mediamark (then called Radmark) repurchased the 5% (500 000 shares) shares held by the Radmark Trust. Consequently, the proportion of the shareholding by LARI and Kagiso Media in Mediamark increased; to 50.03% (4 778 850 shares) and Kagiso Media increased to 49.97% (4 721 150 shares); and [...].

4.3 The 2011 Transaction thereafter took place in 2011 when Kagiso Media exercised the call option by purchasing 2 725 Mediamark shares from LARI, with effect from 1 January 2011. As a result of the 2011 Transaction, Kagiso Media acquired 50.01% (50% plus 1 share), which is [...]. The 2011 Transaction entailed the acquisition of control by Kagiso Media, which it did not exercise before the 2011 Transaction.

4.4 The conduct by the Respondents is in contravention of 13A(3) of the Act, which stipulates that parties to an intermediate merger may not implement that merger until it has been approved, with or without conditions, by the Commission in terms of section 14(1)(b).

5. ADMISSION OF LIABILITY

The Respondents admit that they contravened section 13A(3) of the Act by implementing the 2011 Transaction prior to the approval of this transaction by the Commission.

6. FUTURE CONDUCT

6.1 The Respondents agree and undertake to notify the Commission of any future transactions that constitute a notifiable merger as defined in section 12(1) of the Act read together with section 11(5) of the Act. The Respondents furthermore agree and undertake to refrain from engaging in prior implementation of notifiable mergers in contravention of section 13A(3) of the Act.

6.2 The Respondents also agree and undertake to develop and implement a competition law compliance programme as part of its corporate governance policy, which is designed to ensure that its employees, management, directors and agents do not engage in future contraventions of Chapter 3 of the Act. In particular, such compliance programme will include mechanisms for the identification, prevention, detection and monitoring of any contravention of Chapter 3 of the Act.

6.3 The Respondents furthermore agree and undertake to submit a copy of such compliance programme to the Commission within 60 days of the date of confirmation of this Consent Agreement as an order by the Tribunal.

7. ADMINISTRATIVE PENALTY

7.1 Having regard to the provisions of section 59(1)(d), 59(2) and 59(3) of the Act, Mediamark accepts that it is liable to pay an administrative penalty, which is not more than 10% of its annual turnover in the Republic and its exports from the Republic during the preceding financial year.

7.2 The Respondents have agreed that Mediamark will pay an administrative penalty in the total amount of R1 699 500 (one million, six hundred and ninety-nine thousand and five hundred Rand), within 30 (thirty) Days of confirmation of this Consent Agreement by the Tribunal.

7.3 The administrative penalty will accrue interest in terms of the provisions of section 80(1) of the Public Finance Management Act 1 of 1999 for any amounts not paid within a year from the date of confirmation of this Consent Agreement by the Tribunal.

7.4 The penalty and such interest as may become payable in terms of 7.3 above, must [...].

Bank name: Absa Bank

Branch name: [...]

Account holder: The Competition Commission

Account number: 4[...]

Account type: Current Account

Branch Code: 638056

Reference: [...]

7.5 The penalty will be paid over by the Commission to the National Revenue Fund in accordance with section 59(4) of the Act.

8. FULL AND FINAL SETTLEMENT

This agreement, upon confirmation as an order by the Tribunal, is entered into in full and final settlement and concludes all proceedings

between the Commission and the Respondents relating to the alleged contravention of section 13A(3) of the Act by the Respondents that were the subject of the Commission's investigation under CC case number: 2019Aug0028.

Dated and signed at PRETORIA on the 19th day of April 2021.

Tembinkosi Bonakele

The Commissioner: Competition Commission

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